United Nations ECE/MP.PP/C.1/2022/10

Economic and Social Council

Distr.: General
4 November 2022

Original: English

Economic Commission for Europe

Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Compliance Committee

Seventy-seventh meeting
Geneva, 13–16 December 2022
Item 10 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2014/119 concerning compliance by Poland*

Adopted by the Compliance Committee on 15 June 2022

I. Introduction

1. On 28 November 2014, the Fundacja Frank Bold (Frank Bold Foundation) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of Poland to implement article 7 in conjunction with article 6 (3), (4) and (8) regarding the decision-making on an amendment to the spatial development plan for the Lubuskie Voivodeship (Province), as well as article 9 (3) of the Aarhus Convention with regard to the possibility for members of the public to access administrative or judicial review procedures to challenge acts by public authorities.[1]

2. On 25 March 2015, the Party concerned submitted comments on the preliminary admissibility of the communication.

3. On 9 April 2015, the Committee wrote to the parties requesting clarifications regarding ongoing domestic proceedings.

4. On 28 April 2015, the communicant provided additional information with respect to its use of domestic remedies. On 21 May 2015, the Party concerned provided comments on the communicant's letter of 28 April 2015.

* This document was scheduled for publication after the standard publication date owing to circumstances beyond the submitter's control.

[1] Communication, p. 2.

5. At its forty-ninth meeting (Geneva, 30 June–3 July 2015), the Committee determined on a preliminary basis that the communication was admissible.[2]

6. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention,[3] the communication was forwarded to the Party concerned on 5 October 2015 for its response by 5 March 2016.

7. The Party concerned provided its response to the communication on 1 March 2016.

8. On 30 May 2016, the communicant provided comments on the response of the Party concerned.

9. On 4, 9 and 13 June 2016, the Party concerned provided comments on the communicant's comments of 30 May 2016, inter alia, asserting that the communicant had raised new allegations at a late stage, and asking the Committee either to find the comments inadmissible, or to postpone the hearing scheduled for the Committee's fifty-third meeting (Geneva, 21–24 June 2016).

10. On 8 June 2016, the communicant provided comments on the comments of the Party concerned of 4 June 2016.

11. By letter of 14 June 2016, the Committee informed the Party concerned that the hearing would go ahead as scheduled.

12. At its fifty-third meeting, the Committee held a hearing to discuss the substance of the communication, with the participation of the communicant and the Party concerned.[4]

13. During the hearing at its fifty-third meeting, the Committee confirmed that the communication was admissible. Following the hearing, the Committee commenced its deliberations on its draft findings.[5]

14. On 11 March 2021, the Committee sent questions to the communicant and the Party concerned for their written reply by 8 April 2021.

15. On 8 April 2021, the communicant provided its reply to the Committee's questions. On the same date, the Party concerned submitted a partial reply to the Committee's questions, indicating that it would require further time to provide the information outstanding. On 6 August 2021, the Party concerned provided additional information in reply to the Committee's questions.

16. The Committee completed its draft findings through its electronic decision-making procedure on 28 April 2022. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 29 April 2022, with an invitation to comment by 10 June 2022.

17. The Party concerned and the communicant provided comments on 8 and 10 June 2022, respectively.

18. At its seventy-fifth meeting (Geneva, 14–17 June 2022), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee adopted its findings on 15 June 2022 and agreed that they should be published as a formal pre-session document to its seventy-seventh meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

[2] ECE/MP.PP/C.1/2015/5, para. 55.
[3] ECE/MP.PP/2/Add.8.
[4] ECE/MP.PP/C.1/2016/5, para. 41.
[5] Ibid., para. 41.

II. Summary of facts, evidence and issues[6]

A. Legal framework

Public participation during the preparation of plans and programmes

19. According to the Spatial Planning and Development Act of 2003 (No. 80, item 717) as in force at the time of the amendment to the Lubuskie Voivodeship spatial development plan, voivodeships are responsible for introducing development plans for their region, specifying the destination, zoning, land development, and deployment of public investment. Pursuant to article 39 (3) of the Spatial Planning and Development Act, the voivodeship spatial development plan includes agreements on the voivodeship development strategy and specifications concerning, in particular:

> (1) Basic elements of the voivodeship settlement network and their communication and infrastructural connections, including directions of cross- border connections;
>
> (2) The system of protected areas, including environment, nature and cultural landscape, resorts, cultural heritage and monuments, as well as contemporary cultural assets' protection areas;
>
> (3) Arrangement of public purpose investment of supra-local significance;
>
> (4) Problematic areas along with the rules of spatial planning therefor and metropolitan areas;[7]
>
> (5) Support areas;[8]
>
> (6) Areas at a special threat of flooding;
>
> (7) Boundaries of closed sites and protective zones thereof;
>
> (8) Areas of occurrence of documented mineral deposits.[9]

20. Sections 2 and 3 of the Act on Access to Information about the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments (No. 109, item 1157) (Act on Environmental Information and Impact Assessment) regulate the procedure of public participation prior to the adoption of plans and programmes that influence the environment.[10]

21. Pursuant to article 55 (3) of the above-mentioned Act:

> A written summary containing a justification of the choice of the adopted document in relation to the alternatives considered, as well as the information on the manner in which the following has been taken into account and to what extent it has been used, shall be enclosed with the adopted document:
>
> (1) The findings of the environmental impact prognosis;
>
> (2) The opinions of the competent authorities referred to in articles 57 and 58;
>
> (3) The submitted comments and suggestions;
>
> (4) The results of the procedure relating to transboundary environmental impact, where it has been conducted;

[6] This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

[7] Since repealed.

[8] Since repealed.

[9] Reply of Party concerned to Committee's questions, 8 April 2021, annex 1, p. 8.

[10] Communication, p. 3.

(5) Proposals for the methods and frequency of monitoring the effects of the implementation of the provisions of the document.[11]

Access to justice for environmental organizations, private persons and public authorities

22. Article 91 (1), in conjunction with article 90 (1), of the Act on Voivodeship Self-Government of 1998 (No. 142, item 1590) gives the right of access to justice to all entities whose legal interests or rights are violated by the introduction of acts of local law.

B. Facts

23. In March 2007, the Assembly of the Lubuskie Voivodeship adopted Resolution No. VI/59/07, which provided a legal foundation for the preparation of amendments to the spatial development plan for the voivodeship.[12]

24. On 18 March 2011, the Marshal of the Lubuskie Voivodeship published a public notice regarding the public consultation on the draft amendment to the spatial development plan of the Voivodeship.

