ClientEarth
Prawnicy dla Ziemi

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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
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By email: aarhus.compliance@un.org

Dear Ms Marshall

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Poland with regard to public participation and access to justice in relation to certain water permits (ACCC/C/2017/146)

The Communicant would like to provide the Committee with an update on communication ACCC/C/2017/146 because there have been some relevant legislative changes and jurisprudence since the Communication was submitted in 2017 and the Communicant's comments were presented in 2018. The Communicant hopes that this additional information will facilitate the Committee's preparation for a hearing on this case.

The Communicant would like to emphasise that it maintains all of the claims made in the Communication. While the legal situation has changed, it is still not compliant with the Aarhus Convention.

Firstly, this update provides an overview of the amendment of Article 402 of the Water Law of 30 March 2021 (Section I). Secondly, it explains how this and other amendments as well as jurisprudence affect the claims contained in the Communication (Section II). Finally, it discusses some recent jurisprudence of the Polish courts and explains why these judgements do not resolve the situation (Section III).

I. Recent amendment of the Water law

The Water Law was altered by the Act of 30 March 2021 amending the Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment dated 3 October 2008 and several so-called special acts which regulate various investment proceedings ("Act amending the EIA Law")[1], which entered into force on 13 May 2021. This Act was a response to the reasoned opinion of 7 March 2019 issued by the European Commission within the infringement proceeding against Poland (INFR/2016/2046) regarding the breach of Article 11(1) and (3) of European Parliament and Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

Article 402 of the Water Law, which is of central importance to this Communication, was partially altered by this amendment. Paragraph 1 of this provision remains the same. It reads:

"*1. In proceedings concerning water permits the provisions of Article 31 of the Code of Administrative Procedure shall not apply."*

As explained in the Communication, Article 31 Code of Administrative Procedure (the "CAP") provides NGOs with a right of access to justice under certain circumstances. Based on Article 402(1) of the Water Law, NGOs can still not rely on this provision to challenge water permits.

At the same time, a new paragraph 2 has been added to Article 402 of the Water Law:

2. The provisions of Article 86f (6), Article 86g and Article 86h of the Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment ["(the EIA Law")] shall apply to the proceedings relating to the water permit, preceded by a decision on environmental conditions (EIA decision)."

This provision only changes the procedure for those water permits that have been preceded by an EIA (see further section II.3 below).

The provisions of the EIA Law referred to establish two main changes to the procedure: Article 86f (6) introduces the obligation to suspend in whole or in part the enforcement of the water permit in circumstances where the EIA decision has been suspended and Article 86 g gives the ecological organisation (ENGO) the right to lodge an appeal against the water permit and the right to lodge a complaint to the administrative court (this challenge is limited to the permit's compliance with the EIA decision).

The wording of the newly added EIA law provisions (Article 86f (6), 86g and 86 h) are provided in annex 1.

Below, the effect of the above amendment, as well as any new jurisprudence or other changes, is explained in relation to each of the claims included in the Communication.

[1] Dz.U.2021, poz. 784.

II. Impact on the claims contained in the Communication

1. **Articles 6(1)(a) and 9(2) of the Aarhus Convention: Water permits not covered by the EIA Act**

A. The first claim of the Communication is that certain types of projects listed under items 10 and 11(a) and (b) Annex I of the Aarhus Convention are not listed as projects that require an EIA under the Polish EIA Law. Some of these projects will therefore only require a water permit and not be preceded by EIA, which also means that there will be neither public participation, nor access to justice.

In 2019, the Regulation of the Council of 9 November 2010 on types of projects likely to have significant effects on the environment was replaced by the **new Regulation of the Council of 10 September 2019 on types of projects likely to have significant effects on the environment.**[2] However, the relevant paragraph, namely paragraph 2(1) items 35, 37, 38 and 39 of the Regulation which mostly correspond with the projects specified in items 10, 11 and 13 of Annex I of the Aarhus Convention remained essentially unchanged. The only changes in these items consists of adding "*excluding the transmission of water intended for human consumption through water supply systems*" to items 38 and 39. The numbering remains the same.

This means that public participation is still not required when the project concerns "*Groundwater abstraction or artificial groundwater recharge schemes (…)*"[3] and "*Works for the transfer of water resources (…)*"[4]. Polish law thereby fails to comply with Article 6.1 (a) and 9(2) of the Aarhus Convention.

In summary, the applicability of paragraph 2(1) items 35, 37, 38 and 39 of the Regulation is still narrower than items 10, 11 and 13 of Annex I of the Aarhus Convention and the examples provided previously by ClientEarth are still valid[5].

B. Further, an extension of a water permit is not considered to be a project that requires an EIA or a Screening. According to the Polish Water Law, a water permit is granted for a specified period of time, not exceeding 30 years (Article 400 (1)). When this period comes to an end, an investor needs to apply to the competent authority for the extension of the validity of a water permit at least 90 days before the expiry of the initial period (Article 414 (2)). The authority then prolongs a water permit for a period of up to 20 years, without conducting an EIA or a Screening prior to this decision (Article 414 (7)). The Water Law (Article 414) does not exclude EIA directly, it just does not include nor refer to it in any way in the process of extending the water permit. Thus, a screening is not conducted because an extension does not qualify as a project according to the EIA Regulation.

As a consequence, there will be neither public participation, nor access to justice. The public is permanently excluded from both the administrative and judicial proceedings

[2] Dz. U. 2019 poz. 1839.
[3] Annex I in paragraph 10.
[4] In paragraph 11 (a) and (b).
[5] Communicant's comments on the Party concerned's submission on admissibility, 31 October 2018, p. 3.

concerning existing water facilities (such as dams or hydroelectric power plants) for which water permits are being renewed.

