

## **Findings and recommendations with regard to communication ACCC/C/2013/98 concerning compliance by Lithuania**

**Adopted by the Compliance Committee on 7 June 2021<sup>1</sup>**

### **I. Introduction**

1. On 30 December 2013, Association Rudamina Community (the communicant) submitted a communication to the Compliance Committee of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that Lithuania had failed to comply with articles 6, 7 and 9 of the Convention with respect to the construction of overhead power lines.
2. At its forty-fourth meeting (Geneva, 25-28 March 2014), the Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision I/7. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 27 June 2014.
3. On 26 November 2014, the Party concerned provided its response to the communication and on 15 December 2014 and 25 February 2015, the communicant provided comments thereon. The Party concerned sent comments on 13 March 2015, and the communicant provided additional information on 20 March 2015.
4. The Committee held a hearing to discuss the substance of the communication at its forty-eighth meeting (Geneva, 24-27 March 2015) with the participation of the communicant and the Party concerned.
5. On 18 May 2015, the Committee sent questions to the parties. The communicant and the Party concerned replied on 5 and 8 June 2015 respectively. Further comments and information were provided by the Party concerned on 9 and 25 June 2015, and by the communicant on 25 and 26 June and 11 November 2015.
6. On 11 May 2016, the Committee sent further questions to the Party concerned, which replied on 25 May 2016. On 30 May 2016, the communicant provided comments thereon.
7. On 15 August 2017, the Committee sent further questions to the Party concerned. On 31 August 2017, the Party concerned replied to some of the questions and on 2 October 2017, answered the remaining questions. The communicant provided comments on the Party's replies on 7 September and 9 October 2017, respectively.
8. On 27 September 2018, the Committee requested relevant legislation from the Party concerned, which it provided on 28 September 2018.
9. The Committee completed its draft findings through its electronic decision-making procedure on 25 August 2020. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded to the Party concerned and to the communicant on 1 September 2020 for their comments by 13 October 2020.
10. Following the Party concerned's request on 12 October 2020 for a one-week extension, which was on the same date granted by the Chair, both parties submitted their comments on the draft findings on 20 October 2020 and brief clarifications on 22 October 2020.

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<sup>1</sup> This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

11. The Committee finalized its findings in closed session, taking account of the comments received, and adopted them through its electronic decision-making procedure on 7 June 2021. The Committee agreed that the findings should be published as an official document for its seventy-second meeting (Geneva, 18-20 October 2021).

## II. Summary of facts, evidence and issues<sup>2</sup>

### A. Legal framework

12. At the time of the events at issue in the case, the 1996 Law on Environmental Impact Assessment of the Proposed Economic Activity No. I-1495 (EIA Law) regulated environmental impact assessment procedures in the Party concerned.<sup>3</sup>

13. Public participation in the environmental impact assessment procedure was regulated by Order No. D1-370 of 15 July 2005 “Procedure for Public Information and Participation in the Environmental Impact Assessment Process of the Environmental Impact Assessment of the Proposed Economic Activity” (Public Participation Order).<sup>4</sup>

14. Both the EIA Law and the Public Participation Order have been subject to multiple amendments both during and after the events examined in this case.<sup>5</sup>

### B. Facts

15. The communication concerns a 400kV, 1000 MW overhead power line (OHL) with a length of over 50 kilometres between the towns of Alytus, Lithuania, and Elk, Poland, in an area with four Natura 2000 sites.<sup>6</sup> AB Lietuvos Energija, the state-controlled energy company, was the project developer.

#### Planning and permitting

16. On 29 October 2002, the Lithuanian parliament approved a national master plan through Resolution No. IX-1154 (the 2002 Plan).<sup>7</sup> Its annex 8 contains a map showing a preliminary route for the power line which passes 7 kilometres away from Rudamina village.<sup>8</sup> The 2002 Plan states that the power line will be overhead.<sup>9</sup>

17. In May 2008, LitPol Link (the project coordinator), a joint venture of Poland and Lithuania’s electricity transmission systems operators, was established to coordinate the project’s planning and construction. The Lithuanian electricity system operator, LITGRID AB, holds 50% of the shares in LitPol Link. LITGRID AB was at that time a subsidiary of AB Lietuvos Energija.<sup>10</sup>

18. On 5 December 2008 and 24 March 2009, respectively, the master plans of the Lazdijai and Alytus municipalities were adopted. These showed the same route for the OHL as the 2002 Plan.<sup>11</sup>

19. On 12 October 2009, the Lithuanian Minister of Energy issued a decree “On the preparation of the special plan for the construction of the 400kV overhead power line from the Alytus transformer substation to the Polish-Lithuanian border” (the 2009 Decree) which designated AB

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<sup>2</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

<sup>3</sup> Email from Party concerned, 25 June 2015, annex 2, p. 1.

<sup>4</sup> Ibid. Text provided by the Party concerned on 28 September 2018.

<sup>5</sup> Communicant’s comments on national legislation, 5 June 2015, pp. 1-3.

<sup>6</sup> Communication, p. 2.

<sup>7</sup> Party’s response to communication, p. 2.

<sup>8</sup> Communication, annex 1.

<sup>9</sup> Communication, p. 5.

<sup>10</sup> Party’s response to communication, p. 2.

<sup>11</sup> Communicant’s additional remarks, 25 February 2015, p. 5.

Lietuvos Energija as the planning organizer. The rights and duties of AB Lietuvos Energija were later assigned to its subsidiary LITGRID AB.<sup>12</sup>

20. On 22 October 2009, AB Lietuvos Energija signed an agreement with AB SWECO International and UAB Sweco Lietuva (the consultant) for the OHL works, including the preparation of a strategic environmental assessment (SEA), an environmental impact assessment (EIA) and a special plan.<sup>13</sup>

21. In December 2009, the consultant prepared a special plan concept (the SEA's scoping document and essentially a draft of the special plan). On 4 December 2009, information on the special plan concept was published in four local and one national newspaper, and on 14 December 2009 it was published on the websites of the Alytus County Governor Administration, the municipalities of the Alytus and Lazdijai districts, the project coordinator, and the developer.<sup>14</sup>

22. In early 2010, a project brochure was published. It was distributed at hearings and provided to 13 county, municipal and subdistrict authorities for dissemination.<sup>15</sup>

23. On 22-23 January 2010, notice of the project's EIA programme was published in two local newspapers, a national daily newspaper, on project site billboards, and the websites of the developer and the competent authority, Alytus Regional Environmental Protection Department (Alytus RED). On 25 January 2010, information on the EIA programme was published on the websites of the consultant and in another newspaper.<sup>16</sup>

24. On 26-27 February 2010, notice of the public hearings for the special plan concept was published in four local and one national newspaper.<sup>17</sup>

25. Public hearings on the special plan concept were held on 30 and 31 March 2010 in Lazdijai and Alytus respectively. The public had twenty working days to prepare comments.<sup>18</sup>

26. On 16-17 April 2010, notice of the SEA report and its public hearings was published on the websites of the planning organizer, developer, on billboards of the municipalities and subdistricts concerned, and in two newspapers. The SEA report was available for public inspection for twenty working days.<sup>19</sup>

27. On 30 April 2010, an interstate consultation meeting took place between Poland and the Party concerned. The concluding paragraph of the minutes of that meeting record that the meeting "resolved" that "when drawing up EIA and SEA documents as well as the special plan on the border crossing site [the consultant] will attempt to plan the border crossing point on the site indicated on the said plan [of Sejny County, Poland], with due consideration of general master plan's documentary solutions valid in the territory of Lithuania"<sup>20</sup>. The crossing point was "planned in Lazdijai district, to the north-west [of] Lake Galadusys."<sup>21</sup> All alternatives evaluated in the SEA and EIA procedures crossed the border at this location.<sup>22</sup>

28. Hearings on the SEA and draft special plan were held in Alytus and Lazdijai on 17 and 18 May 2010 respectively. No public comments were received before the hearing on 18 May 2010 and no members of the public arrived at the hearing within an hour.<sup>23</sup> The planning organizer, in the hearing minutes, concluded that "the public is not interested in the environmental impact of the special plan."<sup>24</sup> On 20 May 2010, the final SEA report was published.<sup>25</sup>

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<sup>12</sup> Party's response to communication, p. 2.

