Communication to the

Aarhus Convention's Compliance Committee

Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
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I. Information on correspondents submitting the Communication

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ClientEarth is a non-profit environmental law, science and policy group working in the European Union and beyond. We act for people and the planet, using the legal system allied with current scientific knowledge to meet the environmental challenges facing the earth.

Fundacja ClientEarth Prawnicy dla Ziemi is a legal entity registered in the register of associations, other social and professional organizaitons, foundations and independent public medical institutions of the Polish National Court Register kept by the district court for the capital city of Warsaw in Warsaw, XII Commercial Division of the National Court Register under number KRS 0000364218. An extract from the register is attached to this communication.

II. Party concerned: POLAND

III–VI: Facts of the communication, nature of alleged non-compliance, provisions of the Convention and use of domestic remedies or other international procedures:

1. The present Communication to the Aarhus Convention Compliance Committee concerns the application, in Poland, of the provisions of the Aarhus Convention on access to justice, and in particular Article 9(3) of the Convention.

2. Polish law – both legislative acts and jurisprudence – makes it effectively impossible for environmental organizations to challenge local laws relating to the environment. Polish legislation therefore does not comply with the requirements of Article 9(3) of the Aarhus Convention – a detailed explanation of this is provided in parts IX and X of this Communication (Summary of the Communication and Facts and Recommendations).

3. A Communication to the Compliance Committee is thus the only remedy which is available.

4. Therefore, this Communication is submitted to the Aarhus Convention Compliance Committee in accordance with Article 15 of the Convention and section VI of Decision I/7 on Review of Compliance of the First Meeting of the Parties. This Communication complies with all the requirements provided in Decision I/7 and should therefore be found admissible.

VII Confidentiality: The information contained in this Communication is not confidential.

VIII Supporting documentation

- Chapter 10 of the Act on Communal Self-Government (Ustawa z dnia 8 marca 1990 r. o samorządzie terytorialnym, t.j. Dz. U. z 2016 r. poz. 446).;

- Chapter 8 of the Act on Poviat Self-Government (Ustawa z dnia 5 czerwca 1998 r. o samorządzie powiatowym, t.j. Dz. U. z 2015 r. poz. 1445 z późn. zm.);

- Chapter 8 of the Act on Regional Self-Government (Ustawa z dnia 5 czerwca 1998 r. o samorządzie województwa, t.j. Dz. U. z 2016 r. poz. 486);

- Chapter 2 of the Act of 30 August 2002 on the Law of Procedure before Administrative Courts (Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi, t.j. Dz. U. z 2012 r. poz. 270 z późn. zm.).

- Chapter 4 of the Act on access to information on the environment and its protection, public participation in environmental protection and environmental impact assessment (Ustawa z dnia 3 października 2008 r. o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko, t.j. Dz. U. z 2016 r. poz. 353).

- The verdicts mentioned in part X of this communication.

IX Summary of the Communication

5. This Communication argues that Poland has not implemented 9(3) of the Aarhus Convention.

6. Art. 101 cl. 1 of the Act on Communal Self-Government, art. 87 cl. 1 of the Act on Poviat Self-Government, art. 90 cl. 1 of the Act on Regional Self-Government give entities the right to challenge local laws, provided that the local laws breach their legal interest. However, the interpretation of "legal interest" and "breach of legal interest" in Polish law and jurisprudence is very restrictive and means that environmental organizations will not have the necessary standing to challenge a local law (i.e. a law enacted by a local authority) concerning the environment, even though under the Aarhus Convention they should have such a right. Therefore, we argue that Poland does not comply with the requirements of Article 9(3) of the Aarhus Convention.

7. Polish law is in breach of Article 9(3) by not allowing environmental organizations the right to challenge local laws (i.e. laws enacted by a local authority) which are in

breach of Polish environmental laws, unless the organizations' own rights have been impaired.

8. In this context, we submit that Article 9(3) and (4) of the Aarhus Convention have an effet utile and must allow environmental organizations, to challenge, for example, air quality plans, or other acts which impair the environment, without those acts affecting the rights of the environmental organization itself. The provisions of Article 9(3) cannot mean that Contracting Parties are allowed to completely ignore Article 9(3) and leave their national law, in this regard, unchanged.