The Polish law thereby fails to comply with Article 6.1 (a) and 9(2) of the Aarhus Convention.

A concrete example of a case exemplifying this problem is provided in annex 5. Although the legal situation of this case is based on the previous Water Law of 2001, the aspect of NGOs' access to the proceedings remains unchanged because the relevant provision was duplicated in the new law. The wording of relevant articles of the Water Law are provided in annex 1 (point 4).

2. Articles 6(1)(b) and 9(2) of the Aarhus Convention: No access to justice to challenge negative screening decisions

The second claim of the Communication concerns the lack of access to justice to challenge EIA screening decisions, which results in a violation of Articles 6(1)(b) and 9(2) of the Aarhus Convention.

In the Polish legal system, negative EIA screening decisions can be challenged by NGOs only under the condition that they participated in the first instance administrative proceedings. While this is in itself not compliant with the Convention, NGOs also have no guaranteed right to participate, which constitutes an additional barrier to access to justice.

a. The obligation to participate in the administrative procedure on EIA screening as a precondition for access to justice

In proceedings requiring public participation, Article 44 of the Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment of 3 October 2008 ("the EIA law", see Annex 1) gives environmental NGOs 3 main rights:

1. to participate in the proceedings with the rights of a party, when relying on their statutory objectives and when they conduct statutory activities in the field of environmental protection or nature protection for a minimum of 12 months prior to the date of initiation of such proceedings;

2. to appeal against a decision if it is justified by the statutory objectives of the organization, also in the event that the organization did not participate in a specific proceeding requiring public participation conducted by the authority of first instance;

3. to appeal to an administrative court against a decision if it is justified by the statutory objectives of such organization, also where it did not participate in the specific proceeding requiring public participation.

As explained in a previous submission,[6] since the EIA negative screening decision's procedure does not require public participation, NGOs cannot rely on Art. 44 EIA law to challenge negative screening decisions. As previously explained,[7] this is confirmed by the jurisprudence of the Supreme Administrative Court, which held that :

> *""(...) one of the conditions, the fulfilment of which depends on using [Article 44 of EIA Act] is that public participation is required in a particular proceeding*."[8]

Therefore, the only possibility for an NGO to challenge the EIA negative screening decision continues to be the more general standing provision under the Code of Administrative Procedure (Article 31 of "the CAP"). As the Supreme Administrative Court continued in the same case:

> "*Failure to meet this requirement [of public participation under Art. 44 EIA Act] does not mean, however, that the environmental NGO cannot participate in the proceeding and appeal against the decision. In this situation, however, the general rules governing the participation of social organization in administrative proceedings apply, as indicated in art. 31 of the CAP, a social organization may in a case involving another person demand: 1) initiation of proceedings, 2) admission to participate in the proceedings, if it is justified by the statutory purposes of this organization and when it is in the social interest."*

However, in order to the use of the administrative appeal procedure in Art. 31 CAP, it is necessary to have participated in the decision-making process leading to the adoption of the decision being challenged (in this case the negative screening decision). This is well-established in the case-law of the Polish administrative courts (see Annex 2) which confirms that "*social organizations*"[9] have the rights of a party, and thus also the right to file an administrative appeal, only if they have been admitted to participate in the administrative proceeding.

Subsequently, in order to challenge the EIA negative screening decision before the administrative court, a social organisation may, in accordance with its statutory goals, lodge a complaint in matters concerning other person's legal interests, if they have previously participated in the administrative proceedings (Article 50 § 1 of the Law of 30 August 2002 on the Proceedings before the Administrative Courts ('the PAC" – see annex 1). This means that only social organizations that have been admitted to participate in the administrative proceedings pursuant to Article 31 § 1 of the CAP are, pursuant to Article 50 § 1 of the PAC, entitled to file an appeal before the administrative court.[10]

[6] See also Communicant's comments on the Party concerned's submission on admissibility, 31 October 2018, pp. 3-4.
[7] Communicant's comments on the Party concerned's submission on admissibility, 31 October 2018, p. 4.
[8] The Supreme Administrative Court's judgment of 3 October 2013, case no. II OSK 1274/12.
[9] Note that the Polish legislation uses the term social organisation in a manner that includes environmental NGOs.
[10] The Supreme Administrative Court's judgment of 18 February 2014, case no. II OSK 2099/12.

There is therefore no possibility for environmental NGOs to challenge EIA negative screening decisions without having previously participated in the administrative proceedings. This is a clear violation of Article 9(2) of the Aarhus Convention.[11]

In this regard, the Communicant would also like to draw the attention of the Committee to a judgement of the Court of Justice of the European Union (CJEU) that has been adopted after the Communication was submitted. In its judgement on Case C-826/18 *Stichting Varkens in Nood* of 14 January 2021, the CJEU held that "*Article 9(2) of the Aarhus Convention precludes the admissibility of the judicial proceedings to which it refers, brought by non-governmental organisations which are part of the 'public concerned' referred to in Article 2(5) of that convention, from being made subject to the participation of those organisations in the procedure preparatory to the contested decision, even though that condition does not apply where such organisations cannot reasonably be criticised for not having participated in that procedure."*[12] To be clear, in the present situation there is not even a rule that would exempt organisations that "*cannot be reasonably be criticised for not having participated*"; the requirement of prior participation applies without exception.

