



DEVELOPMENTS IN CASES RELATING TO ACCESS TO JUSTICE AT THE ACCC

Case Study

Justice and Environment, December 2019

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Introduction

Owing to the work of the Aarhus Convention Compliance Committee, more effective public participation procedures enhance the quality of environmental decision-making and offer significant help to the environmental authorities in all Pan-European countries that are parties to the Convention. However, the ACCC is overwhelmed and lacks resources so much that their decisions are typically brought 4-6 years after the submission of a communication. In the meantime, the need of the members and organisations of the public to seek the legal wisdom and advices from the Committee has not declined.

Naturally, Member States should pay more attention to ensuring better working conditions for the ACCC, even if its decisions sometimes do not align with their opinion. In essence, no professional, political or civil sources could so far doubt the importance of help the Committee exerts to the development of environmental democracy in the region. Justice and Environment as a network of European public interest environmental lawyers expresses its interest in and strategic importance of the ACCC for our work. We would be pleased to support the work of the ACCC, and one feasible way of supporting the Committee could be that scientific and practising environmental lawyers' communities regularly analyse the ongoing cases in order to offer alternative thoughts as a „raw material” for further consideration by the ACCC¹. We note that this civil-professional contribution is not without examples, just to mention the observer opinion of the NGO group Environmental Pillar to the ACCC/C/2014/112, Ireland case and several *amicus curiae* letters in other cases.

Justice and Environment wishes to contribute to the work of ACCC with the collection of some significant points where we think that the contemporary national level practices of the European public participation laws raise some general questions. We underline that the following comments are solely based on our practical experiences, while we are aware that the legal literature and the European court practice are full of further precious insights and principal directions. A mutually inspiring parallel analysis of the courtroom experiences of J&E public interest environmental lawyers and the law professors dealing with access to justice problems from theoretical viewpoints, as well as of a systematic analysis of the relevant national and European court cases would be a next level of systematic support of the work of the Compliance Committee.

¹ Prepared by Sandor Fulop PhD, with the help of Kristina Smith, 2019 legal intern at EMLA (collecting the facts of the first 6 cases as well as cases 162-4 in the Annex).

Analysis of Recurring, Significant Problems in Connection with Access to Justice in the Case Law of the Aarhus Convention Compliance Committee

I.

Structural conditions of access to justice

Historical, structural, principal barriers to access to justice are by far the largest and most diverse group of difficulties in the practice of access to justice. This statistical data is a telling one: even if the amazingly fast and pervasive effect of the Aarhus Convention on the national level laws and practices is primarily due to its system nature, the broader systems of general administrative laws, administrative and civil procedural laws, constitutional laws etc. have not changed quickly and thoroughly enough for the smooth and organic fitting of the new rules of environmental democracy. Thus, the application of the Aarhus Convention quite frequently collides with the old elements of these systems and loses ground.

1.

Court practice instead of legislation

The most systematic collision of the Aarhus Convention with the old systems is when the given system is totally unwilling to formally accept the new participation rules. That happened to the third pillar of the Aarhus rights within the European law. No general legal solution was reached for this, while the officials of the EU protected this situation by saying that the court practice fully implements the letter and principles of the Convention. The EU and other Parties for long have used participation friendly court practice as an excuse not to create solid legal basis according to their responsibilities ensuing from the Convention. However, Client Earth, as an interferer in an ACCC case have aptly pointed out that the recent legal practice of CJEU clearly undermines the former argument of the Commission, in connection with the lack of implementation of Article 9(3), and some other relevant parts of Article 9. The “consequentially public participation friendly court practice may fully remedy this situation” argument fails, as soon as the practice is not so consequential or probably even before it. (ACCC/C/2015/128, EU)

2.

Exclusively available judicial review

While courts are independent and full of procedural guarantees of the rights and responsibilities of the parties, the cases before them may be too expensive, complicated and long for offering satisfactory remedies in all environmental cases. Even if neither Article 9.2 nor 9.3 obliges the parties to ensure both administrative and judicial review, from the context of the whole Convention, especially from the requirements of Article 9.4 it seems to be reasonable to suppose that a sole judicial review of an administrative decision is contrary to the intent of the legislator. Recital 18 of the Preamble and Article 3 seem to reinforce this opinion. (ACCC/C/2013/90, UK)

3.

What is environmental decision-making?

Large projects with high level environmental significance usually have many aspects in administrative law. A State supported nuclear investment, for instance may be contrary to the competition rules of the EU. In our opinion this shall not prevent an environmental NGO or a concerned community from participation according to the rules of Aarhus Convention. Realization of a nuclear power plant is an environmental matter in all of its closely interrelated aspects, even if its certain additional features belong to other fields of law. (ACCC/C/2015/128, EU)

4.

Correct information about the considerations of the comments from the public - a *conditio sine qua non*

Public participation is not about dictating the content or a part of the administrative decision. The authority has the full professional and State power to decide the case alongside the relevant substantive and procedural laws and established legal practice. However, participants are entitled to be aware of the handling of their comments, as well as the handling of comments made by the possible other participants in the case. Only if the authority precisely analyses all the facts raised by them, gives its professional opinion on them, also attaches the legal evaluation to the comments, will the participants be in the position to decide if and any legal remedies they wish to apply. (ACCC/C/2013/98, Lithuania)

Another group of structural problems with application of the Aarhus Convention is diverting certain decision-making procedures from the path of regular administrative law to other directions of administrative or civil law.

5.

Administrative cases decided by agreements

Diversion from the route of the regular administrative procedure is usually paired with loss of certain guarantees and public access. In case of administrative contracts, spatial planning contracts and alike, the draft agreements, the final draft and the final signed text may never be published to the public. The public may also be never provided with the opportunity to make comments on the agreement. (ACCC/C/2014/118, Ukraine)

6.

Motions of the authorities of organising nature

In access to information cases it is not possible to submit complaints to the Netherlands' administrative law courts, because a denial of access to information is considered to be an 'actual conduct' (i. e. an act of organisatory function). According to the Netherlands' procedural administrative law only 'decisions' - that is: acts governed by public law and intended to have legal effect - can be challenged in administrative law courts. Moreover, a complaint that no or inadequate public participation took place when all options were open is not independently admissible in administrative law courts, but has to be put forward as part of an appeal against the final decision. As one put the question, if there is room for public participation, what is the point in running a full procedure without it, namely, one important obligatory participant was excluded from the case, with no possibility to share her evidences, suggestions etc. with the court? (ACCC/C/2015/133, the Netherlands)

7.

“That decision is not a decision” - professional and policy preparations, interim decisions

One of the best examples where important matters are decided behind the scenes by certain experts, authority leaders and a narrow circle of owners is the Forest Management Plan (FMP) in Poland (and similar documents in many other countries). In order to challenge the FMP, it would be necessary to invoke not the FMP itself, but the act constituting its legal existence. However, there are formal administrative permits only for smaller parcels of the whole Forest District the FMP regulates as a whole. Therefore, there are no administrative and judicial remedies through which individuals or NGOs can challenge the legality of the FMP itself, there is no legal procedure in which NGOs could ask for a revision of this planning act in terms of its compliance with national environmental law.

In the given Polish case, the act of approving the annex to the FMP (the 'decision') was actually challenged by the Polish Ombudsman in the two-stage procedure, at the Regional and the Supreme Administrative Courts. However, the complaint filed by the Ombudsman was dismissed by both Courts, on the basis that the approval of a FMP by the Minister of the

Environment is not an administrative decision, but rather an 'internal act'. Since the forest in question is a state property, approval of the revised FMP by the Minister of the Environment is an internal act undertaken in the sphere of proprietary rights of the state (dominium), deriving from the concept of superiority and subordination between state authorities and other state organizational units. In the dispute before the decision of the ACCC the representative of the Polish Government added that the forest management plan cannot be implemented in the event of non-compliance with the law, as the implementation of targets based on the plan does not exempt the authorities from compliance with the law, including the need to obtain appropriate approvals. (ACCC/C/2017/154, Poland, also ACCC/C/2018/158, Poland)

8.

Ouster clauses

Permitting individual, specific activities of great environmental significance by a legislative act - another typical way of circumvention of public participation rights, especially access to justice. (ACCC/C/2017/148 Greece)

In a long and complicated process from the first formulation of the idea of a plan or construction with an environmentally significant impact of a project to the realisation of the idea (frequently called a tiered decision-making) the participation of the interested communities and environmental organisations are quite frequently pushed back to a single phase, usually the EIA phase, this way, closing them into a “quarantine”.

9.

Tiered decision-making procedure

Multiple layer, long decision-making procedures represent a problem that ACCC has dealt with several times. Environmental cases, major plans or investments with significant environmental effects, are typically complicated and timely ones, starting from the clarification of financial issues and questions of use of certain territory, that could be subject to SEA procedure, later on EIA and/or integrated environmental permitting, other permitting procedures according to other professional aspects of the project, including permits for starting the operation. Because many of these permits expire and the monitoring activities or the complaints of the interested communities may reveal some environmental problems, during the operation new permitting stages arrive, up to the ceasing of the activity, which may entail further environmental assessments and administrative decisions. It is quite clear that in every stages new facts, new environmental professional insights and requirements may emerge. Yet, many Parties to the Convention hold the opinion that in a multi-layer decision-making procedure it is enough if the concerned members and organisations of the public have access in only one stage, where they can have in-depth information about the case and communicate their suggestions to the planner/investor and to the decision-making bodies. In our views this is not logical and

moreover, quite dysfunctional. In the tiered decision-making procedures, where possibilities for public participation are postponed on later stages major principles of environmental law, first of all the prevention principle may be harmed. Reasonable governance also would dictate to reveal objections against certain planned activities as early as possible, in order to save resources on both the governmental and private sides of the cases. (ACCC/C/2014/119, Poland)

10.

Some stages of a tiered decision-making process may not be considered a decision

According to an Armenian authority an Expert Conclusion (similar to EIS in an expertiza procedure that itself is usually accepted as an EIA) is just an opinion of specialists, which is not an administrative act and does not directly generate legal consequences. Even if those acts may later serve as basis for consequent legal effects on person's rights and liberties, they are not considered to be legally binding unless those acts are brought on the basis of an administrative or real act (e.g. a document created by the administrative body as an evidence for any administrative proceeding or an action of administrative body directed to notify about some administrative proceeding). Therefore, similar documents or actions are not to be independently sued. The issue of lawfulness of those documents or actions can be the subject of an administrative oversight exclusively within the scope of verification of the final administrative act. Challenging this decision the communicant points out that in its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that the OVOS and the state environmental expertiza should be considered jointly as a decision-making process taking the form of an EIA procedure and that the conclusions of the state environmental expertiza should be considered as a decision whether to permit an activity or not. (ACCC/C/2016/138, Armenia)

11.

Tiered decision-making with public participation only in the EIA procedures

The Polish Water Law *expressis verbis* excludes public participation by NGOs in water management cases, through creating an exemption from the general administrative code provision that would allow that directly. This legal situation was created by a 2009 modification of the Water Act based on the argument that water management cases that are significant from environmental viewpoints are subject to EIA procedures, therefore NGO participation in later stages would be superfluous. (ACCC/C/2017/146, Poland)

There are also cases where it seems obvious that the solution is a better recognition and use of the system nature of public participation laws and more broadly of the whole environmental law.

12.

The system nature of the Convention, strong interlinkages between the pillars

An Irish communicant raised the problem that the system for reviewing decisions to refuse access to environmental information by public authorities in the Party concerned is not fit for purpose. Applicants who take their requests to independent administrative appeal, face years of delay and their requests effectively become neutralised. The delays mean that in almost every case requests are answered long after related decisions have been made thereby frustrating public participation and access to justice in environmental decision making. (ACCC/C/2016/141, Ireland)

13.

Cross references within the Convention - confidentiality of information in judicial cases

The confidentiality provisions of Article 4 shall be applied to the second and third pillars of public participation mutatis mutandis. Upon publication of the notice on the onset of an EIA case, the later communicant had prepared a submission detailing the evidence found regarding the breeding sites of a rare bird species called Hen Harrier. Their submission did not include the specific location of the Hen Harrier as international best practice recommends that rare species' locations should be kept confidential and not be put into the public domain to ensure the information will not put those species at risk. (ACCC/C/2019/164, Ireland)

14.

System nature of the environmental law - environmental principles

Public participation law is part of the greater system of environmental law, including environmental principles. Precautionary principle as a principle of mostly procedural nature may be especially relevant here. (ACCC/C/2014/119, Poland)

In addition to the stubborn resistance of the old system of administrative law, governments try to invent new concepts to circumvent public participation.

15.

Special cases of enhanced importance

As we have seen earlier in several cases at ACCC, governments try to circumvent public participation and this way make the permitting procedures cheaper and faster in cases where there is a special social-economic interest at stake. In Ireland, for instance, when a project is designated as Strategic Infrastructure then the only mechanism provided to challenge planning permission is statutory judicial review. (ACCC/C/2015/132, Ireland)

16.

