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**ECONOMIC COMMISSION FOR EUROPE**

Meeting of the Parties to the
Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters

Compliance Committee

# REPORT ON THE SEVENTH MEETING

## Addendum

# FINDINGS AND RECOMMENDATIONS

with regard to compliance by Turkmenistan with the obligations under the Aarhus Convention in the case of Act on Public Associations
(Communication ACCC/C/2004/05 by Biotica (Republic of Moldova))

Adopted by the Aarhus Convention's Compliance Committee on 18 February 2005

## Introduction

1. On 15 March 2004, the secretariat, having become aware of certain information in the public domain on Turkmenistan's new Act on Public Associations and in line with its mandate under paragraph 17 of the annex to decision I/7, wrote to the Government of Turkmenistan to seek further information on the matter. The Government of Turkmenistan acknowledged the letter by reply dated 26 March 2004 but did not provide a substantive reply to the questions raised.

2. On 10 May 2004, the Moldovan non-governmental organization Biotica submitted a communication to the Committee alleging non-compliance by Turkmenistan with its obligations under article 3, paragraphs 4 and 9, of the Aarhus Convention.

3. The communication concerned the newly adopted Act of Turkmenistan on Public Associations. The communicant claims that through the adoption of the Act in November 2003, a new regime for registration, operation and liquidation of non-governmental organizations, the Party is in breach of the provisions of article 3, paragraph 4, of the Convention which requires it to provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and to ensure that its national legal system is consistent this obligation. It also alleges non-compliance by the Party with its obligation under article 3, paragraph 9, to provide the possibility for the public to exercise their rights under the Convention without discrimination as to citizenship, nationality, domicile or location of an entity's registered seat. The communication included several attachments, including opinions of an international organization.

4. The Communicant in its communication asked that part of it should be kept confidential. The Commission held that this request should be honoured on the basis of paragraph 29 of decision I/7 (see MP.PP/C.1/2004/4, paragraph 30). The redacted text of the communication is available at http://www.unece.org/env/pp/pubcom.htm.

5. The communication was forwarded to the Party concerned on 18 May 2004, following preliminary determination as to its admissibility. No further correspondence was received from the Party concerned before the expiry of the six-month period; nor did the Party concerned provide information to or participate in the meeting of the Committee at which the matter was discussed.

6. The Government of Turkmenistan also failed to reply to the correspondence from the secretariat within the deadline set out in paragraph 17 of the annex to decision I/7. However, the Committee decided to take up the matter within the context of dealing with the communication, which covered the same topic, rather than pursuing it on the basis of a referral by the secretariat.

7. The Committee at its fourth meeting (MP.PP/C.1/2004/4, para. 18) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. This determination has not been challenged in any way. The Committee therefore confirms the admissibility of the communication.

8. The Committee discussed the communication at its sixth meeting (15-17 December 2004). Neither the communicant nor the Party concerned expressed interest in attending the discussion.

9. In accordance with paragraph 34 of the annex to decision I/7, the draft findings and recommendations were forwarded for comment to both the Party concerned and the communicant on 1 February 2005. The Party concerned and the communicant were invited to provide comments, if any, by 14 February 2005. Comments were received from the communicant. The Committee, having reviewed the comments, took them into account in finalizing the decision by amending the findings and recommendations where the comments, in its opinion, affected the presentation of facts or the its consideration, evaluation or conclusions.

## I. SUMMARY OF FACTS[1]

10. On 21 October 2003, a new Act on Public Associations was adopted in Turkmenistan. The Act repealed the former Act on Public Associations of 12 November 1991. Some parts of the new Act raised concerns on the international level about the situation of non-governmental organizations (NGOs), including environmental ones.

11. The Act contains, inter alia, the following provisions:

(a) Article 5 of the Act stipulates that only citizens of Turkmenistan may serve as founders, members or participants (if membership is not provided by the charters) of the public association, except where otherwise stated by the Act, or by other Acts on separate types of public associations. The Act itself only allows foreign nationals to be members of international associations;

(b) Article 13, paragraphs 3 and 4, of the Act determine that associations whose Activities, in accordance their with statutory goals, are spread throughout the whole territory of Turkmenistan or most of its velayats, are recognized as nation-wide public associations whereas local public associations are those whose activities, in accordance with their statutory goals, are spread throughout the territory of velayat, city, etrap, settlement or village;

(c) Article 15 of the Act establishes that while five Turkmen citizens can establish a public association, for registration of a national association, five hundred founding members are required;

