ClientEarth
Prawnicy dla Ziemi

31 May 2022

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Polska

Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10 Switzerland

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 hereby like to provide the Committee with a reply to its questions on communication ACCC/C/2016/151, dated 4 May 2022. The Communicant hopes that this additional information will facilitate the Committee's preparation for a hearing on this case.

Question 1: Please provide the text in Polish of the following judgments, along with an English translation of the relevant parts:
(a) Judgment no. SK 23/17 of the Constitutional Court;
(b) Judgment of the Regional Administrative Court dated 28 January 2022 (page 4 of the communicant's update of 21 February 2022)

As regards **point (a)**, the Communicant provides the text in Polish of judgment no. SK 23/17 of the Constitutional Court in **annex 1** and an English translation in **annex 2** to this letter. The translation covers the entirety of the judgement as well as the related dissenting opinions to give the Committee a full picture. The most relevant parts of the Court's reasoning can be found on pages 6-10 of annex 2.

Concerning **point (b)**, the Communicant would like to clarify that on 28 January 2022, the Warsaw Regional Administrative Court issued the judgments in 4 relevant cases:

1. Judgment no. IV SA/Wa 1585/21 issued in a case lodged by an individual;
2. Judgment no. IV SA/Wa 1586/21 issued in a case lodged by two individuals;

3. Judgment no. IV SA/Wa 1587/21 issued in a case lodged by the Association 'Miasto jest Nasze';
4. Judgment no. IV SA/Wa 1588/21 issued in a case lodged by 'ClientEarth' (the Communicant).

All four (groups) of applicants challenged the same air quality plan and the administrative court denied standing in all four cases.

The above-mentioned judgments together with an English translation of relevant parts are included in **annexes 3 – 10** to this letter. **Annexes 3 and 4** contain judgement no. 1 above (in Polish and English), **annexes 5 and 6** contain judgement no. 2 above (in Polish and English), **annexes 7 and 8** contain judgment no. 3 above (in Polish and English), **annexes 9 and 10** contain judgment no. 4 above (in Polish and English).

Question 2: Please provide an English translation of the relevant parts of judgment no. I OSK 2236/12 of the Supreme Administrative Court (annex 8 to the communication)

The Communicant provides an English translation of the relevant parts of the judgment no. I OSK 2236/12 of the Supreme Administrative Court below:

(…) '*Legitimacy to lodge a complaint under Art. 101(1) of the Act on Communal Self-Government is contingent upon the complainants having a legal interest or right that has been violated by an unlawful resolution of a municipal body. The lack of legal interest on the part of the complainants precludes a substantive assessment of the appealed resolution and leads to dismissal of the complaint due to the lack of substantive standing of the complainants (cf. judgment of the Supreme Administrative Court of 3 September 2004, case no. II OSK 1765/07, Legal Information System LEX No 437511; judgment of the Supreme Administrative Court of 19 March 2008, case no. II OSK 1613/07, Legal Information System LEX No 470910; judgment of the Supreme Court of 13 October 1987, case no. III PAN 1/87 - unpublished and decision of the Supreme Administrative Court of 6 October 2006, case no. II FSK 1250/05, Legal Information System LEX No 280389).*

Turning to the second allegation, i.e. the violation by the Court of First Instance of Article 101 of the Act on Communal Self-Government, it should be noted, while agreeing with the Court of First Instance in this respect, that the appellants consider that the violation of their interest by the appealed resolution consists of the fact that it prevents them from exercising their right to purchase the indicated land by way of a tender or to conclude a lease agreement on the land, which would facilitate their business operations.

It is necessary to consider the position of the complainant in light of the standing requirements under Article 101 of the Act on Communal Self-Government.

The cited provision links the right to bring an action to the existence of a violation of a legal interest which must arise from a substantive law standard that shapes the legal position of the applicants. Both the jurisprudence of the administrative courts and the doctrine provide extensive commentary on the right to bring an action based on Article 101 of the Act on Communal Self-Government.

The legal interest of the complainant referred to in Art. 101 of the Act on Communal Self-Government is a normative category of substantive law. Its source is a norm of substantive law shaping the legal situation of the complainant. In other words, it is an interest to which provisions of substantive law in force have granted legal protection. The lack of legal protection means that the complainant has only a factual interest which does not enjoy legal protection, and which does

not give it the right to challenge the resolution of the municipality body. To have a legal interest means to indicate a provision of law entitling a given entity to file a specific claim against a public administration body. The legal standard of deriving a legal interest from substantive law, which is its source, by indicating relations between the addressees of the substantive law regulation, is well established in the jurisprudence of administrative courts (cf. the judgment of the Supreme Administrative Court of 11 April 2008, case no. II OSK 1749/07, Legal Information System LEX no. 470930, the judgment of the Supreme Administrative Court of 15 February 2008, case no. I OSK 1788/07, Legal Information System LEX no. 463973).