In front of the non-retrogression principle

Even if the Almaty MOP in 2005 warned the Parties to the Convention to avoid legal changes which narrow down the possibilities of public participation in a certain group of cases, the non-retrogression principle shall be raised anew in several cases, especially in concern with cases of enhanced economic or political importance. An NGO called Za Zemiata raised a systemic communication upon the allegation that there is a tendency in the Bulgarian law and legal practice to restrict NGOs from participation in environmental cases, especially making legal remedy difficult and more costly. Concrete legislative changes decreased the level of instances available for the NGOs (and others) to challenge environmental impact assessment decisions and also access to environmental information refusal at the courts in respect to priority cases of social importance or strategic value. Also measures were taken that led to significant raise of the cost of NGO litigation. The representative of the Bulgarian Government explained in her response that Aarhus Convention could not prescribe how many levels of legal remedies fulfil the requirements of Article 9 properly. As concerns raising of the amount of court fees, the Government argues that it concerns only certain ways of litigation, while lets others untouched, moreover the fees changed were so low previously that could be called only symbolic. (ACCC/C/2018/161, Bulgaria)

An old attitude of administrative and civil judges is that they are not able and willing to delve into the professional merit of the cases brought to them. This may cause unavoidable, long delays in certain environmental cases, as well as may lead to unreasonable, rigid exclusion of certain cases from judicial review.

17.

Annulling the administrative decision again and again

As scholars say “courts do not issue construction permit”, meaning that their task is limited to the legal supervision of the administrative decisions, while the professional content shall be determined by the administrative authorities. However, this system may lead to endless circles, totally undermining timeliness in the cases. An Irish communicant complained that it is not enough that the office-holder responsible for the independent and impartial review envisaged in Article 9(1) of the Convention is not obliged by law to make an expeditious decision and currently takes an average of 16 months (8 months acknowledged by the Government) to review a decision of a public authority. In many cases he only makes interim jurisdictional decisions and refers the request back to the public authority for a further round of decision-making. (ACCC/C/2016/141, Ireland)

18.

The Wednesbury test

The Wednesbury test may be called another outstanding example when the courts distance themselves from the substantive, professional aspects of the administrative cases brought to their consideration. The communicant said in a British case: “So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Even the courts acknowledge that Wednesbury unreasonableness is an extremely high threshold to reach. This can leave claimants without access to a remedy where substantive review is concerned.” The representative of the British Government in turn explained that the Wednesbury principle is just one of many principles governing the substantive lawfulness of environmental decisions; the case-law demonstrates that there are several routes by which the courts consider substantive grounds of challenge in environmental cases. In our view, however, it is irrelevant that in some cases the courts could use other approaches to allow and enter into substantial supervision of the environmental administrative decisions, once the communicants could prove that in several other cases the courts used solely the Wednesbury test and dismissed the cases raised by the local communities or NGOs. (ACCC/C/2017/156, UK)

II.

Standing, right for legal remedies

Another recurring contradiction between the old administrative procedural laws and the new public participation laws is the concept of standing. The major difference from the previous group of problems is that this one is totally overt, the Aarhus legislators and their regional and national counterparts were quite prepared to conquer this problem, actually, and the second pillar of the system of public participation laws is directly targeting this problem. A compromise solution may be in this contradiction to differentiate full standing from right to participate, maintaining the first one to those, who are materially (fully etc.) interested in the case, while allowing certain level of contribution for those who have further insights, suggestions in the case or simply wish to express their objections against a project in preparation. In some cases, however, we do not see compromises, namely sometimes there is clear discrimination against NGOs or against foreign citizens and organisations.

1.

Difficulties in acknowledgement legal interests of an NGO

In several cases we learned that some legal systems are too rigidly applying the concept of interest in case of legal persons, especially environmental NGOs. In some cases, being an interested party and having full standing in a case ensures larger set of rights than a mere participation position in harmony with Article 2(5). An example of this situation is when the right to a healthy environment can belong only to natural persons as a reminiscence of the historical core of environmental rights as part of right to personal health. (ACCC/C/2014/106, Czech Republic)

2.

Only indirect ways of participation for an environmental NGO

In some countries there is no legislation or case law to challenge local legislative acts (typically spatial planning ordinances) concerning the environment. The Polish Act on Local Governments ensure access to justice for entities against such acts at an administrative court only if their legal interests are harmed by the acts. The interpretation of this provision is rather narrow and in effect excludes any environmental NGOs from having standing in such cases, therefore Article 9(3) of the Convention is infringed. An impairment of right that establishes standing shall be direct and immediate, a local resolution that infringes a law shall concern the substantive rights of the party in the case, depriving it of or making it impossible to apply it. The Polish Government in her response pointed out that, although the complainant organisation could not have standing in a case, indeed, the Local Government Act would have ensured for it the possibility to represent a group of local people, who in their personal capacities fulfil the standing requirements of the Act. Also there is an (other) indirect way to challenge the local legislation, through the Ombudsman. (ACCC/C/2017/151, Poland)

3.

Adjectives to the word “interest”

Another way to narrow down the scope of public participation is to expand the phrase “interest” with certain, usually quite vague adjectives, such as significant, direct or sufficient. Also concrete, individual, actual and objective may be added to the phrase. The worst case is when we have a whole bunch of such adjectives together. (ACCC/C/2014/119, Poland)

4.

Not sufficiently detailed definitions of key concepts

Also in connection with the word “interest” a Danish communication revealed that there is no national legislation implementing Article 9 of the Aarhus Convention in relation to what constitutes a sufficient legal interest. This legal situation prevents individuals from filing a complaint with the knowledge of whether they have a legal interest in the matter, or not. (ACCC/C/2019/162, Denmark)

5.

No newcomers in the cases

Access to justice in many cases in the Pan-European region is restricted to persons that have already participated in the previous related administrative procedures in the matter. At first glance it seems to be simply fair and economical for the administrative system, but knowing the practical way of operation of the environmental NGOs it is rather an unsurmountable barrier for effective public participation. No NGO can afford a continuous, exhausting monitoring of all first instance cases at all relevant administrative bodies in order to enter into such cases in time and this way maintain the right for legal remedies if the decisions turn out to be unfavourable to the environment and to their constituencies. Rather they can realize such risks only after the decisions are brought - but then it is too late... (ACCC/C/2014/106, Czech Republic)

6.

No foreigners, either

In an Austrian case, in harmony with public participation laws of Austria, the communicants authenticated and validated a signature list (authenticated by the 12th September 2014 decision of the Amt der Vorarlberger Landesregierung) with 508 individuals living within Liechtenstein with voting power in municipalities located directly adjacent to the host municipality in Austria and who supported the submissions. Their right to participate was denied because of “lack of conditions of participation in an Austrian case”. (ACCC/C/2019/163, Austria)

In a case of similarly international nature, Client Earth Poland forwarded a communication about the Swedish system of access to justice, which deemed to raise an unnecessary burden to foreign NGOs. At least 3 years of operation in Sweden is prescribed in the procedural laws of Sweden, in order to reach the conditions of standing in environmental court cases, amongst other conditions, such as having minimum 100 members. The communicant herself tried to take part in a Swedish administrative procedure concerning a Baltic Sea natural gas transport project that, apart from the consequences on Swedish territory, concerns the Polish constituency a lot, too. Client Earth considers this discretion as going far beyond the powers of

a Party to the Convention in Article 9. Naturally, Article 2(5) and 4(4) are also relevant here. (ACCC/C/2019/174 Sweden)

7.

Depriving foundations of their participation rights

German authorities denied standing to foundations (such as the national section of the WWF) on the basis that precondition of internal democracy is missing in their case. Whoever, they went on, in a democratic society asserts public interests on behalf of all, should be able to show such legitimacy for this. In a democracy, legitimacy is communicated through the participation of citizens. This participation is guaranteed when all citizens are free to help shape the performance of tasks and the nature of the performance of those tasks. This participation is expressed through membership and voting rights. This all reflects the Convention's perception as an instrument of "environmental democracy". Individuals and their organizations are guaranteed rights of participation in environmental decision-making in order to enhance the protection of the environment. A foundation does not have a democratic internal structure by all means. In our views this is a false and overly simplified concept of participatory democracy: a foundation, such as WWF depends on its supporters, the supporters would withdraw in the minute they are confronted with bad publicity of the supported organisation. In other words, a foundation has rather a democratic external structure. Also, the professional element could be added and balanced with the democracy element in ensuring legitimacy that shall have multiple sources in modern societies. (ACCC/C/2016/137, Germany)

III.

Time

Another issue that is directly addressed by the public participation laws of several levels is losing time during the participation procedure. Once the new laws are not determined enough in establishing expeditious procedure for access to information, participation and justice cases, authorities and especially courts will time to time try to eradicate the core problems in cases at their desk simply by delaying the decision. Soon, time itself solves such cases..

1.

Injunctive relief - time dimensions

In a Romanian forest protection case the communicant started several cases in courts, in order to obtain injunctive relief against a complex development project, including deforestation. All of the injunctive relief procedures were rejected by the national courts, stating that the cases are

not well justified and the plaintiffs were not able to prove that immediate damage may occur if the administrative acts were not suspended. Even if the courts in other procedures later annulled all the environmental permits and the decisions of the Forests and Hunting Inspectorate, by that time the entire forest area was already destroyed. (ACCC/C/2016/140, Romania)

2.

No statutory deadlines within which courts must decide a case

Time in environmental democracy cases is a key factor. Not only environmental information, but participation motions may get obsolete easily after the administrative procedure and the actual construction works proceed quite quickly. On the other hand, if the complaints, appeals, etc. have suspensive effect, time may work for the concerned communities. Unfortunately, in practice of many Pan-European countries slow court procedures with no enforceable deadlines go hand in hand with lack of suspensive effect, moreover with the possibility to allow premature legal force of first instance decisions. Immediate enforceability is usually allowed when this is essential for the protection of human life or health or for the protection of the national economy from major losses or for other reasons of public interest, even more when it is an exceptionally vital interest of a party to proceed. In the latter case the public administration body may make a ruling requiring the party to provide the appropriate guarantee. However, these factors in our view shall not be equally measured: life and environment on one side and economic reasons on the other shall not have equal position. Also, when the administrative court has only cassation rights 'the annulling of the decision, the new decision, the annulling of that one, too' as a circle may go almost endlessly. We consider such a systemic infringement of the general goals of the Convention rather a difficult case to consider, but are convinced that such procedural elements should be handled together and their interrelationships, synergies and time dimensions (such as complicated feed forward mechanisms) are to be examined together. (ACCC/C/2014/106, Czech Republic; ACCC/C/2015/126, Poland)

3.

Too late information makes access to justice futile

Timeliness of communicating administrative decisions in environmental cases strongly influences the mere possibility for access to justice. In a UK case, refusal of a civil person's court complaint in 2015 was based almost totally on the fact that the 2012 permission has been substantially implemented already, a so-called site 1 was even operational. However, the Government acknowledged that the decision was published more than 2 years after it was brought, in 2014 (ACCC/C/2015/131 United Kingdom).

4.

Timeliness during the court phase in access to information cases

The courts do not always grant the right to a brief hearing (enabling one to put one's arguments when the court sits to commence the proceedings), which means that the court will set out a timetable for the exchange of pleadings - and, consequently, that there will be a minimum of several months before a ruling on the case is given. In our views, information should be provided "as soon as possible" principle included in Article 4(1) of the convention shall be applied *mutatis mutandis* in the legal remedy phase of access to information cases, too. (ACCC/C/2015/134, Belgium)

IV.

Costs

Some historical legal systems, especially common law ones, cannot avoid that their sophisticated procedures overburden anyone who undertakes to initiate an environmental case, even if out of sheer public interest. There are some cases, where the plaintiffs have to undertake the hazard of huge expenses entailing with serious existential problems, in case of legal personalities, a total self-eradication. Measures are awaited that are at last better acknowledge the public interest features of the efforts of environmental protection groups and local communities.

1.

Relative costs with some absolute criteria

Average income and the willingness to pay for remedy procedures are thoroughly different in the countries of the Pan-European region, some "absolute" criteria deem quite reasonably exemplifying the phrase "not prohibitively expensive" of Article 9(4). For instance £150,000 and £160,000 for a second instance court procedure in itself seem to be far above the wills and abilities of any litigant in a public interest environmental case, in more general term we could agree with the statement that any level of financial burden that "kills" a civil organisation shall be considered as an infringement of Article 9(4) 'not prohibitively expensive' requirement beyond reasonable doubt. (ACCC/C/2013/90, UK)

An Irish case could potentially reach €200,000 in legal fees that also prevented the local communities and their representatives from participation. (ACCC/C/2014/112, Ireland)

2.