(d) Article 17, paragraph 3, of the Act prohibits activities by non-registered public associations. Any person, conducting an activity on behalf of a non-registered public association shall be liable in accordance with the legislation of Turkmenistan;

(e) Article 28, paragraph 2, of the Act stipulates that the Ministry of Justice of Turkmenistan may cancel the registration of a public association if it had switched to mainly entrepreneurial operations, or if the realization of the association's goal, as stipulated by its charter, becomes impossible. Paragraph 3 of the same article further establishes that if a public association receives more than two written notifications or instructions in one year to cease violating national legislation, or if it fails to present to the Ministry Justice updated data which is subject to registration in a year, then the Ministry may submit to the court an application for the liquidation of the association;

(f) Article 2, paragraph 3, of the Act stipulates that if international agreements to which Turkmenistan is a Party establish rules other than those contained in the Act, then the rules of the international agreements are applicable;

(g) Article 32 of the Act states that public associations can be liquidated for, inter alia, violation of national legislation as well as for failure to inform the authorities about any changes in the data required for registration.

12. The new Act entered into force on 21 November 2003. According to the information available to the Committee, the information about the implementation of the Act is as follows:

(a) After this time, the Ministry of Justice of Turkmenistan abolished the majority of nature protection nongovernmental organizations in Turkmenistan, and left only one environmental public association, the Society for Nature Protection, as part of an overtly acknowledged policy to have only one NGO per sector;

(b) Shortly after the new Act on Public Associations came into force, the activities of certain environmental NGOs were stopped by respective courts upon the request of the Ministry of Justice, on the basis of article 28, paragraph 2, and article 32, even without any written notifications requesting to cease violation of national Act having been issued, which is against the rules of article 28 of the new Act;

(c) The Ministry of Justice has not been willing to receive any new requests for registration of public associations, referring to the workload of re-registration of old associations;

(d) There was no legal remedy for challenging the decisions of the Ministry referred to in paragraphs (b) and (c).

## II. CONSIDERATION AND EVALUATION BY THE COMMITTEE

13. Turkmenistan deposited its instrument of accession to the Convention on 21 June 1999. The Convention entered into force for Turkmenistan on 30 October 2001.

14. In establishing the facts of the case, the Committee, in addition to examining the information provided in the communication, also considered some other information in the public domain, such as an analysis done by the International Center for Non-profit Act (ICNL). The analysis is available on http://www.icnl.org/car/Acts/TM_PA_Act_Comments_ICNL_11_14_2003.doc

15. The communication seems to generally address the restrictive nature of the Act. The Committee, therefore, has endeavoured to assess the conformity of the Act with the Convention from that perspective.

16. As described in paragraph 11 (a) above, the Act in its article 5 largely limits membership in Turkmen public associations to citizens of Turkmenistan. Non-governmental organisations, by bringing together expertise and resources, generally have greater ability to effectively exercise their rights under the Convention than individual members of the public. Furthermore, certain rights accorded to the ‘public concerned’ (e.g. under art. 6, paras. 2, 5 and 6, and art. 9, para. 2) are guaranteed to a greater extent with respect to registered environmental NGOs than they are for individual members of the public, who might have to demonstrate that, for example, their material interests are directly affected in order to be recognized as the ‘public concerned’ Thus the exclusion of foreign citizens and persons without citizenship from the possibility to found and participate in an NGO might constitute a disadvantageous discrimination against them. The Committee is, therefore, of the opinion that article 5 of the Act is not in compliance with article 3, paragraph 9, of the Convention.

17. With regard to the territorial restrictions on the operation of NGOs, evaluation of these provisions in the context of the whole Act, especially comparing them to article 21 on rights of public associations, does not indicate restriction on the local public associations in entering into regional or national level actions if it is in connection with the defence of their local interest.

18. Article 13 in conjunction with article 15 of the Act appears to limit the territorial field of operation, especially with respect to nation-wide organizations which are required to have a rather large membership: only organizations with over 500 members can conduct nation-wide Activities. It poses a question as to whether this might in fact limit the exercise of participation and access to justice rights under the Convention to the territory of a municipality.

19. Since the majority of the regional and national environmental issues naturally concern the local environmental protection interests, the territorial field of operation of the local NGOs seems not to be significantly restricted. If the new legislation were to exclude local NGOs as such from participation in decision-making on projects in other parts of the country or on nation-wide projects, programmes, etc., this would not be in conformity with the Convention. However, since there is no sufficient evidence of Actual implementation of article 13 in conjunction with article 15, the Committee finds it difficult to establish at this stage whether the provisions as such might constitute non-compliance with article 6 and article 9, paragraph 2, in conjunction with article 2, paragraph 5, of the Convention.