25. Interested stakeholders, including individuals, the public and non-governmental organizations (NGOs) as well as other institutions, could submit comments and proposals on the proposed amendment prior to its adoption.[13]

26. Between 18 March and 13 May 2011, 10 comments were submitted to the Office of the Marshal of Lubuskie Voivodeship within the national public consultation procedure on the proposed amendment to the spatial development plan.[14]

27. In addition, 1,099 comments and proposals were received in the context of a cross-border consultation procedure on the proposed amendment.[15]

28. In order to evaluate the information received during the national and cross-border public consultations, the local authority organized the comments and proposals received into seven categories (A–G):

A – Editorial corrections and concerning the update of information on the existing state – considered;

B – The plan already includes corrections proposed by an applicant;

C – Comment is not relevant to the plan;

D – Comment contrary to voivod[e]ship government policy – not considered;

E – Comment partly considered;

F – Comment considered;

G – Comment not considered.[16]

29. The table of statistics included in the summary for the cross-border consultation states that all 1,070 comments by foreign private individuals were marked with the letter D as “contrary to voivodeship government policy” and therefore “not considered” (see para. 28 above). The same classification was assigned to comments received through the national consultations. The letter D marking did not identify the policy with which those comments were considered to be inconsistent, or what the actual content of that particular policy was.[17]

[11] Reply of Party concerned to Committee’s questions, 8 April 2021, annex 1, p. 5.
[12] Communication, p. 4.
[13] Ibid., p. 4.
[14] Ibid., pp. 4 and 7
[15] Ibid., p. 7.
[16] Update from Party concerned, 6 August 2021, annex 1, p. 16.
[17] Communication, pp. 7–8.

30. The amended spatial development plan for the Lubuskie Voivodeship region was adopted on 21 March 2012 on the basis of Resolution No. XXII/191/12.[18]

31. The final reports on the public consultation regarding the amended spatial development plan were published on 4 August 2012 on the website of the Office of the Marshal of Lubuskie Voivodeship, in the Public Information Bulletin and on the Ekoportal.

32. A local landowner and the Municipality of Gubin (the location of the lignite deposits and a proposed coal-fired power plant) each brought court proceedings under, inter alia, articles 90 (1) and 91 (1) of the Voivodeship Self-Government Act seeking to challenge the decision adopting the amended spatial development plan for the Lubuskie Voivodeship.[19]

33. On 20 March and 5 December 2013 respectively, the Provincial Administrative Court rejected the claims of the Municipality and the local landowner. Each then appealed to the Supreme Administrative Court, which, in separate judgments dated 25 February 2015, dismissed their appeals.[20]

C. Domestic remedies

34. The communicant asserts that there were no domestic remedies available through which it could have challenged the alleged failure to carry out a proper public participation procedure on the Lubuskie Voivodeship spatial development plan amendment. It submits that the Party concerned does not recognize environmental organizations as entities possessing a sufficient legal interest to challenge administrative decisions on spatial development plans and that, accordingly, environmental organizations, despite their statutory status, are denied access to review by the courts.[21] In support of its assertion, it points to the judgments of the Provincial Administrative Court and the Supreme Administrative Court rejecting the challenges by a local landowner and the Municipality of Gubin against the Lubuskie Voivodeship spatial development plan amendment (see para. 33 above).[22]

35. With respect to the communicant's allegations concerning the public participation procedure on the Lubuskie Voivodeship spatial development plan amendment, the Party concerned submits that the alleged defects in the public participation procedure were not raised in the court proceedings brought by the local landowner or municipality and that these allegations should therefore be determined inadmissible on the basis of a failure to exhaust domestic remedies.[23]

36. Regarding the communicant's allegation that there is no access to justice for environmental organizations to challenge voivodeship spatial development plans, the Party concerned submits that the communicant has provided no evidence that it sought to bring court proceedings to challenge the Lubuskie Voivodeship spatial development plan amendment. It submits that this allegation should also therefore be determined to be inadmissible on the basis of a failure to exhaust domestic remedies.[24]

37. Regarding the communicant's allegation that there is no access to justice for private persons to challenge voivodeship spatial development plans, the Party concerned submits that the Supreme Administrative Court's judgments (see para. 33 above) make it clear that it is possible for a private person's legal interest to be violated by a voivodeship spatial development plan. The Party concerned submits that this demonstrates that the communicant's allegation is therefore invalid and should be determined to be inadmissible.[25]

38. Lastly, with respect to any allegations in the communication concerning a lack of access to justice for local authorities like the Municipality of Gubin to challenge voivodeship

[18] Ibid., p. 5.
[19] Ibid., p. 5.
[20] Communicant's letter of 28 April 2015, p. 1.
[21] Communication, p. 13.
[22] Ibid., p. 13; communicant's letter of 28 April 2015.
[23] Comments of Party concerned on communicant's letter of 28 April 2015, 21 May 2015, p. 2.
[24] Ibid., p. 1.
[25] Ibid., p. 2.

spatial development plans, the Party concerned submits that, in its findings on communication ACCC/C/2014/100 (United Kingdom),[26] the Committee held that disputes between public authorities are not subject to review by the Committee.[27] The Party concerned contends that, in the light of this, the dispute between the Municipality of Gubin and the Lubuskie Voivodeship should be excluded from the scope of the Committee's examination.[28]

D. Substantive issues

Article 7 in conjunction with article 6 (3), (4) and (8)

39. The communicant claims that the Party concerned failed to comply with article 7, in conjunction with article 6 (3) and (4), of the Convention during the preparation of the Lubuskie Voivodeship spatial development plan amendment but does not elaborate on this allegation.

40. The communicant further alleges that the report on the public consultation regarding the Lubuskie Voivodeship spatial development plan amendment failed to comply with article 7, in conjunction with article 6 (8), of the Convention. The communicant submits that, on the basis of the documents published by the authorities of the Lubuskie Voivodeship, the comments and proposals submitted by the public, including those questioning particular elements of the amendment of the spatial development plan, and especially those relating to the exploitation of the "Gubin" and "Gubin – Zasieki – Brody" lignite deposits, were not properly evaluated.

41. The communicant also submits that there is no evidence that the outcomes of the public consultation were taken into account by the competent authority, the Marshal's Office of Lubuskie Voivodeship. More specifically, the communicant alleges that the report on the public consultation does not provide any detailed information on the process of evaluating the comments received, their impact on the final draft or the authority's position on the specific remarks. Rather, the final report merely presents the comments and proposals received in the form of a table and does not contain the actual responses of the competent public authority to the comments and objections made by the public.[29]

42. On this point, the communicant refers to the Committee's findings on communication ACCC/C/2008/24 (Spain), in which the Committee held that:

> 99. It is quite clear to the Committee that the obligation to take due account in the decision of the outcome of the public participation cannot be considered as a requirement to accept all comments, reservations or opinions submitted. However, while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority must still seriously consider all the comments received.
>
> 100. The Committee recalls that the obligation to take "due account" under article 6, paragraph 8, should be seen in the light of the obligation of article 6, paragraph 9, to "make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based". Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account.
>
> 101. … The Committee notes that a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention.[30]

[26] ECE/MP.PP/C.1/2019/6, para. 8.