The loser pays principle

The loser pays principle in combination with a deterring effect from futile litigation causes insurmountable difficulties even for a national branch of a large international nature protection network. €16,000 and €18,000 are additional costs to the court fee that can be €2,000 on first and €9,000 at the second instance courts. These amounts are compared in Italian context to the average annual income of €11,000. (ACCC/C/2015/130, Italy)

3.

Own costs need never be 'prohibitive'

An interesting argument was raised by the representatives of the Irish government in a case entailing really high costs for the applicants. Their point was that there should be nothing arbitrary or discriminatory found in only requiring the applicant to pay for her own costs of litigation. When there is no mandatory legal representation or other unavoidable costs, everything depends on the free decision of the complainant. However, acknowledges the concerned Party, in common law countries court procedures are hardly imaginable without the assistance of a trained lawyer. (ACCC/C/2015/132, Ireland)

4.

Unfair proceedings where the defendant fulfilled its responsibilities during the case

In a UK waste complaint case the communicant had made the application to the relevant court, while the local authority did what it calls a blitz of clearing up a large proportion of the rubbish, in order to make the complaint futile. The plaintiff in the court cases therefore found himself in a situation where he was responsible for paying costs of £25,000 altogether. (ACCC/C/2016/142, United Kingdom)

V.

The content of the cases

Public participation is basically procedural legal institution, yet, in some cases the substantive content of the cases exerts decisive effect on the extent, scope etc. of participation rights.

1.

Nuke, nuke everywhere

There are certain projects whose significance goes far beyond the natural borders. The use of nuclear energy is typically one of them - even if the probability of a nuclear accident is very low, the consequences are unmeasurably high. Therefore, communities, organisations in distant countries may have the claim to participate in such cases, as it happened in the UK Hinkley Point case, where no one made questionable the right to complain on the side of Ökobüro, Austria. (ACCC/C/2015/128, EU)

In the Czech Republic in a case of nuclear power plant on court level, standing was denied on the basis that the appellant's rights or obligations have not been "created, changed or nullified or bindingly determined by permitting an already existing activity of the power plant to continue". In our views a nuclear power plant represents a significant environmental problem in all its phases of operation. Notwithstanding this important content of the case, it is a matter of principles of the Aarhus Convention that any meaningful modification of an activity shall be considered a new decision-making procedure. Naturally, renewal of an expired old permit raises plenty of new issues, starting from the ageing process of such a facility up to questions as new scientific discoveries in connection with it. (ACCC/C/2016/143, Czech Republic)

2.

When experts decide the merit of the case

The communicant in a Dutch case complained about a generally high degree of judicial passiveness by the courts with respect to the facts of complicated environmental cases and from the courts' most profound respect for the way in which authorities exercise discretionary powers. Also, public authorities too closely rely on expert opinions in taking their decisions, even if the report of the experts was commissioned by the applicant of a permit. Anyone who wishes to challenge before a court of law the findings of an expert is therefore advised to provide contrary evidence by an expert. However, even then it is neither easy nor straightforward for the public to challenge the facts as accepted and interpreted by a public authority. (ACCC/C/2015/133, the Netherlands)

3.

Killing time, killing nature

In another vital environmental and nature protection case, an open pit mine was seemingly endangering precious water resources: the Party concerned was not even answering the calls from the Secretariat of ACCC for long. Although the Committee is not an extraordinary remedy in the substance of concrete environmental cases, naturally, the access to information,

participation and legal remedy sides of the cases are usually closely interrelated to the merit of the cases, so timeliness should be taken into consideration as far as possible in such types of cases in our opinion. (ACCC/C/2016/138, Armenia)

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Annex

ACCC/C/2013/90, UK

Summary of events

The River Faughan Anglers Ltd (RFA) manages the fishing rights of the River Faughan - a Special Area of Conservation under Directive 92/43/EEC due to the Atlantic salmon, otter and native oak woodlands living in and around the river. The RFA brought proceedings against the Planning and Local Government Group (DOE Planning) for breaching articles 1, 3, 4, 6 and 9 of the Aarhus Convention. Of relevance to this report are the violations of article 9, paragraphs 2, 3 and 4 due to the refusal to allow for third party judicial reviews and inviting RFA to take judicial review of the planning decision related to the River Faughan (decision A/2008/0408/F even though it would be prohibitively expensive for the non-for-profit organisation).

Two negative EIA's were determined, by DOE Planning under Regulation 9 of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999, on a proposed retention of an unauthorised settlement lagoon for a concrete production plant, that was located adjacent to the River Faughan Area of Special Scientific Interest (ASSI) and the Special Area of Conservation (SAC) as it concluded that there would be no significant environmental effects. The Northern Ireland Environmental Agency (responsible for ASSI designations and candidate SAC recommendations) advised DOE Planning that it would not however pass the Article 6 Assessment under the Conservation (Natural Habitats) Regulation (Northern Ireland) 1995 (as transposed from the Habitats Directive) due to the 'serious risk of water pollution' the settlement lagoon posed to the SAC.

No other competent authorities were consulted for these assessments, including the NIEA.

In an attempt to understand how the environmental concerns had been addressed according to the EIA Regulations requirements and to try to engage with the DOE in environmental decision making, the RFA asked the DOE environmental questions and raised environmental issues with them. They were simply informed that the appropriate route for remedy was through judicial review.

On the 12th December 2014, the RFA, therefore, began judicial review proceedings in the High Court against the Department of Environment for Northern Island.

Article 9.4 provides for 'adequate and effective remedies including injunctive relief as appropriate, and to be fair, equitable, timely and not prohibitively expensive'. The RFA believe that Article 9 is being violated by the refusal to allow objectors to planning permissions, who aren't the applicants for the respective permissions, to appeal DOE Planning's decisions to administrative appellate body: The Planning Appeals Commission. There is therefore no 'third party' right of appeal against planning decisions for those with an interest in the proposal and

so those wishing to be involved in environmental decision making and reviews and make objections on planning and environmental grounds are forced to take the prohibitively costly route of judicial review. The refusal of the DOE for RFA's participation in decision making is what the RFA believes is the deliberate policy of the DOE to force objectors to use the costly judicial review as they know the RFA cannot appeal to the administrative appeal body. Due to the RFA's only route being the judicial review, they had £21,000 in judicial fees, plus solicitor and ecologist fees, on the date of submission of the communication - unaffordable for them, leading to the redundancy of some of the staff at the RFA. Should they lose their case, the cost of paying for the Parties' fees too would lead to the RFA's bankruptcy? The RFA believe that Northern Ireland Government's policy is intended to discourage legal challenges on environmental grounds and thus impeding the public's ability to effectively engage in environmental decision making.

The High Court ruled against the RFA and in favour of the Department of Environment. The cost of appeal for the RFA would be between £150,000 and £160,000 - more than the RFA can afford and thus prohibited from bringing an appeal. The RFA believes this inability to appeal is a further violation of article 9. The length of the first instance legal challenge meant that the running costs were accrued over 2.5 years. Should the RFA have to cover the Department's costs too, they will go into liquidation and would have regardless of whether a Protected Costs Order had been secured or not.

The case so far

Given the High Court loss, and thus the exhaustion of domestic remedies, the Compliance Committee deemed the case admissible and commenced investigations.

So far, the Committee has focused upon the various legal costs for bringing a judicial review and how these are prohibitively expensive, including whether or not legal representation is mandatory and could an applicant represent themselves or an NGO represent the litigant. They also wanted more information on the depth and intensity of review, including the use of the Wednesbury test, for challenges of negative screening determinations.

For the allegations concerning article 9, paragraph 4 relating to prohibitive costs of accessing justice, a Committee's summary proceedings procedure will be conducted to examine information in the context of a VI/8k decision that found the UK's costs to be prohibitively expensive and thus in violation of article 9, paragraph 4. The procedure will review the UK's follow up to this decision with respect to costs of judicial review proceedings and appeals in Northern Ireland. Therefore further submissions in this particular case must be narrowed to the rights of third parties to appeal planning permissions.

The Communicant refers to issues of accessing substantive justice in that it is apparently 'not the role of the Court... "to carry out a merits based review"' for planning decisions. The RFA was therefore unable to gain access to a review procedure of the substantive legality of the decision. There is a possibility for a review of a manifest error or perversity that they have argued could

to a very limited degree be considered substantive legality but it has a high threshold to pass and is thus not providing access to justice. There is currently an independent Planning Appeals Commission that allows for a substantive merits based review of planning decisions for developers seeking planning permission. This procedure is however not open to third parties, but RFA believes this same administrative structure could be opened to third parties to allow for third party review of planning decisions. They further provide that the majority of environmental challenges involve planning decisions, and thus without a third party right of appeal, there is little access to justice and ability to protect the environment.

The UK believes that the judicial review procedure available to RFA was the appropriate legal remedy through which to pursue their case as it was able to contest 'the invalidity of the DoE's determination that the lagoon scheme did not need EIA'. It is apparent that the Government believes a judicial review is sufficient to meet the articles 9(2) and 9(3) as they only require the public have access to a review procedure before a Court or an administrative or judicial procedure to challenge the legality (both substantive and procedural) of the decision. The government provides that what the RFA is requesting, third party rights for review of planning decisions, is an additional right than the one covered by article 9 of the Aarhus Convention.

Regarding the prohibitive costs, the government provides that the RFA should have withdrawn their proceedings as the planning permission in question had expired and 'it had a duty to its members not to risk its funds in pointless litigation'.

As yet, no summary of the Committee's 63rd meeting and therefore no further information on the case, except that the Committee is continuing its deliberations in closed session and is taking into account the replies of the Communicant and the Party concerned in its draft findings.

ACCC/C/2013/98, Lithuania

Summary of events

A proposal for the planning, construction and operation of an overhead double circuit electrical power line (the OHL) interconnection in an environmentally-sensitive area in the Lithuanian-Polish borderland was approved by the Lithuanian authorities. This area is an ecological framework and interlinks four Natura 2000 sites. Prior to this decision and the relevant EIA (to be mentioned below), no public participation was allowed. The EIA was conducted in April 2010, and the first discussions with the public took place in July 2010, after the EIA report was announced - thus preventing them from participating in the earliest stages of planning. With regards the participation in July 2010, the public were only given 10 working days to sift through the 500 page report and prepare comments, observations and objections. The correspondents had many objections and concerns regarding for example the EIA's figures that toned down or ignored certain numbers of protected species or their lack of addressing an alternative route.

It should also be noted that a Territorial Master Plan of Lithuania approved in 2002 saw a different and more appropriate and environmentally friendly route for the OHL than the one within the EIA - thus making the EIA contradictory to the 2002 Territorial Master Plan of Lithuania, and therefore invalid.

After the public participation meetings in July 2010, various versions of the EIA report were published online and the correspondents were not informed which report was the final EIA report submitted to the competent authority for approval and permission - which was given. This means that the public were unable to see whether their concerns and objections had been taken into account. When the approval decision was published, it became clear that the correspondent's submissions had not been taken into account whatsoever; the report did not discuss in what concerns had been submitted, only that participation by the public had taken place.

Furthermore, the notification of the meetings to be held in July 2010 were only published in local newspapers, and no attempt was made to differentiate them from other announcements to ensure the public would notice and participate.

Therefore, it is argued that article 9.2 has been violated as those having a sufficient interest in the OHL have not been provided with access to a review procedure of the decision before a court on substance and procedure. This makes the public participation ineffective, particularly if it is only allowed and necessary after a decision is made.

The case so far

Committee decided to continue its deliberations through its electronic decision-making procedure but as yet we cannot find evidence of the Committee discussing anything of relation to the article 9 arguments on access to justice.

ACCC/C/2014/106, Czech Republic

Summary of events

An NGO was set up for people living near the Temelin Nuclear Power Plant in the Czech Republic to allow them to effectively defend their rights and interests. This NGO participated in many planning and approval procedures for the power plant, such as the approval process for the opening of the plant's Third and Fourth Block. In connection with this process, they filed a petition against the EIA opinion provided by the Ministry of the Environment of the Czech Republic; this petition was rejected by the Metropolitan Court of Prague as that procedure did not affect the legal interests of the NGO. The Czech Building Code restricts access to judicial review of decisions for the relevant procedures to only the builder and persons whose title of ownership could be affected by the building, thus preventing the NGO from accessing justice

as a member of the ‘public concerned’, under article 9(2) of the Aarhus Convention. Furthermore, the Constitutional Court has limited access to review of administrative decisions by independent courts whereby legal persons, including citizens associations, such as the NGO here, cannot invoke the right to a healthy environment as only natural persons can invoke this right. According to the preliminary findings of the ACCC, in April, 2008, the competent authority granted the planning permit for the facility. The communicant sought administrative review but its administrative appeal was dismissed in July 2008. The communicant challenged this dismissal in court and requested suspensive effect. Suspensive effect was refused. In October, 2010, the Municipal Court in Prague agreed with the communicant that its objections and the facts thereof had not been dealt with by the appellate authority and remitted the case to that body for another decision. However, the building permit had already been issued on 11 November 2008 and development of the facility had commenced.

