AARHUS CONVENTION COMPLIANCE COMMITTEE

United Nations Economic and Social Council

Economic Commission for Europe

Geneva, Switzerland

RE: COMMUNICATION ACCC/C/2023/200

Comitato per la tutela dell'ambiente e la salute dei cittadini

(ex No-Maxi stalla)

v.

Italy

(ACCC/C/2023/200)

WRITTEN RESPONSE by ITALY

IN ACCORDANCE WITH PARAGRAPH 23 OF THE ANNEX TO DECISION 1/7

On May 2, 2023, the Secretariat of the Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (Aarhus Convention) received the communication from the organization *Comitato per la tutela dell'ambiente e la salute dei cittadini (ex No-Maxi stalla)* addressed to the Compliance Committee of the Convention.

The communication, that has been registered under the symbol ACCC/C/2023/200, alleges non-compliance with articles 2(5), 3 (1) and (4) and 9 (2) and (3) regarding access to justice for unregistered environmental associations (Part A of the communication).

In addition, the communication alleges non-compliance with articles 3 (1) and 9 (2)-(4) of the Convention in relation to costs orders against unsuccessful claimants in environmental litigation (Part B of the communication).

The communication was submitted in accordance with the provisions of chapter VI of the annex to decision I/7 of the Meeting of the Parties.

At its seventy-ninth meeting (Geneva, 13–16 June 2023), the Committee heard the views of the communicant and the Party concerned on the preliminary admissibility of the communication in open session. After considering in closed session the information received, the Committee determined that the communication was admissible on a preliminary basis.

With respect to Part B of the communication, the Committee recalled its findings on communication ACCC/C/2015/130 (Italy), in which it held that "by failing to ensure that costs orders against unsuccessful claimants in review procedures under article 9 (2) and (3) of the Convention are fair and not prohibitively expensive, the Party concerned has failed to comply with article 9 (4) of the Convention" and that "by not having in place a clear and transparent framework for determining costs orders against unsuccessful claimants in review procedures under article 9 (2) and (3) of the Convention, the Party concerned fails to comply with article 3 (1) of the Convention.

The Committee recalled that in its follow-up on decision VII/8j (Italy), the Committee is currently examining the progress made by the Party concerned to address its findings on communication ACCC/C/2015/130 (Italy) and the related recommendations.

Italy submitted its first progress report on decision VII/8j (Italy) on 7 December 2023.

Having regard to paragraph 23 of the annex to decision I/7, Italy has been kindly invited to submit to the Committee, until 16 February 2024, any written explanations or statements clarifying the matters referred to in Part A of the communication and describing any response that may have been made in the meantime.

In response to that, while appreciating the Committee enquiries, this Office of the Focal Point, contests the admissibility of the communication for the following reasons:

- The Italian regulation is compliant with the obligations set out in Article 9 of the Aarhus Convention. Indeed, Italy has taken all necessary measures to address access to justice in accordance with the provisions of Article 9.
- Article 9 (2) obliges each Party to: "ensure that members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right … have access to

a review procedure … to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6".

- Article 9 (2), second paragraph, provides that: "What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention".
- The second paragraph states that: "The interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above".
- This means that any NGO meeting the requirements of article 2 (5) is deemed to have standing under article 9 (2). To put it another way, a Party cannot exclude any NGO meeting the requirements of article 2 (5) from standing under article 9 (2).
- Article 2 (5) defines the "public concerned" as: "The public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest". "The public concerned" is thus a subset of "the public", which is defined in article 2 (4), and includes, in accordance with national legislation and practice, associations, organizations and groups.
- Article 2 (5) entitles Parties to set out criteria in their law as to what constitutes a "non-governmental organization promoting environmental protection" and any requirements that need to be met to "be deemed have an interest" in the environmental decision-making.
- In addition, with respect to the Convention's objectives, since NGOs meeting the requirements of article 2 (5) are deemed to have standing under article 9 (2), any criteria set out in a Party's law for the purposes of article 2 (5) must be consistent with the "objective of giving the public concerned wide access to justice within the scope of this Convention", as stated in article 9 (2).
- Pursuant to Article 9(3) of the Aarhus Convention, without prejudice of paragraphs 1 and 2 of Article 9, each Party shall ensure that members of the public, who meet the criteria laid down in its national laws law, may promote administrative or jurisdictional_proceedings to challenges acts or omissions by private individuals or public authorities carried out in violation of national environmental legislation.
- Hence, the provision set out in Article 9 of the Aarhus Convention subordinates the ownership of the rights it provides to the presence of two specific requirements. In particular, in order to have access to judicial protection in environmental matters, it is necessary to: be a member of the public and meet with any criteria established by national law.
- Article 9(3) of the Aarhus Convention confers a greater discretion on the Member States when they lay down the criteria for determining, among all members of the public, who actually has the right to bring the action provided for in that provision (see, to that effect, judgment of 14 January 2021, Stichting Varkens in Nood and Others, C-826/18, EU:C:2021:7, paragraphs 36, 37 and 62).
- Above all, the reference to the "criteria possibly provided for by national law" translates, as far as the implementation of the rights provided for in this article is concerned, into the recognition of a certain margin of discretion, aimed at allowing individual Member States to

