Reply to Communication ACCC/C/2014/119

1. Insufficient evaluation of public consultations

It follows from the content of the Communication submitted by the Frank Bold Foundation to the Aarhus Convention Compliance Committee that the charges of the Communicant relate to a violation of the Convention, *inter alia*, through the insufficient evaluation and failure to consider the results of public consultations in the adopted Spatial Development Plan of Lubuskie Voivodship. The Foundation which submitted the complaint refers primarily to a violation in this respect of the provisions of Article 6, paragraphs 3, 4 and 8 of the Aarhus Convention. In accordance with Article 6, paragraphs 3 and 4 of the Convention, the procedures enabling the public participation in the development of plans of importance for the environment "shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public and for the public to prepare and participate actively during the environmental decision-making". Moreover, the public participation should be ensured early enough "when all options are open and effective public participation can take place". In addition, in accordance with Article 6 paragraph 8 of the Convention, "in the decision due account is taken of the outcome of the public participation".

In the case of spatial development plans of a Voivodship, the issue of public participation is regulated at the level of the national law by the Act of 27 March 2003 on Spatial Planning and Development (Official Journal of the Laws of 2015, Item 199, as amended), hereinafter referred to as "the Development Act". Article 39 paragraph 1 and Article 41 paragraph 1, point 1 and 3, of this Act provide that the procedure for the adoption of a spatial development plan of a Voivodship starts with the issue of a resolution of the Voivodship Assembly on the launch of the preparation of the development plan. Subsequently, "very extensively", both in the press with the nationwide range, at local and county administration offices of a given Voivodship and at the Marshal's Office, the Voivodship Marshal announces the adoption of the abovementioned resolution, defining, at the same time, the form, place and date of submitting suggestions regarding the plan, which is not shorter than 3 months from the date of its announcement. The suggestions are then considered, but the Act does

not specify the form and procedure in which they are to be considered. However, it is deemed in the doctrine that "each suggestion, even the most general one, must be considered (...), suggestions must be addressed in written form (...) and can be addressed in two ways, i.e. individually or collectively" *(Buczyński K.,Dziedzic-Bukowska J., Jaworski J., Sosnowski P.T, Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz (The Act on Spatial Planning and Development. A Commentary (-in Polish), LexisNexis, 2014*). Thus, the Act does not exclude the handling of suggestions in the form of a list with remarks, as it happened in the case considered here. Also in the literature on Article 42 of the Act of 3 October 2008 on the Provision of Information on the Environment and Its Protection, the Public Participation in Environmental Protection and Environmental Impact Assessments, which concerns the handling of comments and suggestions concerning a document which requires public participation, it is pointed out that "there are no reasons why submitted comments should not be systematically arranged into single-type groups and assigned to the individual categories". (*Gruszecki K. Komentarz do ustawy o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko (A Commentary on the Act of 3 October 2008 on the Provision of Information on the Environment and Its Protection, the Public Participation in Environmental Protection and Environmental Impact Assessments (– in Polish), LEX/el.2013*).

In the light of the arguments presented above, the Party concerned believes that the procedure for the adoption of the Spatial Development Plan of the Voivodship does not violate the provisions of the Convention. The authorities of Lubuskie Voivodship placed a list of the comments submitted in the course of the public consultations on its website: http://www.bip.lubuskie.pl/165/Zmiana_Planu_zagospodarowania_przestrzennego_Wojewodztwa_Lubuskiego_2012/. On the same website, there is a document which indicates how the comments and suggestions concerning the draft amendment to the Spatial Development Plan of Lubuskie Voivodship were considered. The opinions and suggestions submitted in relation to the draft amendment to the Spatial Development Plan of the Voivodship are addressed in detail in the documents: "The justification for the opinions concerning the draft amendment to the Spatial Development Plan of Lubuskie Voivodship" and "The justification for the suggestions concerning the draft amendment to the Spatial Development Plan of Lubuskie Voivodship". Therefore, in opinion of the Polish government the public authority

sufficiently addressed the comments submitted in the course of the public consultation process. The comments were not rejected automatically and exhaustive replies were given to them.

2. **Restricting the rights of environmental organisations and private persons to access to justice**

It follows from Article 9 paragraph 3 of the Aarhus Convention that if they meet the criteria, if any, laid down in the national law, members of the public have access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities which contravene the provisions of the national law relating to the environment. In turn, Article 90 of the Act of 1998 on the Voivodship Self-Government (Official Journal of the Laws of 2015, Item 1392, as amended), hereinafter referred to as "the Voivodship Self-Government Act" provides that everybody whose legal interest or authorisation have been violated by the provision of an act of local law issued in a case within the area of public administration has the right to lodge a complaint against the relevant provision at the Administrative Court after having unsuccessfully called on the Voivodship self-government authority to eliminate the violation. Although the spatial development plan of the Voivodship is not an act of local law, still the case-law and doctrine hold the position that the plan may be subject to a complaint lodged with the Administrative Court under Article 90 of the Voivodship Self-Government Act. The judgement of the Supreme Administrative Court, File No. II OSK 647/14, cited by the Foundation, provides that the provisions of Article 90 paragraph 1 in conjunction with Article 91 paragraph 1 of the Voivodship Self-Government Act and Article 3 paragraphs 2 and 6 of the Act of 30 August 2002 on the Law on the Proceedings before Administrative Courts (Official Journal of the Laws of 2012, Item 270, as amended), may provide the basis for lodging a complaint against a resolution of the Voivodship Assembly within the area of public administration, despite the fact that the resolution is not an act of local law. In its further argument, the Supreme Administrative Court states that not only acts of local law, but also other legal actions undertaken by administration authorities may be challenged in the court, if this violates the rights of other persons. The Supreme Administrative Court presented a similar position in its ruling of 8 March 2012, File No. I OSK 306/11. In the light of the above, it should be said that the

