TO:
Ms Fiona Marshall
Secretary of the Aarhus Convention Compliance Committee

Communication to the AARHUS Convention Compliance Committee
ACCC/C/2013/98 (Lithuania)

October 20, 2020

COMMENTS ON THE DRAFT FINDINGS BY THE COMPLIANCE COMMITTEE DATED AUGUST 25, 2020

In response to the communication of the Aarhus Convention secretariat dated September 1, 2020, the Association "Rudamina Community" (the Communicant) has reviewed the draft findings of the communication ACCC/C/2013/98. In general, the Communicant is satisfied with the findings. However, we would like to ask the Committee to take into account the following comments presented below.

Comments regarding Article 6(3) – Time frames in the legal framework (paragraphs 50, 51, 100, 101, 102, 103 of the Draft Findings)

The Communicant is absolutely convinced that one of the main concerns with respect to compliance to the Aarhus Convention is the time frame provided for public participation. They shall be sufficient for the public to adhere to and get acquaint with the content of the documentation properly. However, the actual time frame needed for this purpose depends on the specificity of the content and volume of such a documentation. It shall be also taking into account such aspects as: the novelty of the subject, cultural and educational context of the community concerned, the physical access to the relevant materials and copies of the documentation, extend of information to be reviewed in order to properly comprehend the documents (especially the technical ones), and to understand the essence and consequences, etc.

The time frame definition thereby shall be properly set forth, without implying 10 days requirement only formally. The Communicants position regarding 10 working days as an insufficient time frame was presented in the Communicant's communication to the Committee gated May 5, 2015.

Regarding paragraphs 102 and 103 of the present Draft Findings, wherein the Committee finds that from 25-29 June 2010 till 13-19 July, 2010 there were 10-16 working days. The Communicant would like to note that during that period in the year 2010 there were 12-13 working days due to the fact that the 6th of July in Lithuania is a Public Holiday (the Statehood Day). The regional context (summer season in Lithuania) was that the people mostly would be travelling, on vacation, planned of course without knowing the need of being available for participation may take place one of the sudden.

As the Communicant already pointed out during the Committee hearing in Geneva, 10 or 15 or 20 working days are not a sufficient time frames for efficient public participation in the context of this kind of projects. Finally, the Communicant would like to remind the

Committee that during the proceeding of our complaint, the Party Concerned on at least a couple of occasions asked the Committee to extended the time frames (normally several weeks) provided for responding to or commenting on the materials. And these were by nature essentially the same materials that the Communicant had to analyze and comment on within 12 or 13 days.

Comments of Article 6(6) - regarding the information provided to the public during the EIA procedure (paragraphs 120, 123)

The Communicant would like to remind the Compliance Committee about the complaint lodged in parallel under the Bern Convention (The Council of Europe), No. 2013/5. This complaint was based on observations and findings made by the Communicant and its entrusted experts, which, when taken together, suggested the Party Concerned was not clear and specific about the severe impacts of the overhead power line (OHL) project on the biodiversity. The approved EIA report that justified the preferred route of the OHL did not specify the anticipated scale of losses neither for the endangered species, nor any other flora and fauna. As an outcome of the complaint No. 2013/5, the Standing Committee of the Bern Convention reinforced a mediation procedure, which led to Recommendation No. 175 (2015)[1]. At the time of the adoption of this Recommendation, the OHL was already under construction and a new project, a gas inter-connector Poland-Lithuania (GIPL) was under planning. The location of the latter project was selected by the authorities of Poland and Lithuania in a way that the infrastructure corridor created by the OHL could be maximally utilized (including the same crossing point of the state border) and further expanded.

In the opinion of the Communicant, the fact that the respective bodies of the Bern Convention considered the case No. 2013/5 as a possible case, proposed mediation and issued a recommendation calling for additional mitigation and monitoring measures proves the failure of the developer(s) and the Party concerned to properly inform the public about all the environmental risks of the OHL project at the earliest phase of planning the proposed economic activity. Thus, whereas the Communicant agrees that the Aarhus Convention Compliance Committee indeed "is not in a position to analyze the accuracy of the data which form the basis for the decision in question" (paragraph 122), it would welcome additional clarifications on the criteria for discriminating between the "quality of information" and timely and clear disclosure of the essential impacts, including the serious risks for certain species and even the need for controversial measures in such an environmentally sensitive area (explicitly mentioned in the Recommendation No. 175 as "biodiversity offsetting"). Once again, the Complainant stresses that no concrete and measurable estimates were made for he protected species, although certain negative impacts were admitted in the EIA report.

