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**Response to the Aarhus Convention Compliance Committee in the case ACCC/C2006/18**

In a letter dated 2 April 2007, the secretariat of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) invited Denmark to submit written statements etc. to the complaint (communication) from Søren Wium Andersen received by the secretariat on 26 December 2006. In the same letter from the secretariat, Denmark was also requested to contribute further information on five matters.

Furthermore, Denmark received a copy of a later dated 11 April 2007 containing further statements from Søren Wium Andersen.

It is Denmark's understanding of Søren Wium Andersen's communication to the Compliance Committee that he believes Danish regulations in the Danish Hunting and Wildlife Management Act<sup>1</sup> and in the Statutory Order on Wildlife Damage<sup>2</sup> issued pursuant to this Act constitute an incorrect implementation of the Birds Directive<sup>3</sup>. Søren Wium Andersen has complained to the Compliance Committee that he does not have access to challenge this lack of consistency between the Danish regulations and the Directive under Danish law. As far as Denmark can see, the topic of the complaint concerns only this access to challenge the alleged non-compliance between Danish regulations and the Birds Directive.

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<sup>1</sup> Danish Hunting and Wildlife Management Act (*Lov om jagt og vildtforvaltning*), cf. Consolidated Act no. 114 of 28 January 1997 (*lovbekendtgørelse nr. 114 af 28. januar 1997*) as superseded by Consolidated Act no. 747 of 21 June 2007 (*lbk nr. 747 af 21. juni 2007*) which contains an un-amended Part 6 on wildlife damage

<sup>2</sup> Statutory Order no. 869 of 10 October 2003 on Wildlife Damage (*Bekendtgørelse nr. 869 af 10. oktober 2003 om vildtskader*)

<sup>3</sup> Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds

It is therefore Denmark's understanding that Søren Wium Andersen claims that Denmark is not complying with Article 9(3) of the Aarhus Convention.

Article 9(3) of the Aarhus Convention has the following wording: "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 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".

Thus, Article 9(3) only envisages access for members of the public to administrative or judicial procedures. Contrary to this, Article 9(1) and (2) mention access to a review procedure before a court of law or another independent and impartial body established by law.

Under Danish law, members of the public who meet the criteria for legal interest under Danish law in a case such as the present case can bring the matter of non-compliance between the Danish regulations and the Directive before the Danish courts. Denmark finds the question of legal interest to be of particular relevance in this case.

Pursuant to Danish law, Søren Wium Andersen can, should he have the required legal interest, bring an action before the Danish courts claiming the invalidity of the legislation in question because it contravenes the Birds Directive. Furthermore, it should be noted that Søren Wium Andersen can bring a case with the above content before the European Commission, which, apparently, he has not done.

To meet the requirement for legal interest under Danish law, a person wishing to bring an action before the courts must be able to demonstrate substantial, individual interest in the outcome of the legal proceedings. In practice, this means that neighbours and other parties involved could be considered to have the required interest.

Nothing of certainty can be said about Søren Wium Andersen's capacity to sue (legal interest), since he has chosen not to bring a case before the courts claiming the invalidity of the relevant legislation.

In a ruling of 28 June 2006, the Public Prosecutor for Zealand ruled that Søren Wium Andersen could not be considered to have *locus standi* (legal interest) with regard to the decision that was made by the local police on 1 June 2006. It must be considered very likely that were Søren Wium Andersen to bring a possible legal action before a Danish court, he would also in this event not be considered as having the required capacity to sue (legal interest) in a case claiming the invalidity of the relevant legislation.

However, the crucial fact is that Article 9(3) of the Convention explicitly respects any national rules regarding legal interest. As mentioned above, anyone who wishes to bring an action before the courts under Danish law

must be able to demonstrate a substantial, individual interest in the results of the legal proceedings. According to case law, not only the immediate parties in the case, but also neighbours and other parties involved, could be considered to have the required interest. In certain circumstances, nature and environmental organisations are also considered to have the required interest.

It is on this basis that Denmark believes it fully meets the requirements to the Parties of the Aarhus Convention contained within this provision (Article 9(3)).

