ClientEarth
Prawnicy dla Ziemi

21 February 2022

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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
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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 provisions of the Convention on access to justice regarding local laws (ACCC/C/2016/151)

The Communicant would like to provide the Committee with an update on the communication ACCC/C/2016/151 given that the Communication was submitted in 2016 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 the claims made in the Communication. Even if the legal situation has changed to a limited extent, it is still not compliant with the Aarhus Convention. There have been in fact a number of recent court judgements confirming the impossibility to challenge local laws, in particular air quality plans.

Firstly, this document presents the jurisprudence of the administrative courts concerning the possibility to challenge air quality plans as an example of local law (Section I). Secondly, the available legal remedies under the Polish law are presented and their ineffectiveness to ensure access to justice to challenge local laws are described (Section II). Finally, the ongoing infringement procedure on the air quality plans in Poland launched by the European Commission is presented (Section III).

Section I

The Communicant presents a list of concrete examples of cases exemplifying the lack of possibility to challenge local laws such as air quality plans in annex 1. Since 2012, there have been already six relevant sets of proceedings where the access to justice of members of the public concerned was not granted because of the lack of legal standing. Some of these cases are described below in the section III point 1.

There is a well-established case law of the Polish administrative court consistently rejecting the cases aimed at challenging local laws such as the air quality plans.

Section II

In its Response to the Communication submitted in 2018, the Party concerned indicated five legal remedies available under Polish law which could be used to challenge local laws:

1. Article 101 of the Act of 8 March 1990 on the Municipal Local Government
2. Article 9 point 1 of the Act of July 15, 1987 on the Ombudsman
3. Specific provisions contained in the Act of October 3, 2008 on access to information on environment and its protection
4. Article 24 sec. 1 of the Act on the Preventing Environmental Damage and the Remediation of Environmental Damage
5. Article 221 of the Act of June 14, 1960 - Code of Administrative Procedure

In its additional remarks in reference to the Polish Environment Minister's replay from 31 October 2018, the Communicant briefly commented on the above-mentioned legal avenues and their ineffectiveness to challenge local laws.

Below, the Communicant provides an update for each of these five avenues demonstrating that none of the legal developments since the Communication has been submitted have resulted in a situation where any of this avenues would fulfil the requirements of the Aarhus Convention.

For the purpose of this update, the Communicant addresses avenues 1 and 3 identified by the Response jointly because they are the primary means to challenge administrative acts under Polish law before the administrative courts. The Communicant considers that this structure best gives a "general picture" of why members of the public do not have standing to challenge local laws. The Communicant subsequently addresses the remaining three avenues mentioned in the Response, none of which can be considered to provide effective access to justice in the sense of the Convention even if members of the public have standing to use them. Therefore, the below-described structure will be followed:

1. The possibility of challenging local laws before an administrative court covering avenue 1 and 3 identified in the Response;

2. The possibility of lodging a complaint with the Ombudsman under Article 9(1) and Article 14 point 6 of the Act of 15 July 1987 on the Ombudsman ("AOm") – avenue 2 identified in the Response;

3. The right to report environmental damage under Article 24(1) of the Act of 13 April 2007 on the prevention of environmental damage and its repair ("APED") – avenue 4 identified in the Response;

4. The right to file complaints and requests under Article 221 of the Act of 14 June 1960 Code of Administrative Proceedings ("CAP") and Article 63 of the Constitution of the Republic of Poland – avenue 5 identified in the Response.

1. Legal challenges to the Polish administrative courts – avenues 1 and 3 of the Response

From the four above-mentioned legal avenues, there is the only one that could possibly allow direct challenges to local laws. Unfortunately, legal standing in such a challenge is severely limited.

This is well demonstrated at the example of air quality plans. Pursuant to Article 91(9) of the Act of 27 April 2001 Environmental Protection Law ("EPL"), air quality plans require public participation. Air quality plans are adopted by local self-government authorities at the voivodeship level. Article 90(1) AVSG defines legal standing for challenging air quality plan before the administrative courts. According to this provision legal standing is granted to "everyone whose legal interest or right has been infringed" by the adopted plan.