While the judgements of the CJEU are of course not binding on the Committee, it may take this interpretation into consideration in its elaborations.

b. **Further barriers to challenging EIA screening decisions**

Even though the mere obligation to participate constitutes a violation of the Aarhus Convention, it is important to note that there are further barriers to challenging EIA screening decisions in practice. Environmental NGOs are not automatically admitted to participate in the EIA screening proceedings but need to apply to be admitted. According to Article 31 § 1 (2) of the CAP, the "social organisation"[13] can be admitted to the proceedings if it is justified by its statutory goals[14] and if it is in the social interest.[15] This is decided by the authority in charge of the proceedings.

In a judgement of the Supreme Administrative Court,[16] it was emphasized that the essence of participation of a social organization in administrative proceedings is not to satisfy particular

[11] ACCC/C/2012/76 (Bulgaria), ECE/MP.PP/C.1/2016/3, para. 68. See also Report of the Compliance Committee to the sixth Meeting of the Parties on compliance by Armenia, ECE/MP.PP/2017/33, paras 58-59.
[12] ECLI:EU:C:2021:7, para. 69.
[13] The term "social organisation" is understood as professional, self-government, cooperative and other social organisations (pursuant to Article 5 § 2 item 5 of the CAP), whereby the term "social organisation" under Art. 31 § 1 of the CAP should be interpreted broadly. This provision refers to "any manifestation of organised activity of a certain social group, including a group of people" the Warsaw Regional Administrative Court's judgment of 10 October 2018, case no. VI SA/Wa 774/18.
[14] Justification by "statutory objectives" should be understood as a situation where there is a "*substantive connection between the subject matter of administrative proceedings and the objectives and scope of activity (object of activity) of a social organization. As a rule, the object and purpose of activity of a social organization are specified in its statute, unless the provisions of law do not require the adoption of the statute. The public administration body is therefore obliged to determine ex officio whether the objectives set out in the statute of the social organization justify its participation in the proceedings in a case concerning another person*." Judgment of the Kraków Regional Administrative Court of 14 May 2018, case no. II SA/Kr 361/18.
[15] By "social interest" is meant as the respect for values common for the whole society.
[16] Judgment of 28 September 2009, case no. II GZ 55/09.

interests of the organization itself, but to ensure broadly understood social control over the proceedings. The authority is not obliged to grant every time a motion of a social organization only for the reason that the nature of the examined case is consistent with the scope of its statutory activity.

If the authority issues a decision rejecting the request to admit a social organisation to participate in the proceedings, the organisation can lodge an interlocutory appeal against it. However, appeals against the decision not to admit the organisation to the proceedings do not have suspensive effect on the administrative proceedings. Accordingly, there are situations in which the window of opportunity to challenge the negative screening decision before an administrative court closes before the appeal against the decision not to allow the organisation to participate has been finalised. This was the case in a judgment of the Gliwice Regional Administrative Court of 5 November 2014.[17] In this judgement, the court overruled decisions refusing to admit a social organization. However, the court found at the same time that there were no grounds for giving that organisation the rights of a party to administrative proceedings because these proceedings had already been completed with a final decision. The court considered that there was no longer a "*subject*", i.e. pending environmental proceedings, to which the applicants could be admitted.[18] There was therefore no remedy for the organisation in question.

Concrete case examples illustrating these barriers are provided in annex 3.

4. Articles 6(1) and 9(2) of the Aarhus Convention: Public participation and access to justice limited to first decision in tiered process

The third claim of the Communication concerns the fact that, even if a specific water permit is subject to EIA, access to justice is limited to the first decision in a multi-tiered permitting process.[19] As previously explained, under Polish law, it is the water permit and not the EIA decision which actually authorises the undertaking of the proposed activities and determines relevant environmental conditions of the activity. Therefore, the EIA decision is only a first decision in a

[17] Case no. II SA/Gl 587/14.

[18] "*The court found that issuing an environmental decision without waiting for the conclusion of the proceedings determining the circle of parties to it, including with the omission of the possible participation in it as a party of the environmental organization, even when these proceedings end with a finding that there is no need to conduct an assessment of the environmental impact of a given project - is not an acceptable practice from the point of view of the applicable law. This is because it makes it impossible for the organization - if the conditions for such admittance exist - to present a position which could undermine the findings of the authority. Clearly, however, there are no grounds for admitting an entity on the rights of a party to administrative proceedings that have already been completed with a final decision. This is because then there is no subject (pending environmental proceedings) to which admission could apply. Incidentally, it should be noted that in the state of the law depriving a social organisation of procedural rights guaranteeing the launch of an instance-based and then court-based control of the issued environmental decision does not mean consenting to the full freedom of action of administrative bodies in this respect. Therefore, if the Association is convinced that in the proceedings in which it was not allowed to participate the decision was made in violation of the law, it could have submitted an appropriate motion to the relevant Prosecutor to consider the application of measures set out in Section IV of the Code of Administrative Procedure*."

[19] Communicant's comments on the Party concerned's submission on admissibility, 31 October 2018, p. 5.

tiered decision-making process and access to justice only concerning the EIA decision is insufficient.

This claim has been impacted by the Act amending the EIA Law described above but the issue has not been fully resolved. ENGOs can now challenge water permits that have been preceded by an EIA. However, this challenge is limited to the permit's compliance with the EIA decision. The newly added provision to the Article 402 (2) of the Water Law (Article 86g of the EIA law) only deals with the situation where the water permit is found to be inconsistent with the EIA decision.

