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Access to justice regarding plans and programmes related to the environment – Polish law in the light of Article 9.3 of the Aarhus Convention[1]

Dostęp do sądu w odniesieniu do planów i programów mających wpływ na środowisko – regulacje polskie w świetle artykułu 9.3 Konwencji z Aarhus

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Abstract: Article 9.3 of the Aarhus Convention grants members of the public (meeting certain *requirements*, if a Party to the Convention so specifies) access to a review procedure (access to justice) to challenge *acts or omissions by private persons or public authorities that contravene provisions of its national law relating to the environment*. According to Article 2.4 of the Convention, non-governmental organisations should also be considered as "members of the public".

According to the jurisprudence of the Aarhus Convention Compliance Committee, the activities of public authorities covered by the requirements of Article 9.3 of the Convention include adoption of plans and programmes which may have an impact on the environment. In accordance with Polish law (often following the requirements of EU law), administrative authorities adopt a whole range of plans and programmes relating to the environment or having an impact on the environment. These documents are developed either by regional or local authorities (self-governmental authorities or regional government administration) or at the central level.

[1] The issues discussed in this article were partially described in a legal analysis commissioned in 2019 by WWF Poland and published by this organization in January 2020 (Bar and Jendrośka 2020: 37-41)

Polish law provides very limited opportunities to challenge plans or programmes. With respect to documents created at the central level, there are no such possibilities at all, and with respect to documents created at lower levels, certain, limited, rights in this respect are granted only to private entities whose legal interest has been violated. The possibility for NGOs to challenge plans or programmes is completely excluded. Such a situation should be considered non-compliant with the Aarhus Convention.

Keywords: access to justice, Aarhus Convention, challenging of plans and programmes, environmental plans and programmes

Abstrakt: Artykuł 9.3 Konwencji z Aarhus nakazuje zapewnienie członkom społeczeństwa (spełniającym określone kryteria, jeśli dana Strona Konwencji takie określi) dostępu do procedury odwoławczej (dostępu do sądu) w celu kwestionowania działań lub zaniechań osób prywatnych lub władz publicznych naruszających postanowienia jej prawa krajowego w dziedzinie środowiska. Zgodnie z artykułem 2.4 Konwencji za członków społeczeństwa należy uznać także organizacje pozarządowe.

Zgodnie z orzecznictwem Komitetu ds. Przestrzegania Konwencji z Aarhus do działań władz publicznych objętych wymaganiami artykułu 9.3 Konwencji należą m.in. przyjmowane przez te organy plany i programy, których realizacja może mieć wpływ na środowisko.

Zgodnie z przepisami prawa polskiego (często w ślad za wymaganiami prawa unijnego) organy administracji opracowują cały szereg takich planów i programów. Dokumenty te opracowywane są albo przez władze regionalne lub lokalne (organy samorządowe lub administrację rządową w województwie), albo na szczeblu centralnym.

Tymczasem prawo polskie daje bardzo ograniczone możliwości zaskarżania planów lub programów. W odniesieniu do dokumentów tworzonych na szczeblu centralnym możliwości takich nie ma w ogóle, a w odniesieniu do dokumentów tworzonych na niższych szczeblach – pewne, ograniczone, uprawnienia w tym zakresie przysługują tylko podmiotom prywatnym, których interes prawny został naruszony. Całkowicie wykluczona jest możliwość zaskarżania planów lub programów przez organizacje pozarządowe.

Sytuację taką należy uznać za niezgodną z Konwencją z Aarhus.

Słowa kluczowe: prawo do sądu, konwencja z Aarhus, zaskarżanie planów i programów, plany i programy dotyczące środowiska.

1. Introduction

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) was signed on 25 June 1998 in Aarhus, Denmark, during the 4th Pan-European Conference of Ministers of the Environment. It entered into force on 30 October 2001.

The Aarhus Convention stands on three "pillars": access to information, participation in decision-making processes, access to justice, i.e. the ability of the public to enforce laws. The third pillar – on access to justice – addresses three issues:

– review procedures relating to access to information which backs the right to environmental information granted by Article 4 (Article 9.1),

– review procedures relating to access to public participation under Article 6 (and possibly other provisions) of the Convention (Article 9.2),

– review procedures for public review of acts and omissions of private persons or public authorities concerning national law relating to the environment which provides a mechanism for the public to enforce environmental law directly (Article 9.3) (Aarhus Implementation Guide 2014: 19, Jendrośka and Squintani 2020: 6-7).

