Communication to the Aarhus Convention Compliance Committee – ACCC/C/2015/126

Opening statement on behalf of the Republic of Poland

Mister Chairman, Members of the Committee, Ladies and Gentlemen,

First of all I would like to thank you for inviting us to the 60th meeting of the Aarhus Convention Compliance Committee to clarify doubts regarding case no. ACCC/C/2015/126.

On behalf of the Republic of Poland, the Minister of Environment fully sustains his position expressed in the response to the communication submitted to the Committee by Stowarzyszenie "Zdrowa Gmina" (Healthy Municipality Association) on 11 August 2016. At the same time, the Minister of Environment wishes to reiterate key conclusions presented in the response.

I will not refer to the pleas regarding the alleged ostensibility of the public participation, misleading the residents or exerting pressure on the residents during the proceedings, for in my opinion these pleas are not supported by any evidence submitted by the Association.

The issues raised by the Association regarding compliance with the law of the substitute ordinance issued by the Voivode, recognising the project as a public projects or the lack of transboundary consultations are unrelated to the Aarhus Convention. However, the Republic of Poland, due to the processual prudence will refer to them as well.

Changes in law

Firstly, it is necessary to identify changes in the Act of 3 October 2008 on access to information on the environment and environmental protection, public participation in environmental protection and on environmental impact assessment [1], hereinafter referred to as "the Assessment Act", and the Code of Administrative Procedure[2] of 14 June 1960, hereinafter referred to as "the CAP", which were made after the response to the communication. The most important change regards Article 33 of the Assessment Act and involves extending the period for the public to submit their comments and suggestions from 21 to 30 days, and Article 49 of the CAP in the area of public announcement on the decisions made and other actions taken by authorities. In particular, the change has added the option to notify the parties of abovementioned actions taken by administrative authorities through the Public Information Bulletin (PIB).

Further in my speech, I will refer to the respective pleas submitted by the Association.

Pleas relating to non-compliance of Polish law with the Aarhus Convention

In their communication, the Healthy Municipality Association argued that Polish law is not compliant with the Aarhus Convention due to **the lack of clear requirement to inform the public about the proceedings within a specific deadline and in a specific and efficient manner and too short deadlines for the public to submit comments as part of public participation.**

In Polish law, information to the public about the proceedings is done through notification of the public pursuant to Article 3(1)(11) of the Assessment Act. Notification of the public means, *inter alia*, a) the provision of information on the website of the Public Information Bulletin of the authority competent in the matter, b) the provision of information in a customary manner at the seat of the authority which is competent in the matter, c) the provision of information by notice in a customary manner at the location of the proposed project and, in the case of a draft document requiring public participation, in the press with an appropriate range in the light of the type of the document, d) in the case where the seat of the authority competent in the matter is located in the area of a municipality other than the municipality which is relevant in terms of its location in the light of the subject

[1] The Act of 3 October 2008 on access to information on the environment and environmental protection, public participation in environmental protection and on environmental impact assessment (Dz. U. of 2017, item 1405, as amended).
[2] The Code of Administrative Procedure of 14 June 1960 (Dz. U. of 2017, item 1257, as amended).

matter of the proceedings, also by a publication in the press or in a customary manner used in the locality or localities which are relevant in the light of the subject matter of the proceedings.

In accordance with Article 33 of the Assessment Act, the disclosure obligation arises "without an undue delay" (*bez zbędnej zwłoki*). This term is widely used in Polish legislation to indicate that specific actions must be taken by a given authority immediately. Therefore, one cannot agree with the plea that Polish law does not provide for a specific deadline for informing the public.

Deliveries in the proceedings relating to the issuance of a decision on the environmental conditions are done in accordance with the aforementioned Article 49.

The solution adopted in Polish law fulfils the obligations resulting from the Aarhus Convention both in terms of the manner of and deadlines for public information, which has been referred to in the implementation guide[3] to the Aarhus Convention as an example of best practices in providing access to environmental information.

Moving on to the plea regarding too short deadlines for the public to submit comments as part of public participation, it should be said that in accordance with Article 33 of the Assessment Act before the amendment (i.e. before 1 January 2017), the public had 21 days for submitting comments and suggestions during the proceedings. **The deadline is now 30 days**.

In the event of amendments to case documentation made after the end of public participation, the public participation procedure is repeated. The public is not required to meet any formal conditions.