Such limited scope of review does not comply with Article 9(2) of the Aarhus Convention, which specifies that members of the public concerned have the right to "*challenge the substantive or procedural legality*" of decisions, acts or omissions. The Aarhus Committee has for instance held on that basis that NGOs could not be limited to seeking review of only the substantive, and not procedural, legality of decisions[20]. Equally, the scope of review cannot be limited to an inconsistency with the EIA Decision, thus excluding all other legal violations.

The amendment therefore still does not ensure that ENGOs can challenge water permits for failing to comply with requirements of the Polish Water Law. The example previously submitted by ClientEarth to illustrate this point, related to the instruction for management of water (previously Article 404 of the Water Law),[21] remains valid. Although this Article 404 was deleted by Article 1 point 73 of the Act of 11 September 2019[22] amending the Water Law (this amendment entered into force on 23 November 2019), the provision on the instruction can now be found under Article 407, point 3, of the Water Law.

This instruction is an elaboration constituting the basis for the determination of water management in case of utilization of water by means of damming it up. Article 407, point 3 specifies that in order to obtain a water permit for damming inland surface waters by a high-rise structure with a damming height above 1 m, the Instruction is required. The Instruction is an appendix to the water permit. The scope of the Instruction was specified by the Regulation of the Minister of the Environment of 17 August 2006, on the scope of water management instructions. This Regulation is replaced by the new **Regulation of the Minister of Maritime Affairs and Inland Navigation of 21 August 2019 on the scope of water management instructions.**[23] However, this does not change the substance of the argument.

This is not to suggest that permitting challenges based on a violation of the Water Law would be sufficient. As the Committee has found "*the review procedures according to article 9, paragraph 2, of the Convention should not be restricted to alleged violations of national law "serving the environment", "relating to the environment" or "promoting the protection of the environment", as there is no legal basis for such limitation in the Convention*"[24]. Accordingly, it should also be possible to challenge the water permit based on provisions that are not derived from environmental law, such as concerning economic aspects of investments, trade, finance, public procurement rules, etc. However, Article 402(2) currently excludes any such claims.

[20] ACCC/C/2010/50 (Czech Republic), para. 81.
[21] Communicant's comments on the Party concerned's submission on admissibility, 31 October 2018, pp. 5-6.
[22] Dz.U.2019, poz. 2170.
[23] Dz.U. 2019 poz. 1725.
[24] ACCC/C/2008/31 (Germany), ECE/MP.PP/C.1/2014/8, para. 78.

5. Article 9(3) of the Aarhus Convention: No access to justice if water permits contravene national law related to the environment

As the fourth, and alternative, claim of the Communication, the Communicant alleged that even if these water permits were found, for some reason, to not fall under Article 9(2) of the Aarhus Convention, they would nonetheless be covered by Article 9(3) of the Aarhus Convention because they are national acts (potentially) contravening national law related to the environment. Since Article 402(1) of the Water Law still excludes the application of Article 31 of the CAP, this claim remains unaffected; NGOs continued to be excluded from participation in the administrative procedure for water permits and consequently have no access to justice.

6. Case-law of the administrative courts

The case-law of administrative courts is in line with current legislation. However, there are some recent cases in which the administrative regional courts (the courts of first instance) gave standing to NGOs in line with EU law and the Aarhus Convention.

In the judgment of 20 March 2020, the Warsaw Regional Administrative Court[25] stated that the administrative authorities of both instances, when refusing to allow a social organization to participate in the proceedings, incorrectly assumed that the application of Article 31 of the CAP in water law proceedings is excluded, even though such exclusion is provided for directly in Article 402 of the Water Law.

The court, in reviewing the legality of the appealed decision, found Article 402 of the Water Law to be contrary to the following provisions of EU law and the Aarhus Convention: Article 9(3) of the Aarhus Convention in conjunction with Article 47 of the Charter of Fundamental Rights and Article 14(1) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy ("Directive 2000/60"). The court set aside Article 402 of the Water Law on this basis.

The court also considered the legal standing of the applicant social organisation to file a complaint with the administrative court. This is because Article 50 § 1 of the Law of 30 August 2002 on the Proceedings before the Administrative Courts ('the PAC') makes the possibility of filing a complaint conditional on the prior participation of the social organisation in the administrative proceedings: "*It should be noted that Article 402 of the 2017 Water Law excludes the participation of an environmental organization as a party in the permit proceedings implementing Directive 2000/60/EC. It is also undisputed that this exclusion, in principle, prevents an organization of this kind from bringing a complaint before an administrative court against a decision ending the administrative proceedings. It follows from Article 50 § 1 of the PAC that only such a social organisation (within the scope of its statutory activity) which took part in the administrative proceedings is entitled to lodge a complaint in a case concerning legal interests of other persons.*" The Court then pointed out that, since Art. 402 of the Water Law prevents a social organisation from participating in the proceedings for granting a water permit in violation of EU law, an

[25] Case no. IV Sa/Wa 1248/19.

organisation cannot be denied the possibility of filing a complaint with an administrative court merely because it did not participate in the administrative proceedings.

When considering the request to refer - in case of doubt - the question to the CJEU for a preliminary ruling, the court referred to the judgment of the CJEU in Case C-664/15 (*Protect Natur*, paras 54-57), as well as to the importance of interpreting EU law in a uniform manner. This principle is expressed in the resolution of the Supreme Court of 24 November 2010. (I KZP 19/10, OSNKW 2010, 12, item 103), according to which the interpretation of provisions of EU law provided by the CJEU in an interpretative ruling issued in response to a question for a preliminary ruling submitted by a national court of a Member State other than Poland may constitute grounds for Polish courts to refuse application of a provision of Polish law as incompatible with EU law.

