

**Aarhus Convention Secretariat  
Environment Division  
United Nations Economic  
Commission for Europe  
Palais des Nations, Av. de la Paix 10  
1211 Geneva 10, Switzerland**

## **I. Information on correspondent submitting the communication**

Full name of submitting organization:  
Fundacja Frank Bold (Frank Bold Foundation)

Permanent address:  
22/4 Bandurskiego st.  
31-515 Cracow  
Poland

The contact person authorized to represent the organization in connection with this communication:

*Name:*  
Miss Katarzyna Lichwa

*Title/ Position:*  
Energy Project Manager, [katarzyna.lichwa@frankbold.org](mailto:katarzyna.lichwa@frankbold.org)

Telephone number: +48 530 025 442

## **II. State concerned**

**Republic of Poland**

### **III. Facts of the communication**

#### **1. Reasons that lead to this communication and general legislative background**

1. The Aarhus Convention was ratified by Republic of Poland on 21 June 2001. It has been in force from October 2003 (published in the Polish Journal of Law in 2003, under no.78, item 706).
2. This Communication concerns failures of Republic of Poland's local government (Lubuskie Voivodship) to implement specific measures and regulations of Art. 7 in conjunction with Art.6 (3),(4),(8), as well as some deficiencies related to Art 9 (3) of the Aarhus Convention.
3. The Communicant is convinced, that the process of introducing new Development Plan for Lubuskie Voivodship that included the exploitation of lignite deposits "Gubin" and "Gubin - Zasieki – Brody" and coal- fired power plant failed to meet the provisions of the Convention specified above, especially requirements to ensure that in the decision due account is taken of the outcome of the public participation. Secondly, in the Communicant's opinion, there are deficiencies with regard to the possibility for members of the public to access administrative or judicial review procedures to challenge acts of public authorities.

#### **1.1. General background**

According to the **Spatial Planning and Development ACT** of 2003 (No. 80, item 717), local governments (Voivodships) are responsible for introducing Development Plans for the region, specifying the destination, zoning and land development, and deployment of a public investment. Under the Art. 38 of the Act, government of Lubuskie Voivodship in 2012, adopted amended Development Plan for the region. According to the Art. 39 (3) **Spatial Planning and Development ACT**, amended Development Plan for the region must especially include:

- 1) basic elements of the settlements, infrastructure, and communication in the region, including cross-border connections;
- 2) a system of protected areas, including the areas of environmental protection, nature and cultural landscape protection, spas and cultural heritage, monuments as well as contemporary cultural property;
- 3) the distribution of a public investment of local importance;
- 4) frames and principles of the development of transnational importance areas and based on the circumstances, frames and principles of the development of regional importance areas;
- 5) areas of flood hazards;
- 6) areas exposed to danger of flooding;
- 7) the boundaries restricted areas and their protection zones;
- 8) areas of documented mineral deposits and documented complexes of geological carbon dioxide storage.

Taking into account provisions under Art. 39, par. 3(8) Spatial Planning and Development Act, any changes introduced to the Development Plan of the Voivodship, including these on the exploitation of lignite deposits and coal- fired power plants are subject to specific provisions and regulations connected with adoption of plans and programmes related to the environment. **Act on the access to information about the environment and its protection and environmental impact assessments** (No.109, item.1157), especially Sections 2 and 3 regulate the procedure of public participation in adoption of plans and programmes that influence the environment. On the basis of above mentioned provisions, the Development Plan for Lubuskie Voivodship fall under the definition of the plan and programmes as it is understood under the Spatial Planning and Development Act.

