

GEULEN & KLINGER
Rechtsanwälte

Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
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Communication to the Aarhus Convention's Compliance Committee

I. Information on correspondent submitting the communication

1. This communication is submitted by:

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II. Party concerned

2. Federal Republic of Germany.

III. Facts of the communication

1. Reasons that lead to this communication

3. The communication is targeted at the procedure of association participation in the context of the draft amendment for the Climate Protection Act (*Klimaschutzgesetz – KSG*)¹ which did not allow for effective public participation and therefore violated article 8 of the Aarhus Convention (AC).
4. The KSG is the main framework legislation mapping out Germany's route to climate neutrality. The current German government is planning to amend this Act. In its current form, as one of its main operational instruments, the KSG sets yearly emissions targets for different sectors (so-called sectoral targets).² If one of the sectors fails to meet its yearly emissions target, it is obliged to develop an emergency programme (*Sofortprogramm*) within three months.³ This is the main tool of the KSG to ensure that Germany reaches its total greenhouse gas reduction targets as constitutionally required.⁴ These emergency programmes are planned to be abolished by the current German government, which many environmental associations regard as a clear deterioration of the German climate protection law.
5. There is no urgent need for this amendment legislation with a functional and constitutional KSG currently in force. The political will to change the law was already in the coalition agreement concluded almost two years ago.⁵ There are no urgent reasons to do so now. Furthermore, the parliamentary procedure for amending the law will not begin until September and according to current information, the amendment will not come into force until the beginning of 2024.
6. The draft KSG amendment was sent out on Thursday, June 15, 2023 at 5:28 p.m. by the responsible Federal Ministry for Economic Affairs and Climate Protection (*Bundesministerium für Wirtschaft und Klimaschutz – BMWK*) to initiate the participation of associations pursuant to § 47 of the Joint Rules of Procedure of the Federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien – GGO*). The communicant, Deutsche Umwelthilfe e.V. (DUH), was involved this way. The BMWK set the response deadline for the associations as Monday, June 19, 2023 at 10:00 a.m. In Germany, the Working Hours Act (*Arbeitszeitgesetz – ArbZG*) stipulates a five-day

¹ Current KSG: <https://www.gesetze-im-internet.de/ksg/>.

² Annex 1 to the KSG.

³ § 8 (1) KSG.

⁴ Article 20a of the Constitution (*Grundgesetz – GG*); see: Decision by the German Constitutional Court (*Bundesverfassungsgericht – BVerfG*) of March 24 2021 – 1 BvR 2656/18.

⁵ Coalition Agreement "Mehr Fortschritt wagen", 2021, p. 55.

week with a maximum of 8 hours of working time per working day.⁶ Consequently, the deadline set by the BMWK was one of one working day (Friday) and a maximum of two hours (Monday 8:00 a.m. to 10:00 a.m.).

7. As the sole reason for this short comment period, the BMWK stated that this was “politically imposed.”
8. Factually, the government had put the draft KSG amendment on the agenda for the cabinet meeting on Wednesday, June 21, 2023.⁷ As outlined above, there was, however, no specific reason for the government to do this. Cabinet meetings happen weekly. Parliament will only put the KSG amendment on their agenda after its summer break in September.⁸
9. In terms of content, the draft KSG amendment changes the operational tools of the KSG comprehensively. The sectoral emergency programmes are drafted to be eliminated. Policy adjustments due to missed emissions targets are to be required after two years and for all sectors collectively – as opposed to after three months and for each specific sector.
10. The draft KSG amendment is complex and consists of numerous clauses that are open to interpretation.⁹
11. Due to this extremely short comment period, DUH was unable to provide comprehensive and legal feedback. The feedback DUH was able to provide was one of formulaic and purely general political nature in very short form. An actual legal statement, which also addresses errors, or at least misleading formulations in the draft law, was not feasible in the short time available. Effective participation was thus impossible. Therefore, the German government violated its obligation to ensure effective public participation by fixing sufficient time-frames under article 8 (a) of the Aarhus Convention.
12. The legislative procedure for the Climate Protection Act is just one example of the significantly too short comment periods set by the German government. The same applies to a number of other legislative projects. One example is the recent amendment to the environmental provisions of the Road Traffic Act. The documents for the hearing were sent on June 15, 2023 at 1:00 p.m., and the deadline for comments was June 16, 2023 at 3:00 p.m., which was only a few hours. Again, this bill did not contain any regulations with special urgency.
13. The short deadlines vary depending on the ministry responsible. Draft laws from the ministry originally responsible for the environment sometimes have longer deadlines.