The above judgment was subsequently upheld by the Supreme Administrative Court[26] which confirmed that Article 402 of the Water Law, which prevents a social organisation from participating in proceedings, is contrary to Article 9(3) of the Aarhus Convention in conjunction with Article 47 of the Charter of Fundamental Rights and Article 14(1) of Directive 2000/60, and the administrative court of first instance was fully competent to refuse to apply a national provision contrary to EU law on the basis of the CJEU's interpretation.

Similarly, in the judgment of 21 September 2021 the Białystok Regional Administrative Court[27] held that Article 402 of the Water law is contrary to EU law and the Aarhus Convention. It stated that "*when assessing the admissibility of applying Art. 31 of the CAP in a case for granting a water permit based on provisions of the Water Law, it is justified to refrain from applying Art. 402 of the Act on Water as a provision of national law is contrary to Art. 9 (3) of the Aarhus Convention, approved by Decision 2005/370, in connection with Art. 47 of the EU Charter of Fundamental Rights and Art. 14 Section 1 of Directive 2000/60/EC. The exclusion of the application of Art. 31 of the Code of Administrative Procedure in administrative proceedings for the issue of a water permit, as provided for in Art. 402 of the Water Law, has no effect in this situation. Instead, the procedure of Article 31 of the CAP is applicable. In other words, since the CJEU judgment of 20 December 2017 in Case C-664/15 remains in legal circulation, containing an interpretation of EU law for the procedural rights of social organisations in cases pending on the basis of the provisions implementing Directive 2000/60/EC, the assessment of the control - for the purposes of this case - of the compliance of Article 402 of the Water Law with the provisions of EU law does not require an independent referral by the court to the CJEU for a preliminary ruling under Article 267 TFEU. Consequently, the position of the authorities excluding the possibility of applying Article 31 of the CAP in the present case due to the content of Article 402 of the Act is incorrect*".

However, it should be noted that the same court, the Białystok Regional Administrative Court, in its judgment of 23 January 2020[28], found that the administrative authorities when accepting the participation of an association had infringed the procedural provisions, namely Article 402 (1) of the Water Law, which explicitly excludes the possibility for the NGOs to participate in the water-permit proceedings. The proceedings at stake considered the water permit for damming up water for the needs of a small hydroelectric power plant and the authority of first instance (Director of the Catchment Area Management Board- *Dyrektor Zarządu Zlewni*) had accepted the statement submitted by the association and consequently treated it as a party to the proceedings. The court

[26] Judgment of the Supreme Administrative Court dated 20 April 2021, case no. III OSK 3140/21.
[27] case no. II SA/Bk 416/21.
[28] Case no. II SA/Bk 751/19.

noted that said breach could have had a significant impact on the outcome of the case, i.e. it resulted in the adoption of an incorrect decision by adjudicating the appeal of an entity that was not entitled to the status of a party to the proceedings. The court therefore repealed the decision.

Therefore, it is not a shift in the jurisprudence and a change in legislation is still needed, in particular since the legislation states the exact opposite of what the courts held in these cases. This is also necessary to ensure compliance with Article 3(1) of the Aarhus Convention, which requires that the Convention is implemented by way of a "*clear, transparent and consistent framework*". This is evidently not the case where the law states the opposite of what the Convention requires.

Although in international law the judicial branch is also perceived as a part of the state, the Committee has clearly noted that where legislation is the primary means for bringing about compliance, it needs to be amended to the extent necessary to comply with the Convention.[29] In the same vein, the Committee held that although the direct applicability of international agreements in some jurisdictions may imply the alteration of established court practice, this does not relieve a Party from the duty to take the necessary legislative and other measures, as provided for in Article 3(1).[30]

Similar considerations apply in the present case, considering that the applicable legislation is clearly non-compliant with the Convention. While certain courts have now stepped up to disapply this law, this does not reliably resolve the issue. In fact, if that was not the case, there could arguably never be a non-compliance with Art. 9 Aarhus Convention in an EU Member State because, in theory, as a matter of EU law national courts are always required to interpret national law in compliance with Art. 9 Aarhus Convention and set conflicting national procedural rules aside where necessary.

The Communicant notes that this non-compliance with Art. 3(1) Convention is not an additional claim that was omitted in the original Communication but is merely a response in case the Party concerned was to argue that the above mentioned cases resolve the non-compliance with Art. 9(2) Convention described above. This response is moreover a direct reaction to the changed circumstances, whether perceived or factual, that arise from these recent judgements.

Conclusion

The above information demonstrates that all submissions included in the Communication are still relevant and the Communication should be declared admissible in its entirety.

Yours sincerely,

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[29] Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 42.
[30] Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 43.

Annex 1 – Relevant provisions of Polish law

1. **The Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment of 3 October 2008 (the "EIA law")**

The relevant provisions of the EIA law read as follows:

Article 44

1. Environmental organizations, which, relying on their statutory objectives, declare their willingness to participate in certain proceedings requiring public participation, shall participate therein on the rights of party, if they conduct statutory activities in the field of environmental protection or nature protection for a minimum of 12 months prior to the date of initiation of such proceedings. Provision of Article 31 § 4 of the Code of Administrative Procedure shall not apply.

2. An environmental organization shall have the right to appeal against a decision issued in proceedings that require public participation if it is justified by the statutory purposes of the organization, also in the event that the organization did not participate in a specific proceeding requiring public participation conducted by the authority of first instance; the filing of an appeal shall be tantamount to a declaration of its willingness to participate in such proceedings. In the appeal proceedings, the organization shall participate as a party.