introduce procedural rules establishing the necessary conditions for the submission of the appeals in question.

Therefore, article 9, paragraph 3, of the Aarhus Convention, in light of what has now been observed, requires further acts in order to fully exert its effects. The only obligation foreseen is that national judges apply domestic procedural law in accordance with the objectives pursued by Article 9, paragraph 3, of the Aarhus Convention.

- The European Court of Justice pointed out that "the criteria possibly provided by national law", mentioned in Article 9, paragraph 3, of the Convention, must refer to the subjective requirements relating to the characteristics of the environmental protection associations, and not to the objective requirements inherent to a proceeding concerning the type of admissible action[1]).
- So States have a certain margin of discretion in identifying the criteria of subjective legitimation and do not have to provide stringent requirements that make it impossible for environmental protection associations to contest the acts or omissions of the administrations that violate the fundamental principles of European law.
- National rules may define the requirements that NGOs must fulfil in order to qualify for legal standing *de lege*. CJEU case-law sheds light on how stringent such rules may be.
- Indeed, the interpretation key adopted by the European judge also provides the possibility of ascertaining the adherence and conformity of the Italian regulatory system to international law and European Union law.
- Hence, member States require an NGO to satisfy some criteria to obtain legal standing *de lege*. These criteria may relate to the independence or non-profit-making character of the NGO or to the possession of a distinct legal personality under national law. Or it may be asked to the NGO to prove that it has a solid financial basis to promote environmental protection.
- These criteria may also consist in a minimum duration of existence before legal standing *de lege* is granted.
- The Italian legislator has determined the subjective criteria of legitimation in law 349/1986.
- Indeed, the Article 13 of law 349 of 1986 states that "National environmental protection associations and those present in at least five regions are identified by decree of the Minister of the Environment on the basis of the programmatic objectives and the internal democratic order envisaged by the statute, as well as, the continuity of the action and its external relevance, subject to the opinion of the National Council for the Environment to be expressed within ninety days of the request". An Association, established for at least three years, which operates in the field of environmental protection, can forward an application to the Ministry of the Environment and Energy Security to obtain, if it meets the necessary requirements, identification as an environmental protection association pursuant to of art.13 of L.349/86.
- The requirements include:

[1] "…according to the actual wording of Article 9(3) of the Aarhus Convention, such criteria relate to the determination of those persons entitled to bring an action, not to the determination of the subject matter of the action in so far as the latter concerns infringement of provisions of national environmental law. It follows that Member States may not reduce the material scope of Article 9(3) by excluding from the subject matter of the action certain categories of provisions of national environmental law". See ECJ, case no 873/19, par. 64.

