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ACCESS TO INFORMATION, PUBLIC PARTICIPATION
IN DECISION-MAKING AND ACCESS TO JUSTICE
IN ENVIRONMENTAL MATTERS

Third meeting
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Item 6 (b) of the provisional agenda
Procedures and mechanisms facilitating
the implementation of the Convention:
Compliance mechanism

REPORT BY THE COMPLIANCE COMMITTEE¹

Addendum

**COMPLIANCE BY DENMARK WITH ITS OBLIGATIONS
UNDER THE CONVENTION**

This document was prepared by the Compliance Committee in accordance with its mandate set out in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties. It contains findings with regard to communication ACCC/C/2006/18 submitted by Mr. Søren Wium-Andersen (Denmark) concerning his lack of access to administrative or judicial procedures to challenge an act of culling of rooks in alleged violation of European Community law, as adopted by the Compliance Committee in March 2008.

¹This document was submitted on the above date to allow due time for consultations with the parties concerned following the nineteenth meeting of the Compliance Committee (5-7 March 2008).

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I. BACKGROUND

1. On 3 December 2006, Mr. Søren Wium-Andersen (hereinafter the communicant), a resident of Denmark, submitted a communication to the Committee alleging non-compliance by Denmark with its obligations under article 9, paragraph 3, of the Convention.

2. The communication concerns access to justice for individuals in Denmark. The communicant claims that Danish law does not provide him with any means to challenge the alleged failure of Denmark to correctly implement the European Community Directive 79/409/EEC on the Conservation of Wild Birds (Birds Directive). In a letter to the secretariat, dated 20 December 2006, the communicant clarified that his communication concerns the lack of a right for him to have access to a review or appeal procedure concerning the implementation of the Birds Directive in Denmark.

3. The communication was forwarded to the Party concerned on 2 April 2007, following a preliminary determination as to its admissibility. The same day, the secretariat sent a letter with questions on behalf of the Committee to the communicant as well as to the Party concerned.

4. In its reply, dated 7 September 2007, the Party concerned disputed the claim of non-compliance. It stated that it understood the communication as focusing on the lack of access to procedures to challenge the alleged non-compliance of Danish law with the Birds Directive, and held that Denmark believed that it fully met the requirements of article 9, paragraph 3, of the Convention.

5. In a letter to the secretariat, dated 20 September 2007, the communicant clarified that his communication did not concern the general implementation of the Birds Directive, but rather the lack of administrative and judicial procedures through which he could challenge a concrete act of culling of rooks by the public authority of the municipality of Hillerød in May and June 2006. He concluded that therefore Denmark had not provided the means set out in article 9, paragraph 3, of the Convention.

6. The Committee at its fifteenth meeting (21-23 March 2007) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. Having reviewed the arguments put forward by the Party concerned in its response and having further discussed the issue with both parties at its eighteenth meeting (28-30 November 2007), the Committee at the same meeting confirmed the admissibility of the communication, deeming the points raised by the Party to be of substance rather than related to admissibility.
7. The Committee discussed the communication at its eighteenth meeting, with the participation of representatives of both the Party concerned and the communicant, *inter alia* on the basis of the questions raised by the Committee in letters dated 1 October 2007 sent to both the Party concerned and the communicant.
8. In the discussion, the communicant pointed to the lack of possibilities to challenge the allegedly insufficient implementation by Denmark of the Birds Directive through the Danish penal law system. He also brought to the attention of the Committee the different statements regarding procedural remedies in environmental matters in the 2005 Danish Implementation Report to the Meeting of the Parties and in the Country report of Denmark in a 2007 study by Milieu Ltd under contract to the European Commission, entitled “Measures on access to justice in environmental matters (Article 9(3))” that had been submitted to the Committee by the Party concerned prior to the meeting. He mentioned that he had contacted the police authority as well as the public prosecutor, and that he had written a letter to the Nature Protection Board of Appeal (Naturankenævnet). He also explained that the reason why he had not contacted the Forest and Nature Agency (Skov- og naturstyrelsen), was that he did not believe such action would lead to any result. Asked why he had not used private law remedies, e.g. by suing for an injunction, the communicant replied that such procedures would be too costly.
9. For its part, the Party concerned stressed that the decision by the municipality of Hillerød to cull rooks was carried out not in its capacity of public authority, but as landowner. The Party concerned also described the applicable legislation, in particular the Hunting and Wildlife Act and the derived Statutory Order on Wildlife Damage, and the principles on standing before courts and administrative authorities in Danish law.
10. On 7 January 2008, the secretariat received an e-mail from the communicant containing a comment and an expert opinion, disputing the conclusions in the 2007 study by Milieu Ltd on access to justice in environmental matters in Denmark. In accordance with the Committee’s procedures, this correspondence was forwarded to the Party concerned.
11. The Committee deliberated on the communication at its eighteenth session and completed its preparation of draft findings and recommendations through its electronic decision-making procedure in January 2008.
12. In accordance with paragraph 34 and with reference to paragraph 36 (b) of the annex to decision I/7, the draft findings and recommendations were forwarded for comment to the Party concerned and to the communicant on 1 February 2008. Both were invited to provide any comments by 11 February 2008. The Committee received two letters from the communicant, dated 15 and 18 February 2008, respectively. The comments by the communicant were taken

