Draft findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2011/57 concerning compliance by Denmark

I. Introduction

1. On 26 January 2011, the non-governmental organization (NGO) Dansk Ornitologisk Forening – BirdLife Denmark (DOF) (Danish Ornithological Society) (hereinafter the communicant) submitted a communication to the Committee alleging the failure of Denmark to comply with its obligations under article 9, paragraphs 2, 3, 4 and 5, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

2. Specifically, the communication alleges that the Party concerned fails to comply with the requirements of article 9, paragraphs 2 to 5, of the Convention because the new fees regime before the Nature and Environmental Appeal Board (NEAB), which came into effect since 1 January 2011 imposes fees to NGOs for bringing appeals to the NEAB that are much higher than before and different that the fees imposed on private individuals.

3. At its thirty-first meeting (22-25 February 2011), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 14 March 2011. On the same date, a letter was sent to the communicant. Both parties were invited to answer a question about the average yearly income in Denmark.

5. At its thirty-second meeting (11-14 April 2011) the Committee provisionally agreed that it would discuss the substance of the communication at its thirty-fifth meeting (13-16 December 2011). However, at its thirty-third meeting (28-29 June 2011), the Committee confirmed that it would discuss the communication at its thirty-fourth meeting (20-23 September 2011).

6. On 10 August 2011, the communicant replied to the Committee's question. On 31 August 2011, the Party concerned sent its response to the communication.

7. The Committee discussed the communication at its thirty-fourth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the discussion, the Committee put a number of questions to both the communicant and the Party concerned and invited them to respond in writing after the meeting.

8. The communicant submitted its responses to the Committee's questions on 23 October 2011. The Party concerned submitted its responses to the Committee's questions on 1 November and 30 November 2011, the latter with additional information concerning an important recent development (see para. 25 below). By letter of 13 December 2011, the communicant provided comments on the Party concerned's letter of 30 November 2011.

9. The Committee prepared draft findings at its thirty-fifth meeting (13-16 December 2011), completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 10 February 2012. Both were invited to provide comments by 9 March 2012.

10. The Party concerned and the communicant provided comments on […] and […], respectively.

11. At its […] meeting (…), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its […] meeting (…). It requested the secretariat to send the findings to the Party concerned and to the communicant.

II. Summary of facts, legal framework and issues[1]

A. National legal framework

12. The Danish Nature and Environmental Appeal Board (NEAB) is an independent and impartial tribunal set up to deal with public complaints regarding administrative decisions regarding the environment.

13. Decisions of Danish public authorities can be appealed by natural and legal persons that are affected by those decisions and also by NGOs who are deemed under national law to be members of the public concerned with respect to environmental matters.

14. Until 2004, applicants to the NEAB (whether NGOs, enterprises or individuals), were not charged for starting a procedure. In 2004 an upfront 400 DK fee was introduced for all applicants across the board.

15. In 2006 a Danish Livestock Act was introduced. It created a regulatory framework (permitting regime) for the activity of livestock production facilities. The power to issue the final environmental decision was devolved to local authorities.

16. In early 2011, the regime for fees charged for appeals to the NEAB changed, according to the following legislation (annexes 1 and 2 to the communication and also https://www.retsinformation.dk, all in Danish):

a. Act amending the Act on the Nature and Environmental Appeal Board and other Acts (Act no. 1608 of 22 December 2010);

b. Statutory order no. 1673 of 22 December 2010 on fees on bringing complaints to the Nature and Environment Appeal Board.

The stated purpose of these amendments was to enable the NEAB to focus more on the most important cases and to ensure fast and efficient consideration of all appeals.[2]

17. The new regime entered in effect as of 1 January 2011. Accordingly, a fee of DKK 500 (approximately €67) is charged on private persons and a fee of DKK 3000 (approximately €400) is charged on others, such as enterprises, NGOs and public authorities.

18. Some complaints concerning access to environmental information are exempted from fees (section 18, 2-6, Danish Livestock Act).

