

Kraków, June 10th 2022

Secretary to the Aarhus Convention Compliance Committee

Environment Division
United Nations Economic Commission for Europe
Bureau 332, Palais des Nations
CH-1211 Geneva 10 Switzerland

Case ACCC/C/2014/119

Communicant:

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State Party concerned:

Poland

Communicant's Comments to the Draft Findings

Further to the letter from the Aarhus Convention Compliance Committee (hereinafter as: "**Committee**") from April 29th 2022 received by Fundacja Frank Bold (hereinafter as: "**Communicant**") by email on April 29th 2022, informing that the Committee agreed its draft findings on communication ACCC/C/2014/119 (hereinafter as: "**Draft Findings**") and asking to provide comments by June 10th 2022, the Communicant hereby thanks the Committee for a thorough analysis of the communication and submits comments to the Draft Findings.

1. The course of the proceedings

- 1.1. The Communicant takes note of the Committee's concern that documentation provided by both the Party concerned and the Communicant in this case was unclear and incomplete, including untimely translations of documents (para. 14 and 73 of the Draft Findings).
- 1.2. The Communicant respectfully points out that they made all the efforts to observe any deadlines set by the Committee in the present case. Accordingly, the Committee's requests to provide additional explanations or translations were answered by the Communicant **within the timeframes specified by the Committee**. There were no further requests from the Committee to provide clarifications.
- 1.3. The Communicant would like to express their regret as to any inconvenience they might have caused the Committee. The Communicant was not aware of the unclear or confusing nature of the translations or documents and such a remark has not been given by the Committee.

The Communicant would have addressed the Committee's concerns and provided the certified translations of the judgments, if such information had been expressed by the Committee.

- 1.4. **The Communicant suggests that the remarks of para. 14 and 73 of the Draft Findings be deleted**, taking into account the above and the fact that they do not concern the merits of the case. If, however, the Committee does not share this view, the Communicant alternatively proposes to divide para. 14 and 73 into two parts, describing separately the approach presented by the Communicant and the Party concerned. The incomplete nature of the documentation provided should not be attributed to the Communicant and the current wording could be misleading in this respect. Hence, the words 'unclear', 'confusing' and especially 'incomplete' should not be used with respect to the documents provided by the Communicant.

2. Access of NGOs to judicial review

- 2.1. The Committee finds that the communicant has failed to substantiate their allegation that the Party concerned fails to provide for access to justice under article 9 (3) of the Convention for environmental NGOs to challenge a voivodeship spatial development plan (para. 113 of the Draft Findings).

- 2.2. *In re* para 111 of the Draft Findings:

- a) **the notion of a 'violation of legal interest' is universal and the same, irrespective of the nature of act which is challenged, be it local spatial development plan (hereinafter as: "LSDP") or voivodeship spatial development plan (hereinafter as: "VSDP")**, as was shown by the case-law of the Polish administrative courts provided by the Communicant¹.

Under both article 101 of the Municipal Self-Government Act² and articles 90 and 91 of the Voivodeship Self-Government Act³, violation of the legal interest by an act is necessary in order to have a standing to file a complaint against it. In case of LSDP, challenged by NGOs on the basis of articles 101 of the Municipal Self-Government Act, the courts state⁴ that successful complaint of an NGO depends on demonstrating a violation of its legal interest, namely a link between the appealed local act and the own individual legal

¹ See judgment II SA/Bk 171/10 of the Białystok Regional Administrative Court, judgment II OSK 40/10 of the Supreme Administrative Court, judgment IV SA/Wa 558/07 of the Warsaw Regional Administrative Court, annexes 6, 7, 9 to the communication, translations provided in the Communicant's email on 8.04.2021.

² The Act of 8 March 1998 on Municipal Self-Government (version in force in March 2012 when the amendment to the Lubuskie LSDP was adopted: Official Journal of the Laws of 2001, no142, item 1591, hereinafter as: "Municipal Self-Government Act")

³ The Act of 5 June 1998 on Voivodeship Self-Government (version in force in March 2012 when the amendment to the Lubuskie LSDP was adopted: Official Journal of the Laws of 2001, no 142, item 1590, hereinafter as: "Voivodeship Self-Government Act").

⁴ See judgment II SA/Bk 171/10 of the Białystok Regional Administrative Court, annex 6 to the communication, translations provided by email on 8.04.2021.

situation of the organisation resulting in limitation or deprivation of concrete rights or imposing obligations with regard to the organisation, whereas an organisation may not challenge the act based solely on its statutory objectives. The same understanding of violation of legal interest holds true in case of complaints against VSDP brought on the basis of articles 90 and 91 of the Voivodeship Self-Government Act. Translations of relevant articles demonstrate **lack of differences in their wording that would affect interpretation of 'violation of legal interest'** (as was explained in the Communicant's submission of 30.05.2016, section 2.1.):

Article 90 (1) of the Voivodeship Self-Government Act (in force in March 2012):

Anyone, whose legal interest or entitlement has been violated by the provision of the local law act issued with regard to the case in the scope of the public administration, can, upon ineffective call on the voivodeship self-government authority who issued the provision to remove the violation, complain on the provision to the administrative court.