In Poland, the Convention was ratified on the basis of the Act of 21 June 2001 on Ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, by which the Parliament gave its consent to ratify the Convention.

The instrument of ratification was signed by the President of the Republic of Poland on 31 December 2001 and on 15 February 2002 the document was deposited with the Depositary of the Convention (the UN Secretary-General in New York). The text of the Convention was published in the Journal of Laws in May 2003 (Journal of Laws No. 78, item 706). From that moment on – in accordance with Article 91 of the Polish Constitution – it forms part of the national legal order and may directly be applicable.

The preparation for ratification of the Convention and the ratification itself imposed an obligation on Poland to adapt its law to the Convention's requirements.

This article seeks to demonstrate that the third aspect of access to justice identified above (Article 9.3) covers, inter alia, the access to justice in the case of plans and programmes relating to the environment, and to analyse how this requirement of the Convention has been implemented in Polish law.

2. Requirements of Article 9.3 of the Aarhus Convention

According to Article 9.3 of the Convention:

> In addition, and without prejudice to the provisions relating to the review procedures referred to in paragraphs 1 and 2, each Party shall ensure that members of the public meeting the requirements, if any, laid down in its national law have access to an administrative or judicial procedure to challenge acts or omissions by private persons or public authorities that contravene provisions of its national law relating to the environment.

The jurisprudence of the Aarhus Convention Compliance Committee indicate that "activities" referred to in Article 9.3 of the Convention in-

clude, inter alia, adoption of plans and programmes which relate to the environment.[2]

In case ACCC/C/2005/11 (Belgium) the Committee discussed the issue of planning acts adopted by Belgian authorities (i.a., area plans by the Walloon Government in order to allow a landfill installation). In paras 29 and 31 of its findings in this case, the Committee stated:

> 29. When determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, whether the decision should be challengeable under article 9, paragraph 2 or 3, is determined by the legal functions and effects of a decision, i.e. on whether it amounts to a permit to actually carry out the activity.
> 31. Based on the information received from the Party concerned and the Communicant, the Committee understands that decisions concerning area plans ("plan de secteur") do not have such legal functions or effects as to qualify as decisions on whether to permit a specific activity. Therefore, article 9, paragraph 3, is the correct provision to review Belgian law on access to justice with respect to area plans, as provided for in Walloon legislation.

Although the main issue discussed in this case were criteria for NGOs to have standing before the courts (the Committee found the criteria set by Belgian law too strict) and not the mere question whether plans and programmes are covered by Article 9 of the Convention, the paragraphs cited above confirm undoubtfully that documents such as spatial plans are considered as falling under Article 9.3.

Also in case ACCC/C/2011/58 (Bulgaria), the Committee discussed, i.a., "General Spatial Plans" and "Detailed Spatial Plans" adopted by Bulgarian authorities. In paras 64 and 65 of its findings the Committee confirm that these plans are covered by Article 9.3:

> 64. […] the characteristics of the General Spatial Plans indicate that that these plans are binding administrative acts, which determine future development of the area. They are mandatory for the preparation of the Detailed Spatial Plans, and thus also binding, although indirectly, for the specific investment activities, which must comply with them. Moreover, they are subject to obligatory SEA and are related to the environment since they can influence the environment of the regulated area. Consequently, the General Spatial Plans have the legal nature of acts of administrative authorities which may contravene provisions of national law related to the environment and the Committee reviews access to justice in respect to these plans in the light of article 9, paragraph 3, of the Convention.
> 69. […] the Committee considers Detailed 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 the Detailed Spatial Plans. It follows also that for Detailed 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 (cf. findings on communication ACCC/C/2005/11 Belgium).

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[2] For more about the Aarhus Convention Compliance Committee and its activities: see Samvel 2020, Fasoli and McGlone 2018, Jendrośka 2011, Koester 2007

The Guide to the Implementation of the Aarhus Convention, issued by the UNECE, also confirms that plans and programmes (such as spatial plans) are covered by Article 9.3 (Aarhus Implementation Guide: 197).