Individual and legal persons (including environmental NGOs) have a possibility to seek judicial review of air quality plans only if they demonstrate an infringement of an individual and specific legal interest. Merely having a legal interest is not sufficient to successfully challenge air quality plans. Moreover, according to the case law and jurisprudence, the infringement of legal interest must occur in a "direct, objective and real manner". Thus, the circle of parties entitled to initiate a judicial review of an air quality plan is smaller than the circle of parties entitled to appeal against an individual administrative decision.

1.1. Legal standing of individuals

The judgement issued by the Supreme Administrative Court on 23 January 2018 in a case no. no. II OSK 3218/17 clearly demonstrates that this avenue is not available. The Applicant, a resident of the town of Rybnik, Silesia, challenged the air quality plan for the region of Silesia on the basis of Article 90(1) AVSG. The Polish Supreme Administrative Court dismissed the Applicant's complaint for lack of standing, stating that air quality plans are not directed towards individual members of the public, and therefore the public only has a factual interest and not a legal interest in the matter. Thus, the matter cannot be reviewed by the courts.

The view presented in the Supreme Administrative Court's judgement reflects a common understanding of "legal interest" as interpreted by the Polish jurisprudence and case law. According to both commentators and case law, a "legal interest" must be explicitly defined in a specific provision of substantive, procedural or constitutional law shaping the legal situation of the complainant. The lack of such an explicit provision means that a party has only a factual interest which does not give grounds for challenging an act of local law. Article 90(1) AVSG accordingly allows neither to lodge a complaint as a representative of a group of inhabitants of the voivodeship, nor to lodge a complaint in the public interest. The explicit "right to clean air" could be the source of the "legal interest". However, recently the Polish Supreme Court in its resolution of 28 May 2021 (III CZP 27/20 announced that the right to live in a clean environment is not a

"personal right" under the Polish law. Therefore, since Polish law does not provide an explicit "right to clean air", it could not be the basis of a complaint under Article 90(1) AVSG. Thus, challenging air quality plans on the basis of Article 90(1) AVSG is not possible.

Moreover, according to the case law, a legal interest or right must be infringed in a "direct, objective and real manner". Even if an individual is able to indicate a specific provision that safeguards his or her legal interest (like, for example, personal rights, such as the right to health, right to private life or freedom of movement), in the case law the infringement of these rights by adopting an air quality plan is considered to be indirect, as air quality plans - according to Polish courts - are never addressed to individuals/external entities, but always to municipal authorities.

In practice, "legal interest" under Polish law is limited to the protection of property or other property rights that have been affected by the implementation of an air quality plan. A person whose health may be exposed to harmful effects is not considered to have a legal interest in this case (unless he or she is also the owner or perpetual usufructuary of a property affected by the plan).

In September 2021, two individuals and two non-governmental organisations (ClientEarth Prawnicy dla Ziemi and Miasto jest Nasze - Warsaw grass roots organisation) challenged the air quality plan for the region of Mazowsze on the basis of Article 90(1) AVSG. Recently, on 28 January 2022 the Warsaw Regional Administrative Court dismissed these complaints for lack of standing. Unfortunately, as of the time of this update (February 2022), the court did not issue the written grounds yet but we stand ready to provide them to the Committee at a later stage. In the oral reasons (i.e. when announcing the judgement), the court stated that the AQP did not infringe any rights of individuals and NGOs and for this reason they can't challenge it. Moreover, in the oral reasoning the court stated that the claimants had not demonstrated a violation of their legal interest by the AQP, which is the basis and the formal condition for granting legal standing to challenge local laws (AQP are adopted as the resolution of the Regional Council -Sejmik). The Court added that, taking into account the facts and the situation of the applicants, both natural persons (individuals) and NGOs, granting legal standing in this case would be incompatible with the rule of law of a democratic State and related principle of equality of law.

No further clarification was provided and the Communicant is waiting for the written grounds of the judgment to be delivered.

The Polish courts thereby also ignore long-standing case law of the Court of Justice of the European Union. In the judgments C-237/07 (*Janecek*) and C-404/13 (*ClientEarth*), the CJEU ruled that natural and legal persons directly concerned by the limit values under Directive 2008/50/EC (the 'Air Quality Directive') being exceeded must be able to challenge in court a failure of national authorities to draw up an air quality plan that complies with the requirements of that Directive. Since the Air Quality Directive is designed to protect public health, all residents of the affected settlements shall be considered as "directly concerned" by the limit values being exceeded.

