Reply to the questions of the Aarhus Convention Compliance Committee in case ACCC/C/2016/151

1. ***Please provide the text in Polish of the following provisions, together with an English translation thereof:***
   (a) Article 91 (9) of the Environmental Protection Law of 27 April 2001;
   (b) Article 50 (1) of the Act of 30 August 2002 on Administrative Court Proceedings;
   (c) Articles 3 (1) and 44 (3) of the Act on Act on access to information on the environment and its protection, public participation in environmental protection and environmental impact assessments;
   (d) Articles 3 and 24 (1) of the Act of 13 April 2007 on Preventing Environmental Damage and the Remediation of Environmental Damage;
   (e) Article 63 of the Constitution.

   Please find the translation of the relevant provisions enclosed in appendix 1 to this reply.

2. ***Please provide examples of judgments where an environmental organization was granted access to justice before an administrative court to challenge a local air quality plan which it alleged contravened national law relating to the environment. In addition to the full text in Polish of each of judgment, please provide an English translation of its relevant parts.***

   Please be informed that in order to examine the case law in the scope specified by the question in detail the Ministry of Climate and Environment applied to the competent administrative authorities for reviewing the cases that have been pending before the administrative courts and referred to the air quality programmes. As soon as the Ministry collects information concerned, it will promptly submit it to the Committee.

   It should be explained that despite the generally accessible databases of administrative case law are present, there are no databases dedicated only and exclusively to the environmental protection case law, which makes the search time consuming.

3. ***Please clarify whether a local air quality plan or programme constitutes a "decision requiring public participation" under article 44 (3) of the Act of 3 October 2008 on access to information on environment and its protection, public participation in environmental protection and on environmental impact assessments.***

   The air quality programmes under Article 91 of the Act of 27 April 2001 – Environmental Protection Law, hereinafter referred to as the "EPL", are adopted by the Assembly of the Voivodeship in the form of a resolution. Thus, the air quality programmes are not the decisions in the meaning of Article 44(3) of the Act of 3 October 2008 on access to information on environment and its protection, public participation in environmental protection and on environmental impact assessments (hereinafter the "EIA Act").

4. ***Please provide the text of the relevant legislative provisions, if any, imposing a requirement that local air quality plans and programmes undergo mandatory strategic environmental assessment in accordance with the Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.***

   With regard to environmental impact assessment of the air quality programmes (AQPs), acting under Article 39(1) with regard to Article 54(2) of the EIA Act and pursuant to Article 91(1) of the EPL, the authority in charge of preparation of AQP publishes information on commencement of preparation and of the strategic environmental assessment of the following projects:

1) air quality programme due to exceeded values of air quality standards;
2) prognosis of environmental impact of the air quality programme for the zones in which the exceeded values were recorded, hereinafter referred to as the "prognosis".

Article 39 of the EIA Act states as follows:
1. An authority preparing the draft document requiring the public participation publishes without undue delay information on:
1) commencement of preparation of draft document and its subject-matter;
2) opportunities to familiarise with the necessary case documentation and the place, in which it is available for inspection;
3) opportunity to submit comments and proposals;
4) manner and place of submitting comments and proposals, providing at the same time that the period for submission of such comments and proposals is at least 21 days;
5) authority competent to examine the comments and proposals;
6) transboundary environmental impact procedures, if pending.
2. The necessary case documentation, referred to in section 1(1) include:
1) assumptions or draft document;
2) appendices required by law and the statements of the other authorities, if available within the time period for submission of comments and proposals.

Article 54(2) of the EAI Act states as follows:
The authority preparing the draft provides the opportunity of public participation pursuant to Section III, Chapters 1 and 3, in the strategic environmental assessment.

Article 91(9) of the EPL states as follows:
The Voivodeship board, pursuant to the provisions on access to information on environment and its protection, public participation in environmental protection and on environmental impact assessments, provides the opportunity of public participation in the procedure aiming at preparation of the air quality programme.