It should also be stressed that since under Art. 101(1) of the Act on Communal Self-Government only the infringement of a legal interest, and not merely the threat of such infringement, entitles a complainant to lodge a complaint, the complainant should demonstrate how his legally protected interest or entitlement was infringed through the existence of a direct link between the contested resolution and his own individual and legally guaranteed situation (and not a factual situation). Therefore, he must prove that the appealed resolution, while violating the law, at the same time has a negative impact on his material and legal situation, e.g. deprives him of certain rights or makes it impossible to exercise them.

The jurisprudence and doctrine also emphasize the directness, concreteness, and real character of a legal interest. For this reason, legal interest does not exist in situations in which only subsequent effects of an earlier concretisation of a legal norm in relation to one entity indirectly affect the legal situation of another entity resulting from the application of a different legal norm in relation to it (cf. judgments of the Supreme Administrative Court of11 June 2001, case no. II SA 3157/00 - non-publ. and of 18 September 2003, case no. II SA 2637/02, System Informacji Prawnej LEX nr 80699).

Legal interest must therefore be actual, not potential. Moreover, a legal interest so defined must be "own", personal, individual, i.e. it cannot be derived from the legal situation of another entity, even if in a specific case the links between these entities would be links of a legal nature (cf. J. Zimmermann, Glosa do wyroku NSA z dnia 2 lutego 1996 r., sygn. Akt. IV SA 846/95, OSP 1997 r., Nr 4, poz. 83A).

When applying the above to the present case, one must agree with the position of the Court of First Instance that the complainant does not have any right, either in rem *or as a result of a contractual relationship, to the indicated land plot. It is also of significance in this case that the appealed resolution determines the principle of leasing a part of the indicated real estate, thus preceding any subsequent actions of the executive body on the subject matter. Accordingly, the resolution may not directly affect the legal situation of the complainant, and thus one may not speak of a violation of the complainant's legal interest. (...)*

Having regard to the above, it must be stated that the Court of First Instance correctly assessed the complainant's intention to participate in the tender for the conclusion of the lease agreement for the real estate in question as an actual interest of the complainant. This factual interest, however, does not enjoy protection under substantive law. Also, the feeling of harm and unequal treatment cannot constitute the existence of legitimacy to lodge a complaint under Article 101 of the Act on Communal Self-Government.

An assessment of the complainants' standing to sue in the context of the considerations set out above with respect to the criterion of a legal interest and its infringement as set out in Art. 101 of the Act on Communal Self-Government leads to the conclusion that the challenged resolution does not allow the complainant to effectively challenge it because he has no legal interest.'

Question 3: At page 3 of your update of 21 February 2022, you state that "air quality plans are adopted by local self-government authorities at the Voivodeship level".

(a) Please provide the text of the legislative provision(s), together with an English translation thereof, pursuant to which air quality plans are adopted by the local self-government authorities at the Voivodeship level. Please explain what are the legal effects of these plans, once adopted.

(b) Are local air quality plans and programmes in Poland adopted only at the Voivodeship level? If not:

(i) Please specify at which governmental levels local air quality plans or programmes may be adopted.

(ii) Please provide the text of the legislative provisions, together with an English translation thereof, under which local air quality plans and programmes are adopted at each of these governmental levels.

(iii) For each governmental level besides the Voivodeship level at which local air quality plans and programmes are adopted, please provide a recent judgment demonstrating that there is no access to justice for environmental NGOs under article 9 (3) of the Convention to challenge such plans and programmes

As regards **point (a)**, the aim of the air quality plans is to improve air quality in the zones and agglomerations where limit values are exceeded, so that air pollution does not exceed the standards set in the law. In addition, the air quality plan shall set out measures, so that the exceedance period is kept as short as possible. For the purpose of air quality monitoring Poland is divided into 46 zones and agglomerations.

Under Polish law, air quality plans are referred to as '*program ochrony powietrza*', as stipulated in Article 91 of the Act of 27 April 2001 – the Environmental Protection Act ('EPA'), and short-term action plans as '*plan działań krótkoterminowych'*, as stipulated in Article 92 EPA. The text of both Articles together with an English translation are provided in **annex 11**. In practice, a short-term action plan is in most cases included in an air quality plan as a list of specific short-term measures to tackle air pollution. Such measures are often directed towards individuals. In addition, the Regulation of the Minister of Environment of 14 June 2019 on air protection plans and short-term action plans provides a detailed description and legal requirements for air quality plans and short-term action plans (see **annex 12** for the text of the Regulation in Polish and an English translation of relevant parts). Both documents are adopted by resolution of the '*voivodeship sejmik*' (regionally-elected legislatures), on the basis of projects developed by voivodeship management boards.