This interpretation is supported by the Court's recent judgements on C-197/18 (*Burgenland*) and C-525/18 (*Land Nordrhein-Westfalen*) in which the Court stated that it was necessary to "*examine the purpose and the relevant provisions*" of the directive to ascertain whether an applicant is to be considered concerned.[1] In these cases, the objective of the invoked provisions was the

[1] Judgements on cases C-197/18, *Burgenland*, para. 35 and C-535/18, *Land Nordrhein-Westfalen*, para. 125.

protection of groundwater and, hence, the legitimate use of that water. In the case of the Air Quality Directive, Art. 1(1) Air Quality Directive defines the aim of defining objectives to "avoid, prevent or reduce harmful effects on human health" and air quality plans are meant to ensure compliance with these limit values. Therefore, any individual whose health is threatened by the exceedance of the limit values should be able to apply to the courts to challenge an air quality plan or the lack thereof.

While the judgements of the CJEU are of course not binding on the Committee, the latter two cases were explicitly based on the Aarhus Convention and the Committee may wish to take this interpretation of the Convention into consideration in its elaborations.

1.2. Legal standing of ENGOs

Neither the AVSG nor any other Polish act permits NGOs to challenge air quality plans. The Polish EIA law does not grant environmental NGOs ("ENGOs") a right to challenge plans and programs before an administrative court. Article 44(3) of the Polish EIA law only grants ENGOs the right to challenge administrative decisions. Article 90(1) AVSG grants NGOs legal standing only when the legal interest or right of an NGO itself has been infringed (which in practice is basically reduced to its property rights, as mentioned above); ENGOs cannot use this legal avenue to challenge an air quality plan which does not comply with the Air Quality Directive because they (like individuals) do not have a "right to clean air", which could have been infringed by the plan.

The general provision that regulates the legal standing of NGOs is Article 50 par. 1 of the Act of 30 August 2002 on Administrative Court Proceedings ("ACP"), which provides general rules of legal standing before the administrative courts. Pursuant to this provision, an NGO is entitled to lodge a complaint to an administrative court after fulfilling cumulatively the following three conditions: (i) in matters relating to other persons' legal interests, (ii) only "within the scope of its statutory activity" and (iii) only "if it participated in the prior administrative proceedings". The third requirement is impossible to fulfil in the context of air quality plans because there is no prior administrative proceeding, which would result in an administrative decision. Therefore, under Polish law ENGOs cannot challenge air quality plans in the public interest or to defend legal interests of other persons.

As mentioned above, on 28 January 2022 the Warsaw Regional Administrative Court dismissed the complaints lodged by the individuals and non-governmental organisations who challenged the air quality plan for the region of Mazowsze on the basis of Article 90(1) AVSG for lack of standing.

Again, the Polish court thereby ignored the case law of the CJEU in C-237/07 (*Janecek*) and C-404/13 (*ClientEarth*). As the CJEU has confirmed more recently in its judgement C-664/15 (*Protect*), criteria imposed on standing by environmental organisations "*must not deprive environmental organisations in particular of the possibility of verifying that the rules of EU environmental law are being complied with, given also that such rules are usually in the public interest, rather than simply in the interests of certain individuals, and that the objective of those organisations is to defend the public interest*."[2]

[2] C-664/15 *Protect*, para. 47.

1.3. The Constitutional Court judgment of 1 July 2021 (SK 23/17)

Article 90(1) AVSG has been recently examined by the Constitutional Court[3] in regard to its compliance with Polish Constitution, that is with Article 45(1) and Article 77(2), which provide access to justice.

The constitutional complaint was preceded by a complaint to administrative court, in which the complainant tried to challenge a local air quality plan under Article 90(1) AVSG. The administrative court challenge was however unsuccessful as the Supreme Administrative Court by its decision of November 2016 sustained the judgment of the first instance, dismissing the case due to lack of standing. According to the administrative courts, air quality plans are not capable of causing an infringement of anyone's legal interest as they are addressed to municipal authorities. Therefore, the potential legal interest can be infringed by air pollution, but not by an air quality plan.