The need to prepare of the a/m prognosis is driven by the fact that the AQP outlines the projects intended for implementation, which pursuant to the Regulation of the Council of Ministers of 9 November 2010 on the projects likely to significantly affect the environment are classified as the projects likely to significantly affect the environment.

With regard to the above, pursuant to Article 46(1)(2) of the EIA Act, there is a need to prepare the prognosis of environmental impact. The legal basis for performance of such prognosis is Article 51(1) of the EIA Act. These provisions transpose Articles 4 and 5 of the Directive 2001/42/EC.

The scope of prognosis under Article 5(2) of the Act referred to above should be agreed with the Regional Director for Environmental Protection and the State Regional Sanitary Inspector competent for the location of the zones referred to above i.e. the area covered by the air quality programme.

Article 46(1)(2) of the EIA Act states as follows:

The strategic environmental assessment must be performed for the draft:

2) policy, strategy, plan and programme in the field of industry, energy sector, transport, telecommunications, water management, waste management, forestry, agriculture, fisheries, tourism and land use, prepared or adopted by the administrative authorities, laying down the framework for the subsequent implementation of the projects likely to significantly affect the environment;

Article 51(2) of the EIA Act states that:

Prognosis of environmental impact:

1) contains:

a) information on the content, key objectives of the drafted document and its links with the other documents,

b) information on the methods used for preparation of prognosis,

c) proposals on the anticipated methods of analysis of the effects of implementation of the provisions of the drafted document and its frequency,

d) information on the potential transboundary environmental impact,

e) non-technical summary,

f) statement of the author and in the case in which the projection is prepared by a team of authors – of the team leader, of compliance with the requirements referred to in Article 74a(2) constituting an appendix to the prognosis,

g) date of preparation of the prognosis, name, surname and signature of the author and in the case in which the projection is prepared by a group of authors – name, surname and signature of the team leader and names, surnames and signatures of the team members;

2) determines, analyses and assesses:

a) the existing environmental status and the potential changes of this status, if the drafted document is not implemented,

b) environmental status at the areas covered by the projected significant impact,

c) the existing issues of concern related to environmental protection of significance from the perspective of implementation of the drafted document, including in particular linked with the areas protected under the Act of 16 April 2004 on nature conservation,

d) the environmental protection goals established at the international, community and national level, of importance for the drafted document, and the methods, in which these goals and other environmental issues of concern were considered in drafting the document,

e) the envisaged significant effects, including direct, indirect, secondary, cumulative, short-term, medium-term and long-term, permanent and temporary and positive and negative effects on the goals and object of protection of the Natura 2000 site and integrity of this site, as well as on the environment, including in particular on:

- biodiversity,

- humans,

- fauna,

- flora,

- water,

- air,

- land surface,

- landscape,

- climate,

- natural resources,

- historical objects,

- material assets,

- with consideration to the interactions between these environmental components and between the impacts on these components;

3) presents:

a) the solutions aiming at prevention, limitation or environmental compensation of the negative environmental impacts, which may result from the implementation of the drafted document, including in particular on the goals and object of protection of the Natura 2000 site and integrity of this site,

b) considering the goals and geographical range of the document and the goals and object of protection of the Natura 2000 site and integrity of this site – the solutions alternative to the solutions included in the drafted document along with justification of their choice and the description of methods of assessment leading to this choice or explanation of absence of alternative solutions, including specification of the existing difficulties resulting from technical deficiencies of contemporary knowledge gaps.

Upon providing the opinion on both documents, the summary of comments with information on whether there are considered whether not and relevant justification is prepared. Information on public participation in this process is also provided. Pursuant to Article 39(1)(2-5) of the EIA Act and Article 17(4) of the EPL, the documents subject to public consultation are made available in the electronic form in the Public Information Bulletin of the Marshall Office competent for a given voivodeship and made available for inspection in paper form in the seat of the competent Marshall Office. The comments and proposals can be submitted in writing at the address of this Office or orally to the record, or via electronic mail.

Article 17(1) and (4) of the EPL state as follows:

1. The implementing body of the voivodeship, district and commune, in order to implement the environmental protection policy, prepares the voivodeship, regional and commune environmental protection programmes, respectively, taking into account the objectives listed in the strategies, programmes and programme documents, referred to in Article 14(1).