⁶ §§ 3, 9 ArbZG.

⁷ <https://www.bundesregierung.de/breg-de/bundesregierung/bundeskanzleramt/kabinettsitzungen/bundeskabinett-ergebnisse-2197550>.

⁸ <https://www.bundestag.de/tagesordnung>.

⁹ Compare the press statement of Minister Habeck: <https://www.bmwk.de/Redaktion/DE/Videos/2023/06/230614-pressestatement/video.html>.

However, the Federal Ministry for the Economy and Climate is responsible for the climate protection law relevant here. For the Road Traffic Act mentioned as an example, the Federal Ministry responsible for transport.

2. Legal and procedural background in Germany

a. Legislative process

14. In Germany, laws are adopted by the parliament. They can be introduced either by the “midst of parliament,” the Federal Council (*Bundesrat*) or the government.¹⁰ In the case of governmental introduction, the government firstly submits the draft to the Bundesrat and after receiving its comments it is submitted to parliament. Ordinarily, parliament refers the draft to the respective Committee and adopts it after three readings.¹¹
15. The government initiates this legislative process after it has agreed upon its draft legislation amongst its cabinet. Only after this cabinet meeting, the draft legislation will be sent to the Bundesrat and parliament.
16. By not acting to put the draft KSG amendment onto the parliamentary agenda before its summer break, the government underlined that the KSG amendment is not currently considered a priority and, in particular, that its adoption is not time-critical.

b. Procedural practice

17. With regards to public participation, the Joint Rule of Procedure of the Federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien – GGO*) lays out the ground rules. The GGO stipulates in § 47:

„§ 47 Beteiligung von Ländern, kommunalen Spitzenverbänden, Fachkreisen und Verbänden

- (1) Der Entwurf einer Gesetzesvorlage ist Ländern, kommunalen Spitzenverbänden und den Vertretungen der Länder beim Bund möglichst frühzeitig zuzuleiten, wenn ihre Belange berührt sind. Ist in wesentlichen Punkten mit der abweichenden Meinung eines beteiligten Bundesministeriums zu rechnen, hat die Zuleitung nur im Einvernehmen mit diesem zu erfolgen. Soll das Vorhaben vertraulich behandelt werden, ist dies zu vermerken.
- (2) Das Bundeskanzleramt ist über die Beteiligung zu unterrichten. Bei Gesetzentwürfen von besonderer politischer Bedeutung muss seine Zustimmung eingeholt werden.
- (3) Für eine rechtzeitige Beteiligung von Zentral- und Gesamtverbänden sowie von Fachkreisen, die auf Bundesebene bestehen, gelten die Absätze 1 und 2 entsprechend. Zeitpunkt, Umfang und Auswahl bleiben, soweit keine Sondervorschriften bestehen, dem Ermessen des federführenden Bundesministeriums überlassen. Die Beteiligung

¹⁰ Article 76 para 1 GG.

¹¹ §§ 75 ff. of the Rules of Procedure of the German Bundestag (*Geschäftsordnung des Deutschen Bundestag – GOBT*).

nach Absatz 1 soll der Beteiligung nach diesem Absatz und der Unterrichtung nach § 48 Absatz 1 vorangehen.

- (4) Bei der Beteiligung nach den Absätzen 1 und 3 ist ausdrücklich darauf hinzuweisen, dass es sich um einen Gesetzentwurf handelt, der von der Bundesregierung noch nicht beschlossen worden ist. Dem Gesetzentwurf können die Begründung und das Vorblatt beigefügt werden.
- (5) Wird zu einer Gesetzesvorlage eine mündliche Anhörung durchgeführt, sind hierzu die kommunalen Spitzenverbände einzuladen, wenn ihre Belange berührt sind. Diesen soll bei der Anhörung vor den Zentral- und Gesamtverbänden sowie den Fachkreisen das Wort gewährt werden.“

English translation (by Deepl.com):

“§ 47 Consultation of Länder, municipal umbrella organisations, expert groups and associations

- (1) Draft legislation shall be submitted to the Länder, the central associations of the local authorities and the Länder representations to the Federation as early as possible if their interests are affected. If the opinion of a participating Federal Ministry is likely to differ on essential points, the legislation shall be forwarded only in agreement with that Ministry. If the project is to be treated confidentially, this shall be noted.
- (2) The Federal Chancellery shall be informed of the participation. In the case of draft legislation of particular political importance, its consent must be obtained.
- (3) Paragraphs 1 and 2 shall apply correspondingly to the timely participation of central and general associations as well as of expert groups existing at federal level. The timing, scope and selection shall be left to the discretion of the lead Federal Ministry, unless special provisions exist. Participation under paragraph 1 shall precede participation under this paragraph and information under section 48(1).
- (4) When participating in accordance with subsections (1) and (3), explicit reference shall be made to the fact that the bill in question has not yet been passed by the Federal Government. The bill may be accompanied by the explanatory memorandum and the preliminary sheet.
- (5) If an oral hearing is held on a bill, the municipal umbrella organisations shall be invited to attend if their interests are affected. They shall be granted the right to speak at the hearing before the central and general associations as well as the expert groups.”

