Government Offices of Sweden

2 July 2020

M2019/02078/Me

Ministry of the Environment

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Sweden regarding access to justice for foreign environmental organizations (ACCC/C/2019/174)

1. Sweden would like to thank the Aarhus Convention Compliance Committee for the opportunity to clarify the matter referred to in the communication from Fundacja ClientEarth Prawicy dla Ziemi (the communicant), regarding access to justice for foreign environmental organisations.

2. The communication has been summarized by the Committee as concerning compliance by Sweden with articles 3 and 9 of the Convention with respect to access to justice for foreign environmental organisations.

Factual background

The Swedish Government's decision

3. On 7 June 2018 the Swedish Government granted the company Nord Stream 2 AG a permit to lay two pipelines on the continental shelf within the Swedish exclusive economic zone for the transportation of natural gas. The permit was granted pursuant to Section 15 a of the Act (1966:314) on the Continental Shelf.

The communicant's application for judicial review

4. On 6 September 2018 the communicant applied to the Supreme Administrative Court for judicial review of the Government's

decision in accordance with the Act (2006:304) on Judicial Review of Certain Government Decisions. The communicant, which is registered as a foundation under Polish law and does not have any members, requested that the Government's decision be revoked and presented arguments both as to legal standing as well as substantive issues concerning the decision's alleged breach of Swedish law and EU law. The communicant requested time to supplement the application. The Court granted this request and subsequent requests from the communicant to supplement its application.

5. On 27 September 2018 the communicant submitted several documents to the Supreme Administrative Court in order to be accorded legal standing in the case pursuant to Chapter 16, Section 13, first paragraph, point 4 of the Environmental Code, i.e. to show that its activities are supported by the public. The submitted documents included a PDF file with a screenshot of a web page in Polish with a public petition in Polish, a list of signatures and a letter from Greenpeace Nordic in English, which according to the letter is a regional branch of the non-governmental international environmental organisation with 162 000 supporters. The letter was signed by the Executive Director. The petition has approximately 2 500 signatures. The communicant also requested time to further supplement its application until the next day, 28 September 2018.

6. The letter from Greenpeace Nordic is titled "Regarding judicial review by ClientEarth for the permit issued in Sweden for Nord Stream 2". Greenpeace Nordic states that it supports ClientEarth in its actions to seek a judicial review for the permit issued in Sweden for Nord Stream 2. Greenpeace Nordic further states, among others: "Greenpeace Nordic attaches particular weight to the statements and arguments made by ClientEarth, as this organisation has for over a decade provided a necessary and competent voice for the environment protection. It is active across Europe, and increasingly across the globe as well, using legal instruments to protect wildlife, ecosystems and promoting a transition from fossil-fuel based energy sources to clean and renewable energy. ClientEarth has acquired

considerable public support for its activities, and has gained the respect of fellow environmental NGOs, including Greenpeace. In Poland, where ClientEarth conducts litigation, engage in policy-making, produces expert analysis and takes part in the public debate concerning environmental policy and law, Greenpeace and Client-Earth has worked jointly on a number of projects, most notably in convincing the European Commission and the Court of Justice of the European Union to stop the illegal logging in the Białowieża Forest. Similar activities have been undertaken throughout Europe to ensure that the natural environment is adequately protected."

7. On 28 September 2018 the communicant supplemented its application and requested time to submit further supplements until 1 October 2020.

8. On 1 November 2018 the Supreme Administrative Court issued an injunction providing the communicant the possibility to supplement its application regarding standing by 9 November 2018.

9. On 9 November 2018 the communicant requested additional time to supplement its application until 12 November. The Supreme Administrative Court granted the request.

10. On 12 November 2018 the communicant supplemented its application with arguments concerning standing and submitted, among other documents, a translation of the public petition from Polish to Swedish.