According to the **Art. 12 of the Act on the access to information about the environment and its protection and environmental impact assessments** (No.109, item.1157) and the Art.7 of the Aarhus Convention, Development Plan is a subject to public consultation and participation in the decision making process. **The core principle of the provision on public consultation in decision making process is not only**

**providing the public with necessary information on the proposed activities that affect the elements of environment, but most of all provide the public with the necessary tools and procedures that allow to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity (Art. 6 (7)).** Moreover Art. 6 (8) of the Convention states, that Each Party shall ensure that **in the decision due account is taken of the outcome of the public participation.**

In the opinion of Communicant authorities of Lubuskie Voivodship's while proceeding the adoption of the Development Plan for the region, have failed to comply with the Art. 7 of the Aarhus Convention (in conjunction with applicable provisions of Article 6, (7) and (8)). According to all available evidence, the assessment of the outcome of the public consultations provided in form of comments and remarks have not been considered by the Authorities and included in the final draft of Development Plan for Lubuskie Voivodship.

In March 2007 authorities of Lubuskie Voivodeship adopted resolution No VI/59/07, that provide a background for the preparation of new Development Plan for the region. All interested stakeholders, including individuals, public and nongovernmental organizations, as well as other institutions could submit proposals to the Plan. Between 18 March 2011 and 13 May 2011, 10 comments and remarks to the Development Plan were submitted to the Marshall's Office of Lubuskie Voivodship within the Public Consultation procedure. Based on the documents published by the authorities of Lubuskie Voivodship, proposals and comments questioning particular elements of amendment Development Plan, especially these on the exploitation of lignite deposits "Gubin" and "Gubin - Zasięki – Brody" and coal- fired power plant, were not properly evaluated and there are no evidence that the outcomes of Public Consultation had been taken into account. Moreover Communicant argues, that the Authorities have not assured that the published text of the decision is supported by sufficient justification on which the decision was based.

The Development Plan for the Lubuskie Voivodship was adopted on the 21th of March 2012 on the basis of Resolution No XXII/191/12. Both representatives of the local society as well as authorities of the local municipality Brody and Gubin (where lignite deposits and coal – fired power plant is planned to be located) were rejected by the authorities of Lubuskie Voivodship as well as by the Provincial Administrative Court the right to challenge the decision on the adoption of the Development Plan. Administrative body as well as polish Administrative Court stated that neither individual who's property is located in the area included in the Plan nor local municipalities have sufficient legal interests and impairment of right to challenge the decision.

Article 91 (1) in conjunction with Art. 90 (1) of **the Act on the Province Self-Government (Ustawa o Samorządzie Województwa) of 1998 (No 142, item 1590)** give all entities whose legal interests or rights were violated by the introduction of acts of local law, the right to access to justice. However these rights are very restrictive and requires from the claimant to prove his/her legal interest. As it is presented in the further part of the Communication, both administrative bodies and courts do not recognize sufficient legal interest of most entities involved in the case, including inhabitants of the region, local authorities as well as environmental organizations.

In this context, polish judicial and administrative review proceedings are also in breach of Article 9 (3) of the Aarhus Convention, by interpreting the legal interests of private persons and environmental organization so narrowly, that it effectively bans any review by court. As based on the polish jurisdiction, polish administrative courts have ruled that in relation to Development Plans of the region, private persons and environmental organization do not have sufficient legal interest, which means that it is impossible for these entities to challenge an administrative decisions on Spatial and Development Plans.

Summarizing, the Communicant believes that Republic of Poland (represented by the Authorities of Lubuskie Voivodship) has breached Convention within two areas:

- 1.1. Insufficient evaluation of public consultations, especially the absence of consideration of the outcome of the Public Consultation in the final decision. There is no evidence that the comments and merits from the Public Consultations were considered in the final report.
- 1.2. Restricting the rights of environmental organizations and private persons to challenge the substantive and procedural legality of decision related to the Development Plan.

**Ad. 1.1 Insufficient evaluation of public consultation** (Art. 7 of the Aarhus Convention (in conjunction with applicable provisions of Article 6, (7) and (8))

Article 7 of the Aarhus Convention further refers to the plans and programmes “relating to the environment”. Whether a particular plan or programme relates to environment should be determined with reference to the implied definition of “environment” found in the definition of “environmental information” Art. 2, (3). Development Plan for Lubuskie Voivodship can be defined as a “factor” affecting or very likely to affect the elements of environment such as air, atmosphere and taken from a wider perspective have impact on all elements of the environment as defined in par.3 (a) of Art. 2 as the development of the energy sector clearly affects the whole territory and life therein.