Furthermore, it should be noted that Denmark does not find that Søren Wium Andersen's communication to the Committee concerns his access to challenge disregard of the Danish regulations, including disregard of the regulations by the public authorities. Neither does Søren Wium Andersen in his communication to the Compliance Committee state a wish to challenge supervision of compliance with the Danish regulations. Since the secretariat, nonetheless, has requested information about the possibilities to challenge the supervision of compliance with Danish regulations and the possibilities to challenge acts and omissions by the authorities which contravene Danish regulations, these questions will be answered in the following.

It should also be noted that in his communication to the Compliance Committee dated 20 September 2006 Søren Wium Andersen referred to a case which concerned compliance with Article 9(3) by Kazakhstan. Referral to the Compliance Committee in this case was approved at a meeting on 16 June 2006 (ECE/MP.PP/C.1/2006/4/Add.1). More specifically, Søren Wium Andersen referred to Article 30(a) of this Addendum which states that the Convention applies in matters concerning the public's access to challenge the failure of enforcement by the authorities. However, this case dealt with members of the public complaining that a court of law did not take a position on a claim alleging that the public authorities were not making adequate efforts to enforce national environmental law. As already stated above, this is not the topic of the complaint (communication) submitted by Søren Wium Andersen to the Compliance Committee.

Below is Denmark's response to items 1-5 of the secretariat's letter of 2 April 2007:

*Re 1) Please comment on the description of the Communicant of the (lack of) right to request a criminal investigation in cases concerning the protection of wild birds.*

In an email dated 3 December 2006 to the secretariat of the Compliance Committee, Søren Wium Andersen stated that the non-compliance of the Danish hunting regulations with the EU Directive was reported to the local police. Søren Wium Andersen also stated that the local police decided not to instigate investigations and that the Public Prosecutor subsequently

dismissed an appeal against this decision on the grounds that Søren Wium Andersen cannot be considered to have *locus standi* (legal interest) pursuant to the regulations stipulated in the Administration of Justice Act on appeal against decisions by the prosecution authority.

As a response to this, firstly it should be noted that in his report to the police dated 22 May 2006, Søren Wium Andersen did not argue that the hunting regulations contravened the Directive. In his report to the police, Søren Wium Andersen solely claimed that the regulations of the Statutory Order did not comply with the Hunting and Wildlife Management Act, and that he therefore found the culling of rooks in Hillerød to be in contravention of the Hunting and Wildlife Management Act. Not until in his appeal against the decision by Hillerød Police Department did Søren Wium Andersen make the further claim that the Statutory Order on Wildlife Damage is unlikely to be in compliance with the Birds Directive.

Secondly, it should be noted that pursuant to the Danish Administration of Justice Act the police shall dismiss a submitted report if there is no basis for initiating investigations<sup>4</sup>. Decisions may be appealed to the Public Prosecutor<sup>5</sup>. Persons who believe they have been subject to a criminal offence and others with a special interest in the result of the legal proceedings may appeal.

This arrangement is assessed to be in accordance with Article 9(3) of the Convention which ensures that members of the public, meeting any criteria laid down in national law, have access to administrative or judicial procedures.

*Re 2) Are there any means available for members of the public to challenge acts and omissions by public authorities which contravene the law related to the protection of wild birds as set out in the Danish legislation and in the 1979 EC Directive 79/409 on the conservation of wild birds? If so, please describe these routes and procedures. Also describe who may initiate such action against the public administration.*

As Denmark understands the secretariat's question about Danish regulations, it concerns only those regulations to which the communicant has referred. This reply therefore only relates to the Statutory Order on Wildlife Damage and the Hunting and Wildlife Management Act, notwithstanding the fact that provisions implementing the Birds Directive exist in several other Danish national regulations.

The reply incorporates Statutory Order no. 869 of 10 October 2003 on Wildlife Damage, which was in force at the time when the culling of rooks took place in Hillerød Municipality. This Statutory Order was subsequently

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<sup>4</sup> Section 749 of Consolidation Act no. 1001 of 5 October 2006 (*LBK nr.1001 af 05/10/2006*, § 749)

<sup>5</sup> Section 749(3) of Consolidation Act no. 1001 of 5 October 2006, cf. section 101(2) (*LBK nr.1001 af 05/10/2006*, § 749, stk 3, jf. § 101, stk. 2)

superseded by Statutory Order no. 868 of 4 July 2007, which entered into force on 1 August 2007. Similar to the Statutory Order now repealed, the new Statutory Order contains provisions implementing part of the Council's Directive on the conservation of birds.

