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**CONCERNING COMPLIANCE BY DENMARK WITH THE AARHUS-
CONVENTION WITH REGARD TO FEES FOR APPEALS TO THE NA-
TURE AND ENVIRONMENT APPEAL BOARD (Ref. ACCC/C/2011/57)**

In a letter dated 14 March 2011 regarding the abovementioned case, the Secretariat of the Aarhus Convention Compliance Committee invited Denmark to submit written explanations or statements clarifying the matter referred to in the communication and describing any response which have been made in the mean time.

The Compliance Committee has also asked for information on the average yearly income in Denmark.

Act and statutory order at present on differentiated fees for appeals to the Nature and Environment Appeal Board:

The relevant legislation in question for this case is:

- Act amending the act on the Nature and Environmental Appeal Board and other acts (Act no. 1608 of 22nd of December 2010 (hereafter referred to as the "act"). The act can be found on: <https://www.retsinformation.dk/Forms/R0710.aspx?id=135221> (The explanatory notes from the legislator (the Danish Folketing) to the act is no. 2010/1/ LSF 58. The remarks can be found on: <https://www.retsinformation.dk/Forms/R0710.aspx?id=134224>. (In Danish law these remarks serves as interpretation guidance to the act)
- Statutory order no. 1673 of 22 December 2010 on fees on bringing complaints to the Nature and Environmental Appeal Board (hereafter referred to as the "order"): <https://www.retsinformation.dk/Forms/R0710.aspx?id=134934>

From 1 January 2011, the fee for bringing a complaint to the Nature and Environmental Appeal Board is 500 DKK (approx 67 EURO) for private persons. The fee is 3000 DKK (approx. 400 EURO) for others, including enterprises, farmers, organisations (such as NGO's and other stakeholder organisations) and public authorities.

Certain complaints are not subject to fees. Reference is made to section 18 (2-6) in the act. An example is complaints brought to the Nature and Environmental Appeal Board concerning access to environmental information.

The fee will be paid back to the complainant in the following cases¹:

- If the result of the complaint is that the decision in question is changed or repealed.
- The complaint is upheld or partly upheld by the board.
- The complaint is rejected by the board due the following procedural reasons: deadline for bringing complaints overrun, the complainant has no standing, or the complaint is beyond the subject scope of the board.

According to the explanatory notes of the act concerning the differentiation of fees, the purpose for changing the legislation is for the board “to focus on the more important cases. The bill must be seen in conjunction with the endeavour to obtain shorter time for handling cases and thereby secure fast and efficient handling of all complaints.”

Other notable initiatives were setting down an expert ad hoc committee with the mandate of investigating and giving recommendations to make a complaint system which is effective and fast. Furthermore, there have been allocated extra grants to the board with the aim of solving cases, which have been under consideration of the board for a longer period.

Compliance with Article 9, paragraphs 2 and 3:

“It is DOF’s opinion that this law is a violation of article 9, paragraph 2 of the Aarhus Convention, because we by economic means are restricted in our ability to challenge the substantive and procedural legality of decisions, acts or omissions subject to the provisions of article 6 taken by the Danish authorities within nature and environmental matters.”

“It is also DOF’s opinion that this law is a violation of article 9, paragraph 3 of the Aarhus Convention, because DOF, due to the new high fees, in the future will be hampered from having full access to administrative or judicial procedures, which are necessary to challenge acts and decisions taken by public authorities contravening provisions of our national law relating to the environment.”

According to Article 9, paragraphs 2 and 3, there must be access to review procedures. Article 9, paragraphs 2 and 3 do not regulate fees for access. This question is regulated in Article 9, paragraph 4.

Thus, it is the Danish view-point that the fee is not in non-compliance with Article 9, paragraphs 2 and 3.

¹ Section 2 of the Order

Compliance with Article 9, paragraph 4 and the question of average yearly income in Denmark:

“It is DOF’s opinion that this law is a violation of article 9, paragraph 4 of the Aarhus Convention, because the procedures referred to in paragraphs 1, 2, and 3 of article 9 no longer are fair, because of the fee differentiation, and because they in the long run are prohibitively expensive.”

According to the Convention, review procedures are to be “fair, equitable, timely and not prohibitively expensive.”

It is important to underline that the wording of the Convention is *prohibitively* expensive. This means accordingly, that the costs *may* be expensive, but not *prohibitively* expensive.

The question of average yearly income has been passed to “Statistics Denmark” (<http://www.dst.dk/HomeUK.aspx>), which have supplied the following two numbers respectively before and after taxes (since there are many different ways to fix the average yearly income).

The average yearly income before taxes in 2009 was 274.327 DKK (approx 36576 Euro). The average yearly income after taxes and different compulsory contributions to insurance, labour markets etc. in 2009 was 181.687 DKK (approx. 24224 Euro). This number includes all persons above the age of 14 and who are liable to pay taxes in Denmark.