- - The Association having a local presence in at least five regions - The Associations' local presence in the regions must be represented by membership groups, by a regional headquarters, and by a consistent deployment of activities throughout the region.
- - Programmatic objectives -The Environmental protection focus must be pivotal and prevail over any other purpose pursued by the Association.
- - The statute of the Association must establish a democratic internal order - The observance of this principle must be ensured through the implementation of the relevant legislation to the statutory and regulatory provisions governing the life of the Association.
- - Continuity with regard to the environmental protection action carried out and its external relevance. The activity of the association must refer to the three years preceding the application and it must encompass at least five regions. The association's fulfilment of these conditions is a necessary prerequisite, as indicative of the association's ability to foster wide-spread interest in environmental protection.
- - Therefore, the criteria set forth in Article 13 of Law No. 349/1986 are to be interpreted in a cumulative and non-alternative way, thus the failure to meet even one of them precludes the adoption of the recognition measure under the aforementioned law.
    - Besides being added to the list published on the institutional website of the Ministry of the Environment and Energy Security, the recognition endows the Association with the power of taking legal action either as a civil party in criminal proceedings, either by filing an appeal in administrative proceedings regarding those illegitimate acts or measures which are relevant from the point of view of environmental and ecosystem protection (pursuant to Article 18, paragraph 5, of Law 349/86).
      It should also be noted that the Ministry has set up a specific institutional website for these associations (https://www.mase.gov.it/pagina/elenco-delle-associazioni-di-protezione-ambientale-riconosciute) in order to streamline the submission and acquisition of applications and to introduce greater transparency and efficiency into the administrative procedure.
    - The granting of recognition pursuant to art.13 of L.349/86 allows the Associations to be able to use the wording "Environmental protection association recognized pursuant to art.13 of L.349/86 through Ministerial Decree ..." on their website, on social media pages (for example: Facebook, Instagram, Twitter, Linkedin), on brochures, posters and other types of paper publications.
      The Italian requirements are not overly burdensome or politically motivated, and the legal framework encourages the establishment of NGOs and their constructive participation in public affairs. Moreover, they are consistent with the Convention's principles. The NGO recognition procedure which takes place at the Ministry of the Environment and Energy Security is simple, quick and free of charge, thus removing technical and financial barriers. The Ministry of the Environment and Energy Security strongly promotes and encourages the recognition of NGOs.
      So the requirements in Italian law are clearly defined and they are consistent with the objective of giving the public concerned wide access to justice; and thus they are not unreasonably exclusionary and they do not cause an excessive burden on environmental NGOs. NGOs can work as "advocates for the environment" and in the public interest.

Indeed, Italy is well aligned with favorable sets of criteria used in many Aarhus Parties's legislations and does not provide criteria like some Aarhus Paries that prevents organizations promoting environmental protection that do not have open membership with full voting rights for members from having access to justuce under article 9(2) of the Convention that according to the Compliance Committe is unreasonably exclusionary and not consistent with the objective of giving the public concerned wide access to justice. Nor Italy does not provide criteria providing for a minumum number o members, like in some Aarhus Party (also challenged by the European Cort of Justice).

- At the same time, jurisprudential practice has developed a further legitimation criterion, valid for all those associations not entered in the Register identified by law.It is important to point out that the legitimacy to act for the NGO is not limited to the legal one (pursuant to articles 13 and 18 of the law of 8 July 1986, n. 349; articles 309 and 310 of the Legislative Decree of 3 April 2006, n. 152), but can be recognized on a case-by-case basis even beyond the specific hypotheses foreseen by law, although this opening must not lead to the uncontrolled proliferation of popular action *actio popularis*, not admitted by the law except in a wholly exceptional way (Cons. State, Section IV, 22 March 2018, no. 1838; id., 19 June 2014, no. 3111). *Actio popularis* is incompatible with the fundamental principles of italian procedural system, and have an exceptional nature, being able to be applied only in cases established by law. Moreover, it should also be noted, as the Advocate General Medina on 13 July 2023, in her opinion regarding the case *Societatea Civilă Profesională de Avocaţi AB & CD v Consiliul Judeţean Suceava and Others.Request for a preliminary ruling from the Curtea de Apel Târgu-Mureş*, observed in point 61 that, "…However, this does not imply an unqualified standing to anyone. The Compliance Committee has held, indeed, that the Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment". "In order to assess whether standing requirements make it effectively impossible for certain categories of 'members of the public' from bringing an action, it is important to take into account the legal system as a whole and to assess to what extent national law has such 'blocking consequences".
- Moreover, it is apparent from the document published by the United Nations Economic Commission for Europe, titled 'The Aarhus Convention: An Implementation Guide' (Second edition, 2014), that the parties to that Convention "are not obliged to establish a system of popular action (*actio popularis*) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment' (See also C-252/22).
- The criteria elaborated by the Italian case-law are well -defined and they can be summarized as follow:

i) the statutory non-occasional pursuit of environmental protection objectives;

ii) a certain degree of stability and representativeness;

and

iii) an adequate degree of proximity ("vicinitas") to the substantial interests harmed as a result of the administrative action for the protection of which the association purports to take legal action.