X Facts and legal arguments

Legal framework

9. The Convention is not considered to be self-executing by Poland. This is confirmed by numerous verdicts, exemplified by a verdict of the Supreme Administrative Court of the 20 November 2015 (II OSK 686/14) which is attached to this communication.

10. In light of the above, Poland should have adopted appropriate legislation to ensure that the provisions of the Convention are properly transposed and implemented into Polish law.

11. We believe that Poland has failed to properly transpose and implement art. 9(3) of the Aarhus Convention.

Article 9(3) of the Aarhus Convention

12. Article 9(3) of the Aarhus Convention reads: *"In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment".*

13. This provision establishes an obligation for each Contracting Party of the Aarhus Convention to *ensure* that members of the public have access to administrative or judicial procedures to challenge acts and omissions by private parties and public authorities which contravene provisions of its national environmental law.

14. Under Polish law, acts of local law may be challenged before Polish courts only by an entity whose legal rights or interest have been impaired by the local law in question.

15. According to art. 101 cl. 1 of the Act on Communal Self-Government (hereinafter referred to as the "**ACSG**"): anyone whose legal interest or right has been infringed by a resolution or regulation enacted by a communal body in a matter within the scope of public administration may – after unsuccessfully demanding the removal of a breach of the law – submit a challenge to the administrative court against such a local law or regulation.

16. According to art. 87 cl. 1 of the Act on Poviat Self-Government (hereinafter referred to as the "**APSG**"): anyone whose legal interest or right has been infringed by a resolution enacted by a poviat body in a matter within the scope of public administration may – after unsuccessfully demanding the removal of a breach of the law – submit a challenge to the administrative court against such a local law.

17. According to art. 90 cl. 1 of the Act on Regional Self-Government (hereinafter referred to as the "**ARSG**"): anyone whose legal interest or right has been infringed by a provision of local law enacted by a regional self-government body in a matter within the scope of public administration may – after unsuccessfully demanding the removal of a breach of the law – submit a challenge to the administrative court against such a provision.

18. The above-mentioned provisions are in stark contrast to the general provisions governing the submission of challenges to administrative courts. According to art. 50 cl. 1 of the Act of 30 August 2002 on the Law of Procedure before Administrative Courts (Dz. U. from 2012, item no. 270, hereinafter referred to as the "**LPAC**"), a challenge can be brought by anyone who has a legal interest in doing so, as well as an environmental organization, provided that said environmental organization took part in the administrative proceedings, and only to the extent that the matter is within the scope of its statutory goals and concerns another entity's legal interest.

19. Art. 50 cl. 1 of the LPAC is not a basis for challenging local laws by environmental organizations. Firstly, it is superseded by the specific provisions of art. 101 ACSG, art. 87 APSG, and art. 90 ARSG. Secondly, there is no administrative procedure leading to the enactment of a local law, therefore environmental organizations cannot use art. 50 cl. 1 of the LPAC as a basis for initiating judicial review of local laws, including those governing environmental matters.

20. Furthermore, art. 44 of the Act on access to information on the environment and its protection, public participation in environmental protection and environmental impact assessment (Dz. U. from 2016, item 353, hereinafter referred to as the "**EIA ACT**") also cannot be used as a legal basis for environmental organizations to challenge local laws.

21. Art. 44 cl. 3 of the EIA ACT states that an ecological organization may submit a challenge to an administrative court against a decision requiring public participation, if this is justified by its statutory goals, even if said organization did not participate in the administrative procedure leading to the issuance of the decision.

22. It follows that art. 44 cl. 3 of the EIA ACT can only be used to challenge decisions requiring public participation. The enactment of a local law is not such a decision and, therefore, art. 44 cl. 3 of the EIA ACT cannot be the legal basis for a challenge against a local law.

23. As a result, NGOs can only contemplate challenging local laws on the basis and in accordance with one of the provisions specified in pt. 15 – 17 above.

24. However, as a practical matter, environmental organizations do not have the possibility in Poland to challenge local laws which contravene Polish environmental law, unless said organizations are injured in their own right. This was the situation which existed prior to the ratification of the Aarhus Convention and which continues after that ratification. Polish law has thus not been amended.