11. The public petition is titled "Let's stop the Nord Stream 2 gas pipeline" and addressed to the Swedish Supreme Administrative Court. It has a short text beginning with "We demand that the permit for the construction and operation of the Swedish Section of the Nord Stream 2 gas pipeline (issued on 7 June 2019 by the Swedish Ministry of Entrepreneurship and Innovation) be revoked". The text states that the communicant has filed a complaint requesting that the per-

mit for the gas pipeline be revoked in the Swedish court and that the communicant has to prove that its actions against Nord Stream 2 are supported by Polish citizens because public organisations have to comply with this requirement of the Swedish law. The text also informs that the communicant has already challenged the permit issued in Finland and joined the complaint against the permit issued in Finland and that there is no obligation to demonstrate public support in other countries. According to the petition the pipeline is a threat to the energy security of Europe during the next dozens of years, making Europe dependant on natural gas supplied by an authoritarian, anti-European country which violates human rights and civil liberties. The project of Gazprom is also, according to the text, a direct threat to animals in the Baltic Sea, including species under unconditional protection, such as the Baltic porpoises and grey seals, and it will also exacerbate the current climate crisis.

12.

The Supreme Administrative Court ‘s decision

13. On 21 December 2018 the Supreme Administrative Court rejected the communicant’s application for judicial review of the government's decision (case 4840-18[1]).

14. In its assessment of the circumstances of the case the Court initially noted that it is the responsibility of the party claiming to have standing to demonstrate that the conditions for standing are met.

15. The Court continued by considering the challenged decision to be such a permit decision by the Government that is covered by article 9, paragraph 2 of the Aarhus Convention. The Court did not, however, consider the decision to concern the communicant’s civil rights or obligations in the sense referred to in article 6, paragraph 1 of the European Convention on Human Rights. The communicant could therefore not be granted standing pursuant to Section 1 of the Act on Judicial Review of Certain Government Decisions.

[1] Translation of the Swedish Supreme Administrative Court’s decision, case 4840-18, annexes 1-2.

16. The Court continued by stating that an environmental non-governmental organisation that meets the criteria in Chapter 16, Section 13 of the Environmental Code has standing pursuant to Section 2 of the Act on Judicial Review of Certain Government Decisions.

17. While assessing whether the communicant had standing the Court found that the communicant met the first two criteria of Chapter 16, Section 13, first paragraph. The Court continued by examining whether the communicant met the fourth criterion and began by stating that since the communicant had not referred to any members, it must by some other means show that its activities are supported by the public.

18. In its assessment of whether the communicant met the fourth criteria, the Court referred to preparatory work[2] of Chapter 16, Section 13 according to which a clear and stabile connection to the public should be required regarding organisations without members. The Court also quoted examples mentioned in the preparatory work, i.e. that the organisation should be able to show that it has established support within the local population concerned with the activity or initiative in question, or that it has actively participated in the decision-making process, for example in the consultation process, representing the public in various ways. The Court also mentioned that, according to the preparatory work, other circumstances could include that the organisation has a large number of donors or support members.

19. The Court continued by stating that the communicant had submitted two documents in order to show that it is supported by the public, a Polish petition named "Let's stop the gas pipeline Nord Stream 2" signed by approximately 2 500 people and a letter from Greenpeace Nordic.

[2] Govt Bill 2009/10:184 p. 65.

20. The Court noted that the petition has the express aim of having the permit for the Swedish Section of the Nord Stream 2 gas pipeline withdrawn, is addressed to the Supreme Administrative Court and concerns security aspects relating to the laying of the pipeline on the one hand, and the environmental impact of the project on the other. According to the Court, the petition does not mention the activities of the communicant in any other way than specifying that the communicant, inter alia has challenged the permit decision which was issued in Finland.

21. The Court stated that what is required by an organisation seeking judicial review is to demonstrate public support for the organisation's activities as such, not – as in the present petition – public support for an application in an individual case. The Court referred to a precedent by the Swedish Supreme Court[3]. In the Court's view, the petition did not show that the activities of the communicant have public support within the meaning of Chapter 16, Section 13 of the Environmental Code.