3. An environmental organization shall have the right to appeal to an administrative court against a decision issued in a proceeding requiring public participation, if it is justified by the statutory purposes of such organization, also where it did not participate in the specific proceeding requiring public participation.

4. A decision on a refusal to allow the environmental organisation to participate in the proceedings shall be subject to a complaint.

Article 84

1. In cases where the environmental impact assessment of a project was not conducted, in the decision on environmental conditions the competent authority shall confirm that there is no need to conduct the environmental impact assessment of the project. This decision is issued after obtaining the opinions referred to in Art. 64 par. 1 and 1a[31]*.*

[31] The opinions referred to in art. 64 par. 1 and 1a are the following: "*1. The order referred to in Art. 63 section 1 (the obligation to conduct an environmental impact assessment for a planned project that may potentially significantly affect the environment) shall be issued after consultation with: 1) the regional director for environmental protection; 2) the body referred to in Art. 78 (the State Sanitary Inspection) in the case of projects requiring decisions referred to in Art. 72 par. 1 items 1-3*[31]*, 10-19*[31] *and 21-27*[31] *and the resolution referred to in Art. 72 par. 1b ; 3) the body competent to issue the integrated permit under the Act of April 27, 2001 on Environmental Protection Law, if the planned project is qualified as the installation referred to in Art. 201 par. 1 of that Act; 4) the authority competent to issue the water-law assessment referred to in the provisions of the Act of July 20, 2017. - Water Law.1a. If the project is implemented in the*

1a. In the decision referred to in par. 1 the competent authority may specify the conditions or requirements referred to in Art. 82 par. 1 item 1 letter b or c or impose the obligation to perform the activities referred to in Art. 82 par. 1 item 2 letter b or c. 2.

2. Project characteristics shall take the form of an attachment to the decision on environmental conditions.

Article 86f (6)

The body competent to issue the investment permit shall suspend the proceedings in whole or in part within 7 days from the date of obtaining information about the suspension of the execution of the decision on environmental conditions. The provision of Article 97 § 2[32] of the Code of Administrative Procedure shall apply accordingly.

Article 86g

1. An ecological organisation invoking its statutory objectives, if it has been carrying out statutory activities in the field of environmental protection or nature protection for at least 12 months prior to the date of initiation of the proceedings in respect of an investment permit, also in the case where it has not participated in the proceedings conducted by the authority of first instance, or a party to the proceedings in respect of the issuance of a decision on environmental conditions, shall have the right to appeal against the investment permit preceded by a decision on environmental conditions issued in the proceedings requiring public participation. In the appeal proceedings, the environmental organization shall participate as a party.

2. An appeal shall be lodged to the extent that the authority competent to issue the investment permit is bound by the decision on environmental conditions pursuant to Article 86(2).

3. The appeal shall include:

1) indication to what extent the investment permit is inconsistent with the decision on environmental conditions or fails to take into account its provisions;

2) justification;

3) in the case of the appeal filed by the party to the proceedings on the issuance of the decision on environmental conditions - information or documents confirming the property rights to the real property located within the scope of impact of the project, including at least the number of the cadastral parcel and, if disclosed, the number of its land and mortgage register.

4. The appeal should be lodged within 14 days from the expiry of the deadline for making the content of the investment permit available in accordance with Art. 72 par. 6.

5. The environmental organisation or party referred to in subsection 1 shall have the right to appeal to the administrative court against the investment permit, preceded by a decision on environmental conditions issued in the proceedings requiring public participation to the extent

maritime area, the body competent to issue the opinion referred to in par. 1 is also the director of the maritime office.

[32] When the reasons justifying the suspension of proceedings referred to in § 1 items 1-4 cease to apply, the public administration body shall resume the proceedings ex officio or at the request of a party.

referred to in subsection 2, also in the event that the environmental organisation or party did not participate in the proceedings to issue the investment permit.

6. The complaint shall include:

1) indication to what extent the investment project permit is inconsistent with the decision on environmental conditions or fails to take into account its provisions;

2) justification;

3) in the case of the complaint lodged by the party to the proceedings on the issuance of the decision on environmental conditions - information or documents confirming the property rights to the real property located within the scope of impact of the project, including at least the number of the cadastral parcel and, if disclosed, the number of its land and mortgage register.

7. The complaint shall be lodged within 30 days from the expiry of the deadline for making the content of the investment permit available in accordance with Art. 72 par. 6.

8. The court may, at the request of the environmental organization or the party who filed the complaint, issue a decision to suspend the execution in whole or in part of the contested decision if there is a danger of causing significant damage or causing effects difficult to reverse. The provisions of Article 61 § 4-6 of the Act of 30 August 2002. - Law on Proceedings before Administrative Courts shall apply accordingly.

9. The provisions of this article shall not apply to the proceedings on the issuance or amendment of the decision, referred to in Art. 72 par. 1 items 1, 10, 14 and 18, in the course of which the project's environmental impact assessment is carried out again.

Article 86h

1. Where an appeal against the investment permit or a complaint against the investment permit is filed by a party to the proceedings on issuance of decision on environmental conditions, the body which examines the appeal or the court may request the body which issued the decision on environmental conditions to establish whether the appellant or the complainant has the status of a party to the proceedings on issuance of decision on environmental conditions.

2. The body which issued the decision on environmental conditions shall respond to the request referred to in paragraph 1 within 7 days of its receipt.