Article 9.3 of the Convention encompasses "activities" (including plans and programmes) "that contravene provisions of its national law relating to the environment." This means that – in order to fall under this Article – a plan or programme (or rather its implementation) shall be capable of impacting the environment. As indicated in the Aarhus Implementation Guide:

> national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment. Thus, also acts and omissions that may contravene provisions on, among other things, city planning, environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships are covered by paragraph 3, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws. (Aarhus Implementation Guide: 197).

In the aforementioned case ACCC/C/2011/58 (Bulgaria), the Committee stated that the General Spatial Plans "are subject to obligatory SEA and are related to the environment since they can influence the environment of the regulated area" which was an argument for including them under the scope of Article 9.3 of the Convention.[3]

Recognition of plans and programmes as documents covered by Article 9.3 means that members of the public shall be able to challenge adopted plans and programmes. According to Article 2.4 of the Convention, the notion of "the public" encompasses not only "one or more natural or legal persons" but also non-governmental organizations ("…in accordance with national legislation or practice, their associations, organizations or groups").

3. EU documents implementing Article 9.3 of the Aarhus Convention

At the European Union level, so far no binding legal instrument implementing Article 9.3 of the Convention has been adopted, despite several years of

[3] Lack of access to justice regarding certain plans or programmes may violate also Article 9.2 of the Aarhus Convention. Namely, according to jurisprudence of CJEU, plans or programmes authorising activities requiring appropriate assessment under Article 6.3 of the Habitats Directive are envisaged in Article 6.1.b of the Aarhus Convention and therefore fall within the scope of Article 9.2 of the Convention (judgement in the case European Commission vs Poland, C-432/21, paragraphs 172-173; the judgement concerns forest management plans).

work on a draft directive to this effect, as the plan to adopt a relevant Directive was opposed by some Member States.

In order to feel the gap in EU legislation, the European Commission issued a “Commission Notice on Access to Environmental Justice” which provides some guidance on access to environmental justice.

The Notice indicates in paragraph 96 that, in accordance with Article 9.3 of the Aarhus Convention, members of the public referred to in that article shall have the right to challenge plans and programmes relating to the environment. This view – with regard to air quality plans – was also expressed by the Court of Justice in Case C-237/07 (Janecek) (Bar and Jendrośka: 21).

In 2020, the Commission issued another Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled ‘Improving access to justice in environmental matters in the EU and its Member States’. The Communication stresses in paragraph 23 that the Aarhus Convention, is an integral part of the EU’s legal order and is binding on the Member States. It further indicates that in the absence of EU rules governing access to justice in environmental matters, “it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, […] since the Member States are responsible for ensuring that those rights are effectively protected in each case” (Case C-240/09 Lesoochranárske zoskupenie, para 47-48). In particular, Article 9.3 of the Convention and Article 47 of the Charter of Fundamental Rights of the European Union, read together, impose on “Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law” (case C-664/15 Protect, para. 45; case C-243/15, Lesoochranárske zoskupenie, paras 50 and 73).

The statement of paragraph 23 of the 2020 Communication is based on the fact that the Aarhus Convention is a mixed agreement which – according to Article 216(2) of the Treaty on the Functioning of the European Union – means that the Convention constitutes part of EU law. This includes the parts of the Convention which have not been implemented by means of specific EU acts, such as in the case of Article 9.3. Therefore, Member States which are also Parties to the Conventions (and all the Member States are Parties) have a “double” obligation to observe the Aarhus Convention, based both on international law and on EU law. In the latter case, the Aarhus Convention benefits on the principle of supremacy of EU law.

4. Situation in Poland

4.1. Introduction

In Poland, plans and programmes may be adopted by:

– self-governmental authorities (at municipal, district or regional level),

– governmental administration at regional level,

– authorities at the central level (e.g. Ministers, Council of Ministers etc.).

Numerous plans adopted by administration may be regarded as "related to the environment". These plans are, inter alia:

– air quality plans adopted according to Article 91 of the Environmental Protection Law Act (EPLA) of 27 April 2001 and short-term action plans adopted according to Article 92 of EPLA (as required, accordingly, by Article 23 and Article 24 of the Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe);

– action plans regarding noise management adopted according to Article 119 of EPLA (as required by Article 8 of the Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise);

– waste management plans adopted according to Article 34 of the Act of 14 December 2012 on waste (as required by Article 88 of the Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives);

– local spatial plans and regional spatial plans adopted according to Act on 27 March 2003 on spatial planning and development (Article 14 and Article 38 accordingly);