into account by the Committee by the Committee at its nineteenth meeting, to the effect that some minor changes were made in the draft findings. At the request of the Party concerned, the Committee extended the commenting deadline to 14 March 2008. The Party concerned provided its comments on that date. In its comments, the Party concerned referred to the draft recommendations made by the Committee alongside the draft findings and noted that it did not wish to accept them, since “the Committee does not find that Denmark does not comply with its obligations according to the Convention”. Having regard to its finding set out in paragraph 41, Committee therefore had no possibility to maintain the recommendations.

II. SUMMARY OF FACTS, EVIDENCE AND ISSUES²

13. The matter concerns the lack of access for the communicant to administrative or judicial procedures to challenge the culling of rooks (*corvus frugilegus*) by the municipality of Hillerød, allegedly in violation of the Birds Directive.

14. According to the communicant, in spring 2006 the municipality of Hillerød implemented an extensive culling of rooks in several locations owned by the municipality. One of the rook colonies was situated on a water purification plant, one at a garbage station and others close to town dwellings. The municipality of Hillerød had the intention to cull 1,500 juvenile rooks to reduce the problem connected to vocal noise due to the breeding behaviour in the rook colonies. In cooperation with the State Forest District of the Danish Forest and Nature Agency, under the Danish Ministry of the Environment, and the Hillerød municipality, a number of persons related to the municipality were allowed to cull the juvenile rooks during the period of 1 May to 15 June 2006.

15. The communicant claims that the decision of the municipality, made by it in its capacity of a landowner, to cull the juvenile rooks violates the Birds Directive. Rooks are listed in annex II of the Birds Directive with the effect that they cannot be hunted in Denmark, unless four criteria set out in the directive are met. According to the communicant, none of these criteria were fulfilled before the culling.

16. In Danish law, the hunting of birds is regulated by the Hunting and Wildlife Management Act and the derived Statutory Order on Wildlife Damage. At the time of the decision of the Hillerød municipality, in its capacity as landowner, to cull the juvenile rooks, there was no prohibition against such acts in the said statutory order. Thus, at that time, provided certain conditions were met, landowners were allowed to cull such birds on their land without a license or any kind of prior authorisation. Yet, such culling was in violation of the Birds Directive, unless certain criteria were fulfilled.

17. According to Danish law, the Forest and Nature Agency is responsible for supervising activities covered by the Statutory Order on Wildlife Damage. As such it is bestowed with the power to act against acts that may contravene provisions relating to wildlife damage. If a private person or an environmental organisation report a violation against the statutory order to

² This section summarises only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

the Agency, and the Agency finds the report well founded, it has to request the immediate termination of the challenged acts. A failure to comply with such a request is a criminal offence.

18. The communicant has stated that he wrote letters to the editors of local newspapers, but the municipality continued with the culling. He also reported the culling to the police authority, but his report was turned down. He appealed the decision of the police to the public prosecutor, but this appeal was turned down too. The communicant then reported the alleged non-compliance with the Birds Directive to the Nature Protection Board of Appeal, and was informed by the Board of Appeal that it did not have jurisdiction with regard to the implementation of European Community directives. In its reply, the Nature Protection Board of Appeal informed the communicant that his request had been forwarded to the Forest and Nature Agency for possible actions. Yet, the communicant never received a reply from the Forest and Nature Agency. During the discussion at the eighteenth meeting of the Committee, the Agency representative agreed that it would have been an act of good governance on behalf of the Agency to react to the letter of the communicant.