Section 8 of the Statutory Order in force at the time, stipulated that rook chicks in rook colonies could be culled outside their nest in the period from 1 May to 15 June, providing that one of conditions in section 2(1), nos. 1-4 was met. It followed from section 2(2) that usually it will be the owner or the user of the land who decides whether any wildlife culling should take place on the land. This was an immediate right, which did not require an authority's authorisation. The Statutory Order did not provide for any right to appeal against any type of decision made by the Danish Forest and Nature Agency in pursuance of the Statutory Order.

In a letter dated 11 April 2007, Søren Wium Andersen argued that culling of adult rooks in urban areas requires authorisation. Authorisation from the local State Forest District to cull by shooting a specific number of adult rooks could be given pursuant to section 13 of the Statutory Order in force at the time. This arrangement, which is not relevant to the specific culling of rooks in Hillerød Municipality, is described in one of the replies to the Danish Parliament which Søren Wium Andersen referred to in his letter dated 11 April 2007. Both Parliament replies are enclosed here.

As mentioned above, according to the Statutory Order in force at the time, no decision by an authority was required in the specific case regarding culling of rook chicks. Consequently, this reply needs only clarify the possibility to challenge the authorities' compliance control. This matter will be dealt with below under Question 3) on enforcement.

To the extent that the issue of a statutory order and the adoption of an act with a specific content could be considered acts or omissions by public authorities under Article 9(3) of the Convention, a description has been included below, outlining the possibilities available for members of the public to claim that the national regulations contained in the Statutory Order on Wildlife Damage and the Hunting and Wildlife Management Act contravene with the 'underlying' Birds Directive.

From an overall perspective, it should be noted that - as also stated by the secretariat of the Compliance Committee in an email to Søren Wium Andersen on 11 December 2006 - only the European Commission has the power to supervise EU Member States' compliance with EU legislation. This power, which the Compliance Committee, on the contrary, does not have under the Aarhus Convention, also means that the Commission can process complaints from members of the public about the failure of Member States to live up to Community Law.

Any member of the public in a Member State who believes a Member State is not complying with EU legislation can therefore approach the Commission

with his or her complaint - as also stated by the secretariat in the email of 11 December 2006 mentioned above.

Another option for members of the public is to bring an action before the Danish courts alleging the invalidity of the legislation in question as it contravenes the Birds Directive. According to section 255 of the Danish Administration of Justice Act, the claimant must have the required legal interest in order to do this. The provision in question is enclosed with this response.

Normally, the Ombudsman has no powers to act in complaints that an act or a legislative provision adopted by the Danish Parliament contravenes EU regulations or other international law. The Ombudsman can, however, in pursuance of section 12 of the Danish Ombudsman Act<sup>6</sup>, bring deficiencies in current acts to the attention of Parliament. This provision is however understood to deal exclusively with matters relating to the technical, administrative or due-process aspects of law, e.g. unclear, conflicting, inconsistent or otherwise inadequate provisions. Anybody can submit a complaint to the Ombudsman.

*Re 3) More specifically, are there any means available for members of the public, inter alia under civil or administrative law, to challenge the enforcement by local, regional or central authorities of the law related to the Danish legislation and in the 1979 EC Directive 79/409 on the conservation of wild birds? If so, who may challenge the act, and under which conditions?*

As stated in the reply to question 2), according to section 8 of the Statutory Order on Wildlife Damage, the landowner had an immediate right to cull rook chicks in the period 1 May to 15 June, providing certain conditions were met.

Section 47(1) of the Hunting and Wildlife Management Act stipulated that the Minister for the Environment and Energy shall monitor compliance with the Act and the regulations laid down pursuant to the Act (section 47(1) has not been amended in the current Act). Subsection (3) of the same provision stipulates that the Minister for the Environment and Energy shall take action to ensure an illegal activity is rectified, unless the activity is insignificant.

Similar to the Statutory Order on Delegation in force at the time, section 21(1), nos. 10 and 12, of the new Statutory Order on Delegation<sup>7</sup> contains a provision stipulating that these responsibilities/powers shall be executed by the Forest and Nature Agency.