The case so far

They could also only seek a court review of procedural rights for approval/permission processes where they do have access to justice, and cannot object to factual defects. Therefore, the NGO believes that article 9(2) with regards to the ability to challenge the substantive and procedural legality of any administrative decisions, acts or omissions is violated. The communicant claims that in practice access to justice is, in most cases, restricted to persons that have already participated in the previous related administrative procedure in the matter.

The Party concerned submitted in its response that article 9(2) is not “directly executable”, citing the statements in The Aarhus Convention: An Implementation Guide (Implementation Guide) that a Party has an obligation to ensure “a judicial or other independent and impartial review of substantive or procedural legality” and that “standing requirements [are to be] determined in accordance with national law and with the objective of wide access to justice.

The NGO also complain that the EIA is not considered a decision and thus cannot be reviewed by the public concerned and they are only granted access to participate in certain marginal phases of the whole approval process, such as the Planning Permission Procedure but not the final Commissioning Permission phase. This prevents the members of the public concerned from sufficiently and effectively accessing judicial protection and a court review of the most significant administrative procedures and is therefore in violation of article 9(3) of the Aarhus Convention.

The Czech Republic was alleged, furthermore, not in conformity with article 9(4) of the Convention as there are no statutory deadlines within which courts must decide a case, nor is there effective suspensive effect in practice.

Finally, the NGO believes that as the legality of the EIA procedure can only be reviewed under an action against the subsequent procedure, such as the Planning Permission Procedure, this cannot be considered an adequate, effective and timely remedy and is thus in a violation of

article 9(4) and 9(2) - given that those with legal standing to challenge such procedures is far narrower than those able to participate in the EIA procedures.

The Committee checked with the Communicant which issues raised in the communication had already been considered in a previous communication. They then asked questions in relation to new legislation brought in by the Czech Republic, and whether it would make a difference to the communication. The Communicant did not believe that the amendments adequately resolved the violations.

During the preparation of its draft findings, the Committee identified a point they wished for further clarification on: how the comments from the public during the relevant public participation procedures were taken into account in the respective decisions.

The ACCC has made its preliminary findings in an Internet vote, but it waits for reinforcement at a regular session.

ACCC/C/2014/112, Ireland

Summary of events

In this case the communicants would ask the ACCC to find that the Irish State has repeatedly failed to consult with its citizens before environmental policy decisions were made. A concrete example in this case is a programme for the development of wind turbines and a grid extension to the landscape of rural Ireland as part of the Irish National Renewable Energy Action Plan (NREAP) that was never subject to national or EU level assessment, nor the necessary procedures, including the Strategic Environmental Assessment. Any public participation obligations only take place on a pro forma basis. The public were never provided with the opportunity to participate in the decision making of the 'zero-option' phase of the programme.

The programme does not allow for effective access to judicial review. The Communicant believes articles 9(1), (3), (4) and (5) have all been violated during the process for the development of the NREAP programme. It believes the Office of the Commissioner of Environmental Information in Ireland has effectively stopped processing appeals in relation to access to environmental information. For example, one appeal lodged was not dealt with for over a year, due to a particular lack of resources. Furthermore, the litigation costs are so prohibitively expensive as to prevent the public concerned from accessing the justice enshrined under articles 9(3) and 9(4) of the Convention. To bring a case for judicial review, an applicant must first apply for leave to bring judicial proceedings and then if this leave is granted, the judicial review can be brought. However, the preparatory work for this leave stage can cost up to €20,000 alone. If leave is granted, the cases are drawn out to such an extent that it is no longer affordable for the applicant to bring a judicial proceeding and thus cannot access judicial review. Finally, the above financial restrictions violate article 9(5), particularly given that the State has not simply been passive in the costs, but active in the way in which they caused

undue delay and thus higher costs for the applicants. For example, once a judicial review regarding the lack of public participation and preventing the dissemination of information relating to the NREAP programme was brought against the State, the State maintained the case would take at least 10 days, which could potentially reach €200,000 in legal fees. Moreover, the communicant states that when information requests have been refused, the Communication documents how the Office of the Commissioner for Environmental Information took not just months, but years to process appeals.

The case so far

There is no decision as yet and no further questions from the Committee. The only documentation added has been additional information regarding mentioned cases, opinions from observers or extra information provided by the Communicant on issues such as a request for a preliminary ruling by the CJEU.

ACCC/C/2014/113, Ireland

Summary of events

The communication is in relation to the ‘prohibitively expensive’ legal costs of Ireland, particularly with regards to their shift from using the English rule to the American rule on legal costs. An applicant can request to represent themselves under the Special Costs Procedure but the applicant can face considerably high adverse legal costs to apply for such a declaration should they lose. This therefore prevents parties from bringing a case in the first place as they fear the legal fees will be too high and the system designed to solve the problem of excessively high fees does not provide much effective assistance. Furthermore, the American rule may be set aside (should you be granted access to the SCP) for three reasons: when the claim is frivolous or vexatious, if the applicant conducts her litigation in a manner disapproved of by the Court or if the defendant acted in the contempt of the Court. This introduces great uncertainty with regards to whether the American rule will be set aside, despite it being granted originally, and thus the applicant would have to pay the legal fees they did not anticipate paying. This breaches article 9(4) as the risk of excessive costs is preventing the public from accessing justice.

Furthermore, Ireland does not publish the outcomes of legal cost adjudications, in violation of article 9(4). The adjudicator has the discretion to determine that in the interests of justice the hearing needs to be in secret, and does not need to provide justifications for this. These decisions will not be published and are thus not accessible by the public. Therefore, as the outcomes of legal cost adjudications relates to ‘procedures’ under article 9(4) that shall not be prohibitively expensive, these outcomes, fall within the ‘decisions’ of the same article that shall be publicly accessible. As these decisions are not publicly accessible, they cannot be reviewed

by, for example, the ACCC, to assess whether the cost of procedures in environmental matters is prohibitively expensive or not.

So far, on domestic level there has only been one set of questions and a discussion of the possibility of deferment. The questions relate to the Special Costs Protection procedure and sought to clarify certain matters, such as case law interpretation of 'frivolous and vexatious'.

The case so far

There has been no decision as yet, given that Ireland submitted a request for a preliminary ruling on issues closely related to the ones in the communication at the ACCC to the CJEU and the deliberations of the ACCC are postponed, pending the delivery of the preliminary ruling. The concerned party have considered the suggestion that the Committee may postpone its deliberations on the Communication pending delivery by the Court of Justice of the European Union (CJEU) of its preliminary ruling in Case No.: C-470/16. In their view, however, there is limited overlap between the questions which have been posed in the preliminary reference to the CJEU and the matters which are the subject of the Communication in question. Even if so, the preferable solution would be rather to accelerate the ACCC case in order to serve the CJEU with useful insights.

ACCC/C/2014/118, Ukraine

Summary of events

In Ukraine in 2013, two 50 year-long Production Sharing Agreements (PSA) for the exploration and production of hydrocarbons were signed: one between Shell and Nadra Yuzivska Ltd. at Yuzivska field and one between the Government of Ukraine, Chevron Ukraine BV and Nadra Yuzivksa Ltd. at Oleska field.

The draft agreements, the final draft and the final signed text were never published to the public. The public were never provided with the opportunity to make comments on the agreement.

The Communicant filed multiple requests for accessing to the various texts - all of which were denied on the basis of confidentiality that had been agreed regarding the terms of the agreement by the parties. The public authorities felt this confidentiality declaration was sufficient to prevent the public involvement.

The PSA between Shell and Yuzivska was concluded without an appropriate "ecological expertiza" (an equivalent of EIA procedure), and only almost a year after the conclusion of the agreement was a position conclusion of state ecological expertiza provided. Therefore, in August 2013 (before the Oleska agreement was completed), the Communicant filed an administrative lawsuit claiming their right to participate in a decision-making process was breached due to the failure to carry out ecological expertiza. They also asked the Court to

declare that by not carrying out the relevant ecological expertiza, the Cabinet of Ministers of Ukraine omitted their duties. Furthermore, they claimed this entrance into the agreement without the prior obligatory environmental assessment is illegal and the Cabinet of Ministers were obliged to refrain from entering into the agreement for the Oleska agreement without the performance of the ecological expertiza. The actions of the Government were declared lawful and the case was dismissed.

The Communicant filed an appeal. The court of appeal denied legal standing in this administrative court proceeding and thus revoked part of the lower court decision as it was premature for the lower court to adjudicate the case if the Communicant did not have standing. This violated article 9(1) of the Convention as the public were not given access to an effective review procedure.

The case so far

Ukraine took an excessively long time to provide a reply to the ACCC and were thus provided with an extension. If they did not reply within the deadline, the hearing would be conducted at the next meeting. It should be noted that Shell and Chevron have since both withdrawn from the agreements. The ACCC therefore asked the Communicant what they would like to change regarding their communication and whether they wish to continue. The Communicant has altered the Communication, considering that as a result of long litigation they received the requested contracts, but the issues regarding article 9 remain, because the information received was seemingly just a fragment of the whole contracts. There has been no decision as yet, still awaiting the 63rd Meeting Report.

ACCC/C/2014/119, Poland

Summary of events

The Frank Bold Foundation Communicant from Poland believes the process for a new Development Plan involving the exploitation of lignite deposits and a coal-fired power plan did not allow for the possibility for members of the public to access administrative or judicial review procedures to challenge the acts of public authorities in relation to this new plan.

The Polish administrative courts have ruled that private persons and environmental organisations do not have a sufficient legal interest in Spatial and Development Plans to challenge an administrative decision in relation to those plans. According to the law on Administrative Courts in Poland, the person must 'prove explicit, individual interest or obligations arising from the rules of substantive law'. It is particularly difficult for individuals and organisations to prove a direct impact on the rights due to the environmental deterioration. Therefore, article 9(3) of the Convention is being violated by interpreting legal interests so narrowly that review by court is effectively prevented.

A lot of plans and programs concerning environment are passed as municipality, county or voivodship government's resolution (such as air protection program, local environment protection programs, spatial development plans). Provisions of Polish law effectively bar all environmental organizations from challenging municipality/county/voivodship government's resolutions that contravene national law relating to the environment. Polish law requires to challenge local authority's local law or legal or physical action to prove violation of legal interest. In common administrative court's opinion legal interest must be concrete, individual, actual and objective. Additionally, the violation must be present, not hypothetical or possible. Because of this reason in administrative court's opinion it is impossible for NGO to appeal against resolution, if resolution does not concern directly NGO's legal interest or legal duties, but concerns only NGO's statutory objectives. Communicant's present verdicts of administrative court presenting these common points of view. Additionally, in Communicant's opinion term „legal interest” and „violation of legal interest” is very strictly and rigidly interpreted by administrative courts in Poland, what makes very hard to file a claim by individual person, especially by person who wants to file a claim in public interest. In Communicant's opinion criteria stipulated by national law to challenge the resolution are not adequate.

The comments received by the Committee from the Concerned Party reinforced these statements. However, the representative of the Polish Government has pointed out that in a multi-layer decision-making procedure these decisions represent only an intermediate level and the members and organisations of the public will have opportunity to participate in later stages.

The case so far

The case is still ongoing, and no decision has been made yet. Opening statements were provided at the 53rd meeting.

ACCC/C/2015/126, Poland

Summary of events

The Polish Power Systems Company (PSE) planned an electric energy transmission system in Poland, with a new power line of 2x400kV with the power of 1,000 MW from Elk, the Lithuanian border of Poland. This overhead power lines construction has aroused much controversy among the residents of areas located along the route of the line and a series of legal proceedings were initiated, partly referring to Article 6 of the Aarhus Convention. As concerns Article 9(4) of the Convention, the communicant representing the concerned Bakalarzewo Community doubted that the government provided adequate and effective remedies, including injunctive relief as appropriate, in a fair, equitable, timely and not prohibitively expensive manner. The realisation of the investment has already begun in Bakalarzewo municipality's

area, and it is alleged to cause irreversible damage to the environment due to, among others, irreversible deterioration of species. Generally, in administrative proceedings, filing an appeal to the authority of second instance automatically suspends the implementation of the decision being the subject of the appeal.

The communicant also alleged an infringement of Article 9(5) of the Convention especially because of failure to ensure proper information on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. They received no help, but just the contrary, they were told to be 'on the opposite sides of the proceedings'. The communicants could not afford to hire professional commercial law firms to seek advice and prepare legal complaints for courts is too expensive for the living mostly off agriculture local community.

In its response the Polish Party underlined that the circumstances justifying immediate enforceability of a decision were provided for in the relevant national legislation. The relevant Article reads as follows: [a] decision against which an appeal may be brought can nevertheless be given immediate enforceability if this is essential for the protection of human life or health or for the protection of the national economy from major losses or for reasons of public interest or the exceptionally vital interests of a party to proceedings. In the latter case the public administration body shall make a ruling requiring the party to provide the appropriate guarantee. Immediate enforceability of the decision on the environmental conditions means that the investor may apply for the issuance of the investment decision. Only after the issuance of such decision can the construction works commence.