<sup>13</sup> Ibid..

<sup>14</sup> Ibid., pp. 2-3.

<sup>15</sup> Party's response, annex 5; Party's reply to questions, 31 August 2017, p. 3.

<sup>16</sup> Party's response to communication, pp. 3 and 8.

<sup>17</sup> Ibid., p. 3.

<sup>18</sup> Ibid., pp. 3 and 7.

<sup>19</sup> Ibid.

<sup>20</sup> Party's reply to questions, 31 August 2017, p. 12.

<sup>21</sup> Party's reply to questions, 8 June 2015, annex 3, p. 13.

<sup>22</sup> Ibid., annex 1, p. 13, and annex 4, p. 11.

<sup>23</sup> Party's response to communication, pp. 3-4, 7-8.

<sup>24</sup> Party's response to communication, annex 2, p. 3

<sup>25</sup> Party's response to communication, p. 8.

29. On 25-29 June 2010, notice of the public hearings on the EIA report was published in one national and three local newspapers, and on billboards in Alytus and Lazdijai and their subdistricts.<sup>26</sup>
30. The EIA report considered route alternatives A, B and B1, concluding that B1 was optimal.<sup>27</sup> Route B1 differs from the preliminary route depicted in the 2002 Plan.<sup>28</sup>
31. On 13-19 July 2010, public hearings on the EIA report were held in more than ten different locations.<sup>29</sup> The communicant participated in the Lazdijai meeting on 19 July 2010.<sup>30</sup>
32. On 27 September 2010, a meeting organized by a parliamentary committee was held. Participants included ministry representatives, the developer, the consultant, and local municipal authorities. The developer and consultant were instructed to assess an alternative route for the OHL proposed by Lazdijai municipality.<sup>31</sup>
33. On 11 October 2010, LitPol Link sent the parliamentary committee a letter with its assessment of the changes needed to implement Lazdijai's proposed alternative. It stated the B1 route would remain, as it was the "optimal and most rational alternative."<sup>32</sup> Among the reasons given for rejecting the alternative route was that it would require signing "agreements between the countries [Poland and the Party concerned] and transmission system operators, respectively, concerning the change of the power line route".<sup>33</sup>
34. On 5 November 2010, a meeting on the EIA report took place at Alytus RED. Attendees were informed about Lazdijai's proposed alternative route.<sup>34</sup>
35. On 8-9 November 2010, the public concerned sent comments to Alytus RED on the EIA report; Alytus RED responded that the comments had been forwarded to the consultant.<sup>35</sup>
36. On 25 November 2010, Alytus RED wrote to the EIA consultant requesting it to supplement the EIA report.<sup>36</sup>
37. On 10 December 2010, Alytus RED invited members of the public who had submitted comments on the EIA report to a meeting on 17 December 2010 to discuss these and the supplemented EIA report, which was provided beforehand.<sup>37</sup>
38. On 30 December 2010, Alytus RED approved the EIA report and permitted the OHL through Decision No. ARV2-5-1810 (the OHL decision).<sup>38</sup> On 3 January 2011, information on the OHL decision was published on Alytus RED's website, and additional information was released on 12 January 2011. On 7 January 2011, information on the OHL decision was published in three newspapers and on 11-12 January 2011 on billboards. The text of the OHL decision was provided to the communicant at its request on 1 February 2011.<sup>39</sup>
39. Government Resolution No. 764 of 22 June 2011 approved Alytus' master plan reflecting the same route as in the 2002 Plan.<sup>40</sup>
40. In August 2011, the Ministry of Energy adopted the OHL's special plan reflecting route alternative B1.<sup>41</sup>

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<sup>26</sup> Ibid., p. 8.

<sup>27</sup> Ibid., annex 3, p. 3; Communication, annex 3, pp. 16-24.

<sup>28</sup> Communicant's additional remarks, 25 February 2015, p. 5.

<sup>29</sup> Party's response to communication, p. 4.

<sup>30</sup> Ibid., annex 3, p. 5.

<sup>31</sup> Communicant's additional remarks, 25 February 2015, pp. 1-2, and annex 10.

<sup>32</sup> Ibid., p. 2.

<sup>33</sup> Ibid., annex 11, p. 4.

<sup>34</sup> Party's response to communication, pp. 4-5.

<sup>35</sup> Ibid., p. 5.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Communication, annex 4.

<sup>39</sup> Party's response to communication, p. 6.

<sup>40</sup> Communicant's additional remarks, 25 February 2015, p. 5.

<sup>41</sup> Ibid., p. 6.

41. In November 2012, Alytus changed its master plan to reflect route alternative B1.<sup>42</sup>
42. On 5 May 2014, the official commencement of OHL construction was announced. It was expected to be in operation at the end of December 2015.<sup>43</sup>

#### **The communicant's legal challenges**

43. On 8 February 2011, the communicant challenged the OHL decision before the Kaunas Regional Administrative Court, which found the claim unfounded on 5 July 2012.<sup>44</sup>
44. On 29 May 2013, the Supreme Administrative Court upheld the lower court's ruling.<sup>45</sup>
45. The communicant appealed a costs order ordering it pay €2,766.98 to LitPol Link, an intervening party. On 8 December 2014, the Kaunas Regional Administrative Court dismissed that appeal.<sup>46</sup>

### **C. Substantive issues**

#### **Applicability of articles 6 and 7**

46. The communicant submits that the OHL is an activity covered by annex I, thus article 6(1)(a) applies. It further submits that the 2009 Decree is related to the environment and thus subject to article 7.<sup>47</sup>
47. The Party concerned does not deny that the OHL falls under article 6 of the Convention.<sup>48</sup> It does not comment on whether article 7 applies to the 2009 Decree.

#### **Article 6(2)**

48. The communicant claims that domestic legislation does not contain a clear requirement that the public be informed in a timely, adequate and effective manner.<sup>49</sup> It claims the Party concerned failed to notify the public prior to the 2009 Decree and questions how the publication of the first announcements on a few websites about the preparation of the EIA and SEA could be effective notification, especially since the spatial planning documents then in place did not foresee the OHL route directly affecting Rudamina village.<sup>50</sup> Moreover, the local community, especially the elderly, has limited internet access.<sup>51</sup> The communicant also contends that informing the public via announcements in the local press was ineffective. It claims that the newspaper announcement of the public hearing on the EIA report was superficial, without maps or diagrams and local residents were therefore not informed at an early stage that a 400 kV OHL would cross their lands.<sup>52</sup>
49. The Party concerned states that its legislation sets out the information that public notice must include, limiting the discretion of those responsible for notification. It submits that the public was informed in an adequate, timely and effective manner of the special plan, SEA and EIA procedures.<sup>53</sup> Regarding the low participation of the public, it states that the public was informed but bears responsibility to take an interest.<sup>54</sup>

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<sup>42</sup> Ibid.

<sup>43</sup> Party's response to communication, p. 12.

<sup>44</sup> Party's reply to questions, 8 June 2015, annex 1 p. 13.

<sup>45</sup> Party's reply to questions, 8 June 2015, annex 2.

