

4 September 2017

Jonas Ebbesson
Chair
Aarhus Convention Compliance Committee
Via Aarhus Convention Secretariat, UNECE, at aarhus.compliance@unece.org

Sent by e-mail only

Dear Mr. Ebbesson,

Re: Amendments of February 2017 to Turkmenistan's Law on Public Associations

In response to the letter of 24 August 2017 from the Government of Turkmenistan, please find in the annex our analysis of the implications of the February 2017 amendments to Turkmenistan's Law on Public Associations for the status of Turkmenistan's compliance with the Aarhus Convention, prepared by the European ECO Forum's compliance team.

On the basis of this analysis, we remain of the view that Turkmenistan remains in non-compliance with the Convention and that the Meeting of the Parties should take a firm position on this, especially having regard to the Government of Turkmenistan's failure to notify the secretariat or the Committee of the amendments to the Law on Public Associations.

Yours sincerely,



Jeremy Wates
Secretary General

Annex

Compliance of the Law on Public Associations of Turkmenistan (adopted on 3 May 2014, as amended on 4 February 2017) with the provisions of the Aarhus Convention

Legal Analysis in the context of implementation of the Decision V/9I of the Meeting of the Parties of the Aarhus Convention on compliance by Turkmenistan with its obligations under the Convention

We respectfully urge the Parties and the Compliance Committee of the Aarhus Convention to take into account the considerations explained in this analysis when assessing the implementation of Decision V/9I of the Meeting of the Parties by Turkmenistan.

1. Original text of the Law on Public Associations

On 3 May 2014, a new Law on Public Associations was adopted in Turkmenistan. The Compliance Committee subsequently assessed the text in light of the recommendations of the Meeting of the Parties to the Convention.

On the issue of **foreign citizens**, the Compliance Committee relied on article 11, paragraphs 1 and 5, of the new law, as well as Article 4, paragraph 2. The Committee found that the new legislation was sufficient to allow foreign citizens to **found and participate** in public associations in Turkmenistan. In particular, the Committee concluded that:

“The Committee therefore emphasizes that so long as article 4, paragraph 2, will indeed be applied by the Party concerned in this way in practice, the Party concerned is no longer in non-compliance with article 3, paragraph 9, with respect to the right of non-citizens to found public associations.” (emphasis added)¹

On the issue of activities of **unregistered associations**, the Compliance Committee concluded that

*“[...] in order to meet the requirements of article 3, paragraph 4, of the Convention, the Party concerned would need to show that article 9 of the Law on Nature Protection prevails over the prohibition on activities of non-registered associations set out in article 7, paragraph 2, of the 2014 Act on Public Associations as well as over other relevant legislation (e.g. as *lex specialis*, in the form of a special law which prevails over a more general law). Moreover, in order to comply with decision IV/9g and the Convention the concept of “citizen” in article 9, paragraph 2, of the 2014 Law on Nature Protection must include any natural person, i.e., also foreign citizens and persons without citizenship.”²*

¹ Para. 46, Report to the Meeting of the Parties on compliance by Turkmenistan with its obligations under the Convention (ECE/MP.PP/2014/21).

² Para. 54, *Ibid.*

To confirm its conclusions the Compliance Committee recommended that a party should make several official explanations as to the applicability of the new law to foreigners and those recommendations were introduced into the decision by latest MOP.

2. Legal effect of the amendments of 4 February 2017

On 4 February 2017, a law was adopted introducing amendments into the Law on Public Associations.³ Relevant amendments and their legal affect for the purpose of compliance with the Aarhus Convention are analyzed below. These amendments have a common issue – clarifying the **legal status of foreigners** versus national citizens.

(a) Amendments to Article 1

Article 1 sets the definition of a public association and has one sentence. Below we reproduce the text, as amended with changes highlighted:⁴

“Public association means a voluntary, self-regulating, non-commercial formation, created ~~upon the initiative of citizens~~ by citizens of Turkmenistan united on the basis of common interests for the achievement of common goals, reflected in the statute of public association”.

The legal effects of this amendment are clear: they constitute legal restrictions on foreign citizens being among the founders of public associations.