– forest management plans adopted according to Article 18 of the Forest Act of 28 September 1991;

– hunting plans adopted according to Article 8 of the Hunting Law Act;

– water maintenance plans adopted according to Article 327 of the Act of 20 July 2017 – Water Law;

– river basin management plans adopted according to Articles 315-324 of the Water Law (as required by Article 13 of the Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy);

– flood risk management plans adopted according to Articles 172-173 of the Water Law (as required by Chapter IV of the Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks);

– drought management plans adopted according to Articles 184-185 of the Water Law Act;

– plans of protection measures of Natura 2000 area adopted according to Article 28 of the Act of 16 April 2004 on Nature Protection and a Natura 2000 area protection plans adopted according to Article 29 of the Act on Nature Protection (both types of the aforementioned plans fall under the category of "necessary conservation measures involving […] appropriate management plans" as referred to by Article 6.1 of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora);

– national parks protection plans adopted according to Articles 18-20 of the Act on Nature Protection;

– nature reserves protection plans adopted according to Articles 18-20 of the Act on Nature Protection;

– landscape parks protection plans adopted according to Articles 18-20 of the Act on Nature Protection.

The majority of above listed documents concern the environment directly, i.e. are adopted on the basis of environmental Acts which means that both their content and the procedure of its adoption may violate environmental law. Spatial development plans, although not typically "environmental", shall be regarded as covered by Article 9.3 too, as their provisions must not violate the environmental law requirements such as nature protection laws or water laws and, moreover, land development has an impact on the environment – thus these plans may violate environmental law, too (also the aforementioned findings of the Compliance Committee in cases ACCC/C/2005/11 and ACCC/C/2011/58 confirm that spatial plans are covered by Article 9.3).

Therefore, all these plans or programmes shall be regarded as "related to the environment" and able to "contravene provisions of […] law relating to the environment" and therefore subject to Article 9.3 of the Aarhus Convention.

4.2. Access to justice regarding plans and programmes adopted at a regional or lower level

4.2.1. General remarks

The legal basis for challenging strategic documents adopted at a regional or lower level can be found in the Acts regulating the three tiers of self-governmental authorities and in the Act on governmental administration in the region, namely:

• for plans and programmes to be adopted by various levels of self-governmental authorities:

– Act of 8 March 1990 on Municipal Self-Government (Article 101.1),

– Act of 5 June 1998 on District Self-Government (Article 87.1),

– Act of 5 June 1998 on Regional Self-Government (Article 90.1).
- for plans and programmes to be adopted by governmental authorities:
  – Act of 23 January 2009 on the Voivod and the Governmental Administration in the Voivodship (Article 63.1).

With regard to plans and programmes, the circle of persons entitled to lodge a complaint with the administrative court is precisely defined by the four aforementioned laws which constitute in this respect *leges speciales* in relation to the general provisions of the Act of 30 August 2002 – Law on proceedings before administrative courts (Woś, Knysiak-Molczyk, and Romańska 2005: 214-215; Dauter, Gruszczyński, Kabat, and Niezgódka-Medek 2009: 164-165).

All four of the aforementioned Acts grant standing to persons whose "legal interest or right has been infringed" by the adopted plan or programme. None of these Acts – nor any other provision of law – grant the right to challenge plans or programmes to non-governmental organisations acting in public interest.

4.2.2. Limited access to justice for members of the public other than NGOs

As indicated above (and as described in Bar and Jendrośka 2020: 40-41), the Act on Municipal Self-Government and the Act on District Self-Government stipulate that a strategical document adopted by administration may be challenged by persons whose legal interest or right has been infringed by that document; these persons may file a claim to the administrative court (Article 101.1 of the Act on Communal Self-Government; Article 87.1 of the Act on Poviat Self-Government).

The Act on Regional Self-Government allows for challenging only plans and programmes having the status of a "local law" and grants the right to challenge them to the persons whose legal interest or right has been infringed by the provision of the local law (Article 90.1 of the Act on Regional Self-Government).

Also Article 63.1 of the Act on the Voivod and the Governmental Administration in the Voivodship allows for challenging plans and programmes having the status of a "local law" and grants the right to challenge these plans to the persons whose legal interest or right has been infringed by the provision of the local law (thus the circle of persons entitled is set exactly the same as in the above cited Acts on self-governmental authorities).