Thus, the Communicant remains of opinion that by approving an EIA report that underestimated the important risks of the OHL project in the context of the provisions and guidelines of the Bern Convention on Conservation of the European Wildlife and Natural Habitats the Party Concerned failed to comply with Article 6(6) regarding the information provided to the public during the EIA procedure.

Comments regarding Article 9(4) – Third party costs (paragraphs 142-143)

The Compliance Committee already pointed in para. 142 that the Communicant was exempted from paying a filling fee because its case at the national courts was brought in the

[1] Available at the database of the Bern Convention/Council of Europe, https://rm.coe.int/168074664e

public interest to challenge the public authority decision, and that Litpol Link intervened of its own accord. The national courts awarded 2 766,98 Eur costs in favor of Litpol Link, an involvement over which the Communicant had no control.

The Communicant challenged at the national courts of the Party concerned (in administrative case No. I-757-422/2012 before the Kaunas District Administrative Court and at the appellate level in administrative case No A-602-186/2013 before the Supreme Administrative Court of Lithuania) that the request to award the legal cots in favor of the Third party (LitPol Link) 2766,98 Eu from the Communicant lacks legal and factual justification.

The Committee pointed out that it has no information before it as to the legal and factual basis on which the intervener's costs were awarded, nor how the sum was calculated. Therefore, the Committee came to the conclusion that non-compliance with Art. 9(4) by the Party concerned was not sufficiently substantiated (para. 143).

Taking into account that the Committee so far has not addressed the issue of insufficient information regarding Third party costs in the context of Art. 9 (4), the Communicant therefore presents more information about the legal and factual basis on which the Party concerned courts awarded such costs:

The Lithuanian law provides for legal basis for awarding legal costs to a third party in an administrative case. Such a rule is provided by the Law of Administrative Proceedings of the Republic of Lithuania. Section 5 of Art. 44 of that Law states: *"5. When the third persons obtain a relief or remedy following the hearing of the case, the said parties shall have the rights specified in paragraph 2 of this Article to recover the costs"*.

The Communicant would like to provide a link to the webpage of legal enactments https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.162936?jfwid=q8i88ludr

Paragraph 2 of Article 44 of the Law on Administrative Proceedings specifies types of expenses that the court can award to a litigant as its litigation costs (see the same attached translation or a link to the translation of Article 44) .

The third party LitPoiLink at the mentioned administrative cases submitted documents about its costs and expenses to the Kaunas District Administrative Court (17 980, 27 LTL or 5207, 45 EUR in case No I-757-422/2012) and to the Supreme Administrative Court of Lithuania (3871,12 LTL or 1 121,54 EUR in appellate case No. A-602-186/2013). The applications for awarding the costs were supported by documentation of the expenses, including the rent of a car to travel from Warsaw to Vilnius, fuel costs, day allowance of the CEO of the Litpol Link and legal fees of two Lithuanian attorneys hired to represent the interests of Litpol Link at the court hearings.

The Kaunas District Administrative Court (administrative case No. I-757-422/2012) by its Decision dated 18th of September 2013 awarded in favor of the third party 7 983,60 LTL or 2 312, 21 EUR from the Communicant

The Supreme Administrative Court of Lithuania (in administrative case No. A-602-186/2013 by its Decision dated 28th of August 2013) awarded in favor of Litpol Link 1570, 26 LTL or 454,77 Eur from the communicant.

The Communicant still upholds that the awarding of costs to a third party is violation of Article 9(4) of the Convention due to the following reasons:

1. Litpol Link was not involved to participate in the administrative case by the Communicant (the applicant in the administrative procedures before the national courts). The Litpo Link intervened at its own accord;

2. The courts did not oblige the CEO of the Litpol Link, nor the Litpol Link representatives to be present at the court hearings, nor to submit to the court any procedural documents (i.e. replies to the claim or appeal, etc.);

3. Litpol Link did not seek for any injunction, relief or legal remedy nor it was granted by the courts any relief or legal remedy;

4. A third party under the Law on Administrative Proceedings is not obligated to submit written procedural documents, such as reply to claim/application or to the appeal;

5. In the administrative case the Communicant challenged environmental decisions and actions of the authorities in proceedings of EIA and did not challenge any decision of the authorities to enter into contractual relations with LitpoLink.