22. The Court continued its assessment of whether the communicant had standing by stating that Greenpeace, in its letter, gives its support for the communicant's application for judicial review. The Court noted that the communicant has argued that since Greenpeace Nordic is such an organisation as referred to in Chapter 16, Section 13 of the Environmental Code and the activities of Greenpeace Nordic are supported by more than 1 650 000 members, it must be considered demonstrated that also the activities of the communicant is supported by the public. According to the Court, the communicant must demonstrate that its activities have direct support and, in the Court's view, the letter from Greenpeace Nordic did not demonstrate the existence of such support.

[3] NJA 2012 p. 921, page 18.

23. The Court concluded by stating that the communicant had not shown that it has such a clear and stabile connection to the public as is required for the activity to be considered to have public support in the meaning of Chapter 16, Section 13 of the Environmental Code, and that the communicant therefore was not entitled to seek judicial review pursuant to Section 2 of the Act on Judicial Review of Certain Government Decisions. Nor could the communicant, according to the Court, base its right to seek judicial review directly on EU law or on the Convention. According to the Court, the communicant's application for judicial review must therefore be rejected. As support of its conclusion the Court referred to two rulings by the Court of Justice of the European Union, Case C–263/08 and, C-240/09.[4]

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24. On 19 September 2019 the Convention Secretariat received the communication from the communicant. To the communication there are five annexes. Sweden would like to clarify that two of the Annexes, Annex 1 ("Section 2 of the Swedish Act on Judicial Review of Certain Government Decisions (2006:304) & Section 13, Chapter 16 of the Environmental Code (1998:88)") and Annex 2 ("The decision of the Swedish Supreme Administrative Court of 21 December 2018, in case 4840-18"), are not official Swedish documents and that the translation of the decision of the Supreme Administrative Court is not a translation of the decision in its entirety. Sweden has therefore asked a certified translator to translate Chapter 16, Section 13, of the Environmental Code, Section 2 of the Swedish Act on Judicial Review of Certain Government Decisions and the Supreme Administrative Court's decision (case 4840-18) in its entirety, see Annexes 2 and 4.)

25. In a letter dated 7 October 2019 the Convention Secretariat informed Sweden about the communication and that the Compliance Committee would consider the preliminary admissibility of the

[4] Judgement 2009-10-15, Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd, C-263/08, EU:C:2009:631, paragraph 43-45 and judgement 2011-03-08, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, C-240/09, EU:C:2011:125, paragraph 44 and 45.

communication at its 65th meeting in Geneva, 4-8 November 2019. Sweden was invited to attend in the open session on the preliminary admissibility of new communications on 4 November 2019.

26. Sweden attended the session via audio link and followed up its oral statements by submitting a written statement on 4 November 2019.

27. In a letter of 15 November 2019 Sweden was informed that the Committee had determined the communication to be admissible on apreliminary basis. The Committee invited Sweden to submit written explanations or statements clarifying the matter referred to in the communication.

The Communication

28. The communicant alleges, in summary, that Sweden fails to comply with the provisions of the Convention on access to justice, article 3, paragraphs 1, 4 and 9 and article 9, paragraphs 2 and 3.

29. According to the communicant, Swedish law – both legislative acts and jurisprudence – fails to provide a clear, transparent and consistent framework to implement the provisions of the Convention and imposes an undue and discriminatory burden on foreign environmental organisations to have access to a review procedure before a court of law to challenge decisions, acts or omissions subject to the provisions of article 6 and acts or omissions contravening national laws relating to the environment.

30. More specifically, the communicant is of the view that the criterion in Chapter 16, Section 13, first paragraph, point 3 of the Environmental Code, in conjunction with Section 2 of the the Act on Judicial Review of Certain Government Decisions, violates articles 9, paragraphs 2 and 3, both in conjunction of article 3, paragraph 9 of the Convention.

31. The communicant is also of the view that the criterion Chapter 16, Section 13, first paragraph, point 4 of the Environmental Code, in conjunction with Section 2 of the the Act on Judicial Review of Certain Government Decisions, violates articles 3, paragraphs 1 and 4 and article 9, paragraph 3 of the Convention, both individually and when read together.