20. With regard to article 17, paragraph 3, of the Act, the Committee observes that the Convention does not exclude the possibility for Parties to regulate and monitor to a certain degree Activities of non-governmental organizations within their jurisdiction, and that there is no requirement in it to either regulate or de-regulate activities of non-registered organizations. Thus the matter is within the sovereign powers of each Party. However, any such regulation should be done in a way that does not frustrate the objective of the Convention or conflict with its provisions. Having regard to the arguments set out in paragraph 16 above, it should not prevent members of the public from more effectively exercising their rights under the Convention by forming or participating in NGOs.

21. In this regard, the combination of a prohibition of non-registered associations with overly difficult registration procedures and requirements existing under the Turkmen Act on Public Associations does appear to present a genuine obstacle to the full exercise of the rights of the public. Indeed, it is difficult to see how this combination is compatible with the requirement under article 3, paragraph 4, of the Convention on each Party to provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation. Taking into account the facts presented in paragraph 12 above, the Committee finds sufficient evidence that article 17, paragraph 3, of the Act and the way in which it has been implemented are not in compliance with article 3, paragraph 4, of the Convention.

22. The Committee notes that article 2 of the Act establishes precedence of the international agreements over its provisions. The Committee is, however, of the opinion that by enacting, after the entry into force of the Convention, an Act containing provisions that do not comply with the requirements of the Convention, the Party has not ensured that the provisions of the Convention will be complied with. Thus, it has not established the clear, transparent and

consistent framework to implement the provisions of the Convention, as required by article 3, paragraph 1, rather the opposite. This opinion is reinforced by the fact that in practice national authorities and courts are often reluctant to directly apply provisions of an international treaty.

23. Finally, the Committee notes that while some of the provisions analysed are not in compliance with the requirements of the Convention, it is not possible to analyze many other provisions of the Act without more information on how they are being interpreted and implemented. This applies to whether responses from the authorities to non-compliance with the provisions of the Act could lead or are leading to non-compliance with article 3, paragraph 8, of the Convention. The Committee emphasizes in this regard that it has not been possible for it to enter into a dialogue with the Government of the Party concerned, which the Committee deeply regrets.

## III. CONCLUSIONS

24. Having considered the above, the Committee adopts findings and recommendations set out in the following paragraphs with a view to bringing them to the attention of the Meeting of the Parties.

### A. Main findings with regard to non-compliance

25. The Committee finds that article 5 of the Act on Public Associations is not in compliance with article 3, paragraph 9, of the Convention.

26. The Committee also finds that article 17 of the Act is not in compliance with article 3, paragraph 4, of the Convention.

27. In conclusion, the Committee finds that by enacting provisions that are not in compliance with article 3, paragraph 9, and article 3, paragraph 4, of the Convention, the Party concerned is not in compliance with the requirement of article 3, paragraph 1, to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention.

### B. Recommendations

28. The Committee, pursuant to paragraph 35 of the annex to decision I/7, and noting with regret that no response to the communication was provided by the Party concerned pursuant to the requirements set out in that annex, recommends to the Meeting of the Parties to:

(a) Request the Government of Turkmenistan to amend the Act on Public Associations with a view to bringing all its provisions into compliance with the Convention;

(b) Recommend that the Government of Turkmenistan should immediately take appropriate interim measures with a view to ensuring that the provisions of the Act are implemented as far as possible in a manner which is in compliance with the requirements of the Convention;

(c) Also recommend that the Government of Turkmenistan should carry out the measures referred to in paragraphs (a) and (b) above with the involvement of the public and, in particular, relevant national and international organizations, including non-governmental organizations;

(d) Furthermore recommend that the Government of Turkmenistan should develop and make publicly available official guidance on the interpretation of the Act, taking into account the relevant provisions and standards of the Convention;

(e) Invite the Government of Turkmenistan to submit a report to the Meeting of the Parties, through the Compliance Committee, no less than four months before the third meeting of the Parties on the measures taken to implement the recommendations in subparagraph (a);

(f) Request the secretariat or, as appropriate, the Compliance Committee, and invite relevant international and regional organizations and financial institutions, to provide advice and assistance to Turkmenistan where this is necessary to overcome obstacles to the implementation of these measures.

**Note**

[1] This chapter includes only the main facts considered to be relevant to the question of compliance, as presented to and considered by the Committee.