<sup>46</sup> Communicant's additional remarks, 25 February 2015, p. 10.

<sup>47</sup> Communication, p. 10.

<sup>48</sup> Party's response to communication, pp. 6-11.

<sup>49</sup> Communication, p. 12.

<sup>50</sup> Communication, pp. 4 and 11.

<sup>51</sup> Communication, p. 12.

<sup>52</sup> Ibid., pp. 7 and 12.

<sup>53</sup> Party's response to communication, pp. 6-9.

<sup>54</sup> Party's comments, 13 March 2015, p. 5.

### Article 6(3)

#### *Time frames in the legal framework*

50. The communicant states that, despite the Committee's findings on communication ACCC/C/2006/16, Lithuanian legislation still provides for a commenting period of 10 working days.<sup>55</sup>

51. The Party concerned states that its legislation provides 10 working days for the public to inspect the EIA report and to submit comments prior to the hearing, and another 10 working days to submit comments after the hearing. It submits that the Committee has previously found timeframes of 20 working days or 30 calendar days appropriate.<sup>56</sup>

#### *Time frames for OHL project*

52. The communicant submits that 20 working days for the SEA report was insufficient for the public concerned to acquaint themselves with the technical documentation. Ten working days for the public to review the EIA report was likewise insufficient to verify the large amounts of material and prepare comments.<sup>57</sup>

53. The Party concerned submits that the public had 20 working days to prepare comments each to the special plan concept and the SEA report.<sup>58</sup> The public had 12-16 working days to become familiar with the EIA report before the hearings and an additional 10 working days to submit comments after the hearings, making a total of 22-26 working days.<sup>59</sup>

### Article 6(4)

54. The communicant alleges that the public could only participate after the technology and route had been decided, meaning participation was neither early nor effective. It claims that the 2009 Decree determined the powerline's technology as overhead and was adopted without consulting the public concerned. After the 2009 Decree, it was clear that the project would be constructed, especially considering that the project was on the European Union's 2013 list of projects of common interest (PCIs) and because of the estimated €370 million investment involved.<sup>60</sup>

55. The communicant alleges that the point at which the OHL would cross the border with Poland was decided at the April 2010 meeting between Poland and the Party concerned.<sup>61</sup> The communicant submits that at the 27 September 2010 meeting, Lazdijai and Kalvarja proposed changing the route. While the developer and consultant agreed to prepare a preliminary evaluation of this, the communicant claims the developer stated that any discussion on alternatives would result in lost time and European Union support worth €213 million.<sup>62</sup>

56. The Party concerned submits that the public was involved in the decision-making procedure from the start, claiming that the media had reported on the 2002 Plan.<sup>63</sup> It states that the 2002 Plan only designated territories for particular infrastructure needs at a general level and was to be further specified at lower levels and that public participation preceded the adoption of the subsequent lower level documents.<sup>64</sup>

57. The Party concerned submits that if the underground alternative had been chosen, the 2009 Decree would have been changed accordingly.<sup>65</sup>

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<sup>55</sup> Communication, p. 12.

<sup>56</sup> Party's comments, 13 March 2015, p. 8, citing ECE/MP.PP/2011/11/add.2, para. 89.

<sup>57</sup> Communicant's comments, 12 December 2014, p. 3.

<sup>58</sup> Party's response to communication, p. 7.

<sup>59</sup> *Ibid.*, p. 8.

<sup>60</sup> Communication, pp. 3-5, 8-9 and 11.

<sup>61</sup> *Ibid.*, p. 6.

<sup>62</sup> Communicant's additional remarks, 25 February 2015, pp. 1-2.

<sup>63</sup> Party's response to communication, p. 9.

<sup>64</sup> Party's comments, 13 March 2015, pp. 2-3.

<sup>65</sup> Party's reply to questions, 31 August 2017, p. 2.

58. The Party concerned also claims that the conclusions of the meeting with Poland on 30 April 2010 were not binding<sup>66</sup> and that the document quoted from in paragraph 27 above merely constitutes minutes of the meeting rather than an agreement between the participants.<sup>67</sup>

59. Finally, it asserts that public participation when all options are open does not prevent competent authorities from determining a preliminary opinion, though they must still remain open to public comments.<sup>68</sup> It states that its public authorities acted accordingly, providing the public with the possibility of presenting alternatives and taking comments into account.<sup>69</sup>

#### **Article 6(5)**

60. The communicant alleges that the authorities of the Party concerned did not encourage the planning organizer to discuss issues with the public concerned.<sup>70</sup>

61. The Party concerned does not address this allegation.

#### **Article 6(6)**

62. The communicant claims that the EIA report was of insufficient quality and contained incorrect, misleading information. Insufficient information was provided about technological alternatives and environmental impacts, including on a unique landscape and protected species.<sup>71</sup>

63. The Party concerned submits that sufficient information was provided and more could have been obtained on request.<sup>72</sup>

#### **Article 6(7)**

##### *Requirement that comments be “reasoned”*

64. The communicant claims that, despite the Committee’s findings on communication ACCC/C/2006/16 (Lithuania), the EIA Law in force at the time of the project’s EIA procedure still required comments to be motivated and to be supported by reasoned documentation. While the word “motivated” was deleted from the EIA Law on 29 September 2011 (i.e. after the OHL decision’s adoption), the “reasoned argumentation” criterion remains.<sup>73</sup> Item 11(3) of the Public Participation Order requires comments from the public to contain “information and circumstances justifying the proposal”.<sup>74</sup>

65. The Party concerned states that, although the reference to “reasoned proposals” was in the legislation at the time of the EIA procedure in this case, the public authorities took into account all comments and the communicant has failed to specify which proposals were rejected on this basis.<sup>75</sup>

66. The Party concerned denies that the requirement that comments be motivated remains in a different form and submits this allegation is unsubstantiated.<sup>76</sup>

##### *Role of the developer and consultant*

67. The communicant submits that the role of the developer and consultant in receiving the public’s comments neither ensured the necessary impartiality nor that comments be directly submitted to the authority.<sup>77</sup>

68. The Party concerned submits that in the special plan procedure the developer takes account of public participation and submits a summary of the comments to the competent authority.

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<sup>66</sup> Party’s reply to questions, 31 August 2017, pp. 1-2.

<sup>67</sup> Party’s comments on draft findings, 20 October 2020, p. 6.

<sup>68</sup> Party’s comments, 13 March 2015, p. 2.

<sup>69</sup> Party’s response to communication, p. 9.

<sup>70</sup> Communicant’s additional remarks, 25 February 2015, p. 14.

<sup>71</sup> Communication, pp. 3, 7 and 10-11 and communicant’s additional remarks, 25 February 2015, p. 14.

<sup>72</sup> Party’s comments, 13 March 2015, p. 5.

<sup>73</sup> Communication, p. 12, citing ECE/MP.PP/2008/5/Add. 6, and communicant’s additional remarks, 25 February 2015, p. 15.

<sup>74</sup> Communicant’s comments, 9 October 2017, p. 3.

<sup>75</sup> Party’s comments, 13 March 2015, pp. 6-7.

<sup>76</sup> Party’s email, 25 June 2015, annex 2, p. 2.

<sup>77</sup> Communicant’s additional remarks, 25 February 2015, p. 15.