For the clarity of presenting this reply, the Communicant will use the term ***'air quality plans***' to mean both: air quality plan and short-term action plan.

The procedure of adoption of air quality plans is divided into three steps:

1. Preparation of the draft resolution of the air quality plan for (a) zone(s) where air quality standards are exceeded. This is completed by the voivodeship management board (*zarząd województwa*, the executive body);
2. The draft resolution of the air quality plans is then open for the consultation procedure. Consultations are with:
    a. local administration that will be responsible for the enforcement of the air quality plan (respective heads of villages, mayors or city presidents and district heads),

   b. the Ministry of Climate and Environment,
   c. the public.
3. The final draft resolution of the air quality plan(s) is presented to the voivedeship sejmik for vote (political body).

Air quality plans have the status of acts of local law, which means that they are a source of generally binding law in the areas for which they have been adopted (the voivodeship). The development and adoption of air quality plans is mandatory for the zones/agglomerations where limit values or target values are exceeded. Air quality plans are required to specify the corrective actions, i.e. effective measures, so that the periods in which the limit values or target values are not met are as short as possible.

Air quality plans are the main and most important instrument for combating air pollution. They define corrective actions, which include specific obligations imposed primarily on administrative authorities (especially local government units, i.e. municipalities), but also on entrepreneurs and individuals.[1] Air quality plans indicate the forecast year in which the planned corrective measures will lead to the elimination of exceedances of limit values and target values. The expected environmental effects of individual remedial measures is also indicated.

Accordingly, air quality plans result, at the very least, in the following binding legal effects:
1. Determine measures (corrective actions) to be adopted which create obligations on public and private bodies, including restrictions and prohibitions on companies and individuals;
2. Determine the public authorities responsible for the adoption of the measures;
3. Qualify the measures to be short-, mid- or long-term measures;
4. Set the timeframe to adopt certain measures.

Based on these legal effects, Polish administrative courts allow air quality plans to be challenged by both local governments and private entities whose economic interests could be affected by the measures adopted in the plan. As an example, we provide a judgment issued by the Gliwice Regional Administrative Court in Gliwice on 8 March 2017, in a case no. II SA/Gl 1189/16 (see **annexes 13 and 14** for the Polish text of the judgment and the translation of its relevant parts). The complaint was brought against the Silesian air quality plan by a manufacturer of heating stoves. That plan introduced the so-called ‘anti-smog resolution’ restricting the possibility of burning solid fuels (coal and wood). The complainant argued that the plan's restrictions infringe its economic freedom. The Court found that the infringement of economic activity constitutes grounds for infringement of a legal interest and made a legal assessment of the Silesian air quality plan, declaring it to be unlawful to a certain extent. In the case at stake, legal interest and the standing were allowed.

On the other hand, as explained in the Communication, a very strict and conservative / formalistic interpretation of the ‘breach of legal interest’ in the case of individuals and NGOs prevents access to justice to appeal ineffective air quality plans. As a result, a members of the public cannot question or appeal air quality plans, including ineffective measures, which should improve air quality as soon as possible in order to protect human health.

The Communicant further considers that air quality plans have binding legal effects impacting on the right of individuals to air of a certain quality deriving from their human, fundamental rights, including under EU law. While this has so far not been acknowledged by the Polish administrative courts, this argumentation is confirmed by a recent Opinion of Advocate General Kokott issued

[1] Pursuant to § 5 (2) of the Regulation of the Minister of Environment of 14 June 2019 on air protection plans and short-term action plans – see annex 12.

on 5 May 2022 on Case C-61/21 pending before the Court of Justice of the European Union.[2] The case concerns health damage from air pollution. This opinion states that the Air Quality Directive 2008/50 confers an individual right to ambient air of a certain quality.[3] Further, it found that air quality legislation is designed to protect the legal interest of individuals, which is enshrined in Articles 2, 3, and 37 of the Charter of Fundamental Rights of the European Union , i.e. the right to life, the right to the protection of the physical and moral integrity of the individual, and the protection of the environment.[4]

As regards **point (b) of the question**, the Communicant confirms that air quality plans are adopted only at voivodeship level.

Yours sincerely,

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[2] ECLI:EU:C:2022:359, available at: < https://curia.europa.eu/juris/document/document.jsf;jsessionid=55B5947B4ADFBD102DC9E21188CB43EF?text=&docid=258884&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=573396>.
[3] Ibid, para. 103.
[4] Ibid, paras 73 and 91.