The Communicant also would like to point out that the national administrative courts of the Party concerned did not motivate properly in their Decisions on the award of legal costs why the courts decided to award the costs to the intervening party, which did not seek any relief nor legal remedy. The National courts limited their motivation to one sentence, į.e, *„the court has no doubts that the judgment of the court to reject the claim have defended the rights of the third party, therefore, that third party is entitled to claim compensation of its costs".*[2]

The Communicant is of opinion that the award of the legal costs from the community concerned in favor of a commercial entity, which intervened the proceedings at its own accord and did not seek any injunction, relief nor legal remedy, is contrary to Article 9(4) of the Convention.

Therefore, the Communicant would like to ask the Committee to reconsider the Draft findings in para. 142 and 143 regarding Third-party costs in the context of the Article 9(4).

Comments regarding Article 3(8) – intervention by intelligence institutions (paragraphs 144 to 152 of the Draft Findings)

The Communicant would like to draw the attention on the status of its allegations named in the paragraph 146 of the draft findings as "the 2014 events", in the context of Aarhus Convention and the valid national legislation.

1. The Communicant made public the suspicious activity of the intelligence institutions (possible surveillance and interviewing of the Communicant and the public concerned: a landlord and an environmental expert entrusted by the Communicant) by describing these potentially illegal actions in its communications addressed to the Bureau of Bern Convention[3] (dated September 3, 2014) and to the Aarhus Convention Compliance Committee (dated October 9, 2017), respectively. These

[2] See Page 2 of the Decision dated Sept.18, 2013 issued by the Kaunas District Administrative Court case No. I-757-422/2012 and Page 4 of the Decision dated August 28, 2013 issued by the Supreme Administrative Court of Lithuania, case No A-602-186/2013.

[3] See T-PVS/Files(2014)07 03/09/2014, page 4, of the Bern Convention/Council of Europe database: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168074687a

descriptions were made and remain public on the websites of the respective Conventions.

2. In the opinion of the Communicant, publishing of "the 2014 events" by the above-referred method (on the Internet) was equivalent to the previously made testimony of Ms Rūta Cimakauskienė (the Head of the Communicant), which was aired live on a public service program (see the paragraph 147 of the draft findings considering "the 2012 events").
3. The Communicant would expect that following the national legislation, the State Security Department (SSD) and/or other responsible body of the Party Concerned[4] should have initiated an investigation of the „2014 events" as it did in the case of "the 2012 events". For example, among the relevant legislation, the Law of Intelligence of the Republic of Lithuania (VIII-1861) requires that "any breach of the operational practice shall lead to an investigation started withing 3 working days after the head of an Intelligence institution got informed about any potential misconduct by an intelligence officer" (unofficial translation of the paragraph 60, point 1 of the Law[5]).
4. Within the period of five years since publishing the "2014 events", neither the Communicant, nor the Compliance Committee have not been informed about any relevant investigations of the suspected illegal activity. Such an investigation would have been highly relevant and welcome in the context of the communication, especially since the "2012 events" were officially confirmed by the SSD. Thus, the Communicant was deeply concerned about continued restrictions to exercise its rights under article 9 of the Convention, as correctly noted by the Compliance Committee (paragraph 144 in the draft findings). The fact that during the course of the proceedings of the present Communication the Party concerned has not informed about any investigation started, or at least has not approached the Communicant with a requested for any relevant details on "the 2014 events" with the purpose of clarification of the allegations and the obtained testimonies, further proves the failure to reinforce the "Access to Justice" Pillar of the Aarhus Convention. The Communicant is convinced that under such circumstances, the Party concerned is indeed in non-compliance with article 3(8) of the Convention. The Communicant is of opinion that the hasty recent attempts by the Party Concerned to present additional clarifications by the SSD (which is not the only intelligence institution of the Republic of Lithuania, see Note 4 below) in the response to the present draft findings are desperate actions masking severe democracy issues.

Sincerely,

Dr. Ramūnas Valiokas, representative of the Association "Rudamina Community"

Ms Ramunė Ramanauskienė, advocate

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[4] **Beside the SSD, the other intelligence institutions of the Republic of Lithuania include** Special Investigation Service (see https://stt.lt/) and Second Operational Services Department (see https://kam.lt/lt/struktura_ir_kontaktai_563/kas_institucijos_567/aotd.html).

[5] The Intelligence Law available in the national language in the official repository of the Republic of Lithuania:

https://www.e-tar.lt/portal/en/legalAct/TAR.1881C195D0E2/asr. Note that the referred edition of the paragraph 60 stating the requirement on immediate internal investigations of any potential misconduct was in force in 2014 and remains valid to date.