For the EIA procedure, competent authorities analyse how public participation was taken into consideration.<sup>78</sup> It further refers to article 9(8) of the EIA law which allows participants to send information on possible violations directly to the competent authority.<sup>79</sup>

#### **Article 6(8)**

##### *Taking due account*

69. The communicant claims that it presented comments at the 19 July 2010 hearing on the EIA report which were never taken into account.<sup>80</sup> It asserts the authorities explained that consideration of other alternatives was not possible for reasons including tight EU financing deadlines. It alleges the hearings were thus a mere formality.<sup>81</sup>

70. The communicant submits that the developer published different versions of the EIA report on its website and that the communicant was not informed which version was finally submitted to the competent authority. Consequently, it was unable to ascertain how its comments were treated. It submits that the OHL decision demonstrated that none of the comments had been taken into account, as it outlined the public participation procedure in a brief, superficial way, listing dates of announcements and meetings, but not the essence of the public's concerns.<sup>82</sup>

71. The Party concerned states that the competent authorities reviewed all comments submitted by the public, that this review was not merely formal. It refers to the meeting on 17 December 2010 to which members of the public, EIA entities and the drafter and developer were invited to discuss the comments received.<sup>83</sup>

##### *Role of the developer and consultant*

72. The communicant submits that the identity of the entity responsible for taking comments in the EIA procedure into account is not clearly regulated. The consultant usually collects comments and submits them to the public authority, and this means comments are not adequately taken into account.<sup>84</sup>

73. The Party concerned submits that, under item 33 of the Public Participation Order, the developer or consultant prepares a reasoned evaluation of public comments in the format set out in annex 4 of that Order and also provides written replies to members of the public regarding their comments. Prior to approval of the EIA report, the competent authority organizes a meeting with the developer, EIA drafter, participating authorities and members of the public concerned who submitted comments to discuss the comments received.<sup>85</sup>

#### **Article 6(9)**

##### *Notification of decision*

74. The communicant alleges that the final decision was not published promptly or effectively.<sup>86</sup> It submits that information about the OHL decision was pro forma and placed in a weekly newspaper on 31 December 2010, during the major holiday season when the public were not able to consult with experts and advisors.<sup>87</sup>

75. The Party concerned states that Alytus RED issued the OHL decision on 30 December 2010 and published it on its website on 3 January 2011. Information on the OHL decision was published in local and national newspapers on 7 January 2011 and on the notice boards of local authorities on 11-12 January 2011. Additional information was released on 12 January 2011. It

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<sup>78</sup> Party's comments, 9 June 2015, p. 4.

<sup>79</sup> Party's reply to questions, 8 June 2015, p. 1.

<sup>80</sup> Communication, p. 6.

<sup>81</sup> Communicant's additional remarks, 25 February 2015, p. 2.

<sup>82</sup> Communication, pp. 6-7.

<sup>83</sup> Party's comments, 13 March 2015, pp. 6-7.

<sup>84</sup> Communicant's comments, 9 October 2017, p. 3.

<sup>85</sup> Party's reply to questions, 2 October 2017, p. 3.

<sup>86</sup> Communicant's comments, 12 December 2014, p. 4.

<sup>87</sup> Communication, p. 12.



submits the decision's publication during the holiday period is not non-compliant with the Convention.<sup>88</sup>

*Publication of reasons on which decision is based*

76. The communicant claims that the OHL decision contained no information regarding the comments from the public concerned nor how they were taken into account.<sup>89</sup>

77. The Party concerned submits that the OHL decision refers to the 17 December 2010 meeting and its minutes, which show the public comments and responses thereto. It states that the Convention does not require that the decision describe the public's comments in detail, but rather to state the grounds and reasons for taking the decision and to show that due account was taken of the outcome of public participation. It further submits that it is good practice to provide written responses to the comments received and this was done.<sup>90</sup>

**Article 9(2)**

78. The communicant contends that article 9(2) applies because the OHL decision concerns an activity under Annex I of the Convention, and that, since the communicant's members reside in locations reserved for the OHL route or its immediate vicinity, they are persons having a sufficient interest.<sup>91</sup>

79. The Party concerned submits that the courts granted the communicant access to justice in accordance with article 9(2).<sup>92</sup>

**Article 9(4)**

80. The communicant claims that the Kaunas Regional Administrative Court's refusal to grant injunctive relief breached article 9(4).<sup>93</sup>

81. The communicant also claims the court's order for it to pay LitPol Link, an intervening party, €2,766.98 in costs (an amount more than the communicant's annual budget) did not comply with article 9(4) of the Convention.<sup>94</sup>

82. The Party concerned submits the communicant was exempted from court fees because the case was brought in the public interest and the communicant was only ordered to pay other parties' costs. It disagrees that the amount of the cost order contravened article 9(4) given that it concerned two proceedings conducted over two years.<sup>95</sup>

**Article 3(8)**

83. The communicant alleges that the State Security Department (SSD) of the Party concerned harassed the communicant's representatives and other individuals in connection with the OHL.<sup>96</sup>

*Ms. Cimakauskienė*

84. The communicant submits that in 2012 the SSD made two telephone calls to the communicant's head, Ms. Cimakauskienė, "of [a] harassing nature".<sup>97</sup> It claims that the SSD officer explained that he was interested in the OHL, questioned the communicant's actions and suggested that she "come for a meeting without...bringing a toothbrush". After a second call, Ms. Cimakauskienė contacted a journalist who interviewed her on a popular radio programme during which these incidents were discussed. The SSD did not contact her again.<sup>98</sup>

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<sup>88</sup> Party's response to communication, pp. 10-11; Party's comments, 13 March 2015, p. 7.

<sup>89</sup> Communicant's comments, 12 December 2014, p. 4.

<sup>90</sup> Party's comments, 13 March 2015, pp. 7-8.

<sup>91</sup> Communication, pp. 13-14.

<sup>92</sup> Party's response to communication, p. 11.

<sup>93</sup> Communication, p. 14.

<sup>94</sup> Communicant's comments, 25 February 2015, p. 10.

<sup>95</sup> Party's comments, 9 June 2015, p. 5.

<sup>96</sup> Communicant's comments, 9 October 2017, pp. 2-3.

<sup>97</sup> Communicant's comments, 9 October 2017, p. 2.

<sup>98</sup> *Ibid.*, p. 2, and communicant's additional remarks, 25 February 2015, p. 8.

*Ms. Želionienė*

85. The communicant claims that an SSD officer initiated a meeting in June 2014 with Ms. Želionienė, a landlord who had been closely cooperating with the communicant. Ms. Želionienė “got the impression that her phone calls could have been under surveillance as the facts touched upon in the meeting seemed to be well know[n] to the officer,” and the officer asked questions concerning Ms. Cimakauskienė’s activities.<sup>99</sup>

*Dr. Valiokas*

86. The communicant claims that on 30 May 2014, its representative, Dr. Valiokas, and an expert, Mr. Sniečkus, were performing a biodiversity field survey at the OHL’s planned construction site, when they were asked questions by an environmental protection officer and “other persons who did not present themselves”.<sup>100</sup>

87. The Party concerned states that the SSD acts in accordance with the principles set out in article 4 of the Law on Intelligence. It confirms that the SSD contacted Ms. Cimakauskienė. It claims it did so “to clarify the issues in the Rudamina community related to the electricity power line”<sup>101</sup> and that an SSD internal inquiry into the matter reports that the conversation was “friendly, not provocative and not with tension”.<sup>102</sup> It also concedes that SSD contacted Ms. Želionienė to ask what problems she had. It denies that SSD contacted Dr. Valiokas or Mr. Sniečkus.<sup>103</sup>

#### **D. Domestic remedies**

88. The communicant’s exhaustion of domestic remedies is described above (see paras. 43-45 above).

89. The Party concerned has not challenged admissibility.

### **III. Consideration and evaluation by the Committee**

90. Lithuania deposited its instrument of ratification of the Convention on 28 January 2002. The Convention entered into force for Lithuania on 28 April 2002.