Subsequently, the complainant submitted a constitutional complaint, claiming that Article 90(1) AVSG, understood in a manner adopted in the jurisprudence and doctrine, violates Article 45(1) of the Polish Constitution (access to justice) as it deprives individuals of the possibility of initiating the review of air quality plan.

The Constitutional Court did not share the complainant's views and ruled that the currently binding interpretation of Article 90(1) AVSG complies with the Polish Constitution. At the same time the Constitutional Court confirmed the position of administrative courts, stating that the link between an air quality plan and the infringement of the complainant's legal interest will always be indirect, as air quality plan is never addressed to the complainant, but to municipal authorities. Therefore, the Constitutional Court confirmed that Article 90(1) AVSG in its current interpretation does not enable to challenge air quality plans.

Moreover, the Constitutional Court noted that the Air Quality Directive does not imply any obligation for a Member State to provide access to justice for every resident of the zone covered by the air quality plan to challenge it. The Court noted that the advisability of such a solution was indirectly indicated by the CJEU judgment in C-404/13 case (ClientEarth case). Nevertheless, the Constitutional Court stated that the position of the CJEU in this case does not constitute a basis for extending the scope of application of Article 90(1) AVSG. The Constitutional Court further noted that Article 23 of Air Quality Directive is addressed to the Member States and imposes certain obligations on them. It does not mean, however, that air quality plan adopted at the province level must impose specific obligations or grant rights to the inhabitants of the zone covered by the plan[4].

[3] It should be noted that the Court's legitimacy is contested due to irregularities in the election of its judges and which has been declared by the European Court of Human Rights as not meeting the criterion of "a court established by law" under Article 6 of the European Convention on Human Rights due to its unlawful composition, see *Xero Flor v. Poland*, ECtHR judgment of 7 May 2021, application no. 4907/18. Nonetheless, at the time of writing, the lower Polish courts are usually following the interpretation of the Constitutional Court and it therefore remains the relevant authority to ascertain which legal standing criteria that will be applied by the administrative courts.

[4] See statement of the Constitutional Court published after the hearing, https://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/11579-legitymacja-do-zaskarzenia-aktu-prawa-miejscowego-programu-ochrony-powietrza.

1.4. Summary of point 1

A legal analysis of Polish law summarized above clearly indicates that under the Polish law air quality plans can be challenged before a court only by a member of the public who would manage to demonstrate that a local law has already caused a direct, objective and real infringement to his or her rights, explicitly protected under the Polish law.

Moreover, since the "right to a healthy environment" or a similar right is not protected under Polish law – which has been confirmed by the recently adopted resolution of the Polish Supreme Court of 28 May 2021 (III CZP 27/20) – individuals have no standing under Article 90(1) AVSG. For the same reasons, ENGOs also cannot rely on Art. 90(1) AVSG, nor can they rely on Art. 44(3) EIA Law or Art. 50(1) ACP to challenge local laws.

Furthermore, the above-mentioned judgment of the Constitutional Court demonstrates that the refusal to grant legal standing under Article 90(1) AVSG to challenge local laws was not an isolated case, but is a common practice of Polish courts. The legality of this practice under Polish law has moreover been confirmed several times by the Supreme Administrative Court and by the Constitutional Court itself.

Since the Constitutional Court at the same time ruled that Article 90(1) AVSG complies with the provisions of the Polish Constitution guaranteeing access to justice, it must be noted that therefore also the Polish Constitution does not provide any remedy.

2. <u>The possibility of lodging a complaint via the Ombudsman – avenue 2 identified in the Response</u>

Pursuant to Article 9(1) AOm, the Ombudsman takes steps at the request of citizens or NGOs, including ENGOs. Pursuant to Article 14 point 6 AOm, the Ombudsman – after examining the case – may request to initiate administrative proceedings, lodge a complaint to an administrative court and participate in proceedings with the rights of a public prosecutor. Nevertheless, the decision whether to request to initiate administrative proceedings in a specific case is entirely under the discretion of the Ombudsman. As a rule, the initiation of proceedings at the request of the Ombudsman will take place in cases in which administrative proceedings may be initiated *ex officio* by an administrative authority. The Ombudsman acts on the basis of subsidiarity, not instead of a person concerned.[5] Therefore, it is primarily the party to the proceedings that bears the burden of using the legal means at his/hers disposal.