As it has been stated in The Aarhus Convention Implementation Guide (p. 206), Polish law provides that individuals, but also organisations which are unable to cover the litigation costs, may use the assistance of a court-appointed lawyer in accordance with Article 9(5) of the Convention. Furthermore, in accordance with Polish rules of administrative procedure, the authority is obliged to take into account not only the interest of the investor, but also the interests of all other parties to the proceedings when informing about the effects of the actions taken by the parties under the proceedings. It is difficult to comment on the Association's pleas in this respect; however, it should be pointed out that an administration body cannot treat any of the parties in a preferential way. The authority must remain impartial and settle the case in an objective manner. Moreover, if public authorities ignore applications for access to public information or environmental information, the applicant may always file a complaint regarding such authority's failure to act. There is no evidence in case files of failure to assist the public by the government or self-government bodies or of ignoring applications for access to public information or environmental information.

The case so far

- The determination of admissibility of the Communication took over a year to receive as the Committee first wanted to establish which domestic remedies had been used by the Communicant.
- It wasn't until a year after the admissibility was accepted (11th March 2016) that the communication was dealt with in a hearing at the 60th meeting in March 2018).
- Questions were posed in July 2018 to the parties following the 61st meeting in June 2018. No further action has been taken as yet, the Committee is currently still deliberating on its findings.

ACCC/C/2015/128, EU

Summary of events

The communicant Ökobüro - Allianz der Umweltbewegung from Vienna, Austria forwarded the facts according to which the EU Commission's decision had approved the UK's massive subsidization of the nuclear power plant for the realization of the Hinkley Point, Block C, even if it seemed to contravene the EU's state aid law, which relates to the environment, and furthermore seemed to violate key EU energy and environmental laws. As such, the Communicants should have a means to challenge the Decision, as is assured under Article 9.3 of the Aarhus Convention. However, the Communicants - and the public at large - are blocked from asserting this right. This is due to the wording of the EU Aarhus Regulation, which excludes state aid determinations from its scope under its Article 2(2), as well as the Court's jurisprudence on Article 9.3 and recent decisions by the General Court blocking the application of environmental considerations from state aid decisions. As a result, the EU fails to comply with its obligations under the Aarhus Convention

The case so far

The UK, interfering in the case as *amicus curiae* questioned its admissibility given that it relates to state aid for a development and as such falls within distortion of competition rules of the EU, and not environmental matters of the Aarhus Convention. By allowing admissibility, the ACCC has broadened the scope of the Convention to include any matter that impacts the environment, such as state financial assistance to an environmental development.

In her November 2016 letter, the Party concerned agreed to a hearing. The hearing was not scheduled until March 2018, roughly a year and a half later. Huge delays in the procedures increase the environmental damage, even if the ACCC cases are not to be considered as an extraordinary remedy in the substance of the cases behind the public participation elements. As yet, no decision provided. Only replies coming back and forth between the Party concerned and the Communicant.

Client Earth, another interferer in the case for the NGO side pointed out that the recent legal practice of EUCJ clearly established that the members and associations have no standing in such cases and on the basis described therein.

ACCC/C/2015/130, Italy

Summary of events

WWF Italy brought to the attention of the Committee 4 cases where the courts obliged WWF to pay the expenses of the other parties in environmental cases several thousands of Euros adding up to €16,000 and €18,000. This is additional to the court fee that can be €2,000 on first and €9,000 on the second instance courts. These amounts are compared in Italian relationship to the average annual income of €11,000. There is no possibility to decrease the fees in case of NGOs, because - as the representative of the Italian Government informed the Committee - organisations are alleged to bear financial burdens better than private persons.

After a 2010 procedural law reform the judges have discretionary power to decide on the expenses and on additional court fees if they consider the litigation not enough well based. This may be a special burden in a system where some judges give clear preference to economic interest to environmental activism. The new system is especially rigorous when NGOs challenge public works or other governmental projects. Furthermore, even if Italy has a system of legal aid for court cases, WWF is regularly denied to have access to it.

The case so far

Admissibility confirmed within 5 months of the Communication being submitted but nothing since the 30th September 2016 (the reply of the Party concerned to the Communicant) until the 30th January 2018 where the Committee asks for further information from both parties to continue processing the communication. Almost a year and a half gap significantly increases the likelihood of irreparable damage to the environment.

As yet, no decision provided. Committee awaiting additional information, documentation and legislation.

ACCC/C/2015/131 United Kingdom

Summary of events

A private person forwarded a complaint to the ACCC comprising late or no notification in the case of the environmental assessment a demolition and restructuring a former hospital area near Wimbledon. The public was not notified that the project was subject to an environmental

determination. Also, the Municipality Council adopted a negative screening opinion in 2012, but the screening opinion was not made available to the public until 2014. Meanwhile, the Council granted planning permission for the project subject to 50 conditions. The majority of these conditions required the developer to apply for further consent from the Council before the project could commence. For example, the conditions required further ground investigations, noise surveys, details of the electric substation, and proposed mitigation to be submitted for approval. The Decision Notice detailing the grant of permission and the conditions was not made available to the public until September 2013. In the following stages the communicant alleged a line of infringement of the European and British EIA and other environmental laws. The correspondence from the UK Government has reinforced the factual statements of the communicant, while had differences in its legal evaluation.

As concerns the legal remedies on court phase, in 2015 application of the communicant was refused on all grounds. It was deemed to be “hopelessly out of time” and “totally without merit”. The “totally without merit” determination meant that she was unable to request the decision be reconsidered at an oral hearing. The judge also ordered that she pay the Council’s costs of preparing and filing its acknowledgement of service, which the judge assessed at £6,000, but limited to £5,000 -the maximum allowed by the cap required for cases considered to be subject to the Aarhus Convention under the relevant Civil Procedure provisions. Refusal of the court complaint was based almost totally on the fact that the 2012 permission has been substantially implemented already, a so called site 1 was even operational. As another access to justice issue was raised the lack of procedural equality of the parties in the case. The complainant, as a middle level income person was not eligible to claim legal aid, and had been unable to find a solicitor prepared to act on a pro bono or on contingency basis. A further injury for the right to justice was alleged that a certain decreased court expense (based on a so called protective costs order) only applied to the court of first instance.

The case so far

Over 2 years after the final response was provided from the Party concerned to the Communicant’s comments (31st October 2016), the Committee finally asked questions to both parties (5th November 2018).

No decision as yet, was waiting for further information and will consider how to continue at the 64th meeting in July 2018. The case was not concluded at that occasion, further correspondence took place in the case in early 2019.

ACCC/C/2015/132, Ireland

Summary of events

RTS Substation Action Group has challenged primarily the laws concerning Strategic Environmental Assessment, Ireland's Renewable Energy Plan and the planning permission granted for a specific case - the Laois-Kilkenny Reinforcement Project. When a project is designated as Strategic Infrastructure then the only mechanism provided to challenge planning permission is statutory judicial review.

The communicant also raised the issue that an approx. €50,000 they had to spend in the whole case was prohibitively expensive, even if it was to cover just their own costs.

In such public interest, environmental cases the communicant alleged that it is against effective access to justice that the burden of proof rests exclusively on the applicant.

The Irish Government in its response underlined that in their common law system dispute resolution operates primarily by way of an adversarial system and not an inquisitorial system. Litigants generally obtain legal representation or assistance from legal practitioners, i.e. solicitors and barristers who represent and advocate for their interests in the courts, although litigants may represent themselves if they wish. Unlike many legal systems, the Irish courts permit individuals to represent themselves, thus potentially eliminating "own costs" altogether. Accordingly, in environmental proceedings in Ireland, own costs need never be 'prohibitive' in terms of access to justice.

As concerns the issue of burden of proof on the applicant, this is said by the Government a standard requirement of all litigation in Ireland, as in most common and civil law systems. Normally the person who brings a case has the burden of proving their case, on the balance of probabilities in civil cases. There is nothing arbitrary or discriminatory in requiring the applicant to discharge this burden in a judicial review case arising out of a planning and development decision made by the Board.

The case so far

Admissibility decided on the 11th March 2016, as yet no further action has been taken by the Committee. Spent over a year waiting for the Communicant's response to the admissibility questions from the Party concerned. Unclear whether Communicant ever submitted response as no mention of it after the March 2018 meeting.

Since the meeting of July 2018, the Committee has been preparing questions to soon be submitted, no document of questions having been sent yet.

ACCC/C/2015/133, the Netherlands

Summary of events

The Netherlands Association of People Living in the Direct Vicinity of Wind Turbines forwarded a communication concerning access to information and participation in decision-making

regarding wind power and wind farms, as well as access to justice against administrative decisions approving the construction of wind farms in the Netherlands.

The communicant alleges that in access to information cases it is not possible to submit complaints to Netherlands administrative law courts, because a denial of access to information is considered to be an 'actual conduct' (i.e. an act of organisatory function). According to Netherlands procedural administrative law only 'decisions' - that is: acts governed by public law that are intended to have legal effect-can be challenged in administrative law courts. Moreover, a complaint that no or inadequate public participation took place when all options are open is not independently admissible in administrative law courts, but has to be put forward as part of an appeal against the final decision.

A failure to offer adequate public participation in the formulation of plans and programmes (article 7 in conjunction with article 6, paragraph 4, of the Convention), does not either constitute legal acts under public law (paragraph 6) and are therefore not admissible in administrative law courts.

The communicant also complained about a generally high degree of judicial passiveness by the courts with respect to the facts of complicated environmental cases and from the courts' most profound respect for the way in which authorities exercise discretionary powers. Also, public authorities too closely rely on expert opinions in taking their decisions, even if the report of the experts was commissioned by the applicant of a permit. Anyone who wishes to challenge before a court of law the findings of an expert is therefore advised to provide contrary evidence by an expert. However, even then it is neither easy nor straightforward for the public to challenge the facts as accepted and interpreted by a public authority. In the views of the communicant, a court of law that takes its dispute-settling responsibility seriously, should carry out - directly or indirectly - its own inquiry into the facts of a case if these facts are challenged by the other parties in the case. In order to underpin her statement, the communicant brought statistical data about the ratio of the cases where the courts leave the decisions of the administrative bodies unchanged.

The Dutch Government in its reply underlined that where an authority is granted discretionary power, the Dutch constitutional and administrative law does indeed require that an administrative court review (only) whether or not the authority could reasonably have arrived at its decision and whether or not the boundaries of its competences were crossed. However, this concerns only the procedural aspects of the decision. The fact that the Council of State has so far followed the same line of reasoning in wind turbine cases simply means that in each particular case the Council concluded that the challenged decision had been taken in accordance with the law and that the appellant's arguments in the particular case did not convince it otherwise.

The case so far

Committee agreed to send questions to both parties in its meeting of September 2016 but questions were not sent until March 2018.

Hearing was held during the sixty-second meeting in July 2018. Committee agreed to discuss its findings further in closed sessions and send questions as necessary. Statements at an open hearing were made at the 62th session of the Committee in November 2018. No decision as yet.

ACCC/C/2015/134, Belgium

Summary of events

Avala ASBL municipal swimming pool at Stavelot L'Eau Rouge campsite access ramps at the old Francorchamps motor-racing circuit Court action itself takes time,⁵ particularly because the courts do not always grant the right to a brief hearing (enabling one to put one's arguments when the court sits to commence the proceedings), which means that the court will set out a timetable for the exchange of pleadings -and, consequently, that there will be a minimum of several months before a ruling on the case is given. Information should be provided "as soon as possible".

In order to answer to the communication as well as to the questions of the Secretariat, the Party concerned made an inquire at the national administrative body that informed the focal point that statistics on the effective implementation of the Commission's decisions are unavailable.

The case so far

The Committee received the necessary additional information in March and April 2018 but scheduled the hearing for the 62nd Meeting in November, rather than in July 2018, thus delaying the process further.

As yet, no decision has been made, Committee agreed to defer its deliberations until an upcoming meeting. In 2019 an intensive correspondence took place from all the interested parties.

ACCC/C/2015/135, France

Summary of events

Mr. Janin, a citizen from Lyon, nature protectionist issued a petition to the French Conseil d'Etat (administrative court) with the request to establish that the list of animal species qualified as pests and the time period, as well as the methodology of their destruction is unlawful. Because

of his level of being interested in the matter was interpreted in a restrictive way, his petition was dismissed, what he considered as an infringement of Article 9(2) of the Convention. The court held that Article 9 had no intention to ensure a right to interfere in every kinds of environmental cases for anyone. Mr. Janin had no personal, direct and definite interest in the case. The communicant's view is, however, that this interpretation is contrary to the provision that urges for ensuring wide access to justice for the public concerned. Mr. Janin referred to his longstanding interest and wide scale of activities in the field of nature protection that establish his being interested in the case. Also he took part in the original procedure in which the Ministry responsible for nature protection established and specified the list of pest animals.