32. Finally the communicant is of the view that the criteria in Chapter 16, Section 13, first paragraph, point 3-4 of the Environmental Code are inconsistent with the principles of the Convention and accordingly that Sweden fails to comply with the requirements of article 9, paragraphs 2 and 3 and the associated articles and article 3, paragraphs 1, 4 and 9.

33. The communicant states that Chapter 16, Section 13 of the Environmental Code establishes four cumulative criteria for standing for both foreign and Swedish legal persons and that the criterion specified in the first paragraph, point 3, discriminates against foreign non-governmental organisations (NGOs) who wish to initiate judicial review of a decision issued by Swedish authorities, but have not carried out activity within Sweden for at least three years. The Communicant further states that the fourth criterion in the same paragraph, referring to the demonstration of public support in "some other way" is overly vague and allows for excessive discretion limiting NGO review of environmental decisions and that this is demonstrated by the Supreme Administrative Court's decision in case 4840-18.

34. In the communicant's understanding the Swedish provisions governing NGO standing in environmental cases are incompatible with the general objective of the Convention to give the public – including environmental organisations – wide access to justice and to ensure that, as stated in recital 18 of the Convention – effective judicial mechanisms are accessible to the public, including organisations, so that law is enforced.

Chapter 16, Section 13, first paragraph, point 3 of the Environmental Code – three years of activity in Sweden

35. According to the communicant Chapter 16, Section 13, first paragraph, point 3 of the Environmental Code requires an organisation to have carried out activities in Sweden for at least three years prior to filing the action. The communicant states that the Supreme Administrative Court did not address this aspect of Section 13 in its decision in case 4840-18 but considered the fourth point of the first paragraph in the section. According to the communicant, that's why the Court did not address the communicant's arguments on point 3. Even if the provision (point 3) does not explicitly impose such a requirement as mentioned in article 3, paragraph 9 of the Convention, i.e. a reference to where an environmental organisation has its registered seat or an effective centre of its activities, it's the communicant's view that the effect of the provision amounts to the same, namely it discriminates against organisations registered abroad which focus on environmental protection in a neighbouring state. The communicant refers to a text in the Aarhus Convention Implementation Guide about the requirements that Parties may set for NGOs under national law which states that any requirements should be consistent with the Convention's principles, such as non-discrimination[5]. The communicant further refers to text in the Implementation Guide that reads "For example, a possible requirement for environmental NGOs to have been active in that country for a certain number of years might not be consistent with the Aarhus Convention, because it may violate the non-discrimination clause of article 3, paragraph 9[6]".

36. The communicant further states that article 9, paragraph 2 of the Convention seeks to ensure that the public that has an interest in a given project has the possibility to bring a court challenge. The communicant continues by stating "As regards individuals, these will be first and foremost, although not only, those persons living in the affected area. Equally then for environmental NGOs, those NGOs that focus on the protection of an affected area should be accorded

[5] The Aarhus Convention: An Implementation Guide, Second edition, page 58.

[6] The Aarhus Convention: An Implementation Guide, Second edition, page 58.

standing". When considering a project such as the current laying of the two pipelines, which affects the Baltic Sea which borders the country of registration and main centre of activities of Client Earth Poland, it is according to the communicant clearly apparent that requirinig an organisation to have had activity in a specific state before that project arose does not respect the objective of article 9, paragraph 2.

Chapter 16, Section 13, first paragraph, point 4 of the Environmental Code – at least 100 members or demonstrate that its activity has public support

37. The criterion i Chapter 16, Section 13, first paragraph, point 4 of the Environmental Code might, according to the communicant, appear compliant with the Convention's principles. However, it's the view of the communicant that the interpretation of the provision by the Supreme Administrative Court in case 4840-18 fails to comply with the Convention.