[27] See letter from the secretariat to the Party concerned and communicants of communication ACCC/C/2014/100 (United Kingdom), 7 August 2015; and response of Party concerned to communication, p. 5.

[28] Comments of Party concerned on communicant's letter of 28 April 2015, 21 May 2015, p. 2.

[29] Communication, p. 8.

[30] ECE/MP.PP/C.1/2009/8/Add.1, paras. 99–101.

43. In addition, the communicant asserts that the authorities did not ensure that the published text of the spatial development plan amendment was supported by sufficient justification regarding the reasons on which it was based.

44. The communicant also submits that the national legal framework, namely article 55 (3) of the Act on Environmental Information and Impact Assessment (see para. 21 above) fails in general to meet the requirements of article 7, in conjunction with article 6 (3), (4) and (8), of the Convention.[31]

45. The Party concerned states that the procedure for public participation on a voivodeship spatial development plan is regulated by the Spatial Planning and Development Act. Articles 39 (1) and 41 (1) of that Act provide that the procedure for the adoption of a voivodeship spatial development plan starts with a resolution issued by the voivodeship assembly launching the preparation of the plan. Subsequently, the voivodeship marshal will "very extensively" announce the adoption of the abovementioned resolution in the national press, at the local and county administration offices of the voivodeship and at the marshal's office. The announcement will specify the form, place and time frame for submitting suggestions regarding the plan, which will not be shorter than three months from the date of the announcement. The suggestions received will then be considered. The Party concerned submits that, though the Spatial Planning and Development Act does not specify the form and procedure in which suggestions are to be considered,[32] published commentary on that Act states that "each suggestion, even the most general one, must be considered ..., suggestions must be addressed in written form ... and can be addressed in two ways, i.e. individually or collectively".[33]

46. The Party concerned submits that the Spatial Planning and Development Act therefore does not exclude handling suggestions by means of a list with remarks, as happened in the present case. It also submits that the literature on article 42 of the Act on Environmental Information and Impact Assessment, which concerns the handling of comments and suggestions concerning a document that requires public participation, indicates that "there are no reasons why submitted comments should not be systematically arranged into single-type groups and assigned to the individual categories".[34]

47. The Party concerned submits that its procedure for the adoption of a voivodeship spatial development plan does not violate the provisions of the Convention. The authorities of the Lubuskie Voivodeship placed a list of the comments submitted in the course of the public consultations on its website.[35] A document indicating how the comments and suggestions concerning the draft amendment to the Lubuskie Voivodeship spatial development plan had been considered was posted on the same website. The opinions and suggestions submitted in relation to the draft amendment to the spatial development plan are addressed in detail in two documents: "The justification for the opinions concerning the draft amendment to the Spatial Development Plan of Lubuskie Voivodeship" and "The justification for the suggestions concerning the draft amendment to the Spatial Development Plan of Lubuskie Voivodeship". The comments were not rejected automatically and exhaustive replies thereto were provided.[36] The Party concerned contends that the public authority therefore sufficiently addressed the comments submitted in the course of the public consultation process.

[31] Communicant's comments on response of Party concerned to communication, 30 May 2016, pp. 1–2.

[32] Response of Party concerned to communication, pp. 1–2; opening statement of Party concerned at hearing at Committee's fifty-third meeting, p. 3.

[33] Ibid., p. 2.

[34] Ibid., p. 2, citing *Gruszecki K. Komentarz do ustawy o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko* (A Commentary on the Act of 3 October 2008 on the Provision of Information on the Environment and Its Protection, the Public Participation in Environmental Protection and Environmental Impact Assessments (in Polish), LEX/el.2013.

[35] See https://bip.lubuskie.pl/588/Zmiana_Planu_zagospodarowania_przestrzennego_Wojewodztwa_Lubuskiego_2012/.

[36] Response of Party concerned to communication, pp. 2–3.

Article 9 (3)

48. The communicant claims that the Party concerned fails to comply with article 9 (3) of the Convention because its administrative courts interpret the legal interests of private persons and environmental organizations so narrowly that they effectively bar their access to review. It contends that the possibility for NGOs, private persons and public authorities to challenge voivodeship spatial development plans is merely theoretical and almost impossible to achieve in practice. The communicant submits that the administrative courts have ruled that private persons, including inhabitants of the voivodeship concerned, and environmental organizations, do not have a sufficient legal interest to challenge a voivodeship spatial development plan. Local authorities' rights of access to justice are also interpreted very restrictively.[37] The communicant asserts that, given the current absence of a direct indication from the legislature that would ensure the right of access to justice, the availability of access to review procedure is limited and, in most cases, non-existent.[38]

49. The communicant contends that, according to the administrative courts, spatial development plans are not considered to be acts of local law and thus article 91 (1), in conjunction with article 90 (1), of the Act on Voivodeship Self-Government, which provide entities with the right of access to justice, cannot be applied. That means that it is almost impossible in practice for an environmental organization to prove a legal interest in cases concerned with spatial development.[39]

50. The communicant claims that the statutory activities of environmental organizations are not considered sufficient to establish a legal interest to challenge spatial development plans. On this point, the communicant cites judgment No. IV SA/Wa 338/05 of the Provincial Administrative Court, which ruled that: "There is no possibility of challenging by the social organization, [a] resolution of the municipal council representing local law that is not directly concerned with [the] legal interest or obligations of the organization, but concerns only the remaining issues in the field of statutory activities of the organization."[40]

51. The communicant submits that the Supreme Administrative Court, in its judgments Nos. II OSK 1457/05, II OSK 1736/09, II SA/Bk 171/10 and II OSK 40/10, has taken a similar approach. An environmental organization therefore has to prove that its activities or duties were affected in the specific case in order for its court action to be admissible.[41]

52. With respect to private persons, the communicant alleges that, in order to challenge a decision adopting a spatial development plan, private persons whose property rights were violated by its adoption have to prove a sufficient legal interest, which the administrative courts' jurisprudence has interpreted very narrowly. The communicant submits that, according to the judgments concerning the amendment of the Lubuskie Voivodeship spatial development plan and the other case law before the Committee, private persons do not have sufficient legal interests that are directly and objectively affected and therefore cannot claim their rights to a judicial remedy.[42]

53. The communicant submits that it is often assumed that land property rights are a source of legal interest in cases of appeal against acts violating national law. However, in the view of the administrative courts, legal acts such as a voivodeship spatial development plan cannot be challenged on the ground that property rights have been infringed.