It should also be pointed out that an environmental impact report subject to comments and suggestions in accordance with Article 66 of the Assessment Act must include a non-technical summary in order to facilitate for the public to comment on the report within legal deadlines.

As regards participation of the parties (including environmental organisations participating in the proceedings), the rights to have access to case files and to comment on the subject matter of the case throughout the proceedings both before the first-instance and before the second-instance authority arise from the CAP. In accordance with Article 10(1) of the CAP, public administration bodies are obliged to ensure that the parties can actively participate in any stage of the proceedings and that before issuance of the decision they are offered the opportunity to submit their comments and suggestions on the case evidence gathered and requests made. The parties and environmental organisations are not restricted by the 30 day deadline. They can submit their comments throughout the entire proceedings, i.e. from the initiation until the end of the proceedings.

Pleas relating to the breach of the Convention in the course of specific proceedings

1. As regards **the plea relating to the public project status,** it should be pointed out that Polish law defines public projects as tasks performed at the local (municipality) and supralocal level (poviat, voivodeship and national, including international projects) for the purposes referred to in Article 6 of the Act of 21 August 1997 on real property management[4]. In accordance with Article 6(2) of the aforementioned Act, public projects include construction and maintenance of drainage paths, lines and equipment for transporting liquids, steam and electricity as well as other facilities and equipment necessary to use those facilities and equipment. There is therefore no doubt that implementation of the power line in question pursues a public interest to meet the needs of the population regarding electricity. The project status resulting from the aforementioned Act does not entitle the investor to evade in the course of the project implementation process any obligations relating to the protection of environment or participation of stakeholders and the public in administrative proceedings. Polish regulations concerning environmental impact assessments do not provide for any special or preferential solutions with regard to public projects. The allegation that classification of the project as a public project implied more lenient environmental requirements is unfounded.

[3] "The Aarhus Convention: An Implementation Guide", second edition 2014.
[4] The Act of 21 August 1997 on real property management (Dz. U. of 2018, item 121, as amended)

2. The Association argues that **information about the project was only disclosed to the public in January 2012 and that the periods for verification of the quality of documentation and for preparation of a constructive feedback by the citizens were too short.**

In accordance with Article 33 of the Assessment Act the authority in charge of the proceedings is obliged to inform the public in particular about: the launch of the environmental impact assessment for a project; the initiation of the proceedings; the subject matter of the decision which has to be issued in the matter; the authority competent to issue decisions or the authorities competent to provide opinions and grant approvals; the possibilities of becoming acquainted with the necessary documentation of the case and the place where it is available for review; the possibility of submitting comments and suggestions, the manner and place for submitting comments and suggestions; the authority competent for handling comments and suggestions, providing, at the same time, for a 30-day period for their submission (in the case of the proceedings referred to in the communication, the period was 21 days). As regards the parties to the proceedings, the authority is obliged to notify them of all actions taken in the case before the performance of such actions so that the parties could participate in them, the completion of the evidentiary proceedings and of the issuance of the decision.

In the case in question, information about the initiation of the proceedings regarding the issuance of a decision on the environmental conditions, the submission of the environmental impact report and the public participation were provided in a customary manner in the Bakałarzewo Municipality Office. It should be noted that the first information about the initiation of the proceedings regarding the issuance of a decision on the environmental conditions was notified to the public by way of a notice on the bulletin board of the Bakałarzewo Municipality Office on 12 January 2010. Notices issued by the Regional Directorate for Environmental Protection (hereinafter referred to as the RDEP) and the General Directorate for Environmental Protection (GDEP) in the course of the proceedings were also displayed in the seats of those authorities and in the Public Information Bulletin. Detailed information on fulfilment of the disclosure obligations as well as deadlines and manner of notifying actions taken by the administrative authorities participating in the proceedings was provided in the response to the communication. In this light, it should be said that the information notified to the public included all components required under the Aarhus Convention and that the stakeholders were adequately informed of the proceedings and that they had access to case files.

3. As regards **the plea relating to lack of effective public participation in terms of submission and consideration of comments,** I wish to point out that according to the case files, both the parties and the interested public were appropriately offered the opportunity to submit their comments and suggestions and their opinions had been taken into account before the issuance of the decision on the case. This is confirmed by the grounds of the decision of July 2013 issued by the RDEP in which the authority included an in-depth analysis of respective submitted comments.