Contrary to what the Party concerned seems to suggest in its Response, requesting the Ombudsman to take legal steps is therefore an extraordinary measure of indirect access to justice and cannot be considered as an effective remedy for members of the public concerned. Applying to the Ombudsman does not equate to being able to bring an action before the courts. It is up to the Ombudsman's autonomous assessment whether the protection of human and civil rights justifies lodging a complaint to administrative court.

[5] Trociuk Stanisław, "The Act on the Ombudsman. Commentary", 2nd Edition, 2020. [„Ustawa o Rzeczniku Praw Obywatelskich. Komentarz, wyd. I, 2020].

It should also be kept in mind that the capacity of the Ombudsman to act is limited. In 2020, the Polish Ombudsman received 72.428 letters and submissions from citizens, among which it identified 36.051 legal cases. The Ombudsman initiated legal steps in 12.737 cases, including only 35 complaints to an administrative court.[6]

In light of the foregoing, this legal avenue cannot be considered a legal remedy which would enable members of the public to challenge local laws. An Ombudsman complaint is entirely discretional, indirect and subsidiary to the right to initiate a judicial review before an administrative court, pursuant to Article 14(6) of AOm.

3. The right to report environmental damage – avenue 4 identified in the response

Air quality plans are not covered by the scope of the Act (the APED) that the government mentions in its Response. Therefore, members of the public cannot obtain any remedies on the basis of the APED.

Article 2 APED defines the personal and material scope of application of this act. The APED is applied to "environmental damages or direct risk of environmental damage caused by the activities of the entity using the environment that pose a risk of damage to the environment". The personal scope refers to "the entity using the environment". This term is defined under Article 6 point 9 APED, which refers to Article 3 point 20 EPL and Article 4 of the Act of 6 March 2018 (the entrepreneurs law). "The entity using the environment" is accordingly understood as an entrepreneur that is a private entity or a public entity which conducts commercial activities, which pose a risk of environmental damage. The scope of such activities is listed in Article 3 APED.

In regard to the personal scope of the application of the APED, local self-government might be considered as "the entity using the environment" only in relation to its commercial activities (*dominium*). Since adopting a local law is not a commercial activity, but considered an administrative task (*imperium*), it does not fall in this category. Therefore, the APED does not apply at all to local self-governments when adopting air quality plans.

Moreover, the material scope of activities undertaken by "the entities using the environment" is limited to activities "posing a risk of environmental damage" listed in Article 3 APED. Adopting local laws is not one of the activities listed in this provision.

This legal avenue is therefore irrelevant for challenging local laws and provides no remedy, since adopting air quality plans by local self-governments is beyond the personal and material scope of application of the APED.

4. The right to file complaints and requests/applications – avenue 5 identified in the response

This legal avenue mentioned in the Response is regulated under Article 221 of CAP and Article 63 of the Polish Constitution, and it is essentially a right to address a petition to public authorities (analogous to a petition to the European Parliament under Article 227 TFEU). It is a simplified

[6] Information about the activity of the Ombudsman in 2020 and the status of rights: https://www.rpo.gov.pl/sites/default/files/Informacja_RPO_za_2020.pdf.

administrative procedure with no parties, no procedural obligations imposed on the public authorities and no legal remedies.

Furthermore, the proceeding initiated by a public complaint does not result in an administrative decision, but solely in a notification about the method by which the complaint will be resolved, provided by the public authorities to the complainant. The complainant is not allowed to appeal against the notification nor to lodge a complaint against the notification with an administrative court.

The Committee in its findings on communication ACCC/C/2006/18 (Denmark) held that access to justice under paragraph 3 requires more than a right to address an administrative authority about an illegal activity. **Therefore, this legal avenue cannot be considered as an effective remedy providing access to justice for members of the public as required by** Article 9(3) and (4) of the Aarhus Convention.