The above cited four Acts (on various self-government authorities and on governmental authorities) grant the access to justice to persons whose legal interest is not just "involved" in the case, but the person has to prove that their legal interest or right has been infringed (the mere threat or possibility of infringement is insufficient).

This is a more far-reaching requirement than the one concerning the recognition as a party in the proceedings on individual administrative decisions, where – in accordance with Article 28 of the Code of Administrative Procedure – in order to be recognised as a party it is sufficient that the proceedings concern a person's legal interest (it does not have to be violated).

In a number of verdicts, the administrative courts confirmed the above described narrow understanding of standing to challenge plans or programmes and presented a narrow interpretation of the infringement of the legal interest or right.

For example, in the verdict of 17 October 2017, the Supreme Administrative Court held: "the right to challenge the local spatial plan is not granted to the person having a legal interest in the case, but to the person whose legal interest has been infringed by the contested plan; the infringement of the legal interest of the complainant must be direct, individual, objective and real, and the complainant must demonstrate a link between the contested resolution and its individual legal position" (II OSK 2559/16).

In the verdict of 30 March 2017, the Supreme Administrative Court held: "Article 101(1) of the Act on Communal Self-Government allows for effective appeals against a resolution of the Commune Council by the person whose legal interest has been violated. Simply having a legal interest is not sufficient to effectively challenge a resolution. Only after it has been established that the conditions of Article 101(1) of the Act have been fulfilled, the compliant may be examined on its merits (II OSK 1941/15).

In the verdict of 14 April 2011, the Supreme Administrative Court held: "Article 87(1) of the Act on Poviat Self-Government cannot be interpreted in a broad way by deriving a breach of a legal interest from general values or principles of law" (I OSK 5/11).

Similar views have been expressed in other verdicts and decision of the Supreme Administrative Court, e.g.: verdict of 14 November 2017 (II OSK 457/16), verdict of 20 June 2017 (II OSK 2648/15), verdict of 31 May 2017 (II OSK 2298/15), verdict of 20 April 2017 (II GSK 1912/15), verdict of 7 March 2017 (II OSK 1679/15), verdict of 7 March 2017 (II OSK 1587/15), verdict of 10 February 2017 (II OSK 1344/15), verdict of 5 November 2014 (II OSK 977/13), verdict of 25 March 2014 (II OSK 355/14), verdict of 28 June 2007 (II OSK 1596/06).

Following the interpretations of the Supreme Administrative Court, the Regional Administrative Courts apply the same approach.

As mentioned above, the circle of persons entitled to challenge a plan or programme is narrower than in the case of individual decisions issued on the basis of the Code of Administrative Procedure where the mere "involvement" of a person's legal interest is considered sufficient (there is no need to prove

the infringement of this interest). This view was confirmed by the Supreme Administrative Court in the verdict of 22 February 2017: "In contrast to proceedings carried out under CAP, where everyone whose legal interest is concerned is considered 'a party to the proceedings', in proceedings under Article 101 of the Act on Communal Self-Government only the person whose legal interest or right has been infringed may be a party" (II OSK 1497/15).

The same view was presented by the Court in the verdict of 20 November 2014 (I OSK 1747/14) and in the decision of 8 October 2013 (II OZ 787/13).

In addition, it should be noted that 'legal interest' is understood in Poland in any case rather narrowly, as it is reduced to the protection of ownership or other rights in rem to the property that will be affected by the implementation of the plan or programme (Eliantonio, Backes, Rhee, Spronken, and Berlee 2013: 67). In contrast, for example, a person whose health may be affected is not considered to have a legal interest in the case (unless they are also the owner or perpetual usufructuary of the property). Meanwhile, in judgement C-237/07 (Janecek), the Court of Justice ruled that a person whose health may be affected by an air quality plan that has been incorrectly prepared – or not prepared at all – should be able to bring an action before the court (the case concerned the failure of the competent authorities to prepare adequate air quality plans in Munich). Although the Aarhus Convention was not referred to by the Court in this judgment, it should nevertheless be taken into account when determining the circle of persons who should be entitled to challenge a plan or programme before the courts.

As presented above, Poland applies very strict criteria for standing of private persons. As plans or programs normally provide for a description of future, planned activities it is quite hard to prove that their provisions infringe someone's rights (except perhaps for the local spatial plan which may introduce specific limitations in and conditions of land use).