54. The communicant claims that there is, moreover, no direct definition of legal interest in the legislation of the Party concerned, though an interpretation of legal interest can be found in articles 140 and 143 of the Code of Civil Procedure (No. 16, item 93).[43] The communicant submits that these provisions leave a wide scope for interpretation and that, as described above, administrative courts usually reject complaints lodged by affected parties. According to judgment No. II SA Kr 1092/10 of the Provincial Administrative Court: "[A]

[37] Communication, p. 5.
[38] Ibid., p. 12.
[39] Ibid., pp. 9–10.
[40] Ibid., p. 10.
[41] Ibid., p. 10.
[42] Ibid., p. 10.
[43] Ibid., pp. 10–11.

complaint to the administrative court can be only issued by [an] individual (or [an] organization) that can prove explicit, individual interest or obligations arising from the rules of substantive law."[44]

55. The communicant submits that, in practice, property rights do not guarantee access to review by a court and do not protect individuals whose rights are affected. This is particularly the case for voivodeship spatial development plans affecting or very likely to affect elements of the environment. It is nearly impossible to prove a legal interest because, according to the courts, there is a lack of direct impact on the rights of landowners.[45]

56. The communicant claims that public authorities located in the area subject to the Lubuskie Voivodeship spatial development plan, such as the Municipality of Gubin, were also denied the right to challenge the plan on the basis of lack of legal interest.[46]

57. The communicant states that the objective of the Convention is to ensure that environmental law is better enforced and that members of the public, who are often represented by environmental organizations, have access to administrative or judicial procedures to challenge acts and omissions by public authorities which contravene provisions of environmental law. Under the current law and administrative procedures of the Party concerned, this objective is not attained and the Party concerned fails to comply with article 9 (3) of the Convention.[47]

58. The Party concerned submits that it follows from article 9 (3) of the Convention that, if they meet the criteria, if any, laid down in national law, members of the public have access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities which contravene the provisions of national law relating to the environment. In that regard, article 90 of the Act on Voivodeship Self-Government provides that everybody whose legal interest or right has been violated by the provision of an act of local law issued in a case within the area of public administration has the right to lodge a complaint against the relevant provision at the Administrative Court, having first called on the voivodeship self-government authority itself to eliminate the violation. Although a voivodeship spatial development plan is not an act of local law, the case law and doctrine nevertheless hold that such a plan may be subject to a complaint to the Administrative Court under article 90 of the Voivodeship Self-Government Act.[48]

59. The Party concerned submits that judgment No. II OSK 647/14 of the Supreme Administrative Court, cited by the communicant, makes it clear that the provisions of article 90 (1), in conjunction with article 91 (1), of the Voivodeship Self-Government Act and article 3 (2) and (6) of the Act of 30 August 2002 on the Law on the Proceedings before Administrative Courts (Official Journal of the Laws of 2012, item 270, as amended) may provide a basis for lodging a complaint against a resolution of the voivodeship assembly within the area of public administration, even though such a resolution is not an act of local law. In the above-mentioned judgment, the Supreme Administrative Court stated that not only acts of local law, but also other legal actions undertaken by administration authorities may be challenged in the court if they violate the rights of other persons.[49] The Party concerned submits that the Supreme Administrative Court adopted a similar position in judgment No. I OSK 306/11 of 8 March 2012.[50]

60. The Party concerned contends that, in the light of the above, the provisions of its national law are not in contradiction with the Convention. On the contrary, when adopting the amendment to the spatial development plan in the present case, the Voivodeship Assembly acted in compliance with both national law and the Convention. In both judgments regarding the Lubuskie Voivodeship spatial development plan cited by the communicant, namely judgment No. II OSK 647/14 brought by a private person and

[44] Ibid., p. 11.
[45] Ibid., p. 11.
[46] Ibid., p. 11.
[47] Ibid., p. 12.
[48] Response of Party concerned to communication, p. 3.
[49] Ibid., p. 3.
[50] Ibid., p. 3.

judgment No. II OSK 1598/13 brought by the Municipality of Gubin, the Supreme Administrative Court ruled that the Spatial Planning and Development Act had been applied correctly. In both cases, the complainants had claimed that, by specifying in the spatial development plan the areas where lignite deposits are located, which could lead to a change in the use of the land owned by the complainants in the future, the Voivodeship Assembly had violated their legal interest. In both cases, the Supreme Administrative Court found that the First Instance Court did not violate article 90 of the Voivodeship Self-Government Act and rejected the cassation complaints on the ground that the complainants had failed to demonstrate the necessary condition of a violation of a legal interest resulting from the amendment of the voivodeship spatial development plan.

61. The Party concerned submits that the reasoning in these two judgments is correct for three reasons.

62. First, a voivodeship spatial development plan is not an act of law of universal application and does not define in an abstract and specific way the range of the addressees' obligations. In consequence, the plan does not directly shape the manner in which real estate ownership rights are exercised. Such obligations can only be imposed by a local development plan, which is an act of local law. With respect to the location of an investment project of public interest with higher than local significance, pursuant to articles 15 (3) and (4b) and 44 of the Spatial Planning and Development Act, the provisions of the voivodeship spatial development plan are to be introduced into the local development plan after the date of the implementation of the investment project has been determined. The possible construction of a mine to which the communicant referred would be such an investment project of public interest.[51]

63. Second, the challenged spatial development plan did not indicate unambiguously that an investment project of public interest in the form of a lignite mine was to be implemented in the area referred to, but only described the areas situated in the Municipalities of Gubin, Brody and Lubsko as "areas of national importance, related to the planned exploitation of lignite deposits Gubin and Gubin 1 and, in view of this, requiring separate detailed studies and decisions to be undertaken apart from the planning activities of the Voivod[e]ship".[52] This means that the public will have a further possibility of expressing its views on the provisions of the local land use plan, which provides for wider possibilities of public participation. Thus, the public is not deprived of the possibility of participating in the procedure at the phase when all the options are still open, and the requirement of article 6 (4) of the Convention is therefore satisfied.

64. Third, despite the fact that they had a legal interest, the complainants did not demonstrate a violation of that interest, which is an indispensable condition for an effective complaint under article 90 of the Voivodeship Self-Government Act.

65. The Party concerned concludes that the reasoning of the Supreme Administrative Court in the two above-mentioned judgments is accordingly not in contradiction with the provisions of either national law or the Convention and that the communicant's allegations are therefore not justified.

