

Format for communications to the Aarhus Convention Compliance Committee

I. Information on correspondent submitting the communication

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The law firm represents the Environmental Association of German Environmental Aid (DUH).

II. Party concerned

Germany

III. Facts of the communication

Detail the facts and circumstances of the alleged non-compliance. Include all matters of relevance to the assessment and consideration of your communication. Explain how you consider that the facts and circumstances described represent a lack of compliance with the provisions the Convention.

In 2017, the German Environmental Appeals Act (UmwRG) was amended with the aim of proper implementation of the Aarhus Convention.

As part of this amendment, the following decisions have been added to the scope of application of the UmwRG (§ 1 para. 1 sentence 1):

"5. administrative acts or public contracts authorising projects other than those referred to in paragraphs 1 to 2b by applying environmental legislation of federal law, Land law or directly applicable European Union acts; and

6. administrative acts concerning monitoring or surveillance measures for the implementation or execution of decisions in accordance with paragraphs 1 to 5 which serve to comply with environmental legal provisions of federal law, Land law or directly applicable legal acts of the European Union".

With regard to the draft of this provision, the state secretary in the Federal Ministry of Transport had stated in a letter dated 9 March 2016 to the Federal Ministry of the Environment:

"Furthermore, the legal draft should clarify, if possible before dispatch, that 'administrative acts concerning monitoring and surveillance measures' do not mean product approvals (§ 1 para. 1 sentence 1 No. 6 UmwRG). For the Federal Ministry of Transport and Digital Infrastructure this clarification is important with regard to type-approvals of the Federal Motor Transport Authority for motor vehicles and corresponds in the matter to the common understanding of the government departments."

Despite this request, the Ministry of the Environment's draft law has remained unchanged in this respect.

In the Report of the Compliance Committee regarding the Compliance by Germany with its obligations under the Convention (Decision V/9 h) from 2. August 2017 (ECE/MP.PP/2017/40) the Committee noted the following in paragraph 50:

*„The Committee points out that article 9, paragraph 3, of the Convention is not primarily directed at the licensing or permitting of development projects; rather it concerns acts and omissions that contravene provisions of national law relating to the environment. Moreover, the concept of “acts” under article 9, paragraph 3, of the Convention, is to be given a broad interpretation, the decisive factor being whether the act or omission in question can potentially contravene provisions of national law relating to the environment. The Committee therefore considers that, if it were to be shown that the courts of the Party concerned were to refuse standing to challenge measures **such as emission limits for cars** on the basis that they do not relate to “projects” in the sense of section 1, subsection (1), sentence 1, number 5, of the Environmental Appeals Act, this may constitute non-compliance with article 9, paragraph 3, of the Convention. However, in the absence of any concrete examples under the amended Environmental Appeals Act as applied in practice, and bearing in mind the considerations in paragraph 36 above, the Committee does not make such a finding in the abstract. Accordingly, while noting that uncertainties remain, the Committee considers that this factor as such does not prevent the Party concerned from meeting the requirements of paragraph 2 (b) of decision V/9h. “*

Therefore, the term "project" ("project") must not be understood to include only projects within the meaning of the national Environmental Impact Assessment Act. The Committee has explicitly pointed out that, for example, "regulatory acts concerning emission limits of cars" may "not (be) excluded".

However, since the Committee did not have a court decision from Germany at the time of the resolution, which confirmed that such "projects" are still exempt from the scope of the German regulation, we hereby refer to several similar decisions of the Schleswig-Holstein Administrative Court of 13 December 2017. We attach one of the decisions as

Annex 1

These cases concern legal proceedings brought by the DUH, which concern the use of defeat devices that reduce the effectiveness of emission control systems by various automobile manufacturers in violation of Art. 5 (2) of Regulation (EC) No. 2007/715. The actions aim at the withdrawal of the type approval of the vehicles involved.

The actions were dismissed as inadmissible. The Schleswig-Holstein Administrative Court explicitly stated that, according to the current German legal situation, type approvals for motor vehicles cannot be contested by environmental associations.

The court ruled: The plaintiff lacks the necessary standing under § 42 para. 2 VwGO. Neither is there a legal provision according to § 42 Paragraph 2 Clause 1 VwGO (1.), nor can the plaintiff assert an infringement of his own rights according to § 42 Paragraph 2 Clause 2 VwGO (2.). Nor does the plaintiff have any direct right of action under Union law (3.)

The court denied standing on the basis of § 42 Paragraph 2 Clause 1 VwGO in connection with § 1 (1) sentence 1, No. 5 and 6 of the Environmental Appeals Act (UmwRG) due to a narrow interpretation of the term "project" in § 1 (1) No. 5 UmwRG. The court stated (page 24 f.):