Section III

In May 2019, the Communicant filed a complaint to the European Commission alleging that Poland failed to comply with EU law for not giving members of the public the possibility to challenge local laws such as air quality plans. The Communicant alleged that Poland failed to comply with its obligations under Articles 4(3) and 19(1) TEU and article 288 TFEU in conjunction with Article 23(1) of the Air Quality Directive and Article 47 of the EU Charter of Fundamental Rights read together with Article 9(3) of the Aarhus Convention.

In May 2020, the European Commission announced that it had sent a “letter of formal notice” calling on Poland to remove barriers to access to justice for citizens and environmental organisations in relation to air quality plans.[7] A letter of formal notice is the first step in an infringement procedure under Article 258 TFEU. If the Member State concerned does not resolve the issue in reaction to this letter, the European Commission can send a reasoned opinion and subsequently start proceedings before the Court of Justice of the European Union.

Unfortunately, as of the time of this update (February 2022), the European Commission has taken no additional steps in relation to this infringement. This is despite the fact, as mentioned above, the legal situation has not improved since May 2020.

We are informing the Committee of this procedure as an update to section VII “Use of other international procedures” of the required format for communications. We do not consider that this procedure has provided an adequate remedy to resolve the issues mentioned in the Communication.

[7] See: <https://ec.europa.eu/commission/presscorner/detail/en/inf_20_859>.

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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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Annex 1

Case symbol	Description	Ruling	Reasoning
II SA/Sz 1298/11 Ruling of Szczecin Regional Administrative Court dated 1.02.2012 r.	Lawsuit brought by a resident against *szczecinecki* district AQP on grounds that it will not attain target values and does not account for recent data on air pollution.	Complaint dismissed.	Lack of legal standing before the court on the ground that local laws can only be challenged when complainant can demonstrate an infringement of their individual, specific „legal interest" (pol. *interes prawny*).
II OSK 2671/16 Ruling of Supreme Administrative Court dated 29.11.2016 r.	Appeal of the complainant from II SA/Kr 573/16 ruling on grounds that the court failed to interpret relevant domestic law in accordance with EU law.	Appeal dismissed.	Interpreting the laws in accordance with EU law as proposed by the complainant would constitute a *contra legem* interpretation.
II SA/Gl 1189/16 Ruling of Gliwice Regional Administrative Court dated 8.03.2017 r.	Lawsuit brought by a heating appliances manufacturer against *śląskie* region AQP on grounds that it breached EU law and restricts economic freedom.	The AQP was deemed void in scope of the complaint.	Infringement of economic freedom is a source of „legal interest". The AQP was in breach of EU law on mutual recognition of accredited conformity recognition bodies.
II SA/Gl 639/17 Ruling of Gliwice Regional Administrative Court dated 15.09.2017 r.	Lawsuit brought by a resident against *śląskie* region AQP on grounds that it will not attain target values in as soon as possible.	Complaint rejected.	Lack of legal standing before the court on the ground that local laws can only be challenged when complainant can demonstrate an infringement of their individual, specific „legal interest" (pol. *interes prawny*).
II OSK 3218/17 Ruling of Supreme Administrative Court dated 23.01.2018 r. **(already submitted by the Communicant in March 2018)**	Appeal of the complainant from II SA/Gl 639/17 ruling on grounds that the court failed to interpret relevant domestic law in accordance with EU law, including a motion to request a preliminary ruling of CJEU in the matter.	Appeal dismissed.	Lack of legal standing, refusal to request a preliminary ruling.

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SK 23/17 Ruling of Constitutional Tribunal dated 1.07.2021 r.	Request brought before the Constitutional Tribunal by a complainant from II SA/Kr 1335/20 ruling to examine whether domestic law provisions and jurisprudence's understanding of them restricting access to file a lawsuit against AQPs by residents on grounds of adopting a strict definition of „legal interest" are complaint with the Constitution.	The interpretation thus far applied in jurisprudence complies with the Constitution.	The court found no breach of constitutional law, reasoning that the introduced request argued for a right to a specific ruling rather than for the right to access to justice and that deciding otherwise would relativize general provisions of administrative law on the right to complain against local law before courts depending on a specific case, which would be unconstitutional.

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