3. The request referred to in paragraph 1 shall suspend the time limit for the examination of the appeal or complaint.

Article 97

1. *The Regional Director for Environmental Protection shall state, by way of a decision, the obligation to conduct an assessment of the project's impact on Natura 2000 area, taking into account all of the following conditions:*

(…)

5*. If it is determined that a project will not have a significant impact on a Natura 2000 area, the Regional Director for Environmental Protection shall state, by way of a decision (postanowienie),* ***that there is no need to conduct an assessment of the project's impact on a Natura 2000 area****.*

(…)

7. The order referred to in paragraph 1 may be appealed against.

(…)

9a. Only ***the applicant shall be a party to the proceedings*** *for the making of the order referred to in paragraph 1 and the order referred to in paragraph 5, subject to Article 44.*

2. The Code of Administrative Procedure of 14 June 1960 ("the CAP")

The relevant provisions of the CAP law read as follows:

Article 31

§ 1. A social organisation may demand in a case concerning another person

1) initiation of proceedings,

2) to be admitted to participate in the proceedings,

if it is justified by the statutory goals of such an organization and if it is in the public interest.

(…)

§ 2 A public administration body, recognizing a social organization's demand as justified, shall decide to institute proceedings ex officio or to admit the organization to participate in the proceedings. The decision on refusal to institute proceedings or to admit a social organization to participate in the proceedings may be appealed against.

§ 3 A social organization shall participate in the proceedings on the rights of a party.

§ 4 A public administration body, when initiating proceedings in a case involving another person, shall notify the social organization of that fact if it finds that the organization may be interested in participating in the proceedings on account of its statutory objectives and if there is a public interest in that.

§ 5 A social organization which does not participate in the proceedings with the rights of a party may, with the consent of a public administration body, present to that body its view on the case, expressed in a resolution or statement of its statutory body."

Article 141

§ 1 Decisions issued in the course of proceedings shall be subject to ***interlocutory appeal by a party when the Code so provides.***

§ 2 Complaints shall be lodged within seven days from the date of delivery of the decision to the party, and where the decision has been announced orally - from the date of its announcement to the party.

Article 142

An order that is not subject to complaint ***may be challenged by a party only in an appeal against the decision.***

3. The Law of 30 August 2002 on Proceedings before Administrative Courts ("the PAC")

The relevant provisions of the PAC law read as follows:

Article 9

A social organization, within the scope of its statutory activity, may participate in the proceedings in the cases specified in this Act.

Article 33

§ 1 A person who participated in the administrative proceedings and did not file a complaint, if the outcome of the court proceedings concerns his legal interest, is a participant in these proceedings with the rights of a party.

(…)

§ 2 A person who did not participate in the administrative proceedings may also participate as a participant (in the judicial administrative proceedings) if the outcome of the proceedings concerns his legal interest, as well as a social organization referred to in Article 25 § 4 in cases of other persons if the case concerns the scope of its statutory activity. The decision of the court shall be made in a closed session. A decision refusing to permit participation in a case may be appealed against.

Article 50

§ 1 *Anyone who has a legal interest, a prosecutor, the Polish Ombudsman, the Polish Ombudsman for Children and social organizations within their statutory activity, may bring a challenge in matters concerning other person's legal interests, if they have previously participated in the administrative proceedings.*

4. The Act of 20 July 2017 on Water Law

The relevant provisions of the Water Law read as follows:

Article 389

Unless otherwise provided by law, a water permit shall be required for:

1) water services;

2) the special use of water;

3) long-term lowering of the groundwater table;

(…)

Article 399

§ 1 The issuance of the water permit shall be refused if:

1) the requested way of the use of waters violates the arrangements of the documents referred to in Article 396(1)(1) to (7) or does not meet the requirements referred to in Article 396(1)(8);

2) the requested way of the use of waters for hydropower generation will not ensure the use of hydropower potential in a technically and economically justified manner.

Article 400

§ 1 A water permit shall be granted for a specified period of time, not exceeding 30 years, starting from the date on which the decision becomes final.

Article 414

§ 2 The water permits referred to in Article 389(1) to (3) shall not expire if an establishment applies for a further period of validity for those permits within 90 days before the expiry of the period referred to in paragraph 1(1).

(…)

§ 7 If it is found that the information contained in the water permit referred to in paragraph 3 is up to date or that the circumstances referred to in Article 399(1) do not apply, the competent authority shall, by means of a decision, establish the subsequent validity period of the water permit, no longer than 20 years (…).

5. The Act of 18 July 2001 on Water Law

Article 127

§ 7 In proceedings for the issuance of a water permit, Article 31 of the Code of Administrative Procedure shall not apply.

This article was repealed by the Water Law of 2017, but the provision of the same wording was duplicated by the Article 402 of the Water Law of 2017 and in the Water Law in force.

Annex 2 – Relevant case-law on the prior participation

- Judgment of the Supreme Administrative Court of 12 January 2021, case no. III OSK 3420/21: "*Making the possibility of effective filing of a motion for participation in the proceedings dependent on the fact that the proceedings are still pending is linked by law with closing the proceedings in the case by delivery or announcement of a decision. The act of serving (announcing) the decision closes the proceedings in the case. Admission to participate in the proceedings is admission to the activities of these proceedings. Admitting a social organization to participate in the proceedings before the body of first instance opens the right to file an appeal (motion for reconsideration of the case). In addition, however, it does not give grounds for allowing a social organization to participate in proceedings that have already ended with the issuance (announcement) and delivery of a decision.*"

- Judgment of the Supreme Administrative Court of 23 September 2020, case no. II OSK 1203/20: "*If an application for participation in the administrative proceedings was filed after the first-instance body issued a decision, but before that decision became final, and that decision has not been appealed against, such findings entitle the body to conclude that the application in question was filed after the completion of the first-instance proceedings.*"

- Judgment of the Gliwice Regional Administrative Court of 27 September 2017, case no. II SA/Gl 696/17: "*The right from Art. 31 § 1 point 2 of the CAP to admit a social organization to participate in the administrative proceedings in a given case exists as long as the proceedings are pending, because the institution of admission to participation does not function independently, abstractly, in isolation from a specific case*."