First, it applies a distinction between a concept of “citizens” and “citizens of Turkmenistan”. While we argue that even the original wording (“citizens”) would exclude also foreign citizens, it is unquestionable that this amendment clarifies and leaves no option as to the issue whether foreign citizens fall under the term “citizens of Turkmenistan”. Therefore, the amendment made it clear that a public association can only be created by citizens of Turkmenistan in order to fall under the definition of “public association”, unless there is a clear and direct provision stating otherwise. Such a provision indeed existed till the amendments were introduced (Article 4, paragraph 2) and is analyzed further below.

Second, the change of “created upon the initiative of” into “created by” makes a further restriction on who can be among the founders: while in the original wording one could argue, for example, that if you have a mix of national citizens and foreigners willing to found an association, it could be still considered legal since there is an “initiative by citizens”. In the new wording, there is no ambiguity left as to who can found (create) an association.

(b) Amendments to Article 3

³ Amendments are reproduced from <http://www.turkmenistan.gov.tm/?id=12940>, translation by authors.

⁴ Original text is reproduced from <http://www.turkmenistan.gov.tm/?id=6444>, translation by authors.

Article 3 sets the scope of application of the law itself. In particular, it is explicitly providing now that this law is the *lex specialis* regarding all public associations, except political parties, religious organizations and non-commercial associations of businesses. Below we reproduce separately the new text of Article 3 (it has now only one paragraph) and the original wording of Article 3, paragraph 1.

“The scope of application of this Law covers public associations, created *by citizens of Turkmenistan*, except for religious organizations, political parties, trade unions, as well as non-commercial unions created by commercial organizations, whose creation and operation procedures are set by special laws.” (Article 3 as amended, *emphasis added*)

“The scope of application of this Law covers public associations, created *upon the initiative of citizens*, except for religious organizations, as well as non-commercial unions (associations) created by commercial organizations” (Article 3(1), original text, *emphasis added*.)”

First, it is clear that the amendment to Article 3 follows the same logic and purpose as the amendment to Article 1, analyzed above. Instead of “created upon the initiative of citizens” the new wording is “created by citizens of Turkmenistan”. In our view, this again introduces legal restrictions on the ability of foreigners to be among the founders of public associations in Turkmenistan.

Second, this article is also providing that the Law on Public Associations is the *lex specialis* for any citizens’ association, except for religious and others explicitly listed. This is important for the analysis of *Other relevant issues* below.

(c) Amendments to Article 4

Article 4 establishes the legal details of the “right of citizens to create public associations”. Below we reproduce the first three (as most relevant) paragraphs with amendments highlighted:

“ Article 4. The right of citizens to create public associations

1. The right of citizens to create public associations is realized both through direct association of physical persons and through legal persons – public associations.
2. ~~In cases provided for in this Law, the founders, along with citizens of Turkmenistan, may include foreign citizens and persons without citizenship, residing in Turkmenistan.~~
3. The right of citizens to association includes the right to create public associations for the protection of common interests and pursuing common goals, the right to enter existing public associations or abstain from entry, as well as the right to freely leave public associations.
4.”

First, the deletion of paragraph 2 clearly affects legal certainty as to the role and rights of foreigners to create a public association in Turkmenistan. Moreover, taken together with the amendments in Article 1 and 3, our understanding is that the legal effect of this amendment is to ban any foreign citizen from creating (or being among the founders) of a public association in Turkmenistan. Legally speaking, the new law does not grant the right to create public associations to foreigners.

Second, the original paragraph 3 (after amendment it is paragraph 2) has a direct relevance for this analysis, too. Paragraph 1 provides for two ways to enjoy one's right to create a public association in Turkmenistan: (1) through direct association or (2) through other legal persons (when such legal persons, for example existing public associations, compose a union or a federation). The original paragraph 3 (now para. 2) further details this first right (of direct "association") to include (a) the right to create, (b) the right to become a member of and (c) the right to leave membership of a public association. In effect, this means that the "right of citizens to create public associations" for physical persons includes the right to be a member. That means, the right to be member is not a separate legal category, but is part of a higher legal category "right to association", which in turn is part of "right to create public associations".

In conclusion, the legal effect of deleting paragraph 2 of the original text of Article 4 is that foreigners have neither the right to be **founders, nor to be members** of a public association in Turkmenistan.