The case so far

In September 2016 (54th meeting), the Committee agreed to schedule the hearing for the 56th Meeting but at the 56th Meeting in March 2017, decided to provisionally schedule the hearing for the 59th, 60th or 61st Meeting. The hearing was scheduled for the 60th meeting but due to strikes was delayed to the 61st meeting. Finally in May 2018 the Committee asked the parties whether a hearing was required and at the 62nd meeting in November 2018 a hearing was held. In its 2019 November session the Committee brought its draft findings in the case, where established that the issue on the table did not pertain to Article 6, therefore Article 9(2) would not apply. Rather the case should be examined under Article 9(3), which, as the Committee had pointed out in several decisions neither obliges the parties to introduce *actio popularis*, nor can be interpreted so narrowly that excludes the majority of the members and organisations of the public from access to justice. In the given case, the Committee found the French system in the safe middle zone, because there was seemingly a wide range of actors, such as environmental NGOs or persons living in the vicinity of or using intensively the concerned natural territories. It seemed not to infringe the convention that the documented scientific interest and activity of the communicant turned out not to be high enough interest to ensure him standing in the case of revision of the decision on harmful animals.

ACCC/C/2016/137, Germany

Summary of events

WWF Germany has forwarded a communication in the matter of recognition of environmental organizations in the Federal Republic of Germany, which is found to be too strict and thus to have a discriminatory effect. The result is that only environmental organizations which are set up in the legal form of an association and formally listed in the registry of associations, can obtain recognition - whereas organizations which have a different legal structure, such as foundations (for example WWF Germany) cannot be recognized under German law. The fact that a multitude of environmental organizations cannot obtain recognition in the Federal

Republic of Germany impedes their access to justice, too. While the case preliminary constitutes a violation of Art. 2 para. 5, Art. 3 para. 4, Art. 9 para. 2 and 3, and Art. 3 para. 6 of the Aarhus Convention.

In the opposition of this statement the representative of the German Government established that any person must have the opportunity to become a member of an environmental association in Germany and gain full participation rights in harmony with the definition of “the public” in accordance with Article 2(5) of the Convention. He also highlighted in the text thereof the possessive pronoun “their” associations, organizations or groups. In the view of the Federal Government, this definition makes it clear that the Convention assumes that environmental organizations are combinations of individuals and organisations - something which particularly does not apply to foundations, as they have no members. Foundations are not combinations of natural or legal persons. They are a collection of assets with legal independence, and in particular are not made up of persons. The communicant, which is a foundation, has no members. It is financially supported by donors, and the communicant refers to these donors inaccurately as “promotional members”. Yet, this changes nothing in either legal or factual terms as to the fact that donors are not in the position to control the operation of the foundation closely enough to ensure full democratic legitimation to it.

For clarification he added: Parties to the Convention are of course free to extend the provisions contained in the Convention to also cover foundations. However, Parties are not under any legal obligation to do so.

Further elaborating his statement he explained that precondition of internal democracy satisfies the criteria of participation rights. Whoever, in a democratic society, asserts public interests on behalf of all should be able to show such legitimacy for this. In a democracy, legitimacy is communicated through the participation of citizens. This participation is guaranteed when all citizens are at liberty to help shape the performance of tasks and the nature of the performance of those tasks. This participation is expressed through membership and voting rights. This all reflects the Conventions’ perception as an instrument of “environmental democracy”. Individuals and their organizations are guaranteed rights of participation in environmental decision-making in order to enhance the protection of the environment. A foundation does not have a democratic internal structure by all means. In our views: WWF has democratic external structure.

The case so far

The hearing for this Communication took place at the Committee’s 61st meeting in July 2018, over 2 years since the Communication was first submitted. No issues; only delays while waiting for the replies from the parties, particularly due to requests for extension to reply.

In March 2019, at the 63rd meeting, Committee agreed to defer its deliberations to an upcoming meeting, thus no decision made as yet.

ACCC/C/2016/138, Armenia

Summary of events

Ecological Right” Non-Governmental Organization raised a communication about a case in which in 2014 the Ministry responsible for nature protection in Republic of Armenia issued an Affirmative Conclusion of the Environmental Impact Assessment for the exploitation of Amulsar open-pit mine near the Gndevaz community in Armenia. In accordance with the national legislation, the RA Ministry of Nature Protection is the responsible authority to conduct the state environmental expertise (“expertiza” in OVOS system countries) of the mining projects presented by the developer. In 2015 more than ten members of affected community (Gndevaz), as well as two environmental non-governmental organizations (“Ecoera” and the communicant) filed a claim with the RA Administrative Court against the RA Ministry of Nature Protection and the Sevan Lake Protection Expert Commission litigating their Affirmative Expert Conclusions. The plaintiffs argued the legality of findings of Experts in both Expert Conclusions indicating the breach of national legislation regarding protection regime of unique biodiversity and water ecosystems, as well as other issues regarding the illegality of Amulsar mining project.

According to the decision of RA Administrative Court, the plaintiffs do not have legal standing to sue the either EIA Positive Expert Conclusion or the Expert Conclusion of Sevan Lake Protection Expert Commission in the Administrative Court. The position of the Court was that the plaintiffs may apply to the Administrative Court only in case if the decisions, acts or omissions of the administrative bodies or their officials caused real legal consequences regarding the protection of rights or freedoms of a person. Pursuant to the Court’s Ruling, an Expert Conclusion is just an opinion of specialists, which is not an administrative act and does not directly generate legal consequences. Even if those acts may later serve as basis for consequent legal effects on person’s rights and liberties, but they are not considered to be legally affecting unless those acts are not put on the basis of an Administrative or Real act (e.g. a document created by the administrative body as an evidence for any administration proceeding or an action of administrative body directed to notify about some administrative proceeding). Therefore, similar documents or actions are not the subjects to be independently litigated. The issue of lawfulness of those documents or actions can be the subject of administrative oversight exclusively within the scope of verification of the final administrative act.

Challenging this decision the communicant points out that in its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that the OVOS and the state environmental expertiza should be considered jointly as a decision-making process involving a form of an EIA procedure and that the conclusions of the state environmental expertiza should be considered as a decision whether to permit an activity.

The case so far

It took the Committee a year since the final response from the Communicant was submitted to ask whether the parties required a hearing (from the 21st May 2017 to the 23rd May 2018). Thus far, only a response from the Communicant has been provided.

ACCC/C/2016/140, Romania

Summary of events

Bankwatch Romania forwarded a communication in connection with the lignite quarries in Gorj County that had started being exploited since the communist era, back in the 1960's. In 2011, the operator, a state owned company, decided to extend the quarries on large areas. For the extension of the quarries, the company refused to conduct full-fledged permitting procedures because they considered that it was not necessary because their operation had started over 20 years ago and the company had already obtained the mining licences at that time. The only permitting procedure the company entered in was about deforestation of a larger area. The communicant started several cases in courts, in order to obtain injunctive relief for the whole operation, including deforestation. All of the injunctive relief procedures were rejected by the national courts, stating that the cases are not well justified and we were not able to prove that immediate damage may occur if the administrative acts are not suspended. Even if the courts in other procedures later annulled all the environmental permits and the decisions of The Forests and Hunting Inspectorate, by that time the entire forest area was already destroyed. The communicant considers it as a clear violation of Article 9.4 of the Aarhus Convention. According to them, there were no adequate and effective remedies in the Romanian legislation, specific to the environmental law cases. The classical access to justice procedure does not establish an adequate and effective system to prevent the destruction of the environment. The courts have no procedure that would ensure real remedies for the environmental violations. There is no other body that is able to act against the unlawful implementation of projects that are likely to harm the environment. The National Environmental Guard is not competent to act unless the operator is violating the content of the already issued documents or if the activity is not authorized. In cases as the one they presented, only the court of justice could decide if the activity was legal or not.

Furthermore, the term injunctive relief is not mentioned in the Romanian translation of the Aarhus Convention. The term "adequate and effective remedies, including injunctive relief as appropriate" translates only as "to ensure adequate and effective remediation including court decisions". The meaning of the term injunctive relief is completely misinterpreted. As a result, the Romanian injunctive relief procedure, called suspension of the effects of an administrative act, is not likely to be ever applied to an environmental case. For this, the damage must be

proven, and providing only the argument that some environmental factor may be damaged is not acceptable in court at present. There is no admissible evidence in an environmental case other than that which relates to the arguments against the legality of the administrative act or that would prove the effective and imminent destruction of the environment without forestalling the annulment case. The communicant concludes that the consequences are a complete lack of access to justice in environmental cases. This is strongly related to the timeliness of the cases. The duration of the environmental cases in court is very long, there are no special procedures for the environmental cases that could speed up the time needed to reach a final decision.

The Romanian Government in her response to the communication has provided with the Committee with the long list of all concerned procedures of several segments of the extension of mining activities in the case. Documents involved the lists of ways and timing of public communications, public debates organised and also the fact that the Romanian authorities duly included the facts and opinions given by the members and organisations of the public. Arguments about timeliness and injunctive relates were not addressed in their announcement towards ACCC.

The case so far

There has been nothing, except the determination of admissibility from the Committee. Only one response from the Party concerned to the communication in May 2017 but nothing else from either party or the Committee.

Therefore, as of November 2019, the Committee are to deciding how to proceed at an upcoming meeting depending on the information provided.

ACCC/C/2016/141, Ireland

Summary of events

An Irish NGO named “Right to Know Company Limited by Guarantee” forwarded a communication about the system for reviewing decisions to refuse access to environmental information by public authorities in the Party concerned, alleging that it is not fit for purpose. Applicants who take their requests to independent administrative appeal, face years of delay and their requests effectively become neutralised. The delays mean that in almost every case requests are answered long after related decisions have been made, thereby frustrating public participation and access-to-justice in environmental decision making.

The office-holder responsible for the independent and impartial review envisaged in article 9(1) of the Convention is not obliged by law to make an expeditious decision and currently takes an average of 16 months to review a decision of a public authority. In many cases he only makes

interim jurisdictional decisions and refers the request back to the public authority for a further round of decision making. The courts lack jurisdiction to review the decisions of the public authority and to order release of information - they may only review the independent administrative decision maker on a point of law and if necessary refer requests back to him for further consideration. Overall, it can take 3 to 4 years to reach a final court decision when appeals are issued.

The Irish Government in her response underlined that according to her data the average time for the determination of an appeal is now less than 8 months. Although this is longer than the time allowed for decisions by public authorities, it is inevitably the case that appeals to the second instance body will involve more complex and more contentious issues. The requirements of fair procedures necessitate that an appeal between (at least) two parties disputing a public authority's decision will, on average, take far longer than it took for the public authority to decide the disputed issue. Recourse to the Court, however, has rarely been required as evidenced by the limited cases which have been before the Courts. It is accepted that the Court processes has often been lengthy, but those few cases which have been referred to the Court for determination have typically involved complex or novel issues which go to the heart of the access to environmental information regime (e.g. what is a 'public authority'; what is 'environmental information') and will, it seems likely, inform future decision-making by public authorities and the supervision body. Insofar as the Communicant argues that remittal back to the original body to determine the appeal may lead to delay, it is submitted (i) that it is appropriate that the relevant public authority be the one who makes the decision on the information requested and, for instance, the applicability of any exceptions; (ii) that the strict timelines for the public authority to make a decision on any such remitted matter means that any delay caused if the matter had to be referred back to the supervision body would be relatively slight; and (iii) there is no evidence that matters which are remitted back to public authorities to determine in accordance with the second instance body's decision on appeal are routinely the subject of further appeals.

The case so far

Less than 2 years after the admissibility of the communication was determined, the hearing was held at the 62nd meeting of the Committee.

As of, March 2019, the Committee are continuing its deliberations in closed session. Later communications between the parties took place, also open hearing was organised.

ACCC/C/2016/142, United Kingdom

Summary of events

Mr. Hemming, a Birmingham citizen raised a communication about a contradicting access to justice issue of costs and fairness. The City Council, which is the litter authority for the area, decided to change its policy in terms of the handling of garden waste which it had previously removed for recycling for free, by bringing in a charge of £35 for collection services. The Local Authority recognised that as a consequence of the charge there would be an element of fly tipping. The communicant made the application to the relevant court, while the local authority did what it calls a blitz of clearing up a large proportion of the rubbish, but it could not clear up the whole amount for such a short time. When the case came to court, therefore, Mr. Hemming narrowed the case down to a number of sites which were not cleared up yet. On the occasion of a second court application, however, the local authority did a full blitz of clearing up the remainder of the rubbish. Actually, the local authority sent out their employees to clear up other sites that the communicant had informed them about earlier in the process. On the day of the hearing, knowing that the rubbish had been cleared up, he could not, therefore, obtain an order to clean the rubbish up as it had already been cleared. He considered these facts as “reasonable grounds” to enable him to get his costs and not to have to pay the local authority's costs to issue the proceedings in the first instance. Contrary to the expectations of the communicant, the District Judge decided that because he had no reasonable grounds for the case, should pay the Council's costs of £13,101.56. Together with the costs of appealing procedures, court fees and the own legal expenses the costs climbed up to a total of total £25,788.56 that he had to pay. His argument was that his application was necessary to get the litter authority to clear up the rubbish and it would have been left outside people's houses had he not taken the action. Hence the communicant interpreted the situation that he won and they should pay him not him them. Even if this argument fails to conquer, he felt unjust to pay such an amount in a public interest litigation like this.