25. Polish jurisprudence has adopted a very narrow interpretation of "legal interest" and "breach of legal interest". The Supreme Administrative Court (Naczelny Sąd Administracyjny) succinctly confirmed this in its verdict of 22 March 2013, (Docket no. I OSK 2236/12) where it held that since art. 101 cl. 1 of the ACSG requires a breach of a legal interest for the submission of a complaint, and not just a threat of breach, the party bringing the complaint must show in what manner its legally protected right or interest has been breached, and the right or interest is understood as consisting of a direct link between the resolution in question and an individual, private and legally guaranteed status (not a factual status). The party must show that the resolution in question, in violating the law, concurrently negatively influences the party's sphere of substantive rights, deprives it of certain rights or makes impossible their fulfillment.[1]

    There are many examples of verdicts adopting such a narrow interpretation, and a selection of these verdicts is attached to this complaint.

26. It follows from this that environmental organizations are not able to successfully bring challenges to local laws concerning the environment. Such organizations have no individual, private and legally guaranteed status which can be affected by such a local law (for e.g. an air quality protection plan). This view has been adopted by Polish courts, an example of which is the Regional Administrative Court in Białystok (Wojewódzki Sąd Administracyjny w Białymstoku) which held in its verdict of 5 November 2013 (Docket no. II SA/Bk 507/13) that bringing a complaint by a social organization on the basis of art. 101 cl. 1 of the ACSG and in fulfillment of its statutory goals is not an action which is motivated by a violation of said organization's private, individual and tangible legal interest, but is an action in defense of the public's interest

[1] In Polish: „Skoro w świetle art. 101 ust. 1 u.s.g. do wniesienia skargi legitymuje wyłącznie fakt naruszenia interesu prawnego, a nie tylko zagrożenia naruszeniem, to podmiot wnoszący skargę winien wykazać, w jaki sposób doszło do naruszenia jego prawem chronionego interesu lub uprawnienia, polegającego na istnieniu bezpośredniego związku pomiędzy zaskarżoną uchwałą, a własną, indywidualną i prawnie gwarantowaną sytuacją (nie zaś sytuacją faktyczną). Musi udowodnić, że zaskarżona uchwała naruszając prawo, jednocześnie negatywnie wpływa na jego sferę materialnoprawną, pozbawia go np. pewnych uprawnień albo uniemożliwia ich realizację."

and this interest – as was previously shown – cannot be the basis of a complaint brought pursuant to art. 101 cl. 1 of the ACSG. (...) Social organizations bringing complaints on the basis of art. 101 cl. 1 of the ACSG must also show not only a regular link between the subject matter of the resolution in question and its statutory goals, but must also show a link which may be considered a qualified link, proving that the resolution in question limits or deprives the organization of certain rights or puts additional duties on the organization, i.e. that said resolution infringes the organization's legal status.[2]

27. We submit that Article 9(3) and (4) of the Aarhus Convention have an *effet utile* and must lead to some legal provisions which allow environmental organizations, for example, to challenge air quality protection plans, or other local laws which concern and influence the environment, without those acts affecting the rights of the environmental organizations themselves. The provisions of Article 9(3) cannot mean that Contracting Parties are allowed to completely ignore Article 9(3) and leave their national law, in this regard, unchanged.

28. We are conscious of the fact that there are voices in legal literature which claim that this is exactly what Article 9(3) means: that there is no obligation whatsoever for Contracting Parties to amend or align their national legislation to the requirements of Article 9(3) of the Aarhus Convention.

29. However, in our understanding, this interpretation is incompatible with the general objective of the Convention to give the public – including thus environmental organizations – wide access to justice and to ensure that *"effective judicial mechanism"* are accessible to the public, including organizations, so that *"the law is enforced"* (Recital 18 of the Convention). We recognize that an *actio popularis* is not what Article 9(3) requires, but submit that a complete inactivity with regard to this provision is not a legitimate interpretation of it either.

30. We believe our view is supported by the findings and recommendations with regard to communication ACCC/C/2008/31 concerning compliance by Germany where the Committee stated in pt. 92 that "(...) the criteria for standing, if any, laid down in national law according to this provision should always be consistent with the objective