38. The communicant provided the Supreme Administrative Court with the public petition and the letter from Greenpeace as evidence to demonstrate public support because it was not clear from the legal framework what the exact requirements would be to demonstrate public support. It is the communicant's view that the Court dismissed both pieces of evidence based on criteria that are not evident from the wording of Chapter 16, Section 13 of the Environmental Code, namely that the support for the organisation must be "direct" and that the public support needed to concern the communicant's activities beyond the individual case. This lack of clarity substantiates, according to the communicant, a violation of article 3, paragraph 1 of the Convention, which requires the Parties to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention.

39. According to the communicant, the Supreme Administrative Court's interpretation of Chapter 16, Section 13 of the Environmental Code in its case 4840-18, could not be derived from earlier jurisprudence which, according to the communicant, rather appears to contradict the Court's ruling in case 4840-18. The communicant refers to a

passage in the judgment by the Supreme Court in NJA 2012 p. 921, referred to by the Supreme Administrative Curt in case 4840-18 regarding the criteria in Chapter 16, Section 13, first paragraph, point 4 of the Environmental Code. According to the communicant, this passage appears to suggest that the communicant should have had standing. The communicant further states that in the relevant paragraph of the ruling in case 4840-18, the Court held that the applicant organisation had not fulfilled the criterion in Section 13, first paragraph, point 4 because it had cited to a petition which (a) had no connection to the association and (b) did not express support for the association's case against the petition. The petition submitted by the communicant had (a) been started by the communicant and (b) explicitly referred to the fact that the very purpose of the petition was to demonstrate public support for the communicant's court of action but the communicant was nonetheless denied standing.

40. The communicant states that even though the Swedish Supreme Administrative Court has now provided some interpretation of the criterion in Chapter 16, Section 13, first paragraph, point 4 of the Environmental Code, the applicable requirements are arguably less clear than before. It is, according to the communicant, not clear how an organisation, which does not have members, is supposed to demonstrate generally public support for its activities. It is the communicant's view that a petition must necessarily be linked to a specific issue, it does not appear workable to collect signatures of the public to support all the activities of a given organisation. Even if such a petition was attempted, it will, according to the communicant, be difficult to gain public support without having a clear objective.

41. According to the communicant, neither the decision in case 4840-18 nor any other material provide guidance to the ways in which public support can be demonstrated. The communicant states that it has indeed run a number of campaigns with broad public support on environmental protection issues in Poland, which could have been considered relevant. However, it is the communicant's view that it is not clear what the required threshold of support would be or if providing evidence of such activities could be relevant. According to

the communicant, the letter by Greenpeace Nordic mentioned such activities but it is the communicant's view that the Swedish Supreme Administrative Court did not consider this.

42. It is the communicant's view that in practise, the criteria applied will deter environmental NGOs without members from seeking to rely on their access to justice rights, which is why the criteria violates article 9, paragraphs 2 and 3 of the Convention. Even if there is a possibility to meet the criteria at all, which according to the communicant is not clear, given the inherent financial risk of litigation, an environmental NGO cannot apply to the courts without being able to assess whether they will be accorded standing to bring a challenge. The communicant refers to a statement by Advocate General Sharpston in her Opinion of 2 July 2009 in case C-263/08 of the European Court of Justice about the existance of conditions in national laws that give rise to uncertainty or to discriminatory outcomes.

43. According to the communicant, the imposition of the unclear and deterrent requirement in the fourth criterion also fails to respect article 3, paragraph 4 of the Convention, which requires the Parties to ensure that their national legal systems are consistent with the obligation to give appropriate recognition of organisations prompting environmental protection.

Sweden's response to the communication

Legal framework

The Aarhus Convention

Article 3, paragraph 1

44. According to article 3, paragraph 1, each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in the Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and

consistent framework to implement the provisions of the Convention.

Article 3, paragraph 4

45. Article 3, paragraph 4 states that each Party shall provide for appropriate recognition of and support to associations, organisations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.

Article 3, paragraph 9

46. According to the non-discrimination provision in article 3, paragraph 9 the public shall - within the scope of the relevant provisions of the Convention - have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

Article 9, paragraph 2

47. Article 9, paragraph 2 states that each Party to the Convention shall, within the framework of its national legislation, ensure that members of the public concerned

    (a) having a sufficient interest or, alternatively,

    (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

    have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of the Convention.