3. Other relevant issues

(a) Legal status of foreigners

According to Article 11 of the Constitution of Turkmenistan, foreigners

".. enjoy the same rights and freedoms, bear the responsibilities like the citizens of Turkmenistan, *in accordance with the laws and international treaties of Turkmenistan*". (*emphasis added*)⁵

Therefore, national laws may impose additional requirements on how foreigners may enjoy their rights in Turkmenistan. There is a special general Law on the Legal Status of Foreign Citizens in Turkmenistan (2011). As to the right of association, it stipulates:

"Article 15. Participation in public associations

Foreign citizens in Turkmenistan can enter public associations, if this is provided so by their statutes. Membership of foreign citizens in public associations is *regulated by the relevant legislation of Turkmenistan*." (*emphasis added*).⁶

⁵ Cited from <http://www.turkmenistan.gov.tm/?id=11808>, translation by authors.

⁶ Cited from <http://alpagama.org/pravovaya-baza-turista/zakon-turkmenistana-o-pravovom-polozhenii-inostrannyh-grazhdan-v-turkmenistane.html>, translation by authors.

The wording “regulated by the relevant legislation of Turkmenistan” should be interpreted as giving the Law on Public Associations the status of *lex specialis* over general legislation on the legal status of foreigners for the purpose of the legal framework applicable to foreigners’ right to acquire membership in public associations. Therefore, any argument that the use of words “citizens of Turkmenistan” also covers foreigners is not applicable to the legal issues over the right to association, including the right to found or be a member of a public association.

(b) Unregistered associations

The Law on Public Associations prohibits the operation of unregistered associations (Article 7, paragraph 2).

As explained in part 2 (b) above, the Law on Public Associations is the *lex specialis* for any public association in Turkmenistan by virtue of direct provision in Article 3. While the Law on Nature Protection may provide additional clarity as to the possibility to create an *environmental* association, it is clear that any public association – environmental, human rights, gender related, etc. – can only be created on the basis of the Law on Public Associations. There is no provision or procedure in the Law on Nature Protection as to creation of a public association. Thus, while the Law on Nature Protection may grant specific environmental rights, it is far from granting any exceptions to the operation of public associations.

The key legal issue is whether a specific activity by a group of citizens falls within the definition of a “public association”, given in Article 1. The wording of Article 1 suggests that the main criteria to be met for a group of citizens to qualify for a public association are that the group is:

- (a) voluntary, self-regulating, and non-commercial;
- (b) created by citizens of Turkmenistan;
- (c) united on the basis of common interests for the achievement of common goals.

It is our understanding that in practice most environmental citizens’ groups would meet such criteria. For example, if local residents organize a campaign against a plan to build a chemical plant nearby, they certainly would fall under this definition and, subsequently, a ban for their operation.

4. Conclusions

I. We maintain that Turkmenistan remains in non-compliance with the Aarhus Convention on the basis of the following:

- (a) Possibility of foreigners to be founders of public associations

The amendments introduced to Articles 1, 3 and 4 of the Law on Public Associations of Turkmenistan effectively ban foreigners from being founders of public associations in Turkmenistan, which is not in compliance with Article 3(9) of the Aarhus Convention.

- (b) Possibility of foreigners to be members of public associations

The current wording of Article 4 effectively bans foreigners from being members of public associations in Turkmenistan, which is not in compliance with Article 3(9) of the Aarhus Convention.

(c) Activities of unregistered organizations

The Law on Public Associations by virtue of Article 3 is the *lex specialis* for any group of citizens qualifying as a public association under the Law on Public Associations, therefore the prohibition on the operation of unregistered public associations by Article 7, paragraph 2, of the Law on Public Associations is not in compliance with Article 3(4) of the Aarhus Convention.

II. We maintain that the amendments, introduced to the Law on Public Associations in February 2017, demonstrate a clear political and legislative development by the Party in the opposite direction from the recommendations of the Meeting of Parties, set out in the Decision V/9I (2014).

The amendments introduced reversed the very measures that were designed to bring the Party back into compliance with the Convention. The “reversing” nature of these amendments and the fact the Party failed to notify the Secretariat of these amendments should be taken into account when developing conclusions and measures regarding compliance by Turkmenistan at the upcoming Meeting of the Parties in Budva , Montenegro (11-14 September 2017) .