The UK Government in her response expressed a view that it is untenable for the communicant now to complain that the amount of the costs before the Magistrates' Court and/or the High Court was prohibitively expensive in circumstances where he did not at the time seek a limit to the amount of his liability on that basis. In effect, the Communicant is asking the Compliance Committee to criticize the domestic courts for failing to do something that he did not ask them to do. The proper analysis is that the Communicant has failed in this regard to exhaust domestic remedies and/or that the costs cannot be viewed as having been prohibitive in these circumstances.

The case so far

As of the 63rd meeting in March 2019, awaiting the results of the first progress review on decision VI/8k, then the Committee will ask the Communicant to comment on the extent to which the allegations in the Communications are already being reviewed in the context of VI/8k and therefore, whether the communication will be proceeded with.

ACCC/C/2016/143, Czech Republic

Summary of events

Ökobüro, Vienna and other NGOs forwarded a communication in the case of extension of the operation life of the Dukovany nuclear power plant in Czech Republic. The fairness of the procedure was questioned first because in the course of the ordinary administrative legal remedy, by which the public concerned could in principle appeal to the superior administrative authority (here the President of the special permitting authority itself) is deemed hopeless. On court level, standing is only ensured when the appellant's rights or obligations have been "created, changed or nullified or bindingly determined permitting an existing activity to continue".

The Czech Government in its responses restricted itself to the topic of Article 6(1), i.e. that the extension of lifetime under the special circumstances would not even qualify as a significant modification of an ongoing project.

The case so far

It took over 2 years between decision of admissibility and the hearing for this communication to be held. The case was scheduled for the 64th Meeting in July 2019.

ACCC/C/2016/144, Bulgaria

Summary of events

Non-profit Association Civil Control - Animal Protection, Plovdiv, Bulgaria forwarded a communication on an amendment of the general spatial plan of the city of Plovdiv, approved by a Decision of the Municipal Council of Plovdiv. It has changed the way of permanent use of a territory of approx. 800 hectares, almost entirely falling within the borders of two protected areas under Natura 2000, from Zone for public green space to Zone for sport and entertainment. While the status of the first zone allowed no more than 1% construction, for the second the relevant regulatory framework provides minimal landscaping of 20%, i.e. maximum building of 80%.

The NGO got no standing in the case initiated against the spatial plan, moreover the authority decided to implement it notwithstanding the vague situation about its entering into force. No legal sources clarify this situation concerning spatial plans, while the law and practice in respect to individual administrative acts are clear. They come into force when they become unchallengeable in the way of regular means of reviewing their legality, and they become such when they are not appealed within the statutory period or the complaint is dismissed.

The court complaint against the decision for amendment of the spatial plan of Municipal Council of Plovdiv as a material breach of administrative and procedural rules was left without consideration as inadmissible, and national law provides no other line of defence against the full ignoring of public participation either. The communicant believes that doing this the Party concerned again violates the provisions of Article 9, par.2 of the Convention as it was pointed out in ACCC/C/2013/58. According to this decision, General, as well as Detailed Spatial Plans do not have the legal nature of “decisions on whether to permit a specific activity” in the sense of article 6 of the Convention, as a specific permit (construction and/or exploitation permit) is needed to implement the activity (project). Therefore, article 9, paragraph 2, of the Convention, is not applicable. Bearing in mind their characteristics, the Committee considers Spatial Plans as acts of administrative authorities which may contravene provisions of national law related to the environment. In this respect, article 9, paragraph 3, of the Convention applies also for the review of the law and practice of the Party concerned on access to justice with respect to such Plans. It follows also that for Spatial Plans the standing criteria of national law must not effectively bar all or almost all members of the public, especially environmental organizations, from challenging them in court.

The Bulgarian Government in its response notes that spatial plans do not determine concrete constructions, therefore in principle are exempt from legal remedies.

The case so far

As yet, only the preliminary admissibility has been determined and no hearing has been scheduled as waiting for responses to replies regarding the communication and the Committee decided to proceed at the 64th Meeting in July 2019 if they have received the responses. After having a whole year without communication, in 2019 substantial communication took place in the case between the parties and the Committee.

ACCC/C/2017/146, Poland

Summary of events

Client Earth Poland forwarded a communication about the Polish Water Law that expressis verbis exclude public participation by NGOs in water management cases, through creating an exemption from the general administrative code provision that would allow that directly. This legal situation was created by a 2009 modification of the Water Act based on the argument that water management cases that are significant from environmental viewpoints are subject to EIA procedures, therefore NGO participation in later stages would be superfluous. Even if the Polish Parliamentary Commissioner of Human Rights challenged this legal change in several rounds, it stayed in place. The same happened later in connection with an EUCJ decision that also

targeted the shortcomings of the Water Act, the consequential legal amendments left the provision about NGO participation unchanged.

The response of the Polish Government to the communication is based also on the argument that EIA cases cover the environmentally significant part of the water management issues, and that the decisions of the environmental authorities in those cases would be obligatory for the water management decisions.

The case so far

As of the 63rd Meeting in March 2019, preliminary admissibility had been determined following concerns by the Party.

ACCC/C/2017/148 Greece

Summary of events

Client Earth Europe and WWF Greece raised a communication about a special permit to a widespread lignite mining and power plant operation activity of the state owned Public Power Corporation by a legislative act by the Greek Parliament. This special permit is called Single Production Permit and it cannot be administratively or judicially reviewed. The operations of the Corporation are subject to environmental permit, too, but the validity time of their old permits were extended by legislative tools, as well.

The Greek Government in her response pointed out that the two systems of environmental permitting and mining/energy permitting are totally distinct, the former one fulfils all the international and EU environmental legal requirements, including ensuring public participation rights. Regular court revision of the decisions is possible in that phase. Such a legal framework makes it obvious that Greece, meet the principles of prevention and precaution, too. As concerns the automatic lengthening the validity of otherwise expired environmental permit is led by the conceptual consideration to avoid unregulated, vague legal situation until the new permit gets valid. No one would desire a transitional shutdown of a facility that ensures electricity for whole regions.

The case so far

The Committee discussed in the 64th Meeting how to proceed. Preliminary admissibility has been confirmed. Last correspondences in the case happened in early 2018.

ACCC/C/2017/151, Poland

Summary of events

Client Earth Poland raised a communication to the Committee, because it deems that in Poland there is no legal or jurisdictional possibility to challenge local legislative acts concerning the environment. The Polish Act on Local Governments ensure access to justice for entities against such acts at an administrative court only if their legal interests are harmed by them. The interpretation of this provision is rather narrow and in effect excludes any environmental NGOs from having standing in such cases, therefore Article 9(3) of the convention is infringed. A breach of right that establishes standing shall be direct and immediate, a local resolution that infringes a law shall concern the substantive rights of the party in the case, depriving it or making it impossible to live with it. The complainant introduced concrete practical example in a 2013 Bialystok case, also quoting several ACCC decisions which described the minimal scope of Article 9(3) in national laws.

The Polish Government in her response points out that, although the complainant could not have standing in a case, indeed, the Local Government Act would have ensured the possibility to represent a group of local people, who in their persons fulfil the standing requirements of the Act. Also there is an (other) indirect way to challenge the local legislation, through the Ombudsman. Finally, the representative of the Government adds that that the Communicant has only shown an Air Quality Case when she failed to have a standing, which, in the view of the Government is poorly underpinning the communication.

The case so far

Preliminary admissibility was confirmed over the communication in March 2018, and it was sent due to questions posed to the Communicant from the Chair and Vice-Chair of the Committee.

On the 21st June 2019, the Committee sought the views of the parties on whether three communications should not be considered jointly: ACCC/C/2016/151, ACCC/C/2017/154 and ACCC/C/2018/158. The Communicant has replied immediately, still awaiting the other views.

ACCC/C/2017/154, Poland

Summary of events

Client Earth Poland has raised a communication about the lack of proper implementation of Art. 9(3) of the Aarhus Convention with relation to Forest Management Plans. Until the FMP is approved by the Minister it cannot be applied. The act of approval is in fact the final act in the whole process by which the FMP would eventually entry into force and constitute a legal basis for forestry activities in the particular Forest District. In order to challenge the FMP, it would be necessary to invoke as the basis not the FMP itself but the act constituting its legal existence.

However, there are no administrative and judicial remedies through which individuals or NGOs can challenge the legality of the FMPs, there is no legal procedure in which NGOs could ask for a revision of the act in terms of its compliance with national environmental law. In a concrete example the timber harvest for the 2012-2021 period was raised to 188,000 m³ in a forest. This is a threefold increase of the limit previously set for this Forest District and will lead to increased logging in the Natura 2000 site which is very likely to adversely affect this precious ecosystem. This case raised the possible infringement of Art. 6(3) of the Habitats Directive and Article 33 of the Polish Nature Conservation Act.

The act of approving the annex to the FMP (the 'decision') was actually challenged by the Polish Ombudsman in the two-stage procedure, at the Regional and the Supreme Administrative Courts. However, the complaint filed by the Ombudsman has been recently dismissed by both Courts, on the basis that the approval of a FMP by the Minister of the Environment is not an administrative decision, but rather an 'internal act'. Since the forest in question is a state property, approval of the revised FMP by the Minister of the Environment is an internal act undertaken in the sphere of proprietary rights of the state (dominium), deriving from the concept of superiority and subordination between state authorities and other state organizational units.

In its response the Polish Government repeated the above arguments of the courts: the forest management plan is a type of internal technical documentation prepared by competent and experienced specialists, addressed to people who are legally obliged to implement sustainable forest management in each forests district owned by the State Treasury. During the preparation to the decision of the minister there shall be making a public announcement, at least one month prior to convening the Plan Establishing Committee (PEC), in the Public Information Bulletin and in the local press, information about starting work on drafting a forest management plan for a given district, on the expected date of convening the PEC in this matter, on the possibility of public participation in the PEC proceedings and on the content of the procedure.

The representative of the Polish Government adds that the forest management plan cannot be implemented in the event of non-compliance with the law, as the implementation of targets based on the plan does not exempt the authorities from compliance with the law, including the need to obtain appropriate approvals, decisions or appropriate procedures required by general applicable law. If there is an EIA amongst the following procedure, naturally, public participation and access to justice rights would be fully acknowledged and supported. General rules of Administrative Procedural Act may ensure further participation rights in any other permitting or other administrative procedures, in addition to the right to report damage to the environment according to the Act on Preventing Environmental Damage and the Remediation of Environmental Damage.

The case so far

Preliminary admissibility has been confirmed. On the 21st June 2019, the Committee sought the views of the parties on whether three communications should not be considered jointly: ACCC/C/2016/151, ACCC/C/2017/154 and ACCC/C/2018/158. Still awaiting their views.

ACCC/C/2017/156, UK

Summary of events

Several private persons representing environmental NGOs, such as Friend of the Earth raised a communication of general nature, with the allegation that the courts - even though they could - very seldom deal with the substantive issues in the cases. In the case *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*, the English court set out the standard of unreasonableness of public-body decisions that would make them liable to be quashed by way of judicial review. This came to be known as 'Wednesbury unreasonableness' and was later articulated in *Council of Civil Service Unions v Minister for the Civil Service* by Lord Diplock as a decision: "So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". It essentially means the court does not intervene and set aside an administrative decision unless it is so outrageous as to be perverse. Wednesbury unreasonableness may be understood to be a group (or scale) of standards of review, rather than a single monolithic standard. It encompasses the 'strict' or traditional Wednesbury approach and a more rigorous 'anxious scrutiny' standard, which tends to be applied in rights cases (including human rights where these are absolute or limited). In the majority of environmental cases (and certainly the vast majority of town and country planning cases) the courts apply the strict Wednesbury test to substantive review and not the more searching anxious scrutiny test reserved for cases involving human rights. However, even the courts acknowledge that Wednesbury unreasonableness is an extremely high threshold to reach. This can leave claimants without access to a remedy where substantive review is concerned.

The communicant deems it in conflict with Article 9(4) of the Convention that requires that there be adequate and effective remedies where 9(2) and 9(3) review procedures are engaged. It is plainly the case - as also explained in the Aarhus Convention Implementation Guide at p.199 - that both review procedures require compliant substantive review, but where the standard applied is so high as to be unattainable in all but the most extreme cases (and so not compliant - as it is the case currently in the UK), this does not provide for adequate and effective remedies as they are simply not attainable for what would otherwise be legitimate case.

