

Format for communications to the Aarhus Convention Compliance Committee

Important note:

The communication should be no more than 6,000 words (ten A4 pages). If in an exceptionally complex case more than ten pages are required, in no circumstances should the communication be longer than 12,000 words (twenty A4 pages). The paragraphs of the communication should be numbered and a list of annexes provided at the end.

I. Information on correspondent submitting the communication

1. [Full name of organization or person(s) submitting the communication:
Association Center for Environment (Udruženje Centar za životnu sredinu)
Permanent address:
Miše Stupara 5, 78 000 Banja Luka, Bosnia and Herzegovina
Address for correspondence on this matter, if different from permanent address
-
Telephone: **+387 51 433-140**
Email: **info@czs.org**

If the communication is made by a group of persons, provide the above information for each person and indicate one contact person.

If the communication is submitted by an organization, provide the following information for the contact person authorized to represent the organization in connection with this communication:

Name: **Redzib Skomorac**
Title/Position: **Legal Officer**
Telephone: **+387 61 622-085**
Email: **redzib.skomorac@czs.org**

II. Party concerned

2. [Name of the Party concerned by the communication]
Bosnia and Herzegovina

III. Facts of the communication

3. [Detail the facts and circumstances of the alleged non-compliance. Include all matters of relevance to the assessment and consideration of your communication. Explain how you consider that the facts and circumstances described represent a lack of compliance with the provisions the Convention.]

1. The subject of this communication is the lack of proper implementation of Art. 2 (1) (5), Art. 3. (9) of the Aarhus Convention in relation to environmental permits proceedings in legislation of Federation of Bosnia and Herzegovina (hereinafter FBiH).
2. Environmental permits are administrative decisions issued by relevant ministry of each entity of BiH, and have potentially significant environmental impact. Further, the environmental permits are a prerequisite for applying and obtaining of construction permit for different facilities.
3. Cantonal Court in Sarajevo **dismissed yet another lawsuits submitted by interested party** (Center for Environment, hereinafter CfE) which was submitted against the Decision of the FBiH Ministry of Environment and Tourism (ref. to case ACCC/C/2020/177, communicated on 26th January 2020 by Aarhus Center Sarajevo, BiH), pertaining to issued environmental permit for construction of a SHPP “Dindo” (3,74 MW), on Ljuta river, Municipality of Konjic, FBiH, BiH.

The chronology of the process that led to the lawsuit submission by the CfE and ruling rendered by the Cantonal Court in Sarajevo:

- a. CfE participated in timely manner in the procedure that preceded the adoption of the environmental permit for SHPP “Dindo” on Ljuta river; actively pointed out the remarks and submitted Comments on the draft Environmental Impact Assessment Study for SHPP “Dindo” on Ljuta river; and personally participated in the public hearing held on 1st May 2017 in Konjic on the occasion of drafting the EIA, in which way CfE, as an interested party, timely participated in the procedure of issuing the disputed environmental permit for SHPP “Dindo”.
- b. However, the ministry did not accept the fact that CfE is an interested party in the EIA proceeding, which is why the ministry did not even forward the disputed decision to CfE as interested party when issuing the environmental permit for the SHPP “Dindo” on Ljuta river. Only after the request for access to information from 15th May 2018, the ministry forwarded a copy of the environmental permit to CfE.
- c. On 15th June 2018, CfE submitted a lawsuit before Cantonal Court Sarajevo in timely manner, in an attempt to challenge the decision of the FBiH Ministry of Environment and Tourism issued for SHPP “Dindo” on Ljuta river (Environmental permit no. UPI 05/2-23-11-55/17 SN-I dated on 14th March 2018) due to the obvious violation of administrative proceeding.
- d. On 24th September 2021 the Cantonal Court Sarajevo dismissed the lawsuit and justified its ruling no. 09 0 U 031325 18 U simply due to the fact that the plaintiff is based in City of Banja Luka, whereas the project concerned (SHPP “Dindo”) was located in Municipality of Konjic. By acting in such manner, the Court has violated the FBiH Law on Protection of Environment, the Law on Administrative dispute and the Aarhus Convention, regarding the fact that the **basis for dismissing the lawsuit was found in the address of the plaintiff alone**, which was an clear act of discrimination.

IV. Provisions of the Convention with which non-compliance is alleged

4. [List as precisely as possible the provisions (articles, paragraphs, subparagraphs) of the

Convention that you allege the Party concerned has not complied with.]