#### **Scope of Committee’s consideration**

91. The Committee is mandated to examine allegations concerning compliance with the provisions of the Convention. Thus, it will not consider allegations concerning European Union legislation or other international instruments.<sup>104</sup>

92. At the outset, the Committee notes that the Party concerned submits that it has met the Convention’s requirements regarding the OHL because it provided for public participation on the draft EIA and SEA reports. The Committee points out that article 6 requires public participation on decisions to permit proposed activities, not just EIA reports; similarly, article 7 requires public participation on draft plans themselves, not just SEA reports.<sup>105</sup> However, since the communicant has not made allegations on this point, the Committee will not examine this point further in the present case.

93. In its comments on the Committee’s draft findings,<sup>106</sup> the Party concerned reported that new EIA legislation had been adopted in 2017. Since the Committee was informed of this only after the draft findings were sent to the parties, it does not examine the 2017 legislative developments in the context of the present communication. Rather, the Committee may examine this legislation in its

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<sup>99</sup> Communicant’s comments, 9 October 2017, p. 3.

<sup>100</sup> Communicant’s comments, 9 October 2017, p. 2.

<sup>101</sup> Party’s reply to questions, 2 October 2017, p. 2.

<sup>102</sup> Party’s comments on Committee’s draft findings, 20 October 2020, annex 3, p. 5.

<sup>103</sup> Party concerned’s confirmation of factual clarification, 22 October 2020.

<sup>104</sup> E.g. communication, pp. 6 and 9.

<sup>105</sup> ECE/MP.PP/2017/35, para. 36 and 95(d).

<sup>106</sup> Party’s comments on Committee’s draft findings, 20 October 2020, annex 1, pp. 1, 3 and 8.

review of the implementation of the present findings and any related decision of the Meeting of the Parties.<sup>107</sup>

### **Applicability of articles 6 and 7**

94. The OHL has a voltage of 400kV and extends for over 50 kilometres in the Party concerned.<sup>108</sup> It thus falls under paragraph 17 of Annex I to the Convention and, accordingly, article 6(1)(a) applies.

95. Prior to construction, the OHL was subject to several interrelated decision-making procedures. Following the 2009 Decree, a special plan concept, an SEA report, and an EIA report were prepared, and each was subject to public hearings. Thereafter, Ayltus RED adopted the OHL decision and a final special plan incorporating that decision was adopted. Due to the project-specific nature and temporal proximity of these procedures, rather than considering them as parallel decision-making procedures, the Committee examines them as one complex decision-making procedure to permit a project subject to article 6.

96. The communicant alleges that the 2009 Decree is subject to article 7 but does not clarify whether it is a plan, programme or policy and if so, on what grounds. Based on the evidence before it, the Committee considers the allegation that the 2009 Decree is subject to article 7 is unsubstantiated. Rather, as explained above, the Committee considers the 2009 Decree to be part of the complex decision-making procedure on the OHL under article 6 of the Convention.

### **Article 6(2)**

#### *Means of notification*

97. The hearing on the special plan concept was notified by publication in four local and one national newspaper. Notification for the SEA and special plan hearings was published in two local newspapers, on the billboards of 12 municipalities and subdistricts, and the developer's websites. Notice of the hearing on the EIA report was published in the same two local newspapers, in one national and one local newspaper, and the same billboards as for the 18 May 2010 hearing.<sup>109</sup> No information has been provided to indicate that these newspapers had very low distribution.

98. These methods of informing the public are not per se insufficient. Whilst the fact that no members of the public participated in the 18 May 2010 hearing on the SEA and special plan is significant, lack of attendance does not necessarily mean that the notice itself was ineffective. However, public authorities should take care to choose effective methods of notification, and if experience shows that the methods used do not result in the participation of the public concerned, they should be reconsidered. Lithuanian legislation refers to notification "if possible" by radio and television, which may have been a useful method in this case.<sup>110</sup> However, the communicant has not provided sufficient evidence to show that the methods used did not ensure effective notification and the Committee accordingly does not find non-compliance with article 6(2) in this regard.

#### *Size and format*

99. The Party concerned has provided copies of the notifications regarding the public participation procedure on the EIA report, including the public hearings held between 13-19 July 2010.<sup>111</sup> The Committee considers that the size and format of these notices in general appear to meet the criteria of article 6(2) of the Convention.

#### *Content*

100. Based on the dates provided, it appears the public had 9-15 working days to submit comments before the hearing on the EIA report, depending on which hearing they attended, and 19-25 working days to inspect the report and submit comments in total. The notifications for the EIA hearings, however, announced that the EIA report would be available for 10 working days and that

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<sup>107</sup> See ECE/MP.PP/C.1/2017/12, para. 94.

<sup>108</sup> Communication, annex 4, p. 1.

<sup>109</sup> Ibid., annex 2, pp. 2-3 and 8-11.

<sup>110</sup> Party's reply to questions, 2 October 2017, p. 3.

<sup>111</sup> Party's response to communication, annexes 8(a)-8(c).

the public would likewise have 10 working days from the date of the notification to comment.<sup>112</sup> The public was thus incorrectly notified of the actual timeframes for commenting and for which documentation would be available.

101. It goes without saying that the obligation in article 6(2) of the Convention, to provide “adequate and effective” notice, requires that the information in the notice is correct. The public must be able to rely on this information and should not have to double-check that it is correct. Regardless of which entity carries out the notification, it is for the Party concerned to ensure that the public concerned is adequately and effectively, and by that correctly, notified.

102. Accordingly, the Committee finds that, by not correctly notifying the public concerned about the timeframes during which relevant documentation would be available and in which comments could be submitted, the Party concerned failed to comply with the requirements in article 6(2)(d)(ii) to adequately inform the public concerned about the envisaged procedure, including the opportunities for the public to participate.

### **Article 6(3)**

103. The Public Participation Order provides the public a minimum of 10 working days to inspect the EIA report and submit comments before the hearing. After the hearing, the public has another 10 working days to submit comments. Thus, the public has a total minimum of 20 working days to inspect the EIA report and submit comments.<sup>113</sup>

104. The Committee emphasises that any accompanying guidance to the Public Participation Order should make clear to competent public authorities that these should be genuinely minimum time frames from which the setting of longer time frames is not only possible but in fact recommended for proposed activities with more significant environmental impacts or those affecting a large number of people.<sup>114</sup>

105. In this case, notifications were posted from 25-29 June 2010 and the hearings on the EIA report held between 13-19 July 2010, meaning that, not counting the public holiday on 6 July 2010,<sup>115</sup> the public had 9-15 working days to prepare for the hearing, depending on which notification they received and which hearing they attended. Taken together with the time of 10 working days to submit comments after the hearing, the public had 19-25 working days to prepare and provide comments.

106. The Committee considers that a timeframe of 19-25 working days to prepare and provide comments on the EIA report was reasonable in the present case. Likewise, the timeframes of 20 working days each for the public to submit comments on the special plan concept and the SEA report was sufficient. Accordingly, the Committee finds that the Party concerned did not fail to comply with article 6(3) concerning the timeframes for public participation in the present case.

### **Article 6(4)**

#### *Routing*

#### 2002 Plan

107. The Party concerned submits, and court decisions indicate, that the 2002 Plan set a preliminary route. Prior to the 2002 Plan some form of public participation was conducted and the communicant has not alleged that it was defective. The Committee accordingly considers that it has not been established that the adoption of the 2002 Plan foreclosed routing options in a manner that would contravene article 6(4).

#### April 2010 interstate consultation

108. In its pleadings in the appeal before the Supreme Administrative Court, Alytus RED, the competent public authority for the OHL decision, stated that:

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<sup>112</sup> Ibid.

<sup>113</sup> Party’s reply to Committee’s questions, 8 June 2015, pp. 2-3.