Article 6(7) of the Convention requires adequate consideration of the results of public participation. However, the Article does not stipulate that all comments should be included, but rather that they should be analysed and the authority should present its position on the matter. The Committee confirmed this interpretation during consideration of Communication ACCC/C/2008/292 [5]. Therefore, the Association's pleas relating to the submission and consideration of comments and suggestions do not deserve to be taken into account.

4. With regard to **the alleged lack of the option analysis,** it should be pointed out that pursuant to Article 66(5)(a) and Article 66(5)(b) of the Assessment Act, in an environmental impact report the investor is obliged to indicate the option preferred by the investor, a reasonable alternative, as well as the option which is most favourable for the environment. The option preferred by the investor is subject to a mandatory assessment by the competent authority. Pursuant to Article 81 of the Assessment Act, where the environmental impact assessment for a project indicates the desirability of the implementation of the project in an option other than the one proposed by the applicant (investor), the authority competent to issue a decision on the environmental conditions will, with the applicant's consent, indicate in its decision the option authorised for implementation or, in the absence of the applicant's consent, will refuse to consent to the implementation of the project. Verification of the

[5] "The requirement of article 6, paragraph 8, that public authorities take due account of the outcome of public participation, does not amount to the right of the public to veto the decision. In particular, this provision should not be read as requiring that the final say about the fate and design of the project rests with the local community living near the project, or that their acceptance is always needed".

option preferred by the investor, as well as all other alternative options, must be reflected in the grounds of the decision. An option which is most favourable for the environment is selected by the specialised competent authority. In the proceedings in question, out of the proposed six options regarding the route of the line, four had been selected for a detailed examination and they underwent a multiple-criteria analysis. The selection criteria had been developed by a team of experts preparing the environmental impact report, which was verified by the RDEP in Białystok and then by the GDEP as part of the appeal proceedings. Therefore, a claim that option selection had been already made at the beginning of the procedure cannot be accepted.

It should also be said that the route of the project planned by the investor had been known to the parties and interested residents from the beginning of the proceedings. As indicated in the earlier response to the communication, the investor had presented detailed routes of respective options, including the option selected for implementation, in the environmental impact report of June 2012. All the documents were available for the public at the stage of public participation, thus the residents of Bakałarzewo could review their contents. Moreover, between February 2012 and April 2013, eight meetings took place in Bakałarzewo with the representatives of the Contractor and the Investor, as well as with the residents of Bakałarzewo, during which the detailed route of the power line was discussed.

To sum up, it should be pointed out that public participation was guaranteed already at the first stage of the administrative proceedings, i.e. after submission of application for the issuance of a decision on the environmental conditions by the investor. Therefore, it should be concluded that public participation had been guaranteed at such early stage that all options of project implementation were possible and public participation could be effective, which is in line with Article 6(4) of the Convention.

5. The Association raised **a claim that information and data relating to impact on the environment and human health had been allegedly manipulated**, yet they did not provide any examples of data the Association considers unreliable, or any basis for such conclusions.

The environmental impact report was prepared upon the investor's request by experts in environmental impact assessments. The report cannot be considered unreliable as evidence merely due to the fact that it was drawn up upon request of the investor. This is a solution that is accepted and commonly used across Europe. One should also bear in mind that proceedings relating to environmental conditions apply to the projects that are planned, not completed. Therefore, detailed technical data of the planned project may only be provided by the applicant. The report forms evidence that is assessed by the decision-making authorities. In the event of any doubts or deficiencies, the authority requests the investor to include appropriate supplements. The findings included in the report were assessed for compliance with the requirements laid down in Article 66 of the Assessment Act at the time of issuance of the decision on the environmental conditions by the RDEP in Białystok, and then by the GDEP under the appeal proceedings. The report submitted by the investor contained all the required components and allowed for full evaluation of the results of the environmental impact assessment proceedings.

Moreover, in accordance with the Assessment Act, opinions on the matter were issued by the Voivodeship State Sanitary Inspector in Białystok and the Voivodeship State Sanitary Inspector in Olsztyn. The specialised sanitary authorities approved the conditions of project implementation.

The report also addressed the issue of the impact of the planned project on human health and life. It was concluded that implementation of the project in question would not have negative impact on the environment, including human health, provided that a buffer zone was secured.