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[2] In Polish: „Złożenie przez organizację społeczną skargi w trybie art. 101 ust. 1 u.s.g., będące realizacją jej celu statutowego nie jest działaniem motywowanym naruszeniem własnego, indywidualnego, konkretnego interesu prawnego, ale stanowi działanie w obronie interesu publicznego, a ten - jak wyżej wywiedziono - nie może być przesłanką zaskarżenia na podstawie wymienionego przepisu. Inaczej rzecz ujmując, skoro przepis art. 101 ust. 1 u.s.g. uprawnia do złożenia skargi wyłącznie z uwagi na własny interes prawny, to tym samym nie uprawnia do złożenia skargi w interesie publicznym i nie dopuszcza skarżenia uchwał organów gminy przez każdego. Regułom z art. 101 ust. 1 u.s.g. podporządkowane są również organizacje społeczne, bowiem wskazany przepis nie wprowadza dla nich odmiennych zasad. Oznacza to, że również organizacja społeczna składająca skargę na podstawie art. 101 ust. 1 u.s.g. powinna wykazać nie tylko zwykły związek między przedmiotem zaskarżonej uchwały a własnymi celami statutowymi, ale powinna wykazać związek, który można nazwać kwalifikowanym, a polegający na tym, że konkretne regulacje uchwały powodują ograniczenie lub pozbawienie jej konkretnych uprawnień lub powodują nałożenie na nią konkretnych obowiązków, a więc że pogarszają jej sytuację prawną (vide wyroki NSA z dnia 12 marca 2013 r., I OSK 1761/12 oraz z dnia 13 marca 2012 r., II OSK 2334/11, a także np. wyrok WSA w Poznaniu z dnia 14 lutego 2013 r., IV SA/Po 1017/12, CBOSA)."

of the Convention to ensure wide access to justice. The Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws to the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause >>where they meet the criteria, if any, laid down in its national law<< as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all members of the public, including environmental NGOs, from challenging acts or omissions that contravene national law relating to the environment. Access to such procedures should be the presumption, not the exception, as article 9, paragraph 3, should be read in conjunction with articles 1 and 3 of the Convention and in the light of the purpose reflected in the preamble, that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced" (findings on communication ACCC/C/2005/11 concerning Belgium, paras. 34– 36, on communication ACCC/C/2006/18 concerning Denmark, para. 29-30, and on communication ACCC/C/20058/48 concerning Austria, paras. 68–70).

31. We are conscious of the fact that the Committee, when evaluating the compliance of the Party concerned with article 9, paragraph 3 of the Convention, considers the "general picture" described by the communicant and the Party concerned, i.e. both the relevant legislative framework and its application in practice – as stated in the findings on communication ACCC/C/2008/31 concerning compliance by Germany. We believe we have adequately demonstrated that Polish law effectively blocks access to justice for environmental NGOs in challenging local laws.

32. In our opinion, it is the objective of the Aarhus Convention that environmental law is better enforced. One means to ensure this is to allow environmental organizations to bring an end to situations where environmental law is disregarded by public authorities enacting local laws.

33. The core of the objective of the Aarhus Convention which finds its expression in Article 9(3) appears to us to be that environmental organizations must obtain, next to public authorities and individuals, the possibility to contribute to the enforcement of environmental law. *How* Member States organise this objective in detail is up to them, and they certainly have a very broad margin of discretion. However, they must introduce a procedure which is effective, fair, equitable, timely and not prohibitively expensive. In addition, according to the wording of Article 9(3), this procedure has to be independent of and in supplement to any provisions that a Party to the Aarhus Convention may adopt under Article 9(2).

34. As Poland has not introduced any legislation to make Article 9(3) operational and effective, we submit that it has not complied with its obligations under this provision.

35. Furthermore, we consider that Poland has failed to comply with its obligation to properly implement article 9(4) of the Aarhus Convention, which requires Contracting Parties to ensure procedures which shall *"provide adequate and effective remedies,*

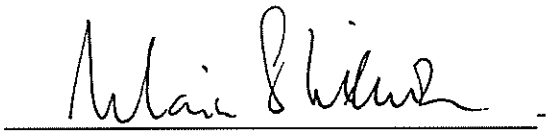
including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive".

XI Recommendations the applicant invites the Committee to adopt

36. We invite the Compliance Committee to find that by not ensuring the standing of environmental NGOs in its laws to challenge laws enacted by local authorities, Poland fails to comply with article 9, paragraph 3 of the Convention.

37. We further invite the Compliance Committee to recommend that Poland take the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that criteria for the standing of NGOs promoting environmental protection to challenge laws enacted by local authorities which contravene national law relating to the environment under article 9, paragraph 3 of the Convention are revised and specifically laid down in national law.

38. In light of the above we would be grateful if the Compliance Committee would consider this Communication.



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