- It should be highlighted that there is absolute consistency between the criteria established by law and those identified by judges in their jurisprudence.
- In Italy, according to the prevailing jurisprudential orientation, the inclusion of associations in the list, referred to in Article 13 of Law 349/1986, does not determine a rigid automatism, as the judge may, after verifying the concrete representativeness, also admit unregistered associations to the exercise of the action, in virtue of the so-called "double track" criterion.
- The " double track" criterion makes a distinction between the *ex-lege* legitimation of nationally recognized environmental protection associations (which does not require verification) and the legitimation process concerning other associations, which, instead, must be carried out considering the specific case and taking into account the existence of the three conditions that were mentioned above.
- The possibility for the administrative judge to evaluate the legitimacy of environmental associations on a case-by-case basis provides a more robust guarantee of protection than the one merely provided by law. It is an additional guarantee, and it does not replace the criteria established by ordinary law.
- The examination of the conditions legitimizing the administrative action must be conducted "ex ante", and therefore ascertaining whether the appellant holds a differentiated legal position on which the Administration's activity can potentially impact, legitimately or otherwise.
- In order for such a differentiated legal position to be identified, the association, although of national importance, must nevertheless have a territorial structure capable of placing it in a relationship of effective, concrete connection with the substantial interest which is assumed to be damaged by an act of the administration.
- This, whenever the provision has a limited spatial effectiveness, i.e. limited to a precise territorial area, which localizes the relevance of the widespread interest taken care of by the exponential body.
- Having said this, the (pre)condition of the stable connection with the territory excludes the legitimation of those "occasional" committees, established for the exclusive purpose of hindering limited initiatives allegedly harmful to the environment or to challenge specific acts.
- Therefore, the admissibility of jurisdictional actions proposed by citizens' committees used by a temporary association form, having as a specific statutory purpose the opposition to the construction of the plant account or such other landfill, has been excluded on several occasions.
- Not even the expansion of the objectives of the association or the committee, as a result of a statutory modification approved during the trial, can avoid, consistently with the approach according to which the conditions of the action must already exist at moment of presentation of the first instance application, the inadmissibility of the appeal due to lack of legitimacy to appeal.
- The legitimacy to act of environmentalist associations cannot expand beyond the insurmountable limits marked by the nature of administrative judgment.
- Moreover, as the Compliance Committee has previously pointed out, “(…) it must be stressed that the compliance procedure is designed to improve compliance with the Convention …. The compliance mechanism aims to facilitate compliance by Parties with their obligations under the Convention. It is not intended as a redress mechanism”. In other words, the purpose

of procedures under the Aarhus Convention is to guarantee access to Justice, not to challenge court rulings.

- In the end, contrary to what is affirmed by the communicant, the possibility of the judge to recognize the legitimacy for legal standing for NGOs on a case by case basis model, has historically increased access to justice for non-profit organizations. Indeed, there is a strong tendency by the administrative courts towards adopting an overly wide interpretation of the right of access to justice of unlisted associations, which is wholly compatible with Article 9 of the Convention. The legal standing for NGOs and citizens' groups, recognized by law or on a case-by-case basis, in Italy is broad, effective and fully in line with the requirements of art.9.
- There is no doubt that there is absolute consistency between the criteria established by law and that are identified by the judges in their case law. Italian judges apply domestic procedural law in accordance with the objectives pursued by Article 9, paragraph 3, of the Aarhus Convention and Italian law fully complies with that article.

From the general framework relating to access to justice in Italy, the effectiveness is evident of the envisaged mechanisms which are accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.

In conclusion, the requirements set by Italian law are clearly defined and they are consistent with the objective of giving the public concerned wide access to justice; they are therefore not unreasonably exclusionary, and they do not cause excessive burden on environmental NGOs. NGOs can act as “advocates for the environment” and in the public interest. The legal standing for NGOs and citizens' groups, recognized by law or ad hoc, is broad, effective and fully in line with the requirements of art.9.