66. With respect to access to justice for NGOs to challenge voivodeship spatial development plans, the Party concerned submits that the communicant has not provided the Committee with any judgment to demonstrate that it was itself refused access to justice in this case, or even that it had lodged a complaint with the Administrative Court against Resolution No. XXII/191/12 of the Assembly of Lubuskie Voivodeship of 21 March 2012 amending the voivodeship spatial development plan. Rather, the communicant has presented a judgment concerning a claim by a private person – File No. II OSK 647/14 – and a judgment in the claim brought by the Municipality of Gubin – File No. II OSK 1598/13. The Party concerned submits that it is therefore difficult for it to address the allegation that it prevented

[51] Ibid., p. 4.
[52] Ibid., pp. 4–5.

NGOs from lodging a complaint against the amendment to the Lubuskie Voivodeship spatial development plan.[53]

III. Consideration and evaluation by the Committee

67. Poland deposited its instrument of ratification of the Convention on 15 February 2002, meaning that the Convention entered into force for Poland on 16 May 2002, i.e. ninety days after the date of deposit of its instrument of ratification.

Admissibility and exhaustion of domestic remedies

68. Pursuant to paragraph 21 of the annex to decision I/7 of the Meeting of the Parties, the Committee should, at all relevant stages, take into account any available domestic remedy, unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress.

69. The communicant claims that, as there is no access to justice for environmental organizations to challenge voivodeship spatial development plans, there were no available domestic remedies through which it could have challenged the Lubuskie Voivodeship spatial development plan amendment.

70. While the communicant did not itself bring court proceedings to challenge the Lubuskie Voivodeship spatial development plan amendment, the Committee has before it the judgments of the Supreme Administrative Court rejecting the challenges brought by a private individual and a municipality against that particular spatial development plan amendment. The Committee has no judgments before it in which an environmental organization or any other member of the public was able to successfully challenge a voivodeship spatial development plan.

71. Given that the Committee has not been provided with any judgments in which an environmental organization was able to challenge a voivodeship spatial development plan, and bearing in mind that the alleged lack of access to justice in this regard is one of the main allegations in the communication, the Committee considers that the Party concerned has not shown that the bringing of court proceedings before the administrative court to challenge the spatial development plan amendment was a domestic remedy "available" to the communicant within the meaning of paragraph 21 of the annex to decision I/7. The Party concerned has therefore not demonstrated that the fact that the communicant did not itself bring court proceedings constituted a failure on its part to exhaust any available domestic remedies.

72. In the light of the foregoing, the Committee finds the communication to be admissible.

Scope of the Committee's consideration and general observation

73. The Committee expresses its concern at the unclear and incomplete documentation provided by the communicant and the Party concerned in this case, including the failure to provide timely English translations of the documentation necessary for the Committee to examine the matters at issue. The Committee emphasizes that, in order to be considered by the Committee, all documentation must be submitted in one of the Convention's official languages, i.e. English, French or Russian, with English being the Committee's working language.[54] In the present case, the incomplete nature of the documentation and translations provided to the Committee by the communicant[55] and the Party concerned[56] has added

[53] Ibid., pp. 5–6.

[54] United Nations Economic Commission for Europe (ECE), *Guide to the Aarhus Convention Compliance Committee: Second edition* (Geneva, 2019), paras. 37–38.

[55] For example, all 10 annexes to the communication were submitted only in Polish and the judgments annexed to the communicant's letter of 28 April 2015 were likewise submitted only in Polish.

[56] See, for example, page 2 of the response of the Party concerned to the communication and its letter of 8 April 2021 providing the names, but not the text, of relevant documents and a weblink to the documents only in Polish. See also paras. 87–88 below of these findings.

significantly to the Committee's workload and substantially prolonged the time required to complete the present findings.

74. With respect to the scope of its consideration, the Committee notes that, in its communication, the communicant submits that "administrative bodies and courts do not recognize sufficient legal interest of … inhabitants of the region, local authorities as well as environmental organizations".[57] However, it is not at all clear to the Committee that the references to municipalities and local authorities in the communication are intended as allegations of non-compliance for the Committee to examine. Rather, in the summary of its communication[58] and in its comments on the response of the Party concerned to the communication,[59] the communicant states that its communication concerns a lack of access to justice for NGOs and private persons.

75. In the light of the foregoing, the Committee confines its consideration of the communicant's allegations concerning access to justice to that of NGOs and private persons only. It will not, therefore, examine access to justice for municipalities and local authorities in the context of the present case.

Article 7 – applicability

76. With respect to whether the amendment to the Lubuskie Voivodeship spatial development plan is a "plan" within the scope of article 7 of the Convention, the Committee recalls its findings on communication ACCC/C/2014/105 (Hungary), in which it held that:

> 126. Article 7 of the Convention does not define a "plan", "programme" or "policy" relating to the environment. When determining how to categorize a document under the Convention, the document's substance, legal functions and effects must be evaluated, rather than its label in domestic law.
>
> 127. A typical plan or programme: (a) is often regulated by legislative, regulatory or administrative provisions; (b) has the legal nature of a general act (often adopted finally by a legislative branch); (c) is initiated by a public authority, which (d) provides an organized and coordinated system that sets, often in a binding way, the framework for certain categories of specific activities (development projects), and which (e) usually is not sufficient for any individual activity to be undertaken without an individual permitting decision.[60]

77. Based on the information before it, the Committee understands that, whilst a voivodeship spatial development plan does not in itself permit any individual activity to be undertaken, such a plan has the legal nature of a general act that sets a framework for more specific activities in the future and which will subsequently be implemented by a more detailed plan at local level.[61] Accordingly, a voivodeship spatial development plan constitutes a "plan" within the meaning of that term in article 7 of the Convention.

78. As to whether the voivodeship spatial development plan "relates to the environment", article 46 (1) of the Act on Environmental Information and Impact Assessment requires that draft spatial development plans be subject to a strategic environmental assessment.[62] Where, as in this case, a strategic environmental assessment is mandatory, it goes without saying that the plan is "relating to the environment" within the meaning of article 7 of the Convention.

79. Given the foregoing, the Committee concludes that a voivodeship spatial development plan, such as that for the Lubuskie Voivodeship, falls within the definition of a plan under article 7 of the Convention. It follows that the Party concerned must ensure that public participation is carried out in accordance with article 6 (3), (4) and (8) of the Convention.

[57] Communication, p. 5.
[58] Ibid., p. 6.
[59] Communicant's comments on response of Party concerned to communication, 30 May 2016, pp. 4–8.
[60] ECE/MP.PP/C.1/2021/16, para. 126–127.
[61] Response of Party concerned to communication, annex, p. 3; opening statement of Party concerned at hearing at Committee's fifty-third meeting, p. 2.
[62] Reply of Party concerned to Committee's questions, 8 April 2021, annex, p. 3.