Article 101 (1) of the Municipal Self-Government Act (in force in March 2012):

Anyone, whose legal interest or entitlement has been violated by resolution or order, passed by a municipal authority with regard to the case in the scope of the public administration, can, upon ineffective call to remove the violation, complain on the resolution or order to the administrative court.

- b) While the Communicant agrees that VSDP and LSDP have different character and function in the Polish legal system of spatial planning and development, these **differences do not preclude drawing conclusions in the aspect of access to justice from local to voivodeship plans** (as was shown in the Communicant's submission of 30.05.2016, section 2.2).

Differences in legal character and function of voivodeship and local spatial development plans result in the fact that the former *"does not affect directly the way the real estate ownership right is exercised, but rather is binding when the study and local plan are drafted and adopted"*, therefore the latter has more *"direct and real consequences"*⁵. These differences have been cited by the courts to explain why VSDP, as opposed to LSDP, in principle do not directly shape the rights of individual entities and thus, generally, **violation of individual legal interests by VSDP is even more difficult to demonstrate than in case of local plans**. Therefore, *a maiori ad minus*, the fact that administrative courts deem violation of NGO's legal interest absent even in case of challenging LSDP⁶, means that it is even more so in case of challenging VSDP by NGOs.

- 2.3. As the Communicant explained in the submission of 30.05.2016, section 2.2, the administrative courts hold that in order to challenge a VSDP, NGOs is obliged to demonstrate concrete

⁵ See judgment II OSK 647/14 of the Supreme Administrative Court, Communicant's submission from 28.04.2015, translation provided by the Party concerned on 2.03.2016.

⁶ See judgment II SA/Bk 171/10 of the Białystok Regional Administrative Court, judgment II OSK 40/10 of the Supreme Administrative Court, annexes 6 and 7 to the communication, translations provided in the Communicant's email on 8.04.2021.

violation of their individual legal interest by such plan. The statutory objectives of NGOs are not sufficient to have legal standing to challenge a local law. However, NGOs' individual interests are virtually never directly adversely affected by acts with respect to which NGOs seek to initiate judicial control, as NGOs speak for individuals or entities affected and act for the environment. Also, according to ACCC/C/2010/50 Czech Republic, para. 67 of the findings, an environmental NGO should by default be considered to have legal interest in the environmental decision-making. By not recognizing that, the Polish law practically eliminates the possibility of NGOs to challenge VSDP, even if they contravene provisions of national law relating to the environment, which constitutes non-compliance of the Party concerned with article 9 (3) of the Aarhus Convention. Therefore the Communicant suggests changing para. 113 so that it states that, by applying an excessively narrow interpretation of the requirement of violation of legal interest, the Party concerned fails to provide for access to justice under article 9 (3) of the Convention for environmental NGOs to challenge VSDP.

3. Access of private individuals to judicial review

- 3.1. The Committee concluded that the Communicant has failed to substantiate their allegation that the Party concerned fails to provide for access to justice under article 9 (3) of the Convention for private individuals to challenge VSDP (para. 118 of the Draft Findings).
- 3.2. The Committee rightly pointed out that article 9 (3) does not require that, in every such challenge, the members of the public must necessarily succeed on the substance of their claim and it was not the Communicant's claim. The Communicant focused on the procedural aspect and submitted that the legal standing of individuals is so narrow that in practice it is impossible for them to challenge VSDP. The national court, before proceeding to address the substantial matter of the complaint and to the judicial control of legality of the complained act (challenged on the basis of article 90 and 91 of the Voivodeship Self-Government Act or article 101 of the Municipal Self-Government Act), has to establish the preliminary issue of the claimant's standing to file the complaint, i.e. the violation of claimant's legal interest. Failing to prove violation of legal interest therefore results in the case not being tried as to its merits and the act at issue not being subject to judicial control – as the Communicant showed in the communication (p.9-11), the submission of 28.04.2015 (p.1-2), the submission of 30.05.2016 (sec. 2.3.). Not only proving legal interest in the case is required (as is generally sufficient for being party to administrative proceedings and complaints to administrative courts) but also proving **violation of individual legal interest by the act at issue**. The Communicant has repeatedly stressed in the communication (p.10) and submissions (of 30.05.2016, sec. 2.3., 3.2.3. last para.) that by excessively limiting the notion of violation of legal interest, administrative courts of the Party concerned have effectively denied private individuals access to judicial review of VSDP.