Acceptable values of electromagnetic radiation for publicly accessible areas have been provided for in Ordinance of the Minister of Environment of 30 October 2003 on the permissible levels of electromagnetic fields in the environment and on the methods to verify the compliance with these levels[6]. According to the information included in the report, both at the construction and at the operation stage the strength of the electric and magnetic components beyond the designated technical buffer zone will not exceed the maximum acceptable values.

It should be said that throughout the proceedings both administration bodies and the investor provided the public with proven information about the environmental impact of the planned project.

[6] Ordinance of the Minister of Environment of 30 October 2003 on the permissible levels of electromagnetic fields in the environment and on the methods to verify the compliance with these levels (Dz. U. of 2003, No. 192, item 1883)

6. The Aarhus Convention requires immediate notification of the public about the issuance of the decision. Moreover, each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

The plea regarding ineffective search for information about the decision in the Bakalarzewo Municipality Office is unfounded. Both the RDEP in Białystok and the GDEP had requested the Bakałarzewo Municipality Office to publish the notices of the issued decisions on the Office bulletin board and/or to publish the information in other manner that was generally accepted in that locality. The notices contained information regarding the place where the decision was made available for the public. Confirmations of receipt of the aforementioned documents by the Bakałarzewo Municipality Office have been included in case files.

In accordance with Article 15 of the Assessment Act, information on the environment and its protection is made available in the manner and form specified in the request. Therefore, the residents of Bakałarzewo were, in accordance with law, offered the opportunity to file a request for access to the decision on the environmental conditions in the manner and form appropriate to them without the need to send their representative to the seat of the RDEP in Białystok.

This procedure is compliant with the Aarhus Convention. During consideration of the case ACCC/C/2006/16, the Committee concluded e.g. that: "It only requires that the public be informed about the decision and has the right to have access to the decision together with the reasons and considerations on which it is based".

7. Responding to **the plea concerning failure to organise meetings with the public,** it should be pointed out that neither the Aarhus Convention nor the Assessment Act provide for mandatory organisation of such meetings. In accordance with Polish legislation, before the issuance of a decision that requires public participation, the authority may hold an administrative hearing that is open to the public. In the case in question, the RDEP in Białystok, acting in accordance with the law, did not consider it necessary to hold such an open hearing. Nevertheless, according to the information from the investor, the contractor took certain actions which consisted in organisation of meetings with citizens, preparation of materials and publications concerning the technology and method of project implementation and a detailed route of the power line. A dedicated website was also launched. As regards public consultations, between February 2012 and April 2013, before and in the course of execution of planning procedures multiple meetings with residents were organised in the area of the planned project implementation, including in the Bakałarzewo municipality. In Bakałarzewo alone, eight such meetings were held. For the avoidance of doubt, project location was presented both in the form of slides and on the maps. Citizens had an opportunity to learn the designed route and to express their opinion on the matter. Therefore, it should be said that as the route of the planned 400kV line was discussed many times, local communities obtained detailed information about the planned project and its options and could participate in every procedure required by law. Considering the abovementioned facts, the plea does not deserve to be taken into account.

8. The plea regarding **lack of transboundary consultations** does not deserve to be taken into account. The Republic of Poland and the Republic of Lithuania, in accordance with the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo), carried out proceedings relating to transboundary environmental impact assessment with respect to the planned project. Poland notified Lithuania of the project in a letter of 17 February 2010, with the attached main details of the planned project and all available information about the potential transboundary impact that could occur on the territory of Lithuania as a result of project implementation. Having analysed the submitted materials, the Lithuanian party, in its letter of 1 March 2010, withdrew from the conducting a full environmental impact assessment in a transboundary context. The Polish party also withdrew from any further transboundary proceedings. The point where said power line was to cross the border was mutually agreed by the parties at a bilateral meeting. On a side note, it should be pointed out that issues relating to environmental impact assessments in a transboundary context are subject to the Convention of 25 February 1991 on Environmental Impact Assessment in a Transboundary Context[7] (Espoo Convention), not the Aarhus Convention.