Article 7 in conjunction with article 6 (3) and (4)

80. The communicant claims that the Party concerned failed to comply with article 7 of the Convention in conjunction with article 6 (3) and (4).[63]

81. The communicant does not provide any specific arguments or evidence to support its allegation regarding these provisions. The Committee accordingly has no basis on which to examine whether there was any failure to comply with these provisions. The Committee therefore finds the allegation that the Party concerned failed to comply with article 7, in conjunction with article 6 (3) and (4), to be unsubstantiated.

Article 7 in conjunction with article 6 (8) – taking due account of the outcome of public participation

82. With respect to what the obligation to take "due account" requires in practice, the Committee recalls its findings on communication ACCC/C/2008/24 (Spain), in which it held that:

> 99. Furthermore, it is quite clear to the Committee that the obligation to take due account in the decision of the outcome of the public participation cannot be considered as a requirement to accept all comments, reservations or opinions submitted. However, while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority must still seriously consider all the comments received.
>
> 100. The Committee recalls that the obligation to take "due account" under article 6, paragraph 8, should be seen in the light of the obligation of article 6, paragraph 9, to "make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based". Therefore, the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account.[64]

83. In its findings on communication ACCC/C/2012/70 (Czechia), the Committee observed that, although "a requirement to make accessible the reasons and considerations on which the decision is based is not expressly provided for in article 7 of the Convention …, the Party concerned has the obligation to demonstrate that it has fulfilled its obligations under article 6, paragraph 8".[65] As the Committee stressed in its findings on communication ACCC/C/2013/96 (European Union), the obligation to take due account has just as much force for plans, programmes and policies under article 7 as it has for projects under article 6.[66] In that case, the Committee held that, by failing to demonstrate in a transparent and traceable way how due account was taken of the public participation, the Party concerned failed to comply with article 7 in conjunction with article 6 (8) of the Convention.[67]

84. It is common ground between the parties that the Marshal of the Lubuskie Voivodeship carried out a public consultation on the amendment to the Lubuskie Voivodeship spatial development plan and that the comments submitted in the context of the national and cross-border consultations were organized in tables grouping the large number of comments received into different categories (see para. 28 above). These tables were published as part of the report on the public consultation.

85. The comments received in the national and cross-border consultations are contained in separate documents and the Lubuskie Voivodeship applied somewhat different methodologies to the comments received in the two consultations. Consequently, the two sets of comments will be examined separately below.

86. Before doing so, the Committee notes that the documentation refers to a "public consultation", whereas the Convention requires the public to have the opportunity to

[63] Communication, pp. 2 and 13.
[64] ECE/MP.PP/C.1/2009/8/Add.1, paras. 99–100.
[65] ECE/MP.PP/C.1/2014/9, para. 62.
[66] ECE/MP.PP/C.1/2021/3, para. 128.
[67] Ibid., para. 137 (c).

"participate" effectively in the decision-making, and not merely to be "consulted". The key point, however, is the substance of the procedure carried out rather than the nomenclature used in the documentation.

National consultation procedure

87. The Party concerned submits that the comments received in the national consultation procedure are addressed in detail in the document entitled "The justification for the opinions concerning the draft amendment to the Spatial Development Plan of Lubuskie Voivodeship".[68]

88. Accordingly, the Committee asked the Party concerned to provide an English translation of all parts of the above-mentioned document that demonstrate how due account was taken of the outcome of the public participation in the decision-making on the 2012 amendment to the Lubuskie Voivodeship spatial development plan. In response, the Party concerned provided English translations of excerpts from documents showing how the comments of two NGOs, namely EKO-UNIA and Naturalists Club Poland, were taken into account. Said translations are not, however, excerpts from the document referred to in paragraph 87 above[69] but from an entirely different document.[70] The Committee notes that the document referred to in paragraph 87 above contains no reference to the comments made by EKO-UNIA or Naturalists Club Poland at all.

89. The document for which the Party concerned has provided translated excerpts contains comments from 10 organizations and individuals, including EKO-UNIA and Naturalists Club Poland. All comments in the document are marked with the letters A–G. The comments from EKO-UNIA and Naturalists Club Poland are addressed in greater detail in two annexes enclosed with that document and the Party concerned has provided English translations of both these annexes to the Committee. There are however no annexes attached to the document in which the comments from the other eight members of the public are similarly addressed.[71]

90. Turning to the document which the Party concerned submits addresses the comments received during the national public consultation procedure (see para. 87 above), the Committee notes that this document contains comments from 104 agencies and institutions, most of which are marked with the letters A–G. A small number of the comments are accompanied by text in the column headed "Justification" but for the vast majority of comments, that column is left entirely blank and the comments are marked with a letter from A–G only.

91. The Party concerned submits that, given the high number of comments received, listing them in a table and assigning them a letter according to their level of acceptance is considered an acceptable solution under paragraph 179 of the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters.[72]

92. Paragraph 179 of the Maastricht Recommendations states that:

> While not all the views expressed in the comments must necessarily be accepted, in order to take all comments submitted duly into account and demonstrate that this has been the case, public authorities may wish to use a variety of methods including

[68] Response of Party concerned to communication, p. 2; opening statement of Party concerned at hearing at Committee's fifty-third meeting, p. 3. Document available at https://bip.lubuskie.pl/system/pobierz.php?plik=uzasadnienie_do_wnioskow_i_opinii_zgloszonych_do_Zmiany_Planu_zagospodarownaia_przestrzennego_Wojewodztwa_Lubuskiego.pdf&id=10856&stats=true (Polish only).

[69] Available at https://bip.lubuskie.pl/system/pobierz.php?plik=uzasadnienie_do_wnioskow_i_opinii_zgloszonych_do_Zmiany_Planu_zagospodarownaia_przestrzennego_Wojewodztwa_Lubuskiego.pdf&id=10856&stats=true (Polish only).

[70] Communication, annex 1.

[71] Ibid., annex 1.

[72] *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters*, United Nations publication, Sales No. E.15.II.E.7.

preparing a table detailing each comment and the way it was handled. In such a table the comments could be grouped in clusters related to certain issues and explaining how these were handled, or a written response could be provided for each comment.

93. The Committee point outs that, while that paragraph indeed indicates that Parties may opt to record all the comments received from members of the public in a table grouped into clusters, it also makes it clear that the table must explain how these were handled. This means that, where the public authority has accepted the substance of a comment, it must explain how that is reflected in the decision taken. Conversely, where the public authority has rejected the substance of a comment, it must explain its reasons for doing so. Where a public authority has accepted the substance of a comment only in part, it must explain what has been incorporated into its subsequent decision and what has been omitted. For those parts that are not accepted on their substance, the public authority must explain clearly and in appropriate detail why they were not accepted.