- 3.3. The Communicant admits that it provided three judgments decided over a nine-year period in which private individuals brought unsuccessful challenges against a VSDP⁷. However, the Party concerned did not provide any concrete examples from the case law of the Polish administrative courts which would prove the contrary and show that the private individuals brought successful challenges against the Voivodeship spatial development plan.
- 3.4. While the Committee rightly pointed out in para. 116 that the Supreme Administrative Court admitted in its judgment II OSK 647/14 that *"one cannot preclude a priori any possible violation of the rights or legal interest of the owners of the real estates situated in the area covered by the Voivodeship spatial development plan"*, this statement does not prove that there exists access to justice for individuals. Firstly, because this **theoretical violation is only reserved for owners of real estate** situated in the area covered by the VSDP. In consequence, individuals whose other rights, unrelated to property of real estate, or whose actual interest may be affected, do not have access to procedure allowing for judicial review of VSDP, while in ACCC/C/2010/50 Czech Republic, para. 66, 67 it was found that the definition of the public concerned having an interest in the decision-making should encompass not only property owners but all those whose other related rights (in rem rights), social rights or other rights or interests relating to the environment may be impaired by the proposed activity, including e.g. tenants. Secondly, because possible **violation mentioned by the court remains only hypothetical**, as there is no case law in practice of effectively challenging VSDP by an individual. Even for those individuals who hold titles to property within area covered by voivodeship spatial development plan, it has not been possible to challenge it, as was demonstrated in judgment II OSK 647/14⁸ in the case of Lubuskie VSDP. Even though the court did not exclude the possibility that such plan may violate individual legal interests, it did not find such violation of legal interest in the case of the complainant, as in the court's view VSDP lacked direct and real consequences for the individual. In consequence, the court refrained from examining the case on the merits, due to lack of standing to file a complaint – even though the amendment of Lubuskie VSDP ultimately violated the law on national and cross-border consultation procedure (which the Draft Findings confirm in para. 99, 104 and 120 of the Draft Findings).
- 3.5. The judgment II OSK 647/14 found that the Lubuskie VSDP does not violate individual rights of owners of real estate situated in the area covered by the plan, whereas the Communicant explained in submissions of 28.04.2015 (p. 2, para. 3) and 30.05.2016 (sec. 3.2.1.) that, contrary to the court's findings, **identifying coal deposits in the Lubuskie VSDP results in concrete limitations as to the exercise of land ownership**. The establishment in a VSDP of a public utility investment (and exploration of coal deposits is one of them) determines

⁷ Judgment II SA Go 833/13 of the Regional Administrative Court in Gorzów Wielkopolski, judgment IV SA/Wa 558/07 of the Warsaw Regional Administrative Court – annexes 8 and 9 to the communication, translation sent by email on 8.04.2021; judgment II OSK 647/14 of the Supreme Administrative Court, Communicant's submission from 28.04.2015, translation provided by the Party concerned on 2.03.2016.

⁸ Judgment II OSK 647/14 of the Supreme Administrative Court, Communicant's submission from 28.04.2015, translation provided by the Party concerned on 2.03.2016.

the use of the area where the public utility investment is envisaged, because the municipality is then obliged to include the public utility investment into the LSDP (and if the municipality fails to do so, the voivodeship is empowered to, by virtue of article 12 (3) of the Development Act⁹).

- 3.6. In consequence, the ownership of real estate situated in the area of public utility investment, such as exploration of coal deposits, may only be exercised in a manner and to the extent that does not collide with the public utility investment envisaged in a VSDP. Therefore, clearly a VSDP that involves a public utility investment such as exploration of coal deposits **entails concrete limitations on the rights and interests of individuals** owning property or living in the area covered by the plan, constituting **violation of their legal interest**. Denial of the above by administrative courts constitutes non-compliance of the Polish law with article 9 (3) of the Aarhus Convention. Therefore, the Communicant suggests to revise para. 118 of Draft Findings so that it states that, by applying an excessively narrow interpretation of the requirement of violation of legal interest, the Party concerned fails to provide for access to justice under article 9 (3) of the Convention for private individuals to challenge VSDP.
- 3.7. To further support this, the Communicant attaches translations of judgments: IV SA/Wa 2438/15 of Regional Administrative Court in Warsaw and II SA/Go 977/12 of Regional Administrative Court in Gorzów Wlkp., showing the same rigorous approach to violation of individual legal interest by VSDP, excluding the possibility to challenge (see highlighted parts).

4. Conclusion

For reasons stated above, the Communicant respectfully asks the Committee to reconsider some aspects of its Draft Findings and hopes their comments might be taken into account by revising Committee's draft findings, as e.g. in the case ACCC/C/2014/99 Spain, where the Committee also revised its draft findings taking into account the comments received.

Bartosz Kwiatkowski

Attachments:

- 1) Judgment IV SA/Wa 2438/15 of Regional Administrative Court in Warsaw, in Polish and in English
- 2) Judgment II SA/Go 977/12 of Regional Administrative Court in Gorzów Wielkopolski, in Polish and in English

⁹ English translation of article 12 (3) of the Development Act: *If council of municipality did not pass a study, did not proceed to modify it or, passing a study, did not set in it the areas where public utility investment of state or voivodeship significance is to be situated, which was encom-passed by a voivodeship spatial development plan or programs referred to in article 48 (1), voivode, upon under-taking actions in order to settle the dates of such investments and the conditions of including them in the study, calls upon the council of municipality to pass the study or modify it within a specified term. Upon the lapse of such term, the voivode prepares local spatial development plan or its modification for the area concerned by the municipality's omission, to the extent necessary for the possibility of undertaking the public utility investment and passes a substitute order in such matter. The plan adopted in such manner is of the same legal force as local spatial development plan.*