"The requirements of the decisions under section 1 (1) no. 5 and no. 6 UmwRG that are the only ones considered here are not met. The applicability of § 1 para. 1 no. 5 UmwRG requires an administrative act or a contract under public law which permits a "project" other than that referred to in nos. 1 to 2b by applying environmental legislation. In this respect, the legislator uses the project concept taken from planning law. The explanatory memorandum to the law expressly refers to the definition of § 2 para. 2 UVPG old, on which the project concept of the UmwRG is also to be based (BT-Drucks. 18/9526, p. 36). The project term according to the old § 2 para. 2 has been defined in implementation of the term "project" from Art. 1 para. 2 of the EIA Directive 85/337/EEC as amended by Directive 2011/92/EU of 13.12.2011, which includes the execution of construction works or of other installations or schemes or other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources. The explanatory memorandum to the UVPG (BT-Drs 18/11499, p. 75) shows that the legislator has based the regulation solely on fixed installations. With regard to the scope of other measures affecting nature and the landscape that go beyond the definition of an installation, only measures that have a direct impact are mentioned. Therefore, the granting of EC type-approval for motor vehicles and the related follow-up measures do not fall under the project concept within the meaning of the UmwRG as amended. This is also shown by the comparison with the projects mentioned in § 1 para. 1 sentence 1 nos. 1 to 2b UmwRG, to which No. 5 refers in principle. Neither the approved vehicle type nor the specific vehicle registered for operation on the basis of the EC type-approval and the certificate of conformity shall constitute installations as defined above. Nor does the approval of the vehicle type or the approval of a specific vehicle have any direct impact on nature and the landscape within the meaning of the UVPG."

This result was confirmed by the decision of the Administrative Court Düsseldorf of 24 January 2018 – 6 K 12341/17,

Annex 2

Also in this action brought by the DUH concerning the non-compliance with emission limits for cars, standing was denied. The Administrative Court Düsseldorf too applied a narrow interpretation of the term "project". The court found (page 22):

"The term 'project' within the meaning of § 1 (1) No. 5 UmwRG only covers planning measures that directly intervene in nature and landscape both physically and in relation to a specific location or area. However, the regulation does not include product approvals such as type-approvals in question here due to a lack of specific local reference and due to a lack of direct interference with nature and the landscape. This concept results from the interpretation of the standard."

During the legislative process, the German Federal Ministry of Transport attempted to influence the legislative text by having the Minister's State Secretary, Mr Rainer Bomba, present it to the Federal Ministry for the Environment in a letter dated 8 March 2016:

*“Furthermore, the draft law (...) should make it clearer that "administrative acts on monitoring and supervisory measures" **do not mean** product approvals (§1 Paragraph 1 No. 6). This clarification is important for the BMVI **with regard to type approvals** of the Federal Motor Transport Authority (Kraftfahrt-Bundesamt) **for motor vehicles** and corresponds in substance to the common understanding of the ministries.”*

Annex 3.

V. Provisions of the Convention alleged to be in non-compliance

Art. 9 para. 3 Aarhus Convention

VI. Nature of alleged non-compliance

For each of the above provisions which you allege to be in non-compliance, clearly explain how you consider that the Party concerned has failed to comply with that provision based on the facts of your case. (Provide as attachments to your communication the key supporting documentation that will help to substantiate your allegations).

Also indicate whether the communication concerns a specific case of a person’s rights of access to information, public participation or access to justice being violated as a result of the non-compliance of the Party concerned or whether it relates to a general failure by the Party concerned to implement, or to implement correctly, the provisions of the Convention. If you consider that the non-compliance concerns a general failure by the Party concerned, provide as attachments to your communication any key supporting documentation that will help to substantiate that it is a general failure.

The scope of the UmwRG is still too narrow and does not comply with Art. 9 para. 3 Aarhus Convention. As stated in the Report of the Compliance Committee from 2. August 2017 (Decision V/9 h), article 9 para. 3 of the Convention is not primarily directed at the licensing or permitting of development projects. Rather, the concept of "acts" under article 9 para. 3 is to be given a broad interpretation.

The new UmwRG as applied by German Courts is however based on a narrow interpretation of the concept of "projects" that excludes for example the granting of EC type-approvals and thus does not cover all "acts" referred to by article 9 para. 3.

In the name and power of attorney of our client, we therefore request that the proceedings against Germany be resumed.

VII. Use of domestic remedies

Describe which, if any, domestic procedures have been invoked to address the particular matter of non-compliance which is the subject of the communication. Specify which procedures were used, when, which claims were made, what the results were and whether there are any other domestic remedies available.

The DUH appealed the judgements of the Administrative Courts of Schleswig and Düsseldorf.

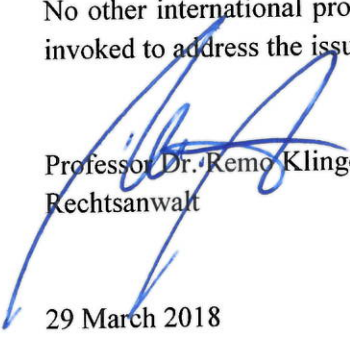
Please note that national appeals require another **2-5 years to be final**.

The administrative courts had also allowed the parties to appeal directly to the highest instance. However, this would have required the consent of the defendant state authorities. This consent has been refused. The proceedings are now taking longer than would have been necessary.

We have taken appropriate legal action, but we believe that the extension of the infringement period is unacceptable. First and foremost because we think we can state that the Federal Republic of Germany has not reported completely and truthfully in the proceedings before the committee.

VIII. Use of other international procedures

No other international procedures besides the Aarhus Convention Compliance Committee have been invoked to address the issue of non-compliance which is the subject of the communication.



Professor Dr. Remo Klinger
Rechtsanwalt

29 March 2018