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<sup>6</sup> Act no. 473 of 12 June 1996 on the Parliament Ombudsman (*Lov nr. 473 af 12. juni 1996 om Folketingets Ombudsmand*)

<sup>7</sup> Statutory Order no. 48 of 18 January 2007 on the delegation of responsibilities and powers to the Forest and Nature Agency and the Ministry of the Environment's Environment Centres (*Bekendtgørelse no. 48 af 18. januar 2007 om henlæggelse af opgaver og beføjelser til Skov- og Naturstyrelsen og Miljøministeriets miljøcentre*)

Thus, state supervision of compliance with the Act has been implemented and is executed by the Forest and Nature Agency. Should any members of the public approach the supervisory authorities with a claim of non-compliance with the Act and the regulations issued pursuant to the Act, the authorities are obliged to hear the supervision case, and this means the requirement for administrative procedures in Article 9(3) is met.

In the present case, Søren Wium Andersen has not approached the state supervisory authority with a claim alleging non-compliance with the Act and the regulations issued pursuant to the Act.

Members of the public cannot - and could not previously - appeal supervision decisions to the Minister, cf. section 36 of the Statutory Order on Delegation.

Members of the public can approach the police and report any violations of Danish environmental legislation by state supervisory authorities. As stated in the reply to question 1), the police will dismiss a submitted report, if there are no grounds for instigating investigations<sup>8</sup>.

Furthermore, Members of the public can submit a complaint about the authorities' enforcement or lack of enforcement to the Ombudsman of the Danish Parliament. As stated above, any person can submit a complaint to the Ombudsman.

Finally, members of the public can bring an action before the courts claiming that the Forest and Nature Agency has omitted to carry out the supervision of compliance with the Act as the Authority is obliged to do under law. As stated above, the claimant must be able to demonstrate the required legal interest.

It should be noted that none of Søren Wium Andersen's approaches in this case, including to the Compliance Committee, can be interpreted as a complaint about the supervision of compliance with the legislation.

*Re 4) Are there any means available for members of the public, inter alia under civil or administrative law, to challenge acts and omissions by private persons or municipalities, when acting in their capacity as landowners, which contravene the law related to the protection of wild birds as set out in the Danish legislation and the Directive 79/409 on the conservation of wild birds? If so, please describe these routes and procedures. Also describe who may initiate such action against the public administration.*

In these situations, members of the public can approach the police and submit a report on violation of Danish environmental legislation. The police will dismiss a submitted report, if there are no grounds to instigate investigations. Members of the public can also approach the state

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<sup>8</sup> Section 749 of Consolidated Act no. 1001 of 5 October 2006 (LBK nr. 1001 af 05/10/2006, § 749)

supervisory authority claiming non-compliance with Danish environmental legislation.

In order to bring an action before the courts against private individuals or against the municipality acting as landowner, claiming a breach of the bird conservation regulations, the member of the public bringing the action must have sufficient legal interest. When deciding whether private individuals have *locus standi* (legal interest) to bring actions concerning the enforcement of public-law provisions, the courts seem to be guided by an assessment of whether the provision can be assumed to have aimed exclusively at safeguarding the general public interest. If the considerations presumed to underlie the statutory provision are of a nature significantly different from the private individual's interest in compliance with the provision, he or she will often not be considered to have *locus standi* (legal interest).

*Re 5) The letter of 25 July 2006 from the Nature Protection Appeal Board to the communicant indicates that the Appeal Board has forwarded his letter of 11. July 2006 to the National Forest and Nature Agency for possible further action. Did the Agency take any action following the receipt of that letter?*

Subsequent to the Nature Protection Appeal Board forwarding the letter dated 11 July 2006 to the Forest and Nature Agency, Søren Wium Andersen himself contacted the Agency. Thus, he has been in regular contact with the Forest and Nature Agency throughout the autumn of 2006 and beginning of 2007, both via email and telephone, amongst other things regarding his communication to the Compliance Committee. His enquiry and his views on the subject propounded at a later time have been included in the Forest and Nature Agency's review of the amendment of the Statutory Order on Wildlife Damage, which entered into force on 1 August 2007. The amended Statutory Order on Wildlife Damage accommodates several of Søren Wium Andersen's views on culling rooks.

  
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