48. What constitutes a sufficient interest and impairment of a right according to article 9, paragraph 2, shall, according to the paragraph,

be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b).

Article 9, paragraph 3

49. According to article 9, paragraph 3 each Party shall ensure that it, in addition and without prejudice to the review procedures referred to in article 9, paragraphs 1 and 2, 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.

Article 2, paragraph 5

50. Relevant for this case is also the definition of "the public concerned" in article 2, paragraph 5, which article 9, paragraph 2 refers to. Article 2, paragraph 5 reads: "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

National legislation

Hierarchical order of sources of law in the Swedish legal system

51. Written law, preparatory work, case law (in superior courts), custom and legal scholarship are all sources of law within the Swedish legal system. In contrast to the tradition in the EU and in common law countries, preparatory work is an important source in finding the functional aims of the legislative acts and how they should be

interpreted. Hence the intention of the legislator as stated in the preparatory works is given great emphasis when applying the law.

The Act (2006:304) on Judicial Review of Certain Government Decisions

52. In Sweden, certain permit decisions are made by the Government as the first instance or after an appeal to the Government. Such decisions may, under certain circumstances, be subject to judicial review by the Supreme Administrative Court under the Act on Judicial Review of Certain Government Decisions.

53. A prerequisite for judicial review is, as a main rule according to Section 1 of the Act on Judicial Review of Certain Government Decisions, that the decision involves an examination of the individual's civil rights or obligations as referred to in Article 6.1 in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

54. Section 2 of the Act on Judicial Review of Certain Government Decisions grants environmental organisations referred to in Chapter 16, Section 13 of the Environmental Code, an explicit right to seek judicial review of permit decisions by the Government that are covered by article 9, part 2 of the Aarhus Convention.

The Environmental Code

55. The general right of environmental NGOs to challenge environmental judgments and decisions is found in Chapter 16, Section 13 of the Environmental Code. The right of environmental NGO's to exercise their right to access to justice is also regulated in several special acts.

56. Chapter 16, Section 13 of the Environmental Code has been amended at several occasions in order to give environmental NGOs a more generous access to justice.

57. According to the wording of Chapter 16, Section 13 of the Environmental Code, the provision now grants an environmental organisation the right to challenge environmental decisions mentioned in the provision if the organisation fulfills all four criteria of the provisions, i.e. (1) the main objective of the organisation is to safeguard nature conservation interests or environmental protection interests, (2) it is not run for profit, (3) it has conducted activities in Sweden for at least three years and (4) has at least 100 members or by some other means shows that its activities are supported by the public.

58. The decisions mentioned in Chapter 16, Section 13 of the Environmental Code are appealable judgements and decisions concerning permits, approvals or exemptions issued pursuant to the code, concerning withdrawal of the status of protected areas pursuant to Chapter 7 or supervision pursuant to Chapter 10 or questions relating to provisions adopted pursuant to the code.

Conclusions on the communication

59. Sweden would like to begin by emphasising the importance of access to justice in environmental matters, for both natural and legal persons including environmental organisations. As described in the previous sections, the Swedish legal framework, and the Environmental Code in particular, gives environmental NGOs an extensive access to justice in general.

60. Sweden would like to refer to the preparatory work and the explicit purpose of Chapter 16, Section 13 of the Environmental Code as response to the communicant's statement that the fourth criterion in the first paragraph of said section, referring to the demonstration of public support in "some other way", is overly vague and allows for excessive discretion limiting NGO review of environmental decisions, and that the Supreme Administrative Court dismissed the communicant's submitted pieces of evidence based on criteria that are not evident from the wording of the section.

61. The relevant preparatory work[7] states that a key idea behind environmental organisation's right of legal standing is that they represent the public interest. It further acknowledges that public interests do not, in the same way as private interests, have a natural representative and that the interest of the existence of certain species in nature or of air and water having a certain quality is something that affects everyone. The preparatory work further states that public interests traditionally are cared for by the state, the authorities and the municipalities. It acknowledges that the importance of taking into account the public's engagement in environmental matters is something that has been recognized, for example within the framework of international cooperation, for many years as well as the importance of public engagement being expressed through the environmental organisations. According to the preparatory work, environmental organisation should therefore have a possibility to represent public interests. This should be the general starting point for determining if an organisation has public support.