18. Hence, § 47 (3) GGO determines that draft legislation is to be submitted to relevant central and general associations as well as expert groups as early as possible. Accordingly, this public participation takes place after the participation of the Länder and their representations and associations but before the cabinet meeting.¹²

¹² See § 51 GGO.

19. In response to a question about how the Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection (*Bundesministerium für Umwelt, Naturschutz, nukleare Sicherheit und Verbraucherschutz* – BMUV) practices public participation, the BMUV stated in 2022 that, as a rule, a comment period of 4 weeks is provided for public participation regarding draft legislation on environmental laws. Considering the scope and complexity of the respective draft legislation, this may be shortened to three or two weeks according to the BMUV. An additional curtailment of the participation period is possible as per the BMUV if there are exceptional reasons for faster processing in individual cases. This exemption clause corresponds to article 9 (4) of EU Regulation (EC) No 1367/2006 which implements the Aarhus Convention.
20. Consequently, although there is no strict timely requirement, both the EU as well as the German institutions take the stance that effective public participation can only be ensured if the comment period covers several weeks. Furthermore, in cases of reduced comment periods, both institutions maintain that this should only be possible in individual cases and if exceptional reasons exist.

3. Public participation for the draft KSG amendment

21. As already presented above, the comment period given to associations with regards to the draft KSG amendment was of one working day plus two hours.
22. The sole reason given by the responsible BMWK was that this short time period was “politically imposed.” What this means in concrete terms was not explained.
23. The only possible justification that the communicant was able to identify was that the government had placed this draft on the agenda of the next cabinet meeting. However, this does not imply that it was politically necessary to accelerate the procedure. The actual legislative procedure does not begin until the draft legislation is introduced into the Bundestag. There, however, this draft will not be on the agenda until after the summer break in September. The period between sending the draft KSG amendment to the associations and the next possible Bundestag session, where this draft could be on the agenda, is therefore two full months with weekly cabinet meetings. Furthermore, as detailed above, the government has planned to amend the KSG since it formed its coalition almost two years ago, there is no particular reason why it is adopting – and rushing associations in the process – now.
24. Moreover, there is currently a functioning KSG in place which further undermines any alleged urgency.

4. Infringement of AC article 8

25. The Aarhus Convention maintains that public participation in decision-making is not a matter of good practice but one of urgency with ever more complex subject matters. Decision-making requires accurate, comprehensive and up-to-date information which the public can be a major source of. Effective public participation therefore not

only provides for the people to enjoy their rights but also improves the ability of authorities to carry out their responsibilities. For the public to become an effective and useful part of the decision-making of public authorities, participation requires an open, regular, and transparent process.¹³

26. The AC emphasizes that “the public input should be capable of having a tangible influence on the actual content of the decision. When such influence can be seen in the final decision, it is evident that the public authority has taken due account of public input.”¹⁴
27. Hence for public participation to be effective, it should be conducted in a way that allows for the public authorities to be influenced by the public input.
28. Article 8 of the AC standardises the procedure with regards to the preparation of laws and rules with potential environmental impact.
29. The public participation procedure regarding the draft KSG amendment directly infringes AC article 8 (a) which maintains that time-frames for public participation should be “sufficient for effective participation.”

a. Applicability of article 8 to the preparation of legislation

30. AC article 8 refers to public participation “during the preparation by public authorities of executive regulations and/or other generally applicable legally binding rules that may have a significant effect on the environment.”
31. In 2021, the civic association VIA IURIS brought a communication against Slovakia before the Aarhus Convention Complaint Committee (from here on: Committee). There, the Committee found that “preparation of legislation by executive bodies to be adopted by national parliaments” are included in the provision of Art. 8 AC.¹⁵ According to the Committee, “nothing in the title or text of article 8 of the Convention [suggests] that it does not include the preparation of legislation by executive bodies to be adopted by national parliaments. On the contrary, although the terms “legislation” and “laws” do not appear in the provision, the wording of article 8 and the ordinary meaning given to its terms nevertheless support the inclusion of legislation and other normative instruments of a similar character.”¹⁶ The Committee understands the text of article 8 as a “generic expression intended to cover different kinds of generally applicable legally binding normative instruments, which may be referred to in different ways in different jurisdictions.”¹⁷ Furthermore, since AC article 8 specifically adds the term of “generally applicable legally binding normative instruments” and does not limit

¹³ Implementation Guide, p. 85.