<sup>114</sup> See Maastricht Recommendations, para. 76.

<sup>115</sup> Communicant’s comments on Committee’s draft findings, 20 October 2020, p. 1.

“the [Kaunas District] Court judgement correctly stated that an agreement was reached during interstate consultations to have the location (NB: but not the point) where the Line crossed the Lithuanian-Polish border would be in Lazdijai district, northwest of Lake Galadusys”<sup>116</sup>

109. Alytus RED’s pleading goes on to state that:

“the alternatives analysed by the drafter of the EIA report were compliant with the agreement achieved during interstate consultations regarding the location where the Line had to cross the Lithuanian-Polish border.”<sup>117</sup>

110. Its pleading further states that:

“we think that the [Kaunas District] Court has lawfully and justifiably recognised that the construction of the Line in the territory proposed by the Appellant would be non-compliant with the agreement reached during interstate consultations regarding the border crossing location.”<sup>118</sup>

111. Separately, LitPol Link, in its letter to parliament of 11 October 2010, stated that Lazdijai’s alternative would require signing “agreements between the countries and transmission system operators, respectively, concerning the change of the power line route” (see para. 33 above).

112. In the light of the above, the Committee considers that the general location, at least, of the OHL’s border crossing point was perceived to have been fixed at the interstate consultation meeting on 30 April 2010 between Poland and Lithuania. The fact that the only alternatives studied in the SEA and EIA procedures “were compliant with” the crossing point agreed at that meeting demonstrates that that agreement foreclosed other options in practice.

113. Cross-border projects clearly require coordination between the States involved, particularly on aspects such as border-crossing points. However, in this case, the border crossing was agreed between Poland and Lithuania at the time of the public participation procedure on the SEA and special plan and prior to the public participation procedure on the EIA report.

114. Based on the foregoing, regardless of whether or not it amounted to a treaty under the Vienna Convention on the Law of Treaties, the agreement reached at the meeting on 30 April 2010 was related to the decision-making concerning the OHL and in practice was considered to have foreclosed options for the border crossing point prior to the public having an opportunity to participate thereon.<sup>119</sup>

115. The Committee finds that, by limiting the options in practice for the location of the border crossing point for the overhead powerline by setting that location through interstate consultations before the public participation procedures had been concluded, the Party concerned precluded the possibility for the public to participate when all options on the crossing point were open and thus failed to comply with article 6(4) of the Convention.

### *Technology*

#### 2002 Plan

116. The communicant submits that the 2002 Plan and 2009 Decree referred to an “overhead” line and therefore foreclosed other technologies. As noted in paragraph 107 above, the communicant has not alleged that the public participation conducted prior to the adoption of the 2002 Plan was deficient. The Committee considers that the communicant has thus not established that the 2002 Plan foreclosed technology options in contravention of article 6(4).

#### 2009 Decree

117. In contrast to the 2002 Plan, which was of a general nature, the 2009 Decree was project-specific and should be seen as part of the complex decision-making procedure to permit the OHL. Moreover, had the decision-maker decided to opt for the underground alternative, the 2009 Decree

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<sup>116</sup> Party’s reply to Committee’s questions, 8 June 2015, annex 4, p. 11.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid., p.12.

<sup>119</sup> See ECE/MP.PP/C.1/2009/8/Add. 1, para. 119(a) (iii), and Maastricht Recommendations, para. 80(d).

would have been changed accordingly (see para. 57 above). Compliance with article 6(4), however, requires not only that all options are legally open at the time of the public participation, it must also be apparent to the public concerned that they are open. In the Committee's view, the reference to the "overhead power line" in the title of the 2009 Decree implies that it had by then already been decided that the power line would use that technology. Moreover, the notice for the public hearing in the Krosna neighbourhood on 14 July 2010 lists five issues remaining at that time to be "solved" to build the power line.<sup>120</sup> This list includes selecting "the most suitable location for the power line"; however, there is no reference to selecting the power line technology. Rather, the notice states:

"The approximately 50 kilometre-long power transmission line will be installed on transmission towers; the average distance between towers shall be 320m. The total number of towers can be 150 ... The height of the transmission tower shall not exceed 73m."

118. These project characteristics are also listed in the brochure published in early 2010, which refers to 150 transmission towers with a height of 73 meters and an average distance between transmission towers of 320 metres.<sup>121</sup>

119. The Committee considers that even if it were still legally possible for the decision-makers to have opted for the underground alternative, the title of the 2009 Decree, the above public notice and brochure all sent a strong message to the public concerned that the choice of overhead technology had already been selected. The Committee accordingly finds that, by failing to ensure that all options with respect to the choice of technology for the power line were not just legally open but also could clearly be seen to be open by the public concerned, the Party concerned failed to comply with article 6(4) of the Convention.

#### *EU funding*

120. In its letter of 11 October 2010, LitPol Link stated that:

"based on agreements with the European Commission, the decision on environment protection conditions for the project of the power line ... should be issued by June 2012 ... If the investment is late, and, respectively, the Polish grid operator has not fulfilled the commitments by the 30<sup>th</sup> of June 2012, the money for the project implementation from the EU regional funds will be possibly lost."<sup>122</sup>

121. Similarly, Alytus RED stated in the court proceedings that "[d]elay of the Project implementation deadlines can result in losing EU funding because financing is available only if the project is completed over the defined financing term."<sup>123</sup>

122. It is crucial that potential funding does not preclude proper consideration of alternatives because this could deprive public participation of any meaning. However, the above statements alone are insufficient to establish that the deadline for completing EIA procedures imposed by EU funding arrangements resulted in a failure by the Party concerned to comply with article 6(4). The communicant has not pointed to any EU funding documentation stipulating deadlines or other constraints that may have foreclosed the consideration of alternatives during the EIA procedure.<sup>124</sup> While the project was in the EU's 2013 list of PCIs, the process of establishing this list was initiated in March 2012, after the OHL decision's adoption. The Committee accordingly does not find the allegation that EU funding requirements foreclosed options in contravention of article 6(4) to be substantiated.

#### **Article 6(5)**

123. The proposed OHL project was an appropriate opportunity for the Party concerned to implement article 6(5), not least to prevent misunderstanding and disagreement. An information conference was held, and the developer distributed information, including a brochure. The

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<sup>120</sup> Party's response to communication, annex 8d.

<sup>121</sup> *Ibid.*, annex 5, p. 1.

<sup>122</sup> Communicant's additional remarks, 25 February 2015, pp. 2-3, annex 11 pp. 2-3.

<sup>123</sup> Party's reply to questions, 8 June 2015, annex 3, p. 23.

<sup>124</sup> Communicant's comments, 9 October 2017.

communicants have accordingly not substantiated that the Party concerned failed to encourage the developer to engage with the public before applying for a permit in breach of article 6(5).

#### **Article 6(6)**

124. The communicant alleges a lack of detailed and reliable data on the impact on the environment, especially on protected species and a unique landscape, and insufficient information on technological alternatives.

125. The Committee notes that information on these aspects are required under article 6(6)(b) and (e) of the Convention respectively. In this regard, the brochure published in early 2010 outlines the technological alternatives studied and “Text Annex 9” of the EIA report compares the underground and overhead alternatives. Regarding a description of the possible effects of the proposed effect on the environment, the Committee notes that the EIA report likewise contains sections on the impact on flora and fauna and landscape.<sup>125</sup>

126. As the Committee has previously made clear, it is not in a position to analyse the accuracy of the data which form the basis for the decision in question.<sup>126</sup> For example, the Convention, while requiring the main alternatives studied by the applicant to be made accessible, does not prescribe what alternatives should be studied. Rather, the role of the Committee is to find out if the data that were available for the authorities taking the decision were accessible to the public.<sup>127</sup> The communicant’s claims appear related to the quality of information provided, rather than that relevant information held by the decision-makers was not disclosed.