62. Regarding the membership criterion for being recognised as an environmental organisation with legal standing pursuant to Chapter 16, Section 13, first paragraph, point 4 of the Environmental Code, the preparatory work states that a numerical criterion should not be absolute. Instead there should be a possibility to allow non-profit associations with fewer than 100 members legal standing, if the association can show that it has public support. In order to be considered to have public support, an association should - for example - be able to demonstrate that it is well connected with the local population affected by the activity in question or some similar circumstances. Other circumstances that may indicate strong support from the public, mentioned in the preparatory work, are if the association can show that it has actively participated in the current decision-making process, such as the public consultation procedure, as a representative of the public concerned or that the association has many donors or support members. According to the preparatory work, a membership number of around 100 members gives a good indication that an association has support of the public. A member-

[7] Govt Bill 2009/10:184, p. 64-66.

ship number that does not reach this number should however not disqualify an association from standing. However, since the number requirement reflects the association's local connection, 100 members clearly show that the activity has support from the public. The preparatory work ascertains that it is, as before, the responsibility of the association that wishes to exercise its right of appeal to show that it meets the criterion[8].

63. Sweden confirms that the criteria set out in Chapter 16, Section 13, first paragraph of the Environmental Code are cumulative in that they give an organisation that meets all criteria a right to challenge environmental decisions mentioned in the provision, including a right to seek judicial review pursuant to Section 2 of the Act (2006:304) on Judicial Review of Certain Government Decisions. However, this does not mean that an environmental NGO that does not meet the criteria will be denied this right. The reason being that the criteria are not exhaustive in a way that an environmental NGO that does not fulfil all the criteria is automatically denied legal standing. This is also firmly established case law.

64. The Swedish Supreme Court affirmed in case NJA 2012 p. 921 that an organisation that meet the criteria in Chapter 16, Section 13 of the Environmental Code has a right to appeal, but in cases where an organisation does not meet the criteria an assessment has to be made of all the circumstances in the particular case. According to the judgment the criteria must never be viewed in isolation from their purpose, i.e. to establish whether an organisation is active in such a way that it can be considered to represent the public, specifically in order to monitor nature conservation or environmental protection interests. The criteria must therefore be seen as the basis for the assessment, not as a requirement of independent importance which in itself may preclude a right to appeal. Such a right for organisations to appeal is well in line with the purpose of the EIA Directive[9].

[8]Govt Bill 2009/10:184, p. 76.

[9] Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.

65. In NJA 2012 p. 921, the Court stated that, with regard to environmental organisation's right to appeal, the provisions of the Aarhus Convention mean that the reviewing bodies might have to make nuanced assessments, which only to a limited extent allows fixed and absolute requirements concerning, for example, operating time and membership numbers that can be maintained in all situations. Section 13 must therefore be applied in the light of the purpose of giving the organisations a comprehensive and easily accessible possibility to appeal. This should also apply in cases where the effects on the environment are limited to local conditions. The Court also stated that the fact that environmental NGOs may base their right to appeal on representing public interests, even in situations when no individuals can invoke such interests, indicates that a generous assessment should be made of the right of environmental NGOs to appeal. The court referred to the preparatory works (Govt Bill 1997/98:45 Part 1 p. 486) and the judgment of the Court of Justice of the European Union in case C-115/09[10].