4. The body referred to in section 1 provides the opportunity for public participation on principles and in the mode laid down in the Act of 3 October 2008 on access to information on environment and its protection, public participation in environmental protection and on environmental impact assessments (Journal of Laws of 2021, item 247, 784, 922, 1211, 1551 and 1718), in the procedure aimed at preparation of the environmental protection programme.

5. ***Please comment on the communicant's claim (page 5 of its update of 21 February 2022) that the requirement to have participated in the prior administrative proceedings in order to have access to justice under article 50 (1) of the Code of Administrative Proceedings is impossible to fulfil with respect to local air quality plans and programmes because there is no prior administrative proceeding which would result in an administrative decision.***

While replying to this question, one should, in the first place, recall the wording of the provision referred to above i.e. Article 50 of the Act of 30 August 2002 – Law on proceeding before administrative courts (Journal of Laws of 2022, item 329, 655), hereinafter referred to as the "LPAC".

Art. 50

§ 1. Any person having its legal interest lodging the complaint, a prosecutor, the Ombudsman, Ombudsman for Children and any community-based organisation in the scope of its statutory activity is entitled to lodge a complaint in the cases referring to legal interests of any other persons, provided that it participated in the administrative proceeding.

The standing to bring proceedings of the community-based organisation referred to in Article 50(1) of LPAC is a formal right (granted under the Act). The use of expression of "any person having its legal interest" in Article 50(1) of LPAC indicates that intention of the legislator to move away from the term of the "party" to the administrative proceeding. This means that even if a public administration authority incorrectly recognises a given entity as a party to the proceeding shall not deprive such entity of its right to lodge a complaint (appeal) to the administrative court against the final administrative decision issued in this proceeding (R. Hauser, M. Wierzbowski (ed.), *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz (Law on proceeding before administrative courts. Commentary)*, Warsaw 2021, Article 50, note 6).

A community-based organisation may participate in the proceeding:

1) in the scope of its statutory activity,
2) in the cases referring to legal interests of other persons,
3) if it participated in the administrative proceeding.

– provided that the following conditions are cumulatively met. *The community-based organisation may lodge a complaint when it participated to the administrative proceeding with the rights of a party. Thus, this must be the community-based organisation, which requested the initiation of an administrative procedure or permitting it to participate in the proceeding and this request was deemed justified by an administrative authority. Thus, in consequence, the basic requirement to recognise the right of the community-based organisation to lodge a complaint in the cases concerning the interests of the other persons is its participation – in effect of a decision of an authority – in the administrative proceeding with the rights of the party* (judgment of 4 July 2013, II OSK 1589/13).

However, one should note that in this case, the provision referred to above cannot be applied, since it refers to an administrative proceeding. The air quality plans are adopted by means of issuing of an act of local law rather than by means of an administrative proceeding. The procedure of adopting the air quality plans and short-term action plan can be appealed in a separate proceeding. To this situation the provision of 50(2) of LPAC applies, which states that:

Any other entity, entitled to lodge a complained under the acts, has the right to lodge a complaint.

This provision should be read in context of Article 90(1) or Article 91 of the Act of 5 June 1998 on the voivodeship self-government (Journal of laws of 2002, item 547) with regard to Article 91(3) and Article 91(1c) of the Act of 27 April 2001 – Environmental protection law (Journal of Laws of 2021, item 1973). Article 90(1) of the Act of 5 June 1998 on the voivodeship self-government states that:

Any person, whose legal interests or right were infringed by the provision of an act of local law issued in the case within the domain of public administration, may appeal against this provision to the administrative court.

Pursuant to Article 91 of the Act of 5 June 1998 on the voivodeship self-government:

1. The provisions of Article 90 shall apply accordingly when the voivodeship self-government authority fails to perform the activities ordered by law or, by the undertaken legal or actual activities, infringes the rights of third parties..

2. In the cases referred to in section 1 the administrative court may order the supervision authority to perform the necessary activities for the appellant.