Such a strict approach to standing of private persons should be regarded as violating Article 9.3 of the Convention. Although this Article allows establishing of criteria for members of the public to have access to justice, the criteria cannot be so strict that they effectively bar all or almost all members of the public from challenging acts or omissions under Article 9.3 of the Convention (this view was presented by the Aarhus Convention Compliance Committee in its findings in case ACCC/C/2006/18, Denmark).

4.2.3. Lack of access to justice for NGOs

As indicated above, no provision in the Polish law grants NGOs a standing to challenge a plan or programme – unless an NGO has its own legal

interest infringed, which would mean it acted as a private entity and not in public interest.

The lack of NGOs' standing in case of strategical documents is confirmed by the jurisprudence. In the verdict of 15 February 2017 the Supreme Administrative Court held:

> An entity filing a complaint with an administrative court against a resolution of the Commune Council on a local spatial development plan should prove that the resolution infringes its legal interest, which results from the material law, and most often from the ownership right to the real property. If, for example, an association has not proved such an infringement, and in particular has not shown that it holds a legal title to the property covered by the planning resolution, the fact that the association deals, according to its by-laws, with 'shaping planning policy' and 'the protection of the urban order' does not mean that it has a legal interest in bringing an action against the resolution in question within the meaning of Article 101 of the on Act Communal Self-Government" (II OSK 1277/15).

Similarly, in the verdict of 21 March 2017, the Supreme Administrative Court held:

"Article 87 of the Act on Poviat Self-Government is designed to protect an individual's interest or right and not an objective legal order. It does not give rise to a complaint by social organisations in order to protect the public interest…" (II OSK 2865/15). The same view has been presented in the Supreme Administrative Court's decision of 23 January 2018 (II OSK 3218/17).

The Aarhus Compliance Committee held in its findings on communication ACCC/C/2005/11 (Belgium) that access to review procedures should be the presumption, not the exception. In the same findings, the Committee held that the Parties may not set such criteria for standing that may effectively bar all or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment (Aarhus Implementation Guide 2014: 198).

As presented above, the issue in Poland is even deeper, as it is not about too strict criteria for NGOs to challenge plans or programmes, but there is no standing for them at all. The lack of the possibility of NGO to challenge environmentally relevant plans and programmes in public interest is undoubtedly a violation of Article 9.3 of the Aarhus Convention (Bar and Jendrośka 2020: 39).

4.3. Access to justice regarding plans and programmes adopted at the central level

As indicated above, Article 9.3 covers "acts or omissions by public authorities which contravene provisions of its national law in the field of the environment".

One form of such government-run action is the adoption of generally applicable executive regulations issued by Ministers or by the Council of Ministers.

At the same time, however, Article 2.2 of the Convention, defining the concept of "public authority", provides that "this definition does not include bodies or institutions to the extent that they are acting in a legislative capacity."

This means that the obligation to provide access to the review procedure under Article 9.3 of the Convention does not apply to a document adopted in the course of the legislative activity of the authority concerned.

It is therefore necessary to decide whether, within the framework of "legislative capacity", acts are created which, in accordance with Article 87 of the Constitution, are sources of universally binding law, i.e. regulations of the Council of Ministers or individual ministers.

The findings of the Aarhus Convention Compliance Committee interpreting Article 2.2 of the Convention do not provide clear and universal guidance as to what features of a document, or what features of the process of adoption of that document, determine that the adopting authority acted in "legislative capacity".

While the Committee stated that the concept of "legislative" action should be interpreted strictly, the case in which this statement was made was concerned with the question of whether the Article 2(2) exception also covers the stage of preparation of draft legislation before it is transmitted to Parliament (ACCC/C/2014/120, Slovakia). It is therefore difficult to draw clear conclusions from these findings as to whether or not the exception in Article 2.2 of the Convention covers Polish executive regulations.[4]

Instead, the content of Article 8 of the Convention, as well as the Committee's jurisprudence on Article 9.3 of the Convention, is helpful in resolving the above issue, first with regard to implementing regulations.

Article 8 deals with public participation in the preparation of certain types of legislation and reads: "Each Party shall endeavour to promote effective public participation, at the appropriate stage and when all options are still

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[4] In another case, the Committee assessed whether the UK Parliament, when adopting the so-called hybrid bills, i.e. acts authorising the implementation of specific major projects, was acting within "legislative capacity". The Committee's response was negative – it ruled that such acts, although adopted by parliament, were in fact in the nature of an individual authorisation of a project and not a legislative act (Case ACCC/C/2011/61, United Kingdom).