[1] This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

[2] Paragraph 1, Explanatory notes to the Bill to amend the Act on the Nature and Environmental Appeal Board and the Act to amend the Nature Protection Act, the Environmental Protection Act and various other acts (Differentiated appeal fee) (English translation provided by Party concerned at page 13 of its letter of 1 November 2011).

19. The fees are returned to the appellant if: (a) as a result of the appeal, the decision at issue is amended or repealed; (b) the complaint is wholly or partly upheld by the NEAB; or (c) if the complaint is rejected by the NEAB for some procedural reasons (section 2 of the Order).

B. Relevant factual background

20. Between 2007 and 2010, several thousand procedures were initiated before the NEAB. For example, in 2008 and 2009, approximately 2500 appeals were brought before the NEAB annually, and in 2010, approximately 3000 appeals were filed.[3] A large number of these appeals related to administrative decisions issued under the Domestic Livestock Act (for example, in 2009, 14% of cases and in 2010 23% cases related to appeals brought under that Act).[4] The Party concerned estimated that approximately 20% of all cases filed annually before the NEAB were brought by NGOs,[5] with 54-56% of appeals under the Danish Livestock Act being brought by NGOs.[6] Although the communicant and Party concerned differ on the statistics, on either tally the success rate of NGO appeals regarding decisions issued under the Danish Livestock Act was high. According to the Party concerned, in a study of 173 appeals under that Act, NGOs succeeded to have the decision annulled or changed in a 95% of their appeals, in comparison to the success rate for permit applicants (47% success), neighbours (61% success) and "others" (57% success).[7]

21. In light of the very large number of cases pending before the NEAB, in 2010 the Danish Government considered various measures to speed up the case processing time and to ensure fast and efficient consideration of all appeals. One of the measures proposed was a substantial, six-fold increase in the fee payable by those other than private persons to appeal to the NEAB – the proposed amount was DKK 3000. In deciding to proceed with this particular measure, the Government's Explanatory Note to the Bill imposing the new fees regime stated, inter alia, that "the number of appeals submitted by organizations and enterprises is expected to decrease."[8]

22. The Party concerned has a number of other quasi-judicial administrative bodies that deal with administrative appeals regarding issues somewhat comparable to environmental rights. These include the National Agency for Patients' Rights and Complaints, the Energy Board of Appeal, the Energy Supplies Complaint Board, the Consumer Complaint Board and the Danish National Tax Tribunal. At the present time the fees for appealing administrative decisions before these other bodies are considerably lower than the fee imposed on NGOs seeking to bring an appeal to the NEAB. For example, appeals to the National Agency for Patients' Rights and Complaints and the Energy Board of Appeal are free of charge.[9]

[3] Table 1, page 2 of Party concerned's response of 30 November 2011.
[4] Table 3, page 3 of Party concerned's response of 30 November 2011.
[5] Table 1, page 2 of Party concerned's response of 30 November 2011.
[6] Page 3 of Party concerned's response of 30 November 2011.
[7] Table 6, page 6 of Party concerned's response of 30 November 2011.
[8] See footnote 2, paragraph 4.1.2.
[9] Page 2 of Party concerned's response of 1 November 2011.

23. The average yearly income for men (after taxation) in Denmark is DKK 194,000 and that of women DKK 164,000 (approximately €26,000 and €22,000, respectively, average of €24,000 for individuals).[10]

24. As for NGOs, their income derives from membership fees and donation. By way of indication, the annual fee for members of the communicant is €37.60.

25. By letter of 30 November 2011, the Party concerned informed the Committee that on 29 November 2011 the Danish government had decided to present a Bill before the Danish Folketing (the Danish Parliament) to reduce the fee for making complaints to the NEAB from DKK 3000 for those other than private persons (for example enterprises, NGOs, authorities etc) to DKK 500. The Party concerned indicated that it is not the intention to change the fee for making complaints for private persons. The fee remains at DKK 500 (which was also the level before the change of the Act introducing new fees). The Party concerned indicated that it is the intention to present the Bill before the Folketing in February 2012 and the Act is expected to come into force in summer 2012.