¹⁴ Implementation Guide, p. 86.

¹⁵ ECE/MP.PP/C.1/2021/19, para. 95 ff.

¹⁶ ECE/MP.PP/C.1/2021/19, para. 95.

¹⁷ ECE/MP.PP/C.1/2021/19, para. 96.

its scope to “executive regulations”, it is, therefore, also applicable to regulations other than those by the executive branch.¹⁸

32. Already in its findings in another case, the Committee had held that article 8 relates “to any normative acts.”¹⁹
33. While AC article 8 is thus applicable to legislation, the Convention is more restrictive with regards to the term “public authority”. According to AC article 2 (2) this does not include bodies or institutions acting in a legislative capacity.
34. However, the Committee understands this limitation as strict and precise, meaning that “it only covers activities by the body or institution with the capacity and power to adopt the legislation.”²⁰ This strict understanding is also in line with applying article 2 (2) as uniformly as possible to the Parties as their legislative processes likely differ.²¹ Otherwise, Parties could attempt to exclude the application of the AC by expanding their preparatory processes with several public authorities involved and with no transparency or public participation.²² Such “comprehensive preparatory procedures are perfectly in line with the Convention,” however, “they must not be used to exclude opportunities for members of the public [...] to participate.”²³
35. Therefore, public authorities, including governments, “do not act in a legislative capacity when engaged in preparing laws until the draft or proposal is submitted to the body or institution that adopts the legislation.”²⁴
36. The BMWK, a German governmental body, sent out the draft KSG amendment before it was submitted to the Bundestag (as detailed above). Hence, it acted within its executive capacity concerning a “generally applicable legally binding rule.” The public participation in question is, therefore, within the scope of article 8.

b. Violation of article 8 (a)

37. AC article 8 (a) states that Parties should take steps to establish “time-frames sufficient for effective participation.” The Implementation Guide explains that the elements regulated in article 8 set forth a “basic procedural framework.”²⁵
38. While article 8 (a) does not set specific time-frames, “the Convention states that the authorities should plan for public participation by fixing their own schedule that is “sufficient” for effective participation.”²⁶ This is illustrated in the Implementation Guide

¹⁸ ECE/MP.PP/C.1/2021/19, para. 97.

¹⁹ ECE/MP.PP/C.1/2011/6/Add.1, para. 61.

²⁰ ECE/MP.PP/C.1/2021/19, para. 99.

²¹ ECE/MP.PP/C.1/2021/19, para. 99.

²² ECE/MP.PP/C.1/2021/19, para. 99.

²³ ECE/MP.PP/C.1/2021/19, para. 99.

²⁴ ECE/MP.PP/C.1/2021/19, para. 101.

²⁵ Implementation Guide, p. 185.

²⁶ Implementation Guide, p. 121.

with a legislation that it finds to be a typical example of this requirement: The Hungarian Act XI of 1987 on Legislation provides that when drafting comment deadlines, the following four factors are to be taken into account: (1) the person giving the opinion should have the opportunity to form a well-based opinion; (2) the opinion must be able to be taken into consideration in the drafting; (3) the size of the draft; and (4) the type of organization giving the opinion.²⁷ This reiterates the need for time-frames that allow for effective participation and underlines that effective participation is made impossible if the deadline does not allow for comprehensive examination.

39. Therefore, it can be deduced that the public authorities have a duty of care to guarantee effective participation.²⁸
40. Truly effective participation is only possible in a deliberative process.²⁹ Deliberation fosters a collaborative decision-making process which allows “the reconciliation of strong democracy and demanding environmentalism.”³⁰ This is in line with the purpose of the Convention to guarantee a comprehensive decision-making process regarding environmental matters.
41. Finally, the last sentence of article 8 requires the result of the public participation to be considered as far as possible. In this regard, the Implementation Guide clarifies that “this provision establishes a relatively high burden of proof for public authorities to demonstrate that they have taken into account public comments in processes under article 8.”³¹
42. While it is difficult to gauge the effectiveness of public participation, it is easier to assess ineffectiveness. It is undoubtedly ineffective if the outcome of the participation process appears to be a “foregone conclusion.” Therefore, this “closed mind” is “in principle unlawful under the Aarhus Convention.”³²
43. It is thus on the public authorities in question to prove their open mind and demonstrate their consideration of the results of the public participation procedure.
44. In the case of this communication, the time given for public participation was one day and two hours. A comprehensive examination of the draft by the public plus the writing of an extensive statement within one day and two hours is impossible. A statement drafted within this period can be general and broad at best. In addition, the time the government took to consider these statements was two days. A comprehensive examination of the submitted statements and an incorporation of these proposals

²⁷ Implementation Guide 121.