In contrast, in a case involving Hungary, the Committee found that the Hungarian Parliament, in adopting a resolution calling on the Hungarian Government to work towards authorising the expansion of a nuclear power plant and a subsequent resolution giving preliminary approval to the start of preparatory activities for the approval of that expansion, also failed to act as a legislative authority (Case ACCC/C/2014/105, Hungary).

open, in the preparation by public authorities of regulations and other generally applicable normative instruments that may have a significant effect on the environment. […]".

Therefore, if it were to be assumed that Polish executive regulations are not subject to the Convention because the authorities drafting them are acting in a legislative capacity, Article 8 would make no sense. Consequently, maintaining the consistency of the Convention's provisions requires an interpretation that the aforementioned Polish acts will also be covered by the requirements of Article 9.3 of the Convention.

In addition, the Committee's jurisprudence on Article 9.3 of the Convention indicates that actions by authorities to enforce environmental law shall be challengeable under Article 9.3 (see findings in cases: ACCC/C/2004/6, Kazakhstan, para 30, ACCC/C/2006/18, Denmark, para 30ACCC/C/2008/31, Germany, para 64).

In light of the above, it can be considered that the implementing regulations fall within the scope of the "executive nature" of the action as they are intended to implement the requirements of the laws under which they are issued.

The conclusion that implementing regulations are subject to the requirements of Article 9.3 of the Convention is not precluded by the fact that they are generally applicable legal acts. The Aarhus Convention Compliance Committee, in a case concerning Bulgaria, ruled on whether the provision of Article 9.3 should apply to a local development plan, which, under Bulgarian law, is a binding act – and ruled that it did (findings in case ACCC/C/2011/58, para. 64).

The interpretation presented above is also supported by the Polish version of Article 2.2 of the Convention, which refers only to 'legislative' (and not 'law-making') action, suggesting that the exception covers only laws adopted by parliament, but no longer other universally binding legal acts such as executive orders.

In conclusion, it must be considered that the above described documents, adopted under Polish law, having the character of generally applicable legislation do not fall under the exception in Article 2.2 of the Aarhus Convention. At the same time, as acts designed to give effect to the objectives of environmental laws, they are covered by the requirement in Article 9.3 of the Convention.

All the more, the documents adopted by resolution of the Council of Ministers are not covered by the exception provided in Article 2.2 of the Convention – insofar as they are intended to implement the environmental objectives of the Acts. Such resolutions – according to Article 93(1) of the

Constitution – "are of an internal nature and are binding only on organisational units subordinate to the body issuing these acts".

Currently under Polish law neither executive regulations nor resolutions of the Council of Ministers are subject to a review procedure that could be initiated by members of the public – and it is hard to imagine an amendment to the legislation that would allow such acts to be subjected to the scrutiny of administrative or common courts.

However, it should be borne in mind that the requirement of Article 9.3 of the Convention can be fulfilled by providing access to an administrative or judicial review procedure. It is therefore not necessarily a right of access to a court as ensuring an administrative appeal procedure would also be sufficient to fulfil the requirement of Article 9.3. The solution concerning the administrative appeal procedure against acts adopted by the EU institutions was introduced in Title IV of the so-called Aarhus Regulation (Regulation No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies – Articles 10 and 11 of that Regulation as amended). An analogous mechanism could therefore also be considered in Poland. How to adapt it to Polish conditions requires more discussion and consideration.

5. Proceedings before the Aarhus Convention Compliance Committee

The issue of access to justice regarding plans and programmes in Poland is currently the subject of three separate cases pending before the Aarhus Convention Compliance Committee: ACCC/C/2016/151, ACCC/C/2017/154, ACCC/C/2018/158. The first of these cases concerns air protection plans and certain other plans adopted by local authorities, the second case concerns forest management plans, and the third case covers a whole range of environmental plans adopted both by the three levels of local government and by regional government bodies as well as by the administration at the central level (covering not only forest management plans and air protection plans, but, among others, also plans in water management, plans for the protection of areas protected under the Nature Conservation Act, plans concerning waste management and a number of others).[5]

[5] Documentation of all these cases is available on the Committee's website: https://www.unece.org/env/pp/cc/com.html.

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