Polish law provides special measures and regulations concerning adoption of plans and programmes that affect the environment. According to the **Act on Spatial Planning and Development** (No.80, item.717) as well as **Act on the Provision of Information on the Environment and its Protection, Public Participation in the Environmental Protection and Environmental Impact Assessments** (No.109, item 1157), that implement the requirements of Aarhus Convention (Pursuant Art. 6 (7), applicable to Article 7), the authority must provide the public and other authorities with the right to present their opinions and remarks on the draft programme/plan (if such opinions are available at the time for submitting comments and motions). The goal of Public Consultation is to clarify doubts accompanying the planned project and due to that,

authority should evaluate all comments and motions in the draft and prepare report on the detailed outcomes of the consultation and their inclusion in the final document. Report should especially include:

- 1) the findings contained in the environmental impact assessment;
- 2) the opinions of the competent authorities;
- 3) reported observations and conclusions;
- 4) the results of proceedings concerning transboundary environmental impact if it is carried out;
- 5) proposals for the methods and frequency of monitoring the effects of the implementation of the document.

Based on the evidence (Annex 1. Annex 2.), the form of comments and motions' evaluation, received during the public consultation failed to meet the requirements of Art. 7 of the Aarhus Convention (in conjunction with applicable provisions of Article 6 (7) and (8). Authority of Lubuskie Voivodship in order to evaluate the information received during the public consultation, organized comments and motions within 7 groups (A-G), which reflected the character of received information:

- A – Editorial corrections and updates regarding the current state – recognized;
- B – The Plan contains alternatives proposed by the applicant;
- C – Remarks do not apply to the content of the Plan;
- D – Remarks in contrary to the voivodship's policy - not recognized;
- E – Remarks partly taken into account;
- F – Remarks taken into account;
- G – Remarks not taken into account;

There were 10 comments submitted within the national consultation and 1099 comments and motions in the context of cross-border consultations. The statistic included in the summary for the cross-border consultation (data not available for national consultation) shows, that all 1070 comments of foreigners have been marked the letter D as contrary

to the policy of the regional government and therefore have not been recognized. The same classification was assigned to the comments received through the national consultations. Marking with letter D did not indicate the area of local policy, with which those comments were found inconsistent and what is the actual content of this policy.

Final report on the Public Consultation on the Development Plan did not provide information on detailed process of comments' evaluation, their impact on the final draft and Authority's position on the specific remarks. It follows that the final report failed to comply with Art.7 of the Aarhus Convention. Pursuant Art. 6 (8) applicable to Art. 7 of the Aarhus Convention, in the decision making due account has to be taken of the outcome of the public participation. According to all available evidence, the Authority of Lubuskie Voivodship had not taken into account the outcomes of the public consultations while deciding on the amendment Development Plan for the region. In the opinion of Communicant, the relevant authority (Marshall's Office of Lubuskie Voivodhip) have failed to ensure, that decision takes due account of the public participation and sufficient evidence have not been provided on how due account was taken of public participation.

Report on the Public Consultation, especially the part on the detailed evaluation of particular comments and remarks (Annex 1., Annex 2.), presented all public proposals/comments in a form of a table. The table did not contain the actual respond to the comments and objections made by the public.

Referring to Aarhus Convention itself on Communication ACCC/C/2008/24 (Spain), the Committee states that:

*"It is quite clear to the Committee that the obligation to take due account in the decision of the outcome of the public participation cannot be considered as a requirement to accept all comments, reservations or opinions submitted. However, while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority **must still seriously consider all the comments received**. The Committee recalls that the obligation to take "due account" under article 6, paragraph 8, should be seen in the light of the obligation of article 6, paragraph 9, to **"make accessible to the public the text of the decision along with the reasons and***



***considerations on which the decision is based”.** Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account. ... The Committee notes that a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention.”*

**Ad. 1.2. Restricting the rights of environmental organizations and private persons to the access to justice** (Art. 9 (3) of the Aarhus Convention)

Apart from the failures of compliance with Articles of the Convention presented above, the Communicant therefore claims, that jurisprudence of both administrative bodies as well as courts are not in compliance with Art. 9 (3) of the Convention with regard to judicial and administrative review.

