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Response to the Aarhus Compliance Committee in the case ACCC/C/2019/162 against Denmark

On 22 February 2019, the Secretariat of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) informed Denmark about a communication from Mr. John Damm Sørensen (complainant) dated 14 March 2017 addressed to the Compliance Committee of the Aarhus Convention.

The communication alleges non-compliance by Denmark with Article 9 of the Aarhus Convention in connection with its alleged failure to grant the complainant standing before the Danish Nature and Environment Board of Appeal, now the Danish Environment and Food Board of Appeal.

At its 63rd meeting on 15 March 2019, the Compliance Committee determined, on a preliminary basis that the communication was to be admissible in accordance with paragraph 20 of the annex to decision I/7 of 2 April 2004 (ECE/MP.PP/2/Add.8).

The Secretariat of the Convention requested that Denmark submits comments on the communication by 22 August 2019.

By e-mail of 8 April 2019 to the Compliance Committee of the Aarhus Convention the complainant made further allegations against Denmark not complying with the Aarhus Convention.

By e-mail of 9 April 2019 the Secretariat of the Convention informed the complainant that the Committee will only consider allegations within the scope of his communication of 14 March 2017.

In the following Denmark presents comments on the allegations of the complainant within the scope of his communication of 14 March 2017.

Comments from Denmark

Denmark believes that the allegations are unfounded and that Denmark has not violated any of its obligations under the Aarhus Convention. The reasons for this are as follows:

1. It is Denmark's understanding from the communication submitted by the complainant that he believes that Denmark does not comply with the Aarhus Conventions art. 9 (2) because he has not been granted standing before the Danish Nature and Environment Board of Appeal, now the Danish Environment and Food Board of Appeal.

The Board found that the complainant did not meet the requirement of having sufficient legal interest concerning the decision by the municipality of Gladsaxe endorsing the environmental

impact assessment regarding the expansion of Bagsværd Rowing Stadium.

The Danish Ombudsman did not oppose to the findings of the Danish Environment and Food Board of Appeal by not granting the complainant standing because of his lack of sufficient legal interest.

2. As stated in the Aarhus Conventions art. 9 (2) each Party shall, within the framework of its national legislation ensure that members of the public concerned having sufficient interest have access to review procedure before court of law and/or another independent and impartial body established by law. What constitutes a sufficient legal interest shall be determined in accordance with the requirements of national law and consistently with the objective of giving public concerned wide access to justice within the scope of the convention. The “public concerned” is defined in art. 2 (5) of the convention in the following way: “public affected of likely to be affected by, or having an interest in, the environmental decision-making.”

3. In defining standing under article 9 (2) the Convention allows a Party to determine within the framework of its national legislation, whether members of the public have “sufficient interest”, where the administrative procedural law requires this as a precondition. While for NGOs the Convention provides some further guidance on how the “sufficient interest” should be interpreted, for persons, such as “individuals”, the Convention requires that “sufficient interest” be determined “in accordance with the requirements of national law”.

Parties, thus, retain some discretion in defining the scope of the public entitled to standing in these cases; but the Convention further sets the limitation that this determination must be consistent “with the objective of giving the public concerned wide access to justice within the scope of the Convention”. This means that the Parties in exercising their discretion may not interpret these criteria in a way that significantly narrows down standing and runs counter to its general obligations under articles 1, 3 and 9 of the Convention. This is also clearly stated in The Aarhus Convention Implementation Guide on page 194-195.

4. Under Danish law it is possible to try a decision concerning Environmental Impact Assessment before the independent and impartial Environment and Food Board of Appeal and/or before the national court.
5. It is stated in the Danish Environmental Assessment Act paragraph 50 (1) that anyone who has sufficient legal interest in the outcome of the case, national environmental NGO's and organisations representing special area users interests, and have at least 100 members, fulfil the criteria of standing before the Environment and Food Board of Appeal.

The Danish Government has stated in the explanatory statements accompanying¹ the Environmental Assessment Act that the Danish rules on sufficient legal interest will be assessed in light of the objective of giving the public concerned wide access to justice within the scope of the Convention.

According to case law by the Danish Environment and Food Board of Appeal, the Board interprets the criteria of ‘sufficient legal interest in the outcome of the case’ with the objective

¹ [2015/1 LSF 147](#) , see chapter 9, page no. 88 and special comments to § 50, 4th paragraph, page no. 140. Please let us know, if you need a translation. The document is enclosed in appendix 1.

of giving public concerned wide access to justice.

The Board has stated that a sufficient legal interest in the outcome of the case lies presumably with individuals, legal entities and/or organisations, which have an affiliation with the area, where the project wishes to be established. When evaluating whether the interest is sufficient, the Board takes into account, the current/topical interest and the essentiality of the disturbance, the project might inflict on the complainant. The Board attaches importance to the distance between the project area and the complainant's property as compared to the disturbances the project will inflict. There is no definite requirement regarding the distance. This is a specific assessment of the circumstances the Board makes individually in each case. More insignificant nuisance or disturbance, taking into account the character of the area concerned, would most likely not be sufficient enough.

If an individual only has an idealistic interest in the nature and environment, this would not be considered sufficient legal interest. Environmental NGO's and organisations representing special users interests connected to the area, with at least 100 members, are on the other hand by law deemed to have sufficient interest to bring a complaint before the Board. When it comes to environmental NGO's it's not necessary to have a legal interest.

6. In the complainant's case, the Board took into account that the property of Mr. John Damm Sørensen lays 1,2 km as the crow flies to the most southern tip of the Bagsværd lake, and 1,7 km as the crow flies from the nearest rowing area. In between the project area and the complainant's property is a housing area. Based on these facts the Board assessed that the complainant would not be affected in such a way that would be of sufficient legal interest in the outcome of the case.

The Danish Ombudsman did not oppose to this decision.

7. As far as access to proceedings before the national Danish court concerns, members of the public, whether physical or legal persons must be able to demonstrate a concrete, significant and individual interest in the case.

In practice this means that neighbours and other parties significantly affected by the outcome of the case could be considered to have the required legal interest. Danish court case law shows that environmental NGO's and organisations representing special users interests connected to the concerned environment have been granted access to the court. As examples referral can be made to case U.1994.780/2 Ø granting Greenpeace standing in a case against the Ministry of Traffic, U.2001.1594V granting a Danish sport fishing association standing, and the city court case of 6 March 2015, granting standing to an 'association of residents around the Marble Church' which is referred to in the compliance case ACCC/C/2013/94 Denmark.

8. The legal standing criteria before the national court is as such not wider than the standing criteria before the Danish Environment and Food Board of Appeal.

If the complainant had chosen to bring the case before the national court within the 6 month time limit, it must be considered very likely that the court would come to the same conclusion as the Danish Environment and Food Board of Appeal and the Danish Ombudsman.

9. In conclusion Denmark believes that the complaint in case ACCC/C/2019/162 is unfounded. There has been no violation of the rights of the complainant to legal standing in accordance to the Aarhus Conventions art. 9 (2).

Please don't hesitate to contact us, if the Committee needs further clarification on any points to assist the Committee in its deliberations.

Yours sincerely



Paolo Perotti
Head of Department
Legal

Enclosed:

Appendix 1: Explanatory statements accompanying the Environmental Assessment Act, 3 March 2016