- Judgment of the Supreme Administrative Court of 18 September 2014, case no. II OSK 626/13: "*In the case of filing an application for participation in the proceedings after the first-instance proceedings have been completed, the first instance authority should first determine whether the proceedings before the second instance authority have been initiated. Only in such a case, the authority will be obliged to examine the merits of the application. If it is determined that the second instance proceedings are not pending, there are grounds for refusing to admit a social organization to participate in the proceedings in the case due to expiration of the right specified in Art. 31 § 1 point 2 and 3 of the CAP*."

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Annex 3

Concrete examples when NGOs were not able to challenge EIA negative screening decisions:

- Final judgment of the Supreme Administrative Court of 23 July 2019 (case no. II OSK 2335/17).

Two NGOs, which did not participate in the proceedings before the administrative body of first instance, lodged an interlocutory appeal against the negative screening decision. One of them also submitted a request to be admitted to the appellate proceedings. The second instance administrative authority rejected their interlocutory appeals as inadmissible because the NGOs had not participated in the 1st instance proceedings so they did not have legal standing to challenge the decision. The NGOs submitted an appeal before the Regional Administrative Court (they based their appeal also on Article 9(2) of the Aarhus Convention).

The court held that due to the lack of the obligation to conduct an environmental impact assessment, the proceedings are not considered a procedure requiring public participation. Therefore, the NGO could not participate in the first-instance proceedings under Art. 44 par. 1 of EIA law, nor was it entitled to lodge an appeal pursuant to Article 44 Section 2 of EIA law. The court further held that the NGO could participate in the proceedings in accordance with the general principles resulting from Article 31 of the CAP, which it failed to do in the proceedings before the body of first instance, as it had only requested to participate in the proceedings at the interlocutory appeal stage. At that stage, there was no proceedings to which an NGO could be admitted as the interlocutory appeal had not been lodged by a party to the proceedings. The court also held that the Aarhus Convention is not an international agreement that can be applied directly without the necessity of making changes to the legal system[33].

The judgment was upheld by the Supreme Administrative Court. The court found inter alia that the regulation of Article 31 of CAP, in conjunction with Article 44(1) and (2) of the EIA law and Article 33(2) of the PAC, guarantee environmental protection organisations wide access to administrative proceedings conducted in cases related to the issuance of EIA decisions, as well as to the appellate procedures against such decisions.

- Judgment of the Łódź Regional Administrative Court of 19 May 2021 (case no. II SA/Łd 245/21) – final

In the first instance decision, a mayor held that an expansion of a sewage treatment plant needed no EIA. A social organisation, which did not participate in the 1st instance proceedings, lodged an interlocutory appeal which was rejected by the Self-Government Board of Appeal pursuant to Article 134 of the ACP. The authority found that in view of the fact that the NGO did not request to participate in the proceedings before the administrative body of first instance, and because none of the parties to these proceedings had filed an appeal, the NGO could not acquire the right

[33] More about the Legal Force and Effectiveness of the Aarhus Convention in the Polish Legal System: https://www.researchgate.net/publication/330475946_The_Legal_Force_and_Effectiveness_of_the_Aarhus_Convention_in_the_Polish_Legal_System.

to effectively initiate proceedings before the body of second instance by filing an appeal. The Regional Administrative Court rejected the NGO's appeal and held that the NGO had no legal standing to challenge the first-instance decision.

Annex 4

Concrete example of when an NGO was excluded from the administrative and judicial proceedings concerning the renewal of a water permit

- Final judgment of the Supreme Administrative Court of 5 December 2017 (case no. II OSK 414/17).

The Marshall of one of the voivodeships in Poland issued a decision to grant a water permit to, *inter alia*, dam up the waters of the Vistula river and the use of the dammed waters for energy production without carrying out an EIA nor a screening procedure prior to this decision. An NGO demanded the proceedings to be initiated to repeal this decision, invoking Article 31 §1 of the CAP. The NGO applied to the appeal authority – the National Water Management Authority (NWMA) - to initiate the proceedings. The NWMA refused to do so, invoking Article 127 § 8 of the Water Law of 2001. This article – repealed by the Water Law of 2017, but duplicated by the Article 402 of the Water Law of 2017 and in the Water Law in force - excluded the application of Article 31 of the CAP in the administrative proceedings concerning the issuance of water permits.

The refusal of the NWMA to initiate the proceedings was upheld on 23 September 2016 by the Warsaw Regional Administrative Court (case no. IV SA/Wa 1397/16) and subsequently by the Supreme Administrative Court on 5 December 2017 (case no. II OSK 414/17). Both relied on the aforementioned Article 127 § 8 of the Water Law of 2001, stating – contrary to the claimants – that the article applies also to the proceedings aiming at annulment, verification or amendment of a water permit, not only its issuance.

ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a registered company in Germany, ClientEarth gGmbH, HRB 202487 B, a registered non-profit organisation in Luxembourg, ClientEarth ASBL, registered number F11366, a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836. ClientEarth is registered on the EU Transparency register number: 96645517357-19. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.