C. Substantive issues and arguments of the parties

Article 9, paragraphs 2 and 3

26. The communicant alleges that the new differentiated regime introducing higher fees for NGOs and other non-private persons to appeal decisions by public authorities in environment and nature protection matters is not in compliance with article 9, paragraph 2, of the Convention. The communicant submits that NGOs have limited resources and the new law effectively limits the capacity of NGOs to challenge the substantive and procedural legality of decision, acts or omissions subject to article 6 of the Convention.

27. The communicant also alleges that the new law is not in compliance with article 9, paragraph 3. Because of their limited resources, NGOs will also be discouraged from challenging acts and decisions of public authorities which contravene provisions of national law relating to the environment.

28. The Party concerned argues that these provisions of the Convention are not relevant in the present case, because the aim of the provisions is to ensure access to review procedures and not to regulate fees.

Article 9, paragraph 4

29. The communicant alleges that the new law is not in compliance with article 9, paragraph 4, of the Convention. The procedures provided under article 9, paragraphs 2 and 3, are not fair, since they provide for differentiated fees for NGOs, and because in the long run they will be prohibitively expensive.

30. The Party concerned disagrees with the communicant. First, with regard to "prohibitively expensive", it argues that the information on the average income in Denmark (see para. **Error! Reference source not found.**), especially compared to other European countries demonstrates that Denmark is a high-income country.[11] It submits that while the fees charged under the new law, may be considered by some as "expensive", they are not "prohibitively" expensive.

31. In support of its views, the Party concerned refers to the findings of the Committee in communication ACCC/C/2008/23 (United Kingdom, para. 49) and ACCC/C/2008/24

[10] The communicant refers to the report "Denmark in figures 2011" from Danmarks Statistik.

[11] Annex to Party's response of 31 August 2011.

(Spain, paras. 106-107). Though the average net incomes in the UK and in Spain are lower than in Denmark in neither case did the Committee find non-compliance by the Parties concerned.

32. Given the above, and also considering that complaints on access to information are exempted from any fees and that fees are returned when the appeals are upheld by the Board (see paras. 18 and 19 above), the Party concerned argues that the new fee regime is not prohibitively expensive.

33. Second, with regard to the arguments of the communicant that the remedies are not "fair", the Party concerned argues that the differentiated fees are due to the different solvency of the appellants, because a union of persons (such as an NGO) is normally in a better financial position than a private person.

34. In support of its argument, the Party concerned refers to the annual income of the communicant, which according to its 2010 annual report had over 16,000 members and received DKK 5.4 million from member fees. It also refers to the findings of the Committee in communication ACCC/C/2008/33 (United Kingdom, para. 128), in which the Committee in assessing compliance with article 9, paragraph 4, considered the system as a whole and in a systemic manner. The Party concerned submits that according to the Convention, access to review is to be granted either to a court of law or another independent and impartial body. The NEAB is an independent and impartial body and there is broad access to make complaints to it. This means that in many environmental cases, the financial barrier for access to justice is €67 for private persons and €400 for all others. It is submitted that these are very modest amounts compared to the costs of legal procedures before courts. In addition, there is no requirement to be represented by a lawyer or to have an expert, which means that these costs are saved. Hence, the system in Denmark is fair and in compliance with the Convention.

Article 9, paragraph 5

35. Finally, the communicant alleges that the new fees regime is not in compliance with article 9, paragraph 5, of the Convention, because the Party concerned has not established appropriate assistance mechanisms to remove or reduce the financial barriers for NGOs on access to justice (and in fact it is the purpose of the new regime to establish such a financial barrier).