127. In the light of the above, the Committee considers that the communicant has not substantiated its allegations that the Party concerned failed to comply with article 6(6) regarding the information provided to the public during the EIA procedure.

#### **Article 6(7)**

##### *Requirement that comments be reasoned*

128. In its findings on communication ACCC/C/2006/16 (Lithuania),<sup>128</sup> the Committee found that the EIA Law in force at the time of the OHL decision in the present case failed to comply with the Convention since it required that comments on the EIA report be “reasoned”. In the present case, however, according to the Party concerned, none of the public’s comments were refused on this basis and the communicant has not provided evidence to show otherwise.

129. The Party concerned states that this requirement was subsequently removed from its legislation. Having reviewed the Public Participation Order as currently in force, the Committee can see no requirement in either instrument that comments on the EIA report be “reasoned”. While items 11.3 and 16 of the Public Participation Order require that proposals for reconsidering a screening conclusion and proposals regarding the EIA programme each be accompanied by “the information and circumstances” substantiating the proposal, there is no such requirement for the public’s proposals regarding the EIA report. The Committee accordingly finds that the communicant’s allegation that the law of the Party concerned currently in force requires comments on the EIA report to be reasoned is unsubstantiated.

##### *Submitting comments directly to the public authority*

130. Four entities were involved in the public participation procedure: AB Lietuvos Energija, the developer and planning organizer, whose rights and duties were later taken over by its subsidiary LITGRID AB; LitPol Link, the project coordinator, whose shares were 50% held by AB Lietuvos energija; and UAB Sweco Lietuva, the consultant hired by AB Lietuvos energija to draft the EIA, the SEA and the special plan.

131. At the time of the public participation procedure on the EIA report, item 21.4 of the Public Participation Order stipulated that comments could be sent to the developer or the EIA drafter, i.e.,

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<sup>125</sup> Communication, annex 3, pp. 93-161 and 343.

<sup>126</sup> ECE/MP.PP/2008/5/Add.6, para. 79.

<sup>127</sup> Ibid., and ECE/MP.PP/C.1/2019/6, paras. 100 and 102.

<sup>128</sup> ECE/MP.PP/2008/5/Add.6, para. 80.

the consultant in this case. Since an August 2011 amendment, item 21.4 now provides for comments to be sent just to the EIA drafter and a new item 21.5 provides that copies may additionally be submitted to the statutory consultees and the competent authority.

132. In principle, delegating certain tasks, such as receiving public comments and organizing public hearings, can be appropriate provided public authorities maintain sufficient oversight.<sup>129</sup> In the present case however, the task was delegated to the EIA drafter, a consultant engaged by the developer. This did not ensure the necessary impartiality and control required by article 6(7) of the Convention.

133. Under article 9(8) of the EIA Law, members of the public may send comments on possible violations directly to the competent authorities. However, this measure could only be used to highlight irregularities once they have already occurred and cannot compensate for the defect identified above.

134. The communicant sent comments to various entities besides the developer and the consultant, and these comments were responded to by these entities. However, Lithuania's legal framework formally designates the EIA drafter as the entity to which comments are to be sent; comments merely may be copied to other entities participating in the EIA procedure.

135. Based on the above, the Committee finds that, by establishing a system whereby comments submitted by the public during the EIA procedure are to be in the first instance submitted to an entity not required to be independent from the developer, and not to the competent public authority itself, the Party concerned is in noncompliance with article 6(7) of the Convention.

#### **Article 6(8)**

136. Item 33 of the Public Participation Order as currently in force requires the drafter (in the present case, the consultant) to prepare a reasoned evaluation of proposals and provide written answers to the members of the public who submitted them. However, the obligation in article 6(8) that the Party concerned shall ensure that in the decision due account is taken of the outcome of the public participation necessarily requires that the public's comments be considered by the competent public authority. Accordingly, the Committee makes clear that it is incompatible with the Convention that the developer's consultant prepared the responses to the comments received and the reasoned evaluation of the comments for the competent public authority. Moreover, it is not in compliance with the Convention that the competent public authority responsible for taking the decision was provided only with the summary of the comments submitted by the public.<sup>130</sup>

137. It is fundamental for compliance with article 6(8) that there should be a clear obligation in the legal framework for the competent public authority itself to take due account of the outcome of the public participation.<sup>131</sup> The Committee finds that, by not ensuring that the competent public authority is required to take due account of the outcomes of the public participation, the Party concerned fails to comply with article 6(8) of the Convention.

#### **Article 6(9)**

##### *Notification of the OHL decision*

138. Based on the information provided, the OHL decision was taken on 30 December 2010 and notified on Alytus RED's website on 3 January 2011, by newspaper notices on 7 January 2011, and publication on local billboards on 11-12 January 2011. While there was an error in the initial website notification, this was amended on 12 January 2011, and the court extended the period to appeal the decision.<sup>132</sup>

139. What constitutes prompt notification of a decision depends on the specific circumstances (e.g. the kind of decision, the type and size of the activity) and the relevant provisions of the domestic legal system (e.g. the relevant appeal procedures and their timing).<sup>133</sup> The communicant has not

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<sup>129</sup> See the Maastricht Recommendations, paras. 27-33 and annex.

<sup>130</sup> ECE/MP.PP/C.1/2011/6/Add.1, para. 64.

<sup>131</sup> See Maastricht Recommendations, para. 124.

<sup>132</sup> Party's response to communication, p. 11.

<sup>133</sup> ECE/MP.PP2008/5/Add.6, para. 82.



provided any evidence that 3-12 January 2011 was a major holiday period in Lithuania. Accordingly, bearing in mind that the time limit for appeal was extended, the Committee does not find that the dates on which the OHL decision was notified amounted to non-compliance with the requirement in article 6(9) to promptly inform the public of the decision.

*Providing the reasons on which the decision is based*

140. In its findings on communication ACCC/C/2006/16 (Lithuania), the Committee held that article 6(9) requires that public authorities provide evidence of having taken due account of the outcome of public participation.<sup>134</sup> The OHL decision in the present case merely states when the public hearings were held and cites the document reference of the minutes of the meeting held on 17 December 2010. It neither summarizes the comments received from the public nor provides information on how they were treated. This is not sufficient.

141. Nor it is sufficient that members of the public who submitted written comments, including the communicant, received an individual written response. While writing individually to each member of the public who submitted comments may be an additional good practice, such individual “private” replies cannot meet the requirement in article 6(9) to publicly show the reasons on which the decision is based, including how the public’s comments have been taken into account.

142. As for the minutes of the meeting on 17 December 2010, the Committee notes that since its June 2015 amendment, item 37 of the Public Participation Order now requires the competent authority, no later than three working days after the decision’s adoption, to post on its website both the decision and the minutes of the meeting held with the members of the public who submitted comments on the EIA report to discuss their comments. That requirement was however lacking from the Public Participation Order in force at the time of the OHL decision and the Committee has received no information to indicate that the minutes of the meeting on 17 December 2010 were made available to the public at the same time and in the same places as the OHL decision itself.

143. In the light of the above, the Committee finds that, by failing to demonstrate, either in or along with the decision, how due account was taken of the outcome of public participation, the Party concerned failed to comply with article 6(9) of the Convention with respect to the OHL decision.

**Article 9(2)**

144. As the Party concerned points out, the communicant was granted standing by the courts to challenge the OHL decision. The Committee accordingly finds that the communicant has not substantiated its claim that the Party concerned failed to comply with article 9(2) of the Convention.