[7] Convention of 25 February 1991 on Environmental Impact Assessment in a Transboundary Context (Dz. U. No. 96, item 1110)

9. As regards the plea **relating immediate enforceability of the decision on the environmental conditions,** I wish to bring it to your attention that, in accordance with Article 108(1) of the Code of Administrative Procedure, a decision against which an appeal may be brought can be given immediate enforceability if this is essential for the protection of human life or health or for the protection of the national economy from major losses or for reasons of public interest or the exceptionally vital interests of a party to proceedings.
Upon request of the investor, due to vital public interest, the RDEP in Białystok had ordered that decision of July 2013 be immediately enforceable.
Immediate enforceability of the decision on the environmental conditions only enabled the applicant to apply for a building permit before the decision on the environmental conditions became final. However, it did not authorise commencement of the construction works. The Association's claim that immediate enforceability allowed for commencement of construction works, thus causing irreparable damage to the environment, is unfounded. The investor may carry out construction works only if he obtains a final building permit, or if the building permit is deemed immediately enforceable.
In accordance with the legislation in force, the appellate authority and the court, upon request of the participants to the proceedings, may suspend the enforcement of a decision. The order of immediate enforceability issued by the RDEP in Białystok was assessed by the GDEP and the Voivodeship Administrative Court in Warsaw. Consequently to the submitted appeals and complaints, having considered the requests for cancellation of immediate enforceability, the second-instance authority and the court did not withold the enforcement of that decision. Review of the grounds for ordering immediate enforceability of the decision on the environmental conditions by the GDEP and administrative courts is in line with the Aarhus Convention. Such instance review prevents arbitrary and random application of that measure. In the analysed case, the complainants used all available legal measures allowing for verification of the grounds for ordering immediate enforceability of the decision.

10. The applicant raised also pleas regarding incorrectness in adopting the local spatial development plan. According to Polish law, adoption of a local spatial development plan is the task of the municipality. However, in accordance with Article 12(3) of the Act of 27 March 2003 on spatial planning and development[8] if the local spatial development plan needs to be adopted and the municipality fails to perform that task, the obligation to prepare the plan in the extent necessary for implementation of a public project is assumed by the voivode, who adopts the local spatial development plan by way of a substitute ordinance. According to the information provided in the case, the Voivode of Podlaskie Voivodeship initiated the procedure for issuance of a substitute ordinance on the adoption of a local spatial development plan due to the Bakałarzewo municipality's failure to adopt local spatial development plan for almost two years and due to the need to implement a public project. It should be highlighted that information on the Voivode's commencement of preparation of the local spatial development plan, the procedure and the issuance of the aforementioned ordinance was published in the Public Information Bulletin of the Podlaskie Voivodeship Office and in local press with voivodeship range, as well as in the form of announcements and notices on the bulletin board of the Podlaskie Voivodeship Office. In order to guarantee the broadest possible public participation in the conducted proceedings, the abovementioned documents were sent to the Bakałarzewo municipality. Draft ordinance was made available to the public in the Podlaskie Voivodeship Office and published on the Office's website, which proves that all stakeholders had the opportunity to learn the contents of the draft. In addition, the Voivode sent notices to the village mayor of the Bakałarzewo municipality, informing him of publication of the draft ordinance and requesting him to publish it on the municipality's bulletin board. The village mayor of the Bakałarzewo municipality fulfilled the request. Moreover, the Voivode, in the course of the planning procedure, set the 21-day deadlines for the submission of comments to the project of local spatial development plan nd to the publicly available local spatial development plan. as provided for in the aforementioned Act. 11 requests to eliminate breaches of legislation in force were submitted with regard to the substitute ordinance. Voivode responded to all of them in detail and sent his response in writing to each petitioner. Therefore, the claim that the public participation in the planning process was ostensible is not reflected in the information provided by the Voivode.

[8] The Act of 27 March 2003 on spatial planning and development (Dz. U. of 2017, Item 1073, as amended).

11. Finally, I wish to say that there is no evidence in case files of **failure to assist the public by the government or self-government bodies or of ignoring applications for access to public information or to information on the environment and its protection.**

Polish law provides that individuals, but also organisations which are unable to cover the litigation costs, may use the assistance of a court-appointed lawyer. This is compliant with the requirements laid out in Article 9(5) of the Aarhus Convention.

An administration body cannot treat any of the parties in a preferential way. In accordance with Article 8 of the CAP in force during the proceeding in question, public administration bodies were obliged to conduct the proceedings in a manner that would arouse the participant's trust in the public authorities.

On a side note, it should be pointed out that the amendment from 2017 to the aforementioned Article made it more precise by obliging a public administration body in the course of proceedings to follow the principles of proportionality, impartiality and equal treatment.

I hope that all possible doubts regarding the subject matter of the case can be clarified by answering questions during the hearing or, if necessary, in writing at further stages of the procedure.

Thank you for your attention