36. The Party concerned argues that the words "shall consider" in article 9, paragraph 5 means that Parties only have an obligation to "consider" appropriate assistance mechanisms and the Convention leaves a wide discretion to the Parties to design financial assistance mechanism. In this regard, by establishing a system before the NEAB that is widely accessible and inexpensive in relation to the average income and compared to court fees, Denmark considers that it has reduced financial barriers to access to justice. Thus there is no need to establish an additional mechanism to further reduce these modest fees.

III. Consideration and evaluation by the Committee

37. Denmark ratified the Convention on 29 September 2000. The Convention entered into force for Denmark on 30 October 2001.

38. The Committee finds the communication to be admissible.

Access to justice – article 9 paragraphs 2 and 3

39. The communicant considers that decisions issued by the local authorities according to the Danish Livestock Act are environmental decisions subject to article 6 of the

Convention. During the discussion of this communication, at the thirty-fourth meeting the representatives of the Party concerned agreed with that allegation.

40. Article 9, paragraph 2, provides for access to review procedures for members of the public concerned to challenge the substantive and procedural legality of any decision, act or omission subject to article 6 of the Convention. Article 9, paragraph 2 addresses issues such as standing and access to an independent and impartial review procedure, whereas financial barriers are addressed in other provisions of the Convention, for example, article 3, paragraph 4, and article 9, paragraph 5. As both the communicant and the Party concerned agree that in Denmark there is an independent and impartial procedure for appealing article 6 decisions and that the communicant is given standing before this procedure to appeal these decisions, the Committee finds that the Party concerned is not in non-compliance with article 9, paragraph 2 in this case.

41. With respect to the communicant's allegation that the Party concerned fails to comply with article 9, paragraph 3, the Committee notes that article 9, paragraph 3, requires access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment, but like article 9, paragraph 2 above, the provision does not address financial barriers. These are, again, addressed in other provisions of the Convention. As the communicant has not alleged it is denied standing to challenge acts and omissions by private persons and public authorities which contravene national law relating to the environment, and in the light of the Committee's finding in paragraph 40 above, the Committee finds that the Party concerned is not in non-compliance with article 9, paragraph 3, of the Convention.

Access to justice – article 9, paragraph 4

42. The communicant makes two separate allegations with respect to article 9, paragraph 4. The first allegation relates to the requirement of article 9, paragraph 4 for the access to justice procedures referred to article 9, paragraphs 1, 2 and 3, to be "fair". The communicant submits that by obligating NGOs to pay a fee which is six times higher than the fee individuals must pay for the same procedure, the new fees regime contravenes this requirement. The communicant's second allegation is that in the long run the new fees for NGOs will be "prohibitively expensive", in violation of the related requirement in article 9, paragraph 4.

43. With regard to the communicant's first allegation, the Committee holds that the requirement for fair procedures means that the process, including the final ruling of the decision-making body, must be impartial and free from prejudice, favouritism or self-interest. While the requirement for fair procedures applies equally to all persons, the Committee nevertheless considers that a criterion that distinguishes between individuals and legal persons - like the differentiated fee in the present case - is not in itself necessarily unfair. The Committee does not find that the Party concerned fails to comply with article 9, paragraph 4, on this ground.

44. With respect to the communicant's second allegation under article 9, paragraph 4, the Committee finds its approach in ACCC/C/2008/33 (United Kingdom) to be appropriate with respect to the current communication also, i.e. to assess compliance with article 9, paragraph 4, by considering the system as a whole and in a systemic manner. The Committee considers that in order to do this a number of considerations need to be taken into account.

45. In this regard, the rights granted to the public by the Convention and its three pillars aim not only at the protection of the individual right on healthy environment, but also at improving the environment (preambular paragraph 7) and enhancing the quality and the enforcement of environmental decisions (preambular paragraph 9). The Convention

explicitly recognizes the importance of the role that environmental NGOs can play in environmental protection (preambular paragraph 13). The Committee also considers that in keeping with the objective set out in preambular paragraph 7 and article 1 to protect and improve the environment for the benefit of present and future generations, the rights under the Convention should, in general, improve over time.