**Article 9(4)**

*Injunctive relief*

145. Article 9(4) requires that Parties provide injunctive relief “as appropriate”. The communicant has not demonstrated why injunctive relief in this case was appropriate, and thus required, since the Kaunas Regional Court issued its decision in 2012 and construction did not start until 5 May 2014. The Committee accordingly finds that the Party concerned, although not providing injunctive relief in this case, did not fail to comply with article 9(4) of the Convention in this respect.

*Third-party costs*

146. The communicant was exempted from paying a filing fee because its case was brought in the public interest. This is a good practice, but it may become devoid of meaning if such applicants are ordered to pay other costs which are prohibitive or unfair. Of particular importance in the present case is that the communicant challenged the public authority’s decision, and LitPol Link intervened of its own accord, an involvement over which the communicant had no control. Moreover, the sum of intervenor’s costs awarded, €2,766.98, was more than the communicant’s annual budget. Ordering members of the public to pay substantial costs to third parties that choose of their own accord to intervene could allow third parties to effectively prevent the public from mounting court challenges to permits, thus making the procedure unfair.

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<sup>134</sup> Ibid., para. 81.

147. In the present case, however, the Committee 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. In these circumstances, the Committee finds the communicant's claim that the costs award failed to comply with article 9(4) of the Convention to not be sufficiently substantiated.

**Article 3(8)**

148. While the communicant only explicitly refers to article 3(8) in its final submission,<sup>135</sup> it has from an early stage alleged that its representatives and others were harassed in connection with their opposition to the proposed OHL.<sup>136</sup> Specifically, the communicant asserts that in 2012 and 2014 national security services (SSD) made several telephone calls and other approaches to members of the communicant in relation to the communicant's opposition to the OHL (see paras. 83-86 above).

149. In its findings on communication ACCC/C/2014/102 (Belarus), the Committee considered that in order to demonstrate a breach of article 3(8) of the Convention, four elements must be established:

“(a) One or more members of the public have exercised their rights in conformity with the provisions of the Convention,

(b) The member of the public or those members of the public have been penalized, persecuted or harassed;

(c) The penalization, persecution or harassment was related to the member(s) of the public's exercise of their rights under the Convention;

(d) The Party concerned has not taken the necessary measures to fully redress any penalization, persecution or harassment that did occur.”<sup>137</sup>

150. Regarding element (a) above, the Committee considers that, while the alleged incidents occurred after the public participation procedure on the OHL, the communicant was still at the time exercising its rights under the Convention to challenge the OHL decision.

151. Concerning elements (b) and (c), in its findings on communication ACCC/C/2014/102, the Committee held:

“Whether the treatment complained of amounts to penalization, persecution or harassment must be assessed on a case-by-case basis in the light of the particular circumstances, including whether the action taken by the State is objective and reasonable, and pursues a legitimate purpose. When making this assessment, the Committee considers whether the treatment complained of could be reasonable and proportional and pursue a legitimate public purpose.”<sup>138</sup>

152. The Party concerned accepts that the SSD telephoned Ms. Cimauskienė in 2012 and visited Ms. Želionienė in 2014 with respect to the communicant's opposition to the OHL. The Committee considers that, even just one telephone call from state security services to members of the public regarding their opposition to an activity subject to the Convention may constitute penalization, persecution or harassment under article 3(8) of the Convention. The burden of proof thus is on the Party concerned to show that the acknowledged phone call and visit by SSD to persons linked to the communicant were reasonable, proportional and pursued a legitimate purpose.

153. The Party concerned acknowledges that the SSD spoke to Ms. Cimauskienė and Ms. Želionienė “to clarify the issues in the Rudamina community related to the electricity power line.” It has also provided the text of article 4(1) and (3) of its Law on Intelligence which sets out the principles in accordance with which SSD's activities are to be carried out. It has not, however, explained how these activities pursued a legitimate public purpose.

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<sup>135</sup> Communicant's comments, 9 October 2017, p. 2.

<sup>136</sup> Communicant's additional remarks, 25 February 2015, p. 8.

<sup>137</sup> ECE/MP.PP/C.1/2017/19, para. 65.

<sup>138</sup> *Ibid.*, para. 69.

154. Concerning element (d), no information has been put before the Committee to indicate that the Party concerned has taken any measures to redress the incidents referred to above.

155. While recognizing the different context in which the incidents examined in the present case and those in communication ACCC/C/2014/102 (Belarus) occurred, the approach set out in the Committee's findings on the latter communication remains applicable.

156. Based on the above, the Committee finds that the telephoning and visiting of persons linked to the communicant, in the context of the communicant's opposition to the overhead powerline, by the State Security Department "to clarify the issues in the Rudamina community related to the electricity power line" constituted harassment, penalization and persecution by the Party concerned in non-compliance with article 3(8) of the Convention.

## **IV. Conclusions and recommendations**

157. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

### **A. Main findings with regard to non-compliance**

158. The Committee finds that:

(a) By not correctly notifying the public concerned about the timeframes during which relevant documentation would be available and in which comments could be submitted, the Party concerned failed to comply with the requirements in article 6(2)(d)(ii) to adequately inform the public concerned about the envisaged procedure, including the opportunities for the public to participate.

(b) By limiting the options in practice for the location of the border crossing point for the overhead powerline by setting that location through interstate consultations before the public participation procedures had been concluded, the Party concerned precluded the possibility for the public to participate when all options on the crossing point were open and thus failed to comply with article 6(4) of the Convention;

(c) By failing to ensure that all options with respect to the choice of technology for the power line were not just legally open but also could clearly be seen to be open by the public concerned, the Party concerned failed to comply with article 6(4) of the Convention;

(d) By establishing a system whereby comments submitted by the public during the EIA procedure are to be in the first instance submitted to an entity not required to be independent from the developer, and not to the competent public authority itself, the Party concerned is in noncompliance with article 6(7) of the Convention;

(e) By not ensuring that the competent public authority is required to take due account of the outcomes of the public participation, the Party concerned fails to comply with article 6(8) of the Convention;

(f) By failing to demonstrate, either in or along with the decision, how due account was taken of the outcome of public participation, the Party concerned failed to comply with article 6(9) of the Convention with respect to the decision on the overhead powerline;

(g) The telephoning and visiting of persons linked to the communicant, in the context of the communicant's opposition to the overhead powerline, by the State Security Department "to clarify the issues in the Rudamina community related to the electricity power line" constituted harassment, penalization and persecution by the Party concerned in non-compliance with article 3(8) of the Convention.

### **B. Recommendations**

159. The Committee pursuant to paragraph 36(b) of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures

request in paragraph 37(b) of the annex to decision I/7, recommends that the Party concerned take the necessary legislative, regulatory and administrative measures to ensure that:

(a) With respect to decisions on whether to permit specific activities subject to article 6 of the Convention:

- (i) The public is notified about all timeframes for opportunities for public participation, including the period during which relevant documentation will be available and in which comments can be submitted;
- (ii) Any international consultations concerning a specific cross-border activity by a public authority of the Party concerned prior to the completion of the public participation procedure under article 6 must not in law or in fact preclude all options being open during the public participation procedure;
- (iii) The range of options open at each stage of decision-making are adequately reflected in the information provided to the public at each stage;
- (iv) A clear requirement is established that comments submitted by the public are sent to the competent public authority itself,
- (v) The obligation to take due account of the comments, information, analysis or opinions submitted by the public during the EIA procedure is placed on the competent public authority;
- (vi) When publishing the decision, the competent public authority provides evidence to the public, either in or along with the decision, of how due account was taken of the outcome of the public participation;

(b) The State Security Department receives clear instructions to refrain from activities that could be perceived as persecution, penalization or harassment of persons seeking to exercise their rights to participate or seek access to justice under the Convention.