Article 2, paragraph 1 (5) of the Convention

Article 3, paragraph 9 of the Convention

Article 9 paragraph 2 of the Convention

NOTE:

Legislation of Federation of Bosnia and Herzegovina is harmonised to the Aarhus Convention in this aspect. Nevertheless, the problem in this case is to be found in the interpretation of the Law by Cantonal Court in Sarajevo. **Denying the access to justice based on the residence of the legal entity** represents discrimination and grave violation of the FBiH Law on Protection of Environment and Aarhus Convention.

V. Nature of alleged non-compliance

5. [For each of the provisions with which you allege non-compliance, clearly explain how you consider that the Party concerned has failed to comply with that provision based on the facts of your case. (Provide as attachments to your communication the key supporting documentation that will help to substantiate your allegations).]

Rationale of the judgment of the Sarajevo Cantonal Court:

The court decided to dismiss the lawsuit, alleging that *"the provision of Article 58 of the Law on Environmental Protection of the FBiH ("Official Gazette of the Federation of BiH", No. 33/2003) was amended by the Law on Amendments to the Law on Environmental Protection (Official Gazette of the Federation of BiH ", No. 38/2009), by the provision of Article 22, which stipulates that Article 58, paragraph (1) and (2) of the Law on Environmental Protection shall be deleted, and the previous paragraph (3) shall become paragraph (1); is amended to read: For plants and installations that require prior environmental impact assessment, the competent ministry shall submit an application for the issuance of an environmental permit, together with attachments, to the competent authorities and interested parties, for the purpose of giving opinions and suggestions "*.

Also, the court states that in the *"Law on Environmental Protection of FBiH, the interested party / body is defined as a natural and / or legal person or organization that lives or works in the area of influence or area that is likely to be affected. Having in mind these provisions, as well as the fact that the plaintiff is the association, whose headquarters are in Banja Luka, at Miše Stupara 5, as indicated in the lawsuit, and that the environmental permit in question was issued to the investor "INGHYDRO" Ltd. Konjic, the plaintiff does not have the status of an interested party according to the Law on Environmental Protection of FBiH, as a substantive law "*.

Furthermore, the court finds that *"the plaintiff does not have the status of an interested person, even in terms of Article 15, paragraph 1 of the Law on Administrative Disputes ("Official Gazette of the Federation of BiH", No. 9/05), which stipulates that when an individual is a member of a social organization or association of citizens which according to its rules (statute) has the task of protecting certain rights and interests of its members, an administrative act violates such a right or interest, and a social organization or association of citizens may, with the written consent of its member, file a lawsuit. It does not follow from the content of the lawsuit that the disputed decision violated the right*

or legal interest of any of the members of the plaintiff and that the plaintiff, with the written consent of his member, was authorized to file a lawsuit on his behalf and conduct an administrative dispute”.

So, Cantonal Court in Sarajevo has decided to dismiss the lawsuits on the ground that in the “(...) *the seat of the plaintiff is in Banja Luka, as indicated in the lawsuits, (...) so, it can be concluded that the plaintiff does not have the capacity of an interested party within the meaning of the Environmental Law of FB&H, as a substantive law.*”

Further, the Cantonal Court in Sarajevo, due to the same reason, elaborates that *"the Plaintiff does not have the capacity of an interested person (...) and can not file on its behalf a lawsuit and lead an administrative dispute."*

Non-compliance with the provisions of the Aarhus Convention and national legislation:

1. This reasoning of the Cantonal Court in Sarajevo is not in accordance with the Aarhus Convention. Specifically, in this particular case, the plaintiff must be considered to be an interested party/public within the meaning of the Article 9, paragraph (2) of the Aarhus Convention, which rules that *“each Party shall, within its national law, ensure that interested members of the public who a) have sufficient interest, or, alternatively, b) claim that the right has been compromised where, in administrative proceeding is required from the Signature country as a precondition, they have access to a review procedure before a court and/or other independent and impartial body established by law, with a view to contesting substantive and procedural the lawfulness of any decision, act or omission (...) What constitutes a sufficient interest and threat to the right is determined in accordance with the requirements of national law and in accordance with the objectives of giving the public concerned broad access to justice within the scope of this Convention. To this end, the interest of all non-governmental organizations meeting the requirements of Article 2 (5) shall be considered sufficient for the purposes of subparagraph (a) above. These organizations are also considered to have rights that may be jeopardized for the purposes of subparagraph (b) above.”* In doing so, Article 2, paragraph 5 of the Aarhus Convention provides that *"the public concerned, designates a public that is or is likely to be influenced, or has an interest in environmental decision-making; for the purposes of this definition, non-governmental organizations promoting protecting the environment and meeting any requirements under national law will be deemed to have an interest."*