94. In this regard, the Committee underlines that, whether the competent public authority decides to provide a written response to each comment received or to group comments in clusters related to certain issues, it must still demonstrate in a clear, transparent and traceable way how due account has been taken of each comment received.[73]

95. For the same reason, it would not be sufficient if members of the public who submitted written comments were to receive an individual written response but that response was not made public. As the Committee held in its findings on communication ACCC/C/2013/98 (Lithuania): "While writing individually to each member of the public who submitted comments may be an additional good practice, such individual "private" replies cannot meet the requirement in article 6 (9) to publicly show the reasons on which the decision is based, including how the public's comments have been taken into account."[74]

96. As noted in paragraph 89 above, of the 10 organizations and individuals who submitted comments during the national public consultation procedure, it is possible to see in a clear, transparent and traceable way how due account was taken only with respect to the comments of two organizations (EKO-UNIA and Naturalists Club Poland). While it may be that the competent authority provided individual written responses to the other eight organizations and individuals, recalling the Committee's findings on communication ACCC/C/2013/98 (Lithuania) cited above, this would not be sufficient to meet the requirements of the Convention.

97. Turning to the document that the Party concerned has submitted addresses in detail the comments received during the national public consultation procedure (see para. 87 above), as already noted in paragraph 90 above, the "Justification" column for the vast majority of comments listed in the document is left entirely blank and the comments received are marked with a letter from A–G only.

98. This means that, for comments that were accepted in whole or in part, it is not possible to trace how the comments marked with a letter only were reflected in the decision taken. Conversely, for the comments that were rejected, in whole or in part, it is not possible to discern in appropriate detail the specific reasons why the comments marked with a letter only were rejected.

99. Based on the foregoing, the Committee finds that, by failing to demonstrate in a clear, transparent and traceable way, how due account was taken of all comments submitted by the public in the context of the national consultation procedure on the amendment to the Lubuskie Voivodeship spatial development plan, the Party concerned failed to comply with article 7, in conjunction with article 6 (8), of the Convention.

Cross-border consultation procedure

100. Comments received in the context of the cross-border consultation procedure were classified according to the categories listed in paragraph 28 above. According to the

[73] *The Aarhus Convention: An Implementation Guide*, United Nations publication, Sales No. E.13.II.E.3., p. 156; and Maastricht Recommendations, para. 179.

[74] ECE/MP.PP/C.1/2021/15, para. 143.

documents before the Committee, a total of 1,099 comments were received in the context of the cross-border consultations.[75] The comments received from 33 entities were organized in a table set out in the document entitled "The method of considering comments and proposals to the amendment to the spatial development plan Lubuskie Voivodeship as part of the conducted proceedings in the case cross-border environmental impact".[76] The competent authority's reaction to the comments received from those 33 entities is set out in the document entitled "The justification for the suggestions concerning the draft amendment to the Spatial Development Plan of Lubuskie Voivodeship".[77]

101. However, for the remaining comments received from the public, the Party concerned has submitted no evidence to the Committee to demonstrate whether, and if so, how, due account was taken of these comments by the Lubuskie Voivodeship.

102. Strikingly, according to the table of statistics prepared by the Lubuskie Voivodeship on the cross-border consultations,[78] all 1,070 comments received from private individuals in the context of the cross-border consultations were grouped in category "D" as being "contrary to voivodeship government policy" and therefore "not considered" (see para. 28 above). Despite the Committee's request to the Party concerned for it "to provide an English translation of the provisions of the voivodeship policy that these comments were contrary to",[79] it has failed to do so.

103. Given the foregoing, the Committee considers that the Party concerned has failed to demonstrate, in a clear, transparent and traceable way, how due account was taken of the 1,070 comments received from private individuals in the context of the cross-border consultations.

104. Recalling the considerations contained in paragraphs 82–83 and 93–94 above, the Committee finds that, by failing to demonstrate, in a clear, transparent and traceable way, how due account was taken of all comments submitted by the public in the context of the cross-border consultation procedure on the amendment to the Lubuskie Voivodeship spatial development plan, the Party concerned failed to comply with article 7 in conjunction with article 6 (8) of the Convention.

Article 9 (3) – access to justice for environmental organizations and private persons

105. Pursuant to article 9 (3) of the Convention, each Party shall ensure that, where they meet the criteria, if any, laid down in national law, members of the public have access to administrative or judicial procedures to challenge acts or omissions of public authorities.

106. As the Committee held in its findings on communications ACCC/C/2005/11 (Belgium)[80] and ACCC/C/2006/18 (Denmark),[81] while article 9 (3) refers to "the criteria, if any, laid down in … national law", the Convention does not set these criteria. Rather, the Convention allows flexibility in defining which members of the public have access to justice. In its findings on communication ACCC/C/2006/18 (Denmark), the Committee explained that "the Convention does not prevent a Party from applying general criteria of a legal interest or of demonstrating a substantial individual interest … provided the application of these criteria does not lead to effectively barring all or almost all members of the public from challenging acts and omissions"[82] that contravene national law relating to the environment. In its findings on communication ACCC/C/2005/11 (Belgium), the Committee observed that "the criteria, if any, laid down in national law" should be such that access to a review procedure is the presumption and not the exception.[83]

[75] Communication, annex 2, p. 5.
[76] Ibid., annex 2, p. 6.
[77] Reply of Party concerned to questions, 8 April 2021, pp. 1–2.
[78] Communication, annex 2, p. 5.
[79] Letter to Party concerned and communicant enclosing questions from the Committee, 11 March 2021, question 2 to Party concerned.
[80] ECE/MP.PP/C.1/2006/4/Add.2, paras. 29–37.
[81] ECE/MP.PP/2008/5/Add.4, paras. 29–31.
[82] Ibid., para 31.
[83] ECE/MP.PP/C.1/2006/4/Add.2, para. 36.