19. While the Forest and Nature Agency never contacted the communicant with regard to his letter, the Statutory Order on Wildlife Damage was indeed amended in 2006, with the effect that landowners are no longer allowed to cull rooks on their land or elsewhere without a license granted by the Forest and Nature Agency. However, the changes in the statutory order did not change the rules on administrative appeal. Thus, there is still no possibility to make an administrative appeal against the decision by the Forest and Nature Agency.

20. The communicant did not report the landowner's decision to cull the rooks to the Forest and Nature Agency, with a request that the Agency stop the culling, or to the Ombudsman. Nor did he start a judicial procedure against municipality. The local branch of the Danish Ornithological Society contacted the Hillerød municipality about the culling (and informed the local press), but there were no attempts by this society or any other member of the public, individuals or non-governmental organizations, to challenge the acts of culling through any administrative or judicial procedures.

21. As far as access to justice is concerned, Danish courts maintain the general criteria that, to have standing, the person concerned, whether a physical or legal person, must have a concrete, significant and individual interest in the case. Danish court practice on access to courts for non-governmental organizations in matters relating to nature protection is scarce and not that well established, and generally rather restrictive towards non-governmental organizations. Yet, some relevant jurisprudence has developed since the entry into force of the Convention for Denmark. In particular, the jurisprudence of the Western High Court (Vestre Landsret), as reflected in its decision of 2001 (*Danmarks Sportfiskerforbund and Lemvig og Omegns Sportfiskerforening vs. Miljø- & Energiministeriet, Skov- og Naturstyrelsen and Naturklagenævnet* [Danish Angler Society and Lemvig and Omegn's Angler Society vs. Ministry of the Environment and Energy, Forest and Nature Agency, and Nature Protection Board of Appeal], U.2001.1594V) indicates that at least some nation-wide as well as local non-governmental organizations concerned with the protection of wildlife can bring cases to court for an injunction. In this case, the organizations challenged decisions to allow the introduction of beavers into certain areas. While the case differs from that of challenging the culling of birds, it shows that such organizations can be considered to have a sufficiently concrete, significant and individual interest to go to court.

For individuals, however, invoking concerns for wildlife normally does not suffice to grant standing in Danish courts.

III. CONSIDERATION AND EVALUATION BY THE COMMITTEE

A. General considerations

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

23. The focus of the examination of the Committee is the claim by the communicant that he had no means available to challenge the alleged failure of Denmark to correctly implement the Birds Directive, and that because of this Denmark failed to comply with the Convention. In addition to writing letters to the editors of local newspapers, he reported the case to the police authority, appealed the decision by the police not to take action to the public prosecutor, and sent a letter to the Nature Protection Board of Appeal, asking it to investigate whether the Danish legislation on hunting and the derived Statutory order on Wildlife Damage complied with the Birds Directive. Yet, the Committee notes that neither did he nor any other member of the public request the competent supervisory authority, i.e. the Forest and Nature Agency, to take action against the culling.

24. It is not for the Committee to consider the culling of birds as such. However, the right of members of the public to challenge acts and omissions concerning wildlife is indeed covered by article 9, paragraph 3, of the Convention, to the extent that these amount to acts or omissions contravening provisions of national law relating to the environment.

25. The municipality of Hillerød constitutes a public authority, in accordance with article 2, paragraph 2, of the Convention, but the relevant decision to cull the juvenile rooks was made by the municipality not in its capacity of public authority, but as a landowner. Even so, article 9, paragraph 3, applies to the act by the Hillerød municipality to cull the juvenile rooks, regardless of whether it acted as public authority or landowner (and thus, in the same vein as a private person).

26. Although the opportunity to challenge acts and omissions set out in article 9, paragraph 3, pertains to a broad spectrum of acts and omissions, the challenge must refer to an act or omission that contravenes provisions in the national law relating to the environment. At the time of the culling of the rooks, while these acts may have been prohibited by the European Community Birds Directive, culling by landowners was allowed according to Danish legislation, including statutory orders.