2. In addition to violating the provisions of the Aarhus Convention, the Cantonal Court in Sarajevo also violated the provisions of the Law on Environmental Protection of FB&H, as follows:

- Article 30, paragraph (2) of the Law on Amendments to the FB&H Law on Environmental Protection, which clearly stipulates that *"an interested public, within the meaning of this Law, means a public that has an interest in environmental decision-making, either because of the location of the project or **because of the nature of the intervention in the environment**, the public affected or likely to be influenced by the intended environmental intervention and **non-governmental organizations promoting the environment.**"*

CfE is registered as a non-governmental organization promoting environmental protection, and therefore, in accordance with the aforementioned provision, represents an interested party/public. (paragraph 8 and 9 of CfE’s Statute from 2016)

- Article 31, paragraph (1) of the Environmental Protection Act, which clearly stipulates that "*in accordance with the provisions of this Law, **the public has access to information**, participation in decision-making and **protection of rights before administrative and judicial authorities** in matters of environmental protection without discrimination on grounds of nationality, nationality or place of residence and in the case of legal persons, **without discrimination based on their place of registration or center of activity.**"*

As the CfE was registered as a legal entity, the court was not allowed to discriminate on the basis of the place of registration or the center of activity, which was done on in the court's decision. Specifically, the court states that "*the FB&H Law on Environmental Protection defines an interested party/body as a natural and/or legal person or organization residing or operating in an area of influence or area likely to be affected.*" However, this provision is not complete and the court had to be guided by sections 30 (2), 31 (1) and 39 (1) and (2) of the Environmental Protection Act. Since the court found that the plaintiff did not have the capacity of an interested party, this way it directly violated the aforementioned articles, i.e. it violated the Federal law.

Article 39, paragraphs (1) and (2) of the FB&H Environmental Law, which clearly stipulates that "*representatives of the **interested public** who participated in the first instance proceedings have the right to appeal against the decision or part of the decision. In addition to the right to participate in licensing and environmental impact assessment procedures have the right, if one acts contrary to the environmental principles of environmental law, **to initiate proceedings to protect their rights before a competent court.**"*

As the CfE participated in first instance proceedings in the particular case, it is clear that as such it had the right to initiate legal proceeding. Also, the CfE, in the process of issuance of the Environmental permit, was acknowledged by the FBiH Ministry of Environment and Tourism as an interested party, since the ministry itself, in elaboration within the concerned permit, referred to CfE's comments submitted on the draft Environmental Impact Assessment in regard to the SHPP "Dindo".

3. We also emphasise that the court erred in fact by stating that the CfE does not represent an interested party/authority within the meaning of the Law on Administrative Disputes, since the right or legal interest of a person has not been violated from plaintiff's members. However, we emphasise in this way that the Cantonal Court in Sarajevo did not check whether the right or legal interest of any of the members of the plaintiff was actually violated, but still, based on an arbitrary assessment, reached such a conclusion, which is also contrary to the cited law.

6. [Also indicate whether the communication concerns a specific case of a person's rights of access to information, public participation or access to justice being violated as a result of the alleged non-compliance of the Party concerned, or whether it relates to a general failure by the Party concerned to implement, or to implement correctly, the provisions of the Convention. If you consider that the non-compliance concerns a general failure by the Party concerned, provide as attachments to your communication any key supporting documentation that will help to substantiate that it is a general failure.]

The violations of Aarhus Convention in this matter is a general one, since the FBiH, as one of the entities of BiH, has failed to acknowledge CfE as a relevant party in charge to initiate concerned legal proceeding, and/or to find the ground for such status in the provisions of the Aarhus Convention, as a supranational law.

VI. Use of domestic remedies

7. [Describe which, if any, domestic remedies have been invoked to address the particular matter of non-compliance which is the subject of the communication. Specify which domestic remedies were used, when they were used, what claims were made, what the results were and whether there are any other domestic remedies available.]

CfE has filed a lawsuits against the environmental permit of the Federal Ministry of Environment and Tourism to the Cantonal Court in Sarajevo, which ultimately, **after more than three years dismissed the lawsuit** on before-mentioned ground.

Since the Cantonal Court ruling is considered as final in judiciary system of FBiH, CfE had to file an extraordinary legal remedy, a **requests for extraordinary review of court decisions** before the Supreme Court of the Federation of Bosnia and Herzegovina as a higher court on 26th October 2021, elaborating the same violations as in this very communication to the ACCC.