107. In its findings on communication ACCC/C/2006/18 (Denmark), the Committee also held that: "When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e. to what extent national law effectively has such blocking consequences for members of the public in general, including environmental organizations, or if there are remedies available for them to actually challenge the act or omission in question."[84] In this evaluation, article 9 (3) should be read in conjunction with articles 1–3 of the Convention, and in the light of the purpose reflected in the preamble, that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced".[85]

108. With respect to the allegations concerning article 9 (3) in the present case, the communicant and the Party concerned have provided the Committee with the following ten judgments:

(a) Judgment No. IV SA/Wa 338/05 of the Warsaw Regional Administrative Court, regarding a claim brought by a foundation against a resolution of a municipality on "on catching homeless animals";[86]

(b) Judgment No. II OSK 1457/05 of the Supreme Administrative Court, concerning a claim brought by a foundation against Resolution VII/47/2003 of the Municipality of Karczew regarding the protection of animals;[87]

(c) Judgment No. II OSK 1736/09 of the Supreme Administrative Court, concerning a claim by a private person against a resolution of a municipality on a local spatial development plan;[88]

(d) Judgment No. II SA/Bk 171/10 of the Białystok Regional Administrative Court, concerning a claim brought by an NGO against a resolution of a municipality on a local spatial development plan;[89]

(e) Judgment No. II OSK 40/10 of the Supreme Administrative Court, regarding a claim brought by an association against Resolution No. XLII/1299/2008 of the Municipality of Warsaw concerning a local spatial development plan;[90]

(f) Judgment No. II SA Go 833/13 of the Regional Administrative Court in Gorzów Wielkopolski, regarding a claim by a private person against a voivodeship spatial development plan;[91]

(g) Judgment No. IV SA/Wa 558/07 of the Warsaw Regional Administrative Court, concerning a claim brought by two private persons against Resolution No. 65/2004 of the Regional Assembly of the Mazowieckie Voivodeship adopting the spatial development plan for the Mazowieckie Voivodeship;[92]

(h) Judgment No. II SA Kr 1092/10 of the Provincial Administrative Court in Kraków, concerning a claim by three private persons against a resolution of a voivodeship on the expropriation of property;[93]

(i) Judgment No. II OSK 647/14 of the Supreme Administrative Court, regarding a claim brought by a private person against Resolution No. XXII/191/12 of the Lubuskie Voivodeship concerning the amendment of the Lubuskie Voivodeship spatial development plan;[94]

[84] ECE/MP.PP/2008/5/Add.4, para. 30.
[85] ECE/MP.PP/C.1/2006/4/Add.2, para. 34; and ECE/MP.PP/2008/5/Add.4, para. 30.
[86] Communication, annex 3; communicant's reply to Committee's questions, 8 April 2021, annex 3.
[87] Communication, annex 4; communicant's reply to Committee's questions, 8 April 2021, annex 4.
[88] Communication, annex 5.
[89] Communication, annex 6; communicant's reply to Committee's questions, 8 April 2021, annex 5.
[90] Communication, annex 7; communicant's reply to Committee's questions, 8 April 2021, annex 2.
[91] Communication, annex 8.
[92] Communication, annex 9; communicant's reply to Committee's questions, 8 April 2021, annex 1.
[93] Communication, annex 10.
[94] Response of Party concerned to communication, annex.

(j) Judgment No. II OSK 1598/13 of the Supreme Administrative Court, concerning a claim brought by the Municipality of Gubin against Resolution No. XXII/191/12 of the Lubuskie Voivodeship concerning the amendment of the Lubuskie Voivodeship spatial development plan.[95]

109. The Committee notes that, of the ten judgments before it in this case, only four concern access to justice with respect to voivodeship spatial development plans (see para. 108 (f), (g), (i) and (j) above). The Committee examines below the communicant's allegations regarding access to justice for environmental NGOs and other members of the public to challenge voivodeship spatial development plans under article 9 (3) of the Convention in the light of these four judgments.

Environmental non-governmental organizations

110. Regarding access to justice for environmental NGOs to challenge voivodeship spatial development plans, the Committee notes that none of the judgments listed in paragraph 108 above concern a challenge brought by an environmental NGO against a voivodeship spatial development plan.

111. While the Committee has before it two judgments brought by NGOs against local spatial development plans (see para. 108 (d) and (e) above), local and voivodeship spatial development plans have different legal functions and effects under the law of the Party concerned. Moreover, under the legal framework of the Party concerned, the legislative provisions that provide for access to justice with respect to acts (including spatial development plans) of municipalities (article 101 of the Municipal Self-Government Act) differ from those that provide for access to justice regarding acts at the voivodeship level (articles 90 and 91 of the Voivodeship Self-Government Act).

112. It is therefore not possible for the Committee to deduce from judgments concerning access to justice for environmental NGOs seeking to challenge local spatial development plans what the courts' position on challenges by environmental NGOs against voivodeship spatial development plans might be.

113. In the light of the foregoing, the Committee finds that, in the context of this communication, the communicant has failed to substantiate its allegation that the Party concerned fails to provide for access to justice under article 9 (3) of the Convention for environmental NGOs to challenge voivodeship spatial development plans.

Private individuals

114. At the outset, the Committee points out that the obligation in article 9 (3) for members of the public to have access to administrative or judicial procedures to challenge acts and omissions which contravene national law relating to the environment does not require that, in every such challenge, the members of the public must necessarily succeed on the substance of their claim.

115. In the present case, the Committee has before it three judgments in which private individuals sought to challenge voivodeship spatial development plans (see para. 108 (f), (g) and (i) above). These three judgments are drawn from a nine-year period, from judgment No. IV SA/Wa 558/07 in 2007 through to judgment No. II OSK 647/14 in 2015. In each case, the claimants were ultimately unsuccessful in their claim.

116. The Committee notes, however, that, in its 2015 judgment No. II OSK 647/14, the Supreme Administrative Court states that: "Bearing in mind the provisions of the Spatial Planning and Development Act 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".[96]

117. Given the above statement by the Supreme Administrative Court, the Committee does not see how these three judgments decided over a nine-year period in which private

[95] Ibid., annex.
[96] Ibid., annex, p. 9.

individuals brought unsuccessful challenges against a voivodeship spatial development plan demonstrate that there is a systemic failure to provide for access to justice under article 9 (3) of the Convention for private persons to challenge such plans.

118. Based on the foregoing, the Committee finds that, in the context of this communication, the communicant has failed to substantiate its allegation that the Party concerned fails to provide for access to justice under article 9 (3) of the Convention for private individuals to challenge voivodeship spatial development plans.

IV. Conclusions and recommendations

119. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

120. The Committee finds that, by failing to demonstrate, in a clear, transparent and traceable way, how due account was taken of all comments submitted by the public in the context of the national consultation procedure and the cross-border consultation procedure on the amendment to the Lubuskie Voivodeship spatial development plan, the Party concerned failed to comply with article 7 in conjunction with article 6 (8) of the Convention.

B. Recommendations

121. The Committee, pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 36 (b) of the annex to decision I/7, recommends that the Party concerned take the necessary legislative, regulatory, administrative and practical measures to ensure that public authorities, when carrying out national or cross-border public participation procedures on voivodeship spatial development plans within the scope of article 7 of the Convention demonstrate, in a clear, transparent and traceable way, how due account has been taken of all comments received from the public.