The representative of the British Government in turn explained that the Wednesbury principle is just one of many principles governing the substantive lawfulness of environmental decisions; the case-law demonstrates that there are several routes by which the courts consider substantive grounds of challenge in environmental cases (such as: carrying out insufficient investigations; failure to take into account material considerations; taking into account

immaterial considerations; misinterpretation of legislation; misinterpretation of policy; insufficient reasoning; and incorrect categorisation of decisions in legal term), and even in relation to allegations of Wednesbury unreasonableness, environmental cases can and do succeed.

The case so far

Preliminary admissibility has been confirmed and was decided how to proceed in the 64th meeting. On the 65th meeting the statements were made by both parties on 5th of November, 2019.

ACCC/C/2017/157, UK

Summary of events

A private person Mr. Andrew Dean Hardwick raised a communication about the special hardship to challenge the decision of the Secretary of State that granted planning permission to a highly controversial project that was refused in several rounds by several level of authorities earlier. To challenge such a decision would be extremely expensive and, because of the high prestige of the decision-maker would offer a very low level of winning chance. Ceiling of court costs previously introduced for Aarhus related cases would not apply in such a case.

The representative of the British Government in her response pointed out that the Government has been taking steps to review the costs capping scheme for eligible environmental challenges and specifically on proposals within the scope of the Aarhus Convention.

The case so far

Preliminary admissibility has been confirmed and will decide how to proceed in the 64th meeting, in light of the information and update provided by the Party concerned. Intensive communication took place in 2018-19.

ACCC/C/2018/158, Poland

Summary of events

Stowarzyszenie Pracownia na rzecz Wszystkich Istot, a Polish NGO forwarded a communication about lack of public participation in adoption of so-called multiannual farm and hunting plans and annual hunting plans on the management of game-animals, including their hunting. These plans are adopted by State Forest Authorities, as well as lack of access to

justice for environmental NGOs and very limited access to justice for other persons in case of plans, programmes and other strategic documents relating to the environment.

The communicant adds that similar strategic decisions share these structural problems, such as air quality plans adopted according to the Environmental Protection Law Act, action plans regarding noise management, waste management plans according to the Waste Act, local spatial plans and regional spatial plans adopted according to Act on Spatial Planning and Management, too. In Poland, the general rules for procedure in case of individual administrative cases (decisions) are provided for by the Code of Administrative Procedure (CAP). It regulates the issue of administrative review of the decisions specifying who has standing to initiate a review proceeding. It also provides for rules regarding participation of non-governmental organisations in the administrative proceedings and their access to justice. CAP is however not applicable to plans, programmes or other strategic documents. There is no other "CAP-like" general act applicable to such documents, which means that there are no general rules regarding administrative review of the strategic documents, nor regarding NGOs' rights in this regard. As far as NGOs are concerned, it shall be stressed that there is no provision in the Polish law allowing them to challenge a plan or program (unless they had its own legal interest or right infringed, which means they would act as private entities and not in a common interest). The lack of NGOs' standing in case of strategic documents is confirmed by the jurisprudence.

The representative of the Polish Government has given a detailed answer to this communication, too, but in essence has repeated the argument in the two earlier similar cases.

The case so far

- narrowed the scope of the communication to only the plans/programmes discussed in the communication and allows the Communicant to extend the scope
- admissibility confirmed
- on the 21st June 2019, the Committee sought the views of the parties on whether three communications should not be considered jointly: ACCC/C/2016/151, ACCC/C/2017/154 and ACCC/C/2018/158. Still awaiting their views.

ACCC/C/2018/161, Bulgaria

Summary of events

An NGO called Za Zemiata raised a systemic communication upon the allegation that there is a tendency in the Bulgarian law and legal practice to restrict NGOs from participation in environmental cases, especially making legal remedy difficult and more costly. Concrete legislative changes decreased the level of instances available for the NGOs (and others) to challenge environmental impact assessment decisions and also access to environmental

information refusal at the courts in respect to priority cases of social importance or strategic value, also measures were taken that lead to significant raise of the cost of NGO litigation.

The representative of the Bulgarian Government explains in her response that Aarhus Convention could not prescribe how many levels of legal remedies fulfil the requirements of Article 9 properly. As concerns raising of the amount of court fees, the Government argues that it concerns only certain ways of litigation, while lets others untouched, moreover the fees changed were so low previously that could be called only symbolic.

The case so far

As yet, only the admissibility has been confirmed - 1st October 2018, the communication was submitted - on 18th January 2019. Response to the communication arrived later this year.

ACCC/C/2019/162, Denmark

Summary of events

Comments provided by the Communicant for an EIA report regarding plans to expand a rowing stadium in Gladsaxe Municipality, Denmark were rejected by the Gladsaxe Municipality and at The Environmental Board of Appeal on the basis that the Communicant's house being 1.2 km from the lake in question was too far to be considered to have a legal interest in such a case. When a complaint was filed at The Danish Ombudsman, the complaint was not considered as the Environmental Board of Appeal's arguments would be hard to criticise.

There is no legislation implementing Article 9 of the Aarhus Convention in relation to what constitutes a sufficient legal interest, thus preventing individuals from filing a complaint with the knowledge of whether they have a legal interest in the matter.

This is in violation of Article 9 of the Aarhus Convention by denying the Communicant his right to a fair trial as he could not bring a case to the Environmental Board of Appeal due to the lack of definitions for the term 'legal interest' in EIA matters.

There have been two sets of questions from the secretariat at the ACCC asking for more details. The first set of questions was regarding the Communicant's comments made regarding the EIA procedure and the exhaustion of available domestic remedies. The comments were made as part of the EIA procedure required under Danish Law for this proposed project. The Communicant's comments were acknowledged but rendered irrelevant as the project considered the expansion of an already existing legally operating rowing stadium (that was not subject to EIA procedure) rather than an alternative placement for the stadium. Regarding available domestic remedies, by the time the Danish Ombudsman decision was received, the 6 months grace period to bring a court proceeding to challenge the Environmental Board of Appeal's decision had passed. The Communicant did not attempt to challenge the decision at

any point through the Danish Court as he was reliant on a positive outcome from the Ombudsman given the prohibitively high costs of accessing justice. The second set of questions referred to the possibility for the decision of the Environmental Appeals Board to be appealed in a court, such as the relevant costs (particularly in relation to how prohibitive they are) and the appeal procedure. The cost to appeal the decision could have easily amounted to DKK250,000 with the possibility to apply for a 'free process' but this sets a maximum amount of aid, making it impossible to hire a lawyer which is considered a must in Denmark. In an extreme case an individual spent DKK 15 million during a 7 year trial in 2 courts, and while he won both cases, was only awarded half the amount in costs. The loser pays principle applies in Denmark with one case seeing an individual paying DKK100,000 to the Environmental Appeals Board. Furthermore, the higher courts have the possibility to both raise and lower the awarded costs and often lower the awarded costs from the lower courts. The Communicant could have appealed the first court decision in a higher court even if he had lost an appeal regarding the Environmental Appeals Board decision.

The case so far

Thus far, the ACCC have determined the preliminary admissibility of the case. Awaiting response from the Party regarding the communication.

ACCC/C/2019/163, Austria

Summary of events

The Stadttunnel Feldkirch project for the construction of a wide-stretched underground road infrastructure in Feldkirch (an area in Austria) had to undergo a simplified EIA. One of the planned exit roads for this tunnel network will be next to the Liechtenstein border, causing additional traffic and a negative impact on the environment in that region of Liechtenstein. A Liechtenstein citizens' group 'mobile ohne Stadttunnel' (the Communicants) and an Austrian citizens' group 'stattTunnel' both submitted comments regarding the EIA report to the developer of the project. These submissions were the first step at initiating statutory public participation in EIA procedures - domestically and cross-border.

For simplified EIA procedures, citizens' groups have a procedural right to inspect the EIA file. To evidence standing as a citizens' group, an officially authenticated signature list is required of at least 200 people who enjoy 'voting power in municipal elections in the host municipality or in a directly adjacent municipality'. People living in a municipality adjacent to the host municipality may be adversely affected as matter of law as thus if they meet the signature list requirements, they have standing. The Communicant's authenticated and validated signature list (authenticated by the 12th September 2014 decision of the Amt der Vorarlberger Landesregierung) had 508 individuals living within Liechtenstein with voting power in

municipalities located directly adjacent to the host municipality in Austria and who supported the submissions. Therefore, the Communicant was officially recognised as a Party to the EIA proceedings, as was the 'stattTunnel' group who submitted a list of 800 signatures entitled to vote in Austrian municipal affairs.

The aforementioned decision giving the Communicant locus standi was challenged on 6th October 2014 at the Federal Administrative Court and the decision was annulled as the signatures of the 'members' were not Austrian residents and could not participate in proceedings for the project as it was an Austrian project. This decision was taken to the Supreme Administrative Court. Once again, it was decided the Communicant had no procedural rights to the EIA proceedings, despite the Communicant arguing (with relevance to Access to Justice) that Article 9(2) of the Aarhus Convention provides the public concerned residing in a third but adjacent State with the right to access justice in the State where the EIA procedure is ongoing.

Therefore, the Communicant provides that Austrian law in its present state does not accept third party State groups who have met the requirements of national law for domestic citizens' groups to participate in EIA procedures. This is in violation of article 9(2) of the Aarhus Convention because citizens' groups whose members belong to the public concerned of an affected Party cannot access justice for transboundary EIA procedures on the grounds of domicile.

The case so far

Thus far, the ACCC have determined the preliminary admissibility of the case. Awaiting response from the Party concerned regarding the communication.

ACCC/C/2019/164, Ireland

Summary of events

An Board Pleanála accepted the application for the construction of a wind farm permit in Co Donegal on the basis of a negative Environmental Impact Assessment. The development site is a regionally important area for Hen Harrier (supporting 7% of the national population of the species) and is considered a 'non-designated Special Protection Area for Hen Harrier'. The EIA concluded that between 2015 and 2017 there was no evidence of Hen Harrier breeding activity in the site boundary or within the 2km survey buffer of the development site boundary, nor was the species observed during the core breeding season of mid-May to June. However, the Irish Raptor Study Group's routine survey of the breeding activity between April and June 2017 found two breeding pairs: one within the site boundary and one within the buffer zone. The EIA also published sensitive environmental information obtained from the National Parks and Wildlife Service (NPWS).

Upon publication of the notice of the planning application, the Communicant prepared a submission detailing the evidence found above regarding the breeding of the Hen Harrier contradicting the EIA conclusions. Their submission did not include the specific location of the Hen Harrier as international best practice recommends that rare species' locations should be kept confidential and not be put into the public domain to ensure the information will not put those species at risk of persecution; instead the submission provided that the precise grid references could be provided in a separate confidential communication should the party require. Furthermore, the NPWS information published in the EIA made public information put the species at risk of persecution due to the historical evidence that areas subject to wind farm development planning applications see the persecution and disappearance of Hen Harrier.

The inspector only took note of the Communicants' submission but did not request the information about the Hen Harrier locations and decided that the Hen Harrier only had a historical association with the site and no recent use for breeding - thus accepting the planning application.

The Communicant brought a judicial review to challenge this decision, due to its effects on the Hen Harrier and the failure to resolve the conflict between the EIA conclusions and the identification of the breeding pairs by the Communicant's survey. The issue of the confidentiality of the information was a central issue to the case as the refusal to provide the information unless confidential prevented An Bord Pleanála from receiving that information. It was therefore decided that there was no legal basis for An Board Pleanála to engage with the submission with regards to the confidential information and therefore the Communicant could not treat this information as confidential.

Articles 9(2) and 9(3) of the Aarhus Convention are the articles alleged to be in non-compliance in relation to access to justice. The EIA legislation does not provide any administrative or judicial remedy to members of the public to challenge the decision to publish environmental information in an EIA. The Communicants considered this a violation of article 9(3). Furthermore, the public concerned have no procedure to submit confidential information to the competent authorities during public participation, thus denying the Communicant its right to access a judicial remedy under article 9(2).

The case so far

Thus far, the ACCC have determined the preliminary admissibility of the case. Awaiting response from the Party concerned regarding the communication.

ACCC/C/2019/174 Sweden

Summary of events

Client Earth Poland forwarded a communication about the Swedish system of access to justice which deemed to raise an unnecessary burden to foreign NGOs. At least 3 years of operation in Sweden is prescribed in the procedural laws of Sweden, in order to reach the conditions of standing in environmental court cases, amongst other conditions, such as having minimum 100 members. The communicant herself tried to take part a Swedish administrative procedure concerning a Baltic Sea natural gas transport project that apart from the consequences on Swedish Territory concerns the Polish constituency a lot, too.

Client Earth considers this discretion as going far behind the borders of free decision of the scope of participation by a Party to the Convention in Article 9. Naturally, Article 2(5) and 4(4) are relevant here.

The case so far

Only the communication is available yet and correspondence about preliminary issues of admissibility.