In regard to the cases affecting environment, environmental organizations as well as Private Persons concerned are effectively prevented from access to review procedures of some administrative acts and omissions, especially on Spatial and Development Plans. According to the Administrative Courts, Development Plans are not Acts on local law and thus provision on the Article 91 (1) in compliance with 90 (1) of the **Act on the Voivodship self- government of 1998 (No.142, item 1590)** that provide entities a right to access to justice cannot be applied. In practice it means that it is almost impossible

for Private Persons, environmental organization or other entities to prove legal interest in the cases concerned with the Spatial and Development.

For example, according to the sentence adopted by the Provincial Administrative Court on 30.09. 2005 (see judgment IV SA/Wa 338/05) *“there is no possibility of challenging by the social organization, resolution of the municipal council representing local law that is not directly concerned with legal interest or obligations of the organization, but concerns only the remaining issues in the field of statutory activities of the organization”*. Based on this sentence as well as in other judgments presented by the Polish Supreme Court (sentences: II OSK 1457/05; II OSK 1736/09; II SA/Bk 171/10, II OSK 40/10), statutory activities of environmental organizations are not sufficient to establish legal interest to challenge decisions concerning Spatial and Development Plans. Environmental organizations have to prove that its activities or duties were affected in the specific case in order for a court action be admissible.

This is also the case with the right to judicial remedy of the Private Persons and other entities. According to the sentences of Provincial Administrative Court Private Person, whose property rights were violated by adoption of Development Plan, in order to challenge the decision, had to prove sufficient legal interest, which based on the courts' jurisdiction, is very narrowly interpreted. According to the particular cases referred below, including the one on the challenging the decision on adoption Lubuskie Voivodships Development Plan, Administrative Court stated that Private Persons do not have sufficient legal interests, that is directly and objectively affected and therefore cannot claim their rights to judicial remedy (see: Judgment of the Provincial Administrative Court, No. II SA/Go 833/13; IV SA/Wa 558/07).

It is often assumed that the right to property of land is a source of legal interest in the case of appeals against acts that violate the law. However, based on the Polish jurisdiction legal acts, such as the Development Plan, according to the public authorities and administrative courts, cannot be questioned on the basis of the property rights being infringed. There is no direct definition of legal interest in the Polish law. However,

interpretation of the legal interest can be found in the **Code of Civil Procedure (No.16, item.93)** within Articles: 140 and 143.

Existing definition of legal interest in the Polish legislation provides authorities with wide space of interpretation by administrative courts, which, based on the evidence, usually deny complaint lodged by parties concerned. According to the Administrative courts case law, legal interest means that it originates from a particular, individual and separate legal rule that grants certain benefits to legal entity. Thus, the "complaint to the administrative court can be only issued by individual (or organization) that can prove explicit, individual interest or obligations arising from the rules of substantive law" (see: Judgment of the Provincial Administrative Court, No. II SA Kr 1092/10). In practice, the property right does not guarantee the access to court review and do not protect individual whose rights are affected. This is particularly applicable for programmes such as the Spatial and Development Plans, affecting or very likely to affect the elements of environment, where it is nearly impossible to prove legal interest because, as courts argumentation holds: there is lack of direct impact on the rights of the entities: land owner, or environmental NGOs.

Similar, public institutions located on the area where the Development Plan was introduced –municipality Gubin was rejected the right to bring a claim on the decision, on the basis of lack of legal interest in the case.

Article 9(3) of the Aarhus Convention states: *"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 the 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"*. This provision establishes an obligation for each Party of the Aarhus Convention, to ensure that members of the public as well as representatives of environmental organizations 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.

Described example indicates, that the opportunity to challenge the Regional Development Plans as well as other acts and omissions by private persons and public authorities which contravene provisions of its national law relating the environment are only theoretical, however almost impossible to achieve in practice. In the absence of a direct indication of the legislature and very narrow interpretation of laws by the authorities, that ensure certain entities the right of access to justice, the availability of access to review procedure is limited and in most cases impossible.