./. (Furthermore, “Statistics Denmark” has supplied the attached table based on the median income so the incomes can be seen in a European context.)

It follows from this information, that Denmark is a high-income country. Therefore, the trigger, when estimating whether a cost is prohibitively expensive, must by all means be higher in Denmark in comparison with countries with lower incomes. The trigger must be estimated in the light of the relevant society.

The average yearly income for a person in Denmark after taxes is around 24000 Euro. Private persons must pay around 67 Euro for making a complaint and other complainants around 400 Euro. As described above, the fees will be paid back in certain situations.

In ACCC/C/2008/24, paragraph 106-107, the Murcia High Court decided to impose all costs (2148 Euro) to the communicant. The Compliance Committee didn’t find that this amount, per se, was prohibitively expensive. The information provided to the Compliance Committee in the case was however not sufficient to make any conclusion.

In ACCC/C/2008/23 paragraph 49, the Compliance Committee didn’t find a cost order on 5.130 UK-pounds prohibitively expensive.

According to the table supplied by "Statistics Denmark", Spain had in 2009 an average net income on 13300 Euro. The UK had an income on 16262 Euro. Denmark had an average net income on 24929.

Even if an organisation is in a situation where it brings a large amount of complaints to the board, the Danish regulation is in compliance with the Convention. As described above, the fees will be paid back in certain situations. A number of complaints are actually upheld by the board. So even if bringing a large number of complaints, can be a challenge for the financial liquidity for a smaller NGO, it must be remembered that the board in some cases will return the fee accordingly as cases are being dealt with. The criterion for returning the fee is described on p. 2.

It is therefore the Danish point of view, that the fees for bringing complaints before the board are not *prohibitively expensive* and thus in compliance with the Convention.

As mentioned above complaints on access to environmental information (Article 9, paragraph 1 of the convention) is free of fees.

The system with a distinction between private persons and others is *fair* and thus also in compliance with the Convention. The differentiation of the fees is fixed due to the different solvency, that is typical for the different categories of complainants. A union of persons (for example a company or an organisation) is normally in a better financial position than a private person. Furthermore, a fee of 400 Euro is still a modest amount.

According to their annual report 2010, the Danish Ornithological Society, BirdLife Denmark (DOF) has over 16.000 members and received 5.4 mio. DKK in subscription from members. DOF has a number of incomes of which 2.1 mio. DKK are public subsidies (where a part derives from the pool and lottery funds).

In ACCC/C/2008/33, paragraph 128, the Compliance Committee held that when assessing the cost related to the procedures for access to justice in the light of Article 9, paragraph 4, the Committee would consider the system as a whole and in a systemic manner. Hence, the Compliance Committee is evaluating the costs related to access review as a whole. It is therefore of relevance to describe how the access to review system is implemented in Denmark:

According to the Convention, access to review is to be granted: 1) to either a court of law or 2) another independent and impartial body. The board is an independent and impartial body. In Denmark there is a broad access to make complaints to the board. This also has the consequence that in many environmental cases, the financial barrier for access to justice is - de-facto - respectively 67 Euro and 400 Euro. These are very modest amounts in comparison to legal procedure costs before the courts.

Moreover, it is also of relevance that before the board, there is no requirement that the complainant must use a lawyer or other expertise. This means that there are no additional costs, for example experts fees, salary for lawyers etc. etc, after having paid respectively 67 Euro and 400 Euro.

It is thus the Danish point of view, that Denmark fully meets its obligations under Article 9, paragraph 4.

Compliance with article 9, paragraph 5:

"It is DOF's opinion that this law is a violation of article 9, paragraph 5 because Denmark has not established appropriate assistance mechanisms to remove or reduce the financial barriers to our access to justice. In fact it is the very purpose of Act. No 1608 to establish such a financial barrier. "

It follows from Article 9, paragraph 5 that Parties to the convention "...shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

The wording "*shall consider*" underlines that Parties only have an obligation to *consider* the establishment of appropriate assistance mechanisms. Parties are left with a wide amount of discretion in defining and drawing up specific assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Indeed, by having this system where there is a wide and cheap access to make complaints to the board, Denmark considers that it has reduced financial barriers to access to justice. When making a complaint to the board, there is no need to go through the court system, which is more expensive than bringing a complaint to the board. The fees for making complaints to board are not even expensive. Thus, there is no need to establish appropriate assistance mechanisms to pay the fees.

It is thus the Danish point of view, that Denmark fully meets its obligations under Article 9, paragraph 5.

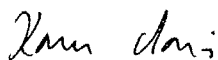
Any responses which have been made in the mean time:

The only response or any other communication with relevance to substance matter that has been exchanged with the communicant from the 14 March 2001 and until now is information sent 19 August 2011 by the secretariat regarding answer from DOF on the question of income in Denmark.

Preliminary decision of admissibility:

No comments.

Yours sincerely



Karen Aarøe
Head of division