66. Sweden would also like to mention another Swedish precedent, MÖD 2015:17. In this case, the Land and Environmental Court of Appeal gave an ornithological club with 37 members the right to appeal a decision concerning the building of three windmills. The Court found that the decision was covered by article 9, paragraph 3 of the Convention. The Court repeated that the Swedish Supreme Court in NJA 2012 p. 921 had ruled that the application of Chapter 16, Section 13 of the Environmental Code must be generous and applied in the light of the purpose of the Convention's provisions, giving environmental organisations a comprehensive and easily accessible possibility to appeal. The Court noted, among others, that the current organisation had conducted activities for a long time and regularly held meeting with different events connected to its activities and had also participated in consultation procedures concerning environmental matters. The Court found that the organisation therefore met the criteria concerning public support and that it was

[10] Judgement 2011-05-12, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, C-115/09, EU:C:2011:289.

such an organisation as referred to in Chapter 16, Section 13 of the Environmental Code.

67. Sweden agrees with the commuicant that requiring an organisation to have had activity in a specific state before a challenged project arose does not respect the objective of article 9, paragraph 2. Sweden would like to clarify that there is no such requirements in the Swedish legal system.

68. Regarding the decision by the Supreme Administrative Court, Sweden would like to reiterate what has already been underlined in the written statement of 4 November 2019, namely that the criteria in Chapter 16, Section 13, first paragraph, point 3 of the Environmental Code about three years of activities in Sweden was not addressed by the Supreme Administrative Court and hence not used as ground to reject the communications application for judicial review.

69. According to the wording of its decision, the Court rejected the communicant's application for judicial review because the communicant had not, in the view of the Court, demonstrated that its activity has public support and the communicant could thus not be considered to represent the public interest. According to the Court, the Communicant's had not provided enough support to demonstrate that its activities have public support within the meaning of Chapter 16, Section 13, first paragraph, point 4 of the Environmental Code.

70. The ruling of the Supreme Administrative Court in case 4840-18 does not affect the firmly established case law according to which the reviewing body must, in cases where an organisation does not meet the criteria, make an assessment of all the circumstances in the case, with the purpose of providing an extensive and easily accessible access to justice in accordance with the Convention. Swedish courts thus interpret the criteria in conformity with the Convention.

71. Finally, regarding the communicant's statement about the inherent financial risk of litigation and that an environmental NGO cannot apply to the courts without being able to assess whether they will be accorded standing to bring a challenge, Sweden would like to highlight that no fees are charged for appeals to Swedish courts or for applications regarding judicial reviews. Nor is any legal representation required to obtain access to justice. A person or organisation that appeals a decision or applies for judicial review is not responsible for their opposite party's trial costs either.

72. When public authorities and courts in Sweden deal with cases and matters, the 'ex officio' principle is applicable. This principle means both that the examining authorities have an obligation to ensure that a satisfactory investigation is made of each individual matter and that the public authorities are not bound by the facts presented by the parties. The application of this obligation to conduct an investigation must be considered to be something that contributes to reducing the public's need for the assistance of legal expertise, which then leads to lower litigation costs for the public.

Summary

73. Chapter 16, Section 13 of the Environmental Code, and its interpretation by case law, has been adjusted to comply with the Convention and EU legislation. According both to the wording of the provision and firmly established case law, the standing criteria are not exhaustive. If an organisation does not meet the criteria, an assessment must be made of all the circumstances in the case, with the purpose of providing an extensive and easily accessible right of appeal in accordance with the Convention. Swedish courts thus interpret the criteria in conformity with the Convention with the aim of giving environmental organisations a generous access to justice.

74. Sweden is of the view that the Swedish provisions on access to justice are compliant with the Convention and that the Swedish legal system gives environmental NGOs a wide access to justice and

ensures that, as stated in recital 18 of the Convention, effective judicial mechanisms are accessible to the public, including organisations, so that law is enforced.

Sweden hopes that the information in this letter provides useful clarification to the Compliance Committee. However, should the Committee require any further information, please do not hesitate to contact us.

On behalf of the Swedish Government,

Susanne Gerland

Acting Director-General of Legal Affairs

Annexes

1. The Swedish Supreme Administrative Court's decision (case 4840-18), original language (Swedish)
2. The Swedish Supreme Administrative Court's decision (case 4840-18), English translation
3. Relevant national legislation, original language (Swedish)
4. Relevant national legislation, English translation