It is the objective of the Aarhus Convention that environmental laws is better enforced and members of the public, often represent by environmental organizations have access to administrative or judicial procedures to challenge acts and omissions by both private persons and public authorities which contravene provisions of environmental law. Under current polish law and administrative procedures these objectives are not attained and failed to comply the Art. 9 (3) of the Aarhus Convention.

#### **IV. Nature of alleged non- compliance**

The communication presents the example of specific case in which the authorities of Lubuskie Voivodship – district in western Poland have failed to comply with the provisions of the Aarhus Convention namely Art. 7 in conjunction with Art. 6 (7) and (8) as well as with a general issue concerning Art.9 (3).

The specific case provides an example of important limitation in enforcing the rights of citizens and environmental organizations to participate in the decision making process concerning activities that have impact on the environment. Despite the fact that, the provisions of the Aarhus Convention have been transposed to the Polish legal system, as evidence show, particular requirements under listed Articles of the Convention are not applied in the practice. Environmental organizations, Private Persons, as well as other public institutions by not recognizing their sufficient legal interest in the case, are effectively prevented from access to review procedures.

## **V. Provisions of the Convention relevant for the communication**

Article 7 in conjunction with article 6 paragraphs 3, 4, 8;

Article 9 paragraph 3;

## **VI. Use of domestic remedies or other international procedures**

Based on the available evidence, Polish authorities during administrative and judicial proceedings, do not recognize environmental organizations as entities possessing sufficient legal interest to challenge the administrative decision on Spatial and Development Plans that influence the environment. Based on the evidence of Development Plan for Lubuskie Voivodship, which introduced legal frames for mine and power plant investment, environmental organizations despite their statutory objectives are rejected the right to statutory and judicial reviews.

Private Person and Municipality disadvantaged in the case, introduced the case of violation of individual property rights and the rights of municipality to the Provincial Administrative Court. Both, in the case of complaint introduced by private persons as well as public institution, Provincial Administrative Court rejected the complaint. Both judgments have been appealed to the Supreme Court. The judgment of the Polish Supreme Court is still pending. In the case related to the introduction of Development Plan of the Lubuskie Voivodship, as well as in references to other cases presented in the Communication, the aspect of non-compliance of the Republic of Poland with the requirements of the Aarhus Convention which are subject of this Communication was expressly addressed.

Based on national jurisprudence environmental organization such as the Frank Bold Foundation are systematically rejected the right to challenge the substantive and procedural legality of decision concerning Spatial and Development Plans that might or

significantly influence environment. Due to that, the Communicant do not have the sufficient legal interest that is directly affected and cannot claim its right to judicial remedy and could not participate in the court review.

## **VII. Confidentiality**

The Communicant does not ask for any information contained in this communication to be kept confidential.

## **VIII. Supporting documentation (copies, not originals)**

The Communicant attach the following supporting materials and kindly ask the Compliance Committee to inform the communicant what other materials would be useful for the Compliance Committee in this case and shall be provided.

1. Annex 1. List of comments from the public to the draft of Development Plan. National consultation
2. Annex 2. List of comments to the draft of Development Plan. Transnational consultation
3. Annex 3. Judgment of Provincial Administrative Court: IV SA/Wa 338/05
4. Annex 4. Judgment of Polish Supreme Court: II OSK 1457/05
5. Annex 5. Judgment of Polish Supreme Court: II OSK 1736/09
6. Annex 6. Judgment of Polish Supreme Court: II SA/Bk 171/10
7. Annex 7. Judgment of Polish Supreme Court: II OSK 40/10
8. Annex 8. Judgment of Provincial Administrative Court: II SA/Go 833/13
9. Annex 9. Judgment of Provincial Administrative Court: IV SA/Wa 558/07
10. Annex 10. Judgment of Provincial Administrative Court: II SA Kr 1092/10

## **Signature**

In Kraków, Poland, 28.11.2014

Ms. Katarzyna Lichwa