27. The communicant argues that the act of culling the rooks contravenes European Community legislation rather than Danish legislation, whereas article 9, paragraph 3, refers to “provisions of its national law relating to the environment”. Therefore, the Committee must first consider whether in a case concerning compliance by Denmark, i.e. an EU member state, European Community legislation is covered by article 9, paragraph 3, of the Convention. The Committee notes that, in different ways, European Community legislation does constitute a part

of national law of the EU member states. It also notes that article 9, paragraph 3, applies to the European Community as a Party, and that the reference to “national law” therefore should be understood as the domestic law of the Party concerned. While the impact of European Community law in the national laws of the EU member states depends on the form and scope of the legislation in question, in some cases national courts and authorities are obliged to consider EC directives relating to the environment even when they have not been fully transposed by a member state. For these reasons, in the context of article 9, paragraph 3, applicable European Community law relating to the environment should also be considered to be part of the domestic, national law of a member state.

B. Criteria for ensuring access to administrative or judicial procedures

28. Access to justice in the sense of article 9, paragraph 3, requires more than a right to address an administrative agency about the issue of illegal culling of birds. This part of the Convention is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene environmental laws, and with the means to have existing environmental laws enforced and made effective. Thus, Denmark is obliged to ensure that, in cases where administrative agencies fail to act in accordance with national law relating to nature conservation, members of the public have access to administrative or judicial procedures to challenge such acts and omissions.

29. As the Committee has pointed out in its findings and recommendations with regard to communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, paras. 29-37), while article 9, paragraph 3, refers to “the criteria, if any, laid down in national law”, the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which members of the public have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (“*actio popularis*”) in their national laws with 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 so strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging act or omissions that contravene national law relating to the environment. This interpretation of article 9, paragraph 3, is clearly supported by the Meeting of the Parties, which in paragraph 16 of decision II/2 (promoting effective access to justice) invites those Parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, “to take fully into account the objective of the Convention to guarantee access to justice”.

30. When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e. to what extent national law effectively has such blocking consequences for members of the public in general, including environmental organizations, or if there are remedies available for them to actually challenge the act or omission in question. In this evaluation article 9, paragraph 3, should be read in conjunction with articles 1 to 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.”

31. The Convention does not prevent a Party from applying general criteria of a legal interest or of demonstrating a substantial individual interest of the sort found in Danish law, provided the application of these criteria does not lead to effectively barring all or almost all members of the public from challenging acts and omissions related to wildlife protection.

C. Available procedures to challenge decisions to cull protected birds

32. Although the communication centres on the communicant's attempts to initiate penal procedures against those responsible for the culling, the lack of such an opportunity for the communicant does not in itself necessarily amount to non-compliance with article 9, paragraph 3. That depends on the availability of other means for challenging such acts and omissions. Accordingly, for the assessment of compliance by the Party concerned, it is not sufficient to take into account only whether the communicant could make use of the Danish penal law system. It is not even sufficient to examine whether he himself had access to any administrative or judicial procedure to challenge the decision to cull the bird population. Rather, the Committee will have to consider to what extent some members of the public – individuals and/or organisations – can have access to administrative or judicial procedures where they can invoke the public environmental interests at stake when challenging the culling of birds allegedly in contravention of Danish law, including relevant European Community law.

33. At the time of the culling, the communicant was indeed able to address the alleged non-compliance of the activities in Hillerød with the Birds Directive to the Forest and Nature Agency. If the Agency would have found this claim to be well founded, it may have acted so as to stop the activity. Although the communicant's report on the incompatibility of Danish law and the Birds Directive did reach the Forest and Nature Agency, via the Nature Protection Board of Appeal, the report was essentially limited to a request to investigate the issue of compatibility. It did not include any claim for action against the municipality of Hillerød.