However, although the proceeding before the highest judiciary authority in FBiH has only been initiated, CfE has decided to file this complaint to the ACCC at the same time because the judicial processes in Bosnia and Herzegovina are **extremely time consuming** and there is no way to speed up the proceedings because environmental cases do not constitute priorities in the litigation process. The problem is even greater, as environmental permits have a term of 5 years, and court proceedings before Cantonal Court in Sarajevo last for a minimum of 3 years, therefore, we are more than likely to find ourselves in situations where the environmental permit expires before a very ruling of the highest court is rendered.

Further more, in these cases, the **legal remedy** does not achieve its purpose and it is **vaguely efficient** since the court does not exercise the possibility of “injunctive relief”, even if requested. This leaves us with a possibility for the investor to legally apply for and obtain a construction permit for the SHPP, and, while the environmental permit is still been considered by judiciary authority, perform the construction works, despite the uncertainty of the legality of the project itself.

Despite warnings (sent prior to this communication) by the Aarhus Center in Sarajevo to the Cantonal Court in Sarajevo, together with addressing this issue to the Ombudsman Institution in BiH in 2019 by the Association for the Protection and Promotion of the Environment, Nature and Health “EKOTIM” from Sarajevo, still it was **unable to expedite the court proceedings** in this matter.

8. [If no domestic remedies have been invoked or if there are other domestic remedies available, explain why they have not been used. This information will be important for the Compliance Committee’s decision on admissibility of the case.]

Having said all the above, we hope that the Aarhus Convention Compliance Committee will understand the **urgency of this matter**, and/or find the sufficient *ratio* to address it to the full extent to the authorities in Bosnia and Herzegovina, and not render the case as premature, especially when the same **Cantonal Court has violated** the same provision of the **Aarhus Convention for the fourth time in two years.**

VII. Use of other international procedures

9. [Indicate if any international procedures besides the Aarhus Convention Compliance Committee have been invoked to address the issue of non-compliance which is the subject of the communication. If so, specify which procedures were used, when they were used, what claims were made and what the results were.]

No other international procedures were invoked by the time of this communication.

VIII. Confidentiality

10. [Note that unless you expressly request it, none of the information contained in your communication will be kept confidential. If you are concerned that you may be penalized, harassed or persecuted, you may request that information contained in your communication, including information on your identity, be kept confidential. If you request any information to be kept confidential, clearly indicate which information. It is also helpful for the Committee to know why confidentiality is requested.]

The correspondent does not request for any information included in this communication to be kept confidential.

IX. Supporting documentation (copies, not originals)

11. [Insert a list of annexes at the end of your communication. Clearly specify in your communication which paragraph of your communication each annexed document relates to. For each annexed document, highlight those parts which are essential to your case.]
12. [Avoid including extraneous, superfluous or bulky documentation. Attach only documentation essential to your case, including:
- Relevant national legislation, highlighting the most relevant provisions.
 - Relevant decisions/results of other review procedures, highlighting the most relevant sections.
 - Relevant correspondence with public authorities of the Party concerned or other documentation that substantiates your allegations of non-compliance, highlighting the most relevant sections.]
13. [Provide all supporting documentation in the original language, together with a legal standard English translation thereof, or if that is not possible, a legal standard translation in either Russian or French.]

1. Reply of the ministry on the Comments on draft EIA (original copy)

2. Lawsuit (against the Environmental permit) no: 134/18 from 15th June 2018 (original copy)

3. Court decision no: 09 0 U 031325 18 U from 24th September 2021 (original copy)

**for english translation of the Court decision please see "Rationale of the judgment of the Sarajevo Cantonal Court" (page 3-4 of the Communication)*

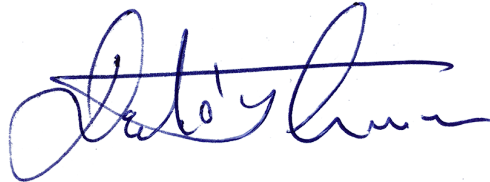
4. CfE Statute from 11th November 2016 (original copy)

X. Signature

14. [Sign and date the communication. If the communication is submitted by an organization, a person authorized to sign on behalf of that organization must sign it.]

Mr. Tihomir Dakić, President of the Center for Environment

Signature:



Date: **Banja Luka, 27th October 2021**

XI. Sending the communication

15. Send the communication by email to the Secretary to the Compliance Committee at the following address:
aarhus.compliance@un.org
16. In the exceptional case that you do not receive an acknowledgement of receipt from the secretariat by email within one week, send the communication by registered post to the following address:

Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10, Switzerland