provisions of the national law are not in contradiction with the provisions of the Aarhus Convention. Therefore, the arguments presented above lead to the conclusion that when adopting the development plan pursuant, *inter alia*, to Article 41 of the Development Act the Voivodship Assembly acted in compliance with both the national law and the Aarhus Convention.

In both of the judgements cited by the Frank Bold Foundation, the Supreme Administrative Court ruled that the application of Article 41 of the Development Act had been justified and that it had been applied correctly. Moreover, the Supreme Administrative Court found that the First Instance Court did not violate Article 90 of the Voivodship Self-Government Act. The Supreme Administrative Court rejected cassation complaints against both judgements. In one case, the complainant was a municipality, while in the other case it was a private person. In both cases the cassation complaints were rejected, stating that the complainants did not demonstrate the mandatory condition of a violation of a legal interest which would have occurred as a result of the issue of the spatial development plan of the Voivodship. In both cases, the complainants claimed that by specifying in the development plan the areas where lignite deposits are located, which could lead to a change in the use of the land owned by the complainants in the future, the Voivodship Assembly violated their legal interest. In both cases, the content of the justification of the judgement should be supported. Firstly, the spatial development plan of the Voivodship is not an act of universally applicable law and does not define in an abstract and specific way the range of the addressees' obligations. In consequence, the plan does not directly shape the manner in which the ownership right to the real estate is exercised. Such obligations can only be imposed by the local development plan, which is an act of local law and into which, pursuant to Article 15 paragraphs 3 and 4b and Article 44 of the Development Act, the provisions of the spatial development plan of the Voivodship are introduced in respect of the location of an investment project of public interest with higher than local significance after the date of the implementation of such an investment project has been determined. The mine the possible construction of which the Foundation referred to is such an investment project of public interest. Secondly, the challenged spatial development plan did not indicate unambiguously that in the area referred to an investment project of public interest in the form of a lignite mine was to be implemented, but only described the areas situated in the

Municipalities of Gubin, Brody and Lubsko "as problematic areas of national importance, related to the planned exploitation of lignite deposits Gubin and Gubin 1 and, in view of this, requiring separate detailed studies and decisions to be undertaken apart from the planning activities of the Voivodship". This means that the parties will still have another possibility of expressing their views on the provisions of the local land use plan, which provides for wider possibilities of public participation. Thus, the parties are not deprived of the possibility of participating in the procedure at the phase when all the options are still open. Therefore, the requirement of Article 6 paragraph 4 of the Convention is satisfied. Thirdly, despite the fact that they had a legal interest the complainants did not demonstrate its violation, which is an indispensable condition for an effective complaint under Article 90 of the Voivodship Self-Government Act. Taking the above into account, it should be said that the justifications of both judgements are not in contradiction with the provisions of either the national law, or the Aarhus Convention. At this point, it should also be stressed that the Municipality of Gubin was one of the parties to the proceeding. In the opinion of the Polish government and in accordance with the letter presented by the Aarhus Convention Compliance Committee in Case ACCC/C/2014/100, the disputes between public authorities are not subject to review by the Committee. In the light of this, Polish government believes that the dispute between the Municipality of Gubin and Lubuskie Voivodship should be excluded from the proceeding in question. It should also be noted that the other party – a private person – has lodged its complaint with the Provincial Administrative Court not in relation to environmental protection, but because of the way of exercising of the ownership right in the area covered by the spatial development plan of the Voivodship in question.

Coming back to the issue of the participation of nongovernmental organisations in the process of preparing an amendment to the spatial development plans of Voivodships, it should be noted that the Frank Bold Foundation did not present evidence which would indicate that it had lodged a complaint with the Administrative Court against the resolution of the Assembly of Lubuskie Voivodship of 21 March 2012 in respect of an amendment to the spatial development plan of the Voivodship. In response to the request of 9 April 2015 to provide information about its use of national review remedies, the Foundation only presented two judgements of the Supreme Administrative Court: in the case of a complaint lodged by a private person, File No. II OSK 647/14, and in the case of a complaint by

Municipality of Gubin, File No. II OSK 1598/13. In turn, it did not present a ruling of the Administrative Court which would indicate that it was refused access to justice in this specific case. In the light of this, it would be difficult for the Polish authorities to address the charges of preventing nongovernmental organisations from lodging a complaint against the abovementioned resolution of the Assembly of Lubuskie Voivodship.

Having analysed the Communication of the Frank Bold Foundation, the Polish government holds the position that in the light of the arguments presented above the charges of the Foundation are not justified.