34. If the communicant had requested action by the Forest and Nature Agency at the time of the culling, it is still quite unlikely that the Agency would have decided in his favour, taking into account that the Agency was already fully aware of decisions of the municipality of Hillerød to cull the rooks. Moreover, had the Agency's decision not been in his favour, it is also unlikely that he would have had access to a judicial review procedure due to the Danish criteria for standing in court. Even so, the Committee notes that the communicant did not make his request to the Agency, taking into account also that he could have complained to the Minister of the Environment if the Agency had not decided in his favour. Nor did the communicant report the matter to the Ombudsman. As far as the Committee is aware, nor did any other member of the public.

35. While there is also an opportunity for individuals and non-governmental organisations to bring a private action directly to a court against an illegal activity, it is clear that in this case the communicant would not have fulfilled the criteria for standing. However, considering the limited, yet relevant, case law mentioned in paragraph 21, there appears to have been some possibility for some members of the public, namely certain non-governmental organizations, to challenge the culling. They could have reported the culling to the Forest and Nature Agency, alleging that the statutory order was not compatible with the Birds Directive and pointing at the general obligation of public authorities to ensure the fulfilment of Denmark's obligations arising

from European Community legislation. Had the Forest and Nature Agency turned down their request for actions against the culling, at least some such organisations, in particular local ones, might have had access to a judicial review of the Agency's decision.

36. The Committee is aware that Danish jurisprudence is not fully clear as to the effectiveness of this remedy, and that there is little case law to build upon. Yet, it cannot ignore the fact that neither the communicant nor any other member of the public tried to request action by the Forest and Nature Agency, and that no other actions were taken by the communicant or any other member of the public than those referred to in paragraph 23. The Committee is not convinced that, simply because there was no possibility for the communicant to trigger a penal procedure, Denmark failed to comply with the Convention in this particular case. Nor was there sufficient information provided to the Committee to conclude that no other member of the public would have been able to challenge the culling through other administrative or judicial procedures.

37. While the Committee concludes that it is not convinced that Denmark has failed to comply with the Convention, it notes the limited case law with regard to standing for non-governmental organisations in these situations. It therefore stresses that its findings are based on the presumption that the approach reflected in the decision by the Western High Court in 2001, referred to in paragraph 21, should indeed be applied *mutatis mutandis* as a minimum standard of access to justice for non-governmental organizations in cases relating to the protection of wildlife.

38. Although it is not decisive for the question of compliance in this case, the Committee notes that the Danish law on the culling of birds was actually changed shortly after the communicant's request reached the Forest and Nature Agency. It is not clear whether it was a direct result of the communicant's letter, but the new regime for the culling of birds requires a prior permit for any culling of the bird species in question. The licensing procedure has the effect that it is now illegal to cull these birds without a licence, and the Forest and Nature Agency is required to take action to immediately stop any unauthorised culling. If such a request by an environmental non-governmental organisation is turned down by the Agency, the relevant non-governmental organizations would have access to a judicial review procedure.

39. The Committee is aware that several kinds of decisions related to nature conservation can be appealed within the administrative system to the Nature Protection Board of Appeal. Often these decisions concern the protection of areas and habitats, and conflicts between the landowners' interests in using land against the public interest of preserving nature. However, some decisions relating to the direct protection of species of wild fauna, such as the new licensing regime on the culling of birds, cannot be appealed to the Nature Protection Board of Appeal, but only to a court. In the view of the Committee, although access to courts is an essential element, providing an administrative appeal to the Nature Protection Board of Appeal, in addition to the court procedure, would seem to be a more effective way of promoting the objective of the Convention than the current system.

IV. CONCLUSIONS

40. Having considered the above, the Committee adopts the findings set out in the following paragraphs.

41. The Committee is not convinced that the lack of opportunity for the communicant to initiate a criminal procedure in itself amounts to non-compliance by Denmark. On the basis of the information provided in the case, the Committee is not able to conclude that Danish law effectively bars all or almost all members of the public, in particular all or almost all non-governmental organizations devoted to wildlife and nature conservation, from challenging the culling of wild birds, as covered by article 9, paragraph 3.

42. While the Committee is not convinced that the Party concerned fails to comply with the Convention, it notes the limited case law with regard to standing for non-governmental organisations in these situations. As far as standing for such organisations is concerned, it therefore stresses the importance of applying the approach reflected in the decision by the Western High Court in 2001, referred to in paragraph 21, *mutatis mutandis*, as a minimum standard of access to justice in cases relating to the protection of wildlife.