²⁸ ECE/MP.PP/C.1/2021/19, para. 103; *Eppiney*, in: Epiney/Diezig/Pirker/Reitemeyer, Aarhus Konvention, 1. Auflage 2018, Art. 18 AK, marginal no. 4 f.

²⁹ Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship*, 2020, p. 153.

³⁰ Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship*, 2020, p. 67 f.

³¹ Implementation Guide, p. 185.

³² Lee, “The Aarhus Convention 1998 and the Environment Act 2021”, in: *The Modern Law Review* 86 (3), May 2023, p. 756 (782).

into the text within two days is also impossible. Hence, a time-period as given in the process in question indicates a "closed mind" and does not allow for effective participation. This is especially true in the case of the amendment of a critical operational tool within the main framework legislation for climate protection.

IV. Nature of alleged non-compliance

45. This communication concerns the specific case of non-compliance of the Federal Government in its involvement of associations regarding the draft of the Climate Protection Act Amendment. The German government did not make sufficient efforts to allow the public to effectively participate in the process. It thereby violated article 8 (a) of the Aarhus Convention.

V. Relevant provisions of AC

46. Article 8 (a) of the Aarhus Convention.

VI. Use of domestic remedies

47. Public participation within the German legislative process is regulated by § 47 (3) GGO (see above). The GGO is an administrative regulation with regularly no external impact.³³ This means, that legal action is not available. To legally challenge governmental action that is based on administrative regulation, the regulation in questions needs to have developed external impact. This is the case when there is consistent practice because of the so-called "self-binding of the administration." Based on the right to equal treatment of article 3 (1) GG, consistent administrative practice creates external impact and, thus, a possible legal claim.³⁴

48. Even though the German government claims that it regularly sets statement-deadlines of several weeks,³⁵ this is not the case in practice. For years, associations have complained about deadlines that are not allowing for comprehensive examination of the respective draft legislation.³⁶ There is no indication that public participation regarding environmental legislation are dealt with consistently.

49. Consequently, there is no external impact of § 47 (3) GGO which means that there is no domestic remedy available to enforce the present violation of article 8 of the Convention.

³³ Epping, BeckOK GG, as of 15.05.2023, Art. 65 GG, marginal no. 19.3.

³⁴ Kluckert, Die Selbstbindung der Verwaltung nach Art. 3 I GG, in: JuS 2019, p. 536 (537).

³⁵ See the letter of the BMUV provided as a supporting document.

³⁶ For example: <https://www.handelsblatt.com/politik/deutschland/einwanderungsreform-bundesregierung-gibt-verbaenden-eine-woche-mehr-zeit-fuer-stellungnahmen/28996260.html> (2023), <https://www.dggg.de/presse/pressemitteilungen-und-nachrichten/kurze-fristen-bei-verbaendeanhoerungen> (2022), <https://www.zfk.de/politik/deutschland/verbaende-kritisieren-kanzleramt-extrem-kurze-anhoerungs-fristen> (2019).

VII. International remedies

50. No international remedies were invoked.

VIII. Confidentiality

51. The information of the communicant can be made transparent.

IX. Supporting documents (copies, not originals)

52. Copies of the following documents are supplied in support of the communication:

- Excerpt of the Copy of the GGO (in German and English) (paragraphs 6, 17-18, 47-49) [**annex 1**],
- Excerpt of the ArbZG (in German and English) (paragraph 6) [**annex 2**],
- Email of the BMWK to the associations with the draft KSG legislation, specifying the comment deadline (in German and English) (paragraphs 6-7, 13, 21-23, 36, 44) [**annex 3**],
- Article 9 EU directive EC/1367/2006 (paragraph 19) [**annex 4**],,
- Statement submitted by the communicant (in German and English) (paragraphs 11, 44) [**annex 5**],,
- Reply of the BMUV to an UIG request from June 8, 2022 (in German and English) (paragraphs 19, 48) [**annex 6**],,
- Power of attorney for legal representation (in German and English) (paragraph 1) [**annex 7**].

X. Signature

Prof. Dr. Remo Klinger
Legal representative