46. With regard to the submission by the Party concerned, that Denmark is a high-income country and therefore the fees charged under the new law are not prohibitively expensive, the Committee considers that the relationship between average individual net income and NGOs' financial capacity to have access to justice is not clear. Moreover, the financial capacity of any particular NGO to meet the cost of access to justice like in this case, may depend on a number of factors, including the amount of the NGO's membership fee, the number of members and the amount of resources allocated for access to justice activities in comparison to other activities amongst other factors. For this reason, the Committee does not find the submission by the Party concerned to be persuasive.

47. When assessing if the new fees regime is "prohibitively expensive", apart from the amount of the fee as such, the Committee considers the following aspects of the system as a whole to be particularly relevant: (a) the contribution made by appeals by NGOs to improving environmental protection and the effective implementation of the Danish Livestock Act; (b) the expected result of the introduction of the new fee on the number of appeals by NGOs to the NEAB; and (c) the fees for access to justice in environmental matters as compared to fees for access to justice in other matters in Denmark.

48. According to the statistics provided by the Party concerned (see paragraph 20 above), it is evident that NGO efforts resulted in the repeal of a large number of illegal decisions, a halt on many potentially environmentally harmful activities, and the imposition of measures for limiting other harmful effects on the environment. These statistics alone provide sufficient evidence of the contribution made by appeals by NGOs to improving environmental protection and the effective implementation of the Danish Livestock Act.

49. It is the communicant's strongly-put submission that the increased fees for NGOs will result in a decrease in the number of environmental appeals filed by NGOs before the NEAB. Moreover, the Explanatory Note to the bill introducing the new fees regime explicitly states: "the number of appeals submitted by organizations and enterprises is expected to decrease".[12] Therefore the Committee finds that the new fees system was intended to, and is likely to, result in a decrease of the number of appeals filed against environmental decisions by NGOs.

50. The Committee has been provided information by the Party concerned regarding the cost to appeal administrative decisions before other similar quasi-judicial bodies in the Party concerned, including those concerned with patients' rights (health), consumer issues, energy supply and tax matters. The Committee notes that such appeals are either free of charge or have fees of considerably less than DKK 3000 whereas higher fees are charged for appeals concerning matters regarding primarily commercial interests, such as competition, patent and trademark rights. The Committee also notes that NGO appeals before the NEAB have more the nature of appeals to the first group of bodies than appeals regarding primarily commercial interests.

[12] See footnote 2, paragraph 4.1.2.

51. Based on the above three considerations, the Committee finds that the fee of DKK 3000 for NGOs to appeal to the NEAB is in breach of the requirement in article 9, paragraph 4, that access to justice procedures be not prohibitively expensive.

Access to justice – article 9, paragraph 5

52. Having found that the Party concerned has failed to comply with article 9, paragraph 4, the Committee does not find it necessary to consider the allegation with respect to article 9, paragraph 5, further.

IV. Conclusions and recommendations

53. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

54. The Committee finds that by introducing a fee of DKK 3000 for NGOs to appeal to the NEAB, the Party concerned has failed to comply with the requirement in article 9, paragraph 4, of the Convention, that access to justice procedures be not prohibitively expensive (para. 51 above).

55. The Committee has taken note of the information provided by the Party concerned in its letter of 30 November 2011 that the Danish government has decided to present a Bill before the Danish Folketing (the Danish Parliament) to reduce the fee for those other than private persons to make a complaint to the NEAB from DKK 3000 to DKK 500. While welcoming this information, the Committee holds that this development does not change its findings with respect to the situation as it currently stands.

B. Recommendations

56. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the meeting of the Parties to the Convention, [and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7,] recommends that the Party concerned undertake the necessary legislative, regulatory and administrative measures to ensure that the fees for NGOs to appeal environmental decisions before the Nature and Environmental Appeal Board are not prohibitively expensive.