Notwithstanding the above regulations, one should also mention Article 33(2) of the LPAC, according to which a community-based organisation may apply for permitting it to take part in the judicial and administrative proceeding as a participant:

§ 2. Taking part as a participant may be applied for also by the person, who did not participate in the administrative proceeding, if the result of this proceeding is related to its legal interest, and a community-based organisation, referred to in Article 25(4), in the cases of the other persons, if the case relates to the scope of its statutory activity. The decision is made by the court in camera. The decision on refusal to permit to participate in the case is appealable.

Article 25(4). The § 4. The community-based organisations, even if without a legal personality, have the judicial capacity in the scope of their statutory activity in the cases related to legal interests of the other persons.

Permitting a community-based organisation to participate in the judicial proceeding is governed by Article 33(2) of the LPAC, pursuant to which a community-based organisation may submit its participation in the judicial proceeding in the cases of the other persons, provided that the case falls within the scope of its statutory activity. With a view to Article 33(2) of the LPAC, each objective laid down in the statute granted or adopted in accordance with the applicable law in force may justify the request to permit to administrative proceeding, provided that the object of the proceeding falls within the scope of activities of the community-based organisation either with regard to the actions taken within the proceeding or with regard to its result. The objective listed in the statute of the organisation, which justifies the permit the community-based organisation to participate in the judicial proceeding may include, for example, propagation of specific activity or ideas, protection of tangible or intangible values, preventing the negative social or economic phenomena. Participation of the community-based organisation must correspond to the mission of administrative justice i.e. enhance implementation of the "judicial administrative control". The community-based organisation may act for one of the parties, strengthening its position in the proceeding, or perform its actions under the proceeding independently from the interests of neither of the parties, focusing only on compliance with the requirements of social interest (judgment of the Supreme Administrative Court of 23 September 2016, II OZ 972/16).

Importantly, according to the case law, the community-based organisation, which participated in the judicial proceeding in the case on the basis of the complaint (appeal) of the other entity against the resolution, is entitled to lodge a cassation appeal also when the appellant does not execute its right to appeal (judgment of the Supreme Administrative Court of 19 June 2019, II OSK 836/12).

There is also another applicable judgment of the Administrative Supreme Court, which refers to the appeal against the planning document (study of spatial development conditions and directions) however is applicable to the air quality plans by analogy:

The position that a community-based organisation, when submitting its participation to the proceeding in the case of appeal against the study of spatial development conditions and directions lodged by the other person, must demonstrate its legal interest in this proceeding is justified neither by the

provisions of the Act of 30 August 2002 – Law on proceeding before administrative courts (Journal of Laws No. 153, item 1270 as amended), nor by the Act of 8 March 1990 on the commune self-government (uniform text in Journal of Laws of 2001, No. 142, item 1591 as amended). Also the Act of 27 March 2003 on spatial planning and development (Journal of Laws No. 80, item 717 as amended) contains no separate regulations in this scope, which would exclude the application of Article 33(2) of the Law on proceeding before administrative courts with regard to community-based organisations (judgment of the Supreme Administrative Court of 26 April 2012, II OZ 338/12).

6. ***Please comment on the communicant's claim (page 5 of its update of 21 February 2022) that a local air quality plan or programme is not an activity within the scope of article 3 of the Act of 13 April 2007 on Preventing Environmental Damage and the Remediation of Environmental Damage, and thus cannot be subject to challenge under that Act.***

The air quality programme is not an activity. It is a plan in the meaning of the Aarhus Convention.

Article 24 of the Act of 13 April 2017 on preventing environmental damage and the remediation of environmental damage provides each entity with the opportunity to notify the competent authority of direct risk of environmental damage or of environmental damage. Pursuant to Article 3 of this Act, the activity posing the environmental risk includes the operation of installations requiring the integrated permit and the permit for emission of dusts and gases to air.

Referring to the previous correspondence, the Polish authorities intended to demonstrate that there is an existing mechanism providing the public with the opportunity to report environmental damage or direct risk of environmental damage caused by the installations referred to above.