

18 January 2023

Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance
Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10 Switzerland

████████████████████
██████████ Warszawa,
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By email: aarhus.compliance@un.org

Dear Ms Marshall

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Poland with the provisions of the Convention on access to justice in relation to forest management plans (ACCC/C/2017/154)

The Communicant would like to thank the Committee for this opportunity to comment on the letter sent by the Party concerned.

Given the advanced stage of proceedings of joint cases ACCC/C/2016/151, ACCC/C/2017/154 and ACCC/C/2018/158, the Communicant will strictly limit its observations to specific points raised in the letter of 10 November 2022 sent by the Party concerned.

It is the Communicant's reading of this letter that the Party concerned does not raise any points that relate to communication ACCC/C/2016/151; air quality plans and spatial plans are neither listed in the section titled "Exhaustion of domestic remedies", nor referred to further below in the document.

Moreover, ClientEarth will leave it to the Communicant of communication ACCC/C/2017/158 to make its observations on any related arguments. This does not mean that ClientEarth agrees with the arguments of the Party concerned in this regard.

The Communicant's observations below therefore only relate to communication ACCC/C/2017/154. The Communicant hopes that this additional information will facilitate the Committee's preparation of its draft findings on this case.

Forest Management Plans fall under Article 9(3) Aarhus Convention

First of all, the Communicant has consistently argued that access to justice in order to challenge forest management plans should be granted under Article 9(3) Aarhus Convention. The Party concerned in its recent letter submits that forest management plans are not initiated by a public authority, but by a forest owner.¹ However, this fact does not mean that forest management plans are not covered by Article 9(3) Aarhus Convention.

First, Article 9(3) Aarhus Convention applies to both acts of public authorities and private persons. Thus, even if forest management plans were purely private acts, they would be covered by Article 9(3) Aarhus Convention, so it is unclear where this argument takes the Party concerned.

Be that as it may, it follows from the facts that forest management plans are to be characterized as acts of a public authority. As the Party concerned itself states,² forest management plans are approved by the Minister of Climate and Environment. This approval is a necessary step in the legal procedure for the adoption of the forest management plan – without this approval, a forest management plan cannot be finalised.

As the Aarhus Compliance Committee has consistently held, Article 9(3) Aarhus Convention “*is applicable to all acts and omissions by private persons and public authorities contravening national law relating to the environment*”.³ Accordingly, as long as an act has been adopted, i.e. it is no longer in draft form, it must be susceptible to judicial review.

This also means for instance that the concept of “acts” is not limited to acts of general application.⁴ Therefore, the Party concerned’s submission that the forest management plan does not have a legal nature of a general act,⁵ does not exclude it from the material scope of Article 9(3) Aarhus Convention either.

Equally, plans and programmes are considered acts for the purpose of Article 9(3) Aarhus Convention.⁶ In essence, Article 9(3) Aarhus Convention “*does not allow Parties any discretion as to the acts or omissions that may be excluded from implementing laws*”⁷.

Therefore, the arguments presented by the Party concerned on the nature of the forest management plans do not exclude these acts from the material scope of Article 9(3) Aarhus Convention.

To find otherwise would ignore the basic logic of Article 9(3) Aarhus Convention, namely that all acts that have the potential to contravene national law related to the environment should be covered. The fact that forest management plans can contravene environmental law is demonstrated by the judgment of the Court of Justice of the European Union in case C-441/17 of April 17, 2018.⁸ The Court held that the adoption of an appendix to the forest management plan for the Białowieża Forest District, without ascertaining that that appendix would not adversely

¹ Party concerned’s letter of 10 November 2022, p. 4-5.

² Party concerned’s letter of 10 November 2022, p. 4.

³ ACCC/2005/11 (Belgium), para. 28; ACCC/C/2008/32 (European Union), Part II, paras 98-99.

⁴ ACCC/C/2008/32 (European Union), Part II, paras 51 and 94.

⁵ Party concerned’s letter of 10 November 2022, p. 3-4.

⁶ ACCC/C/2005/11 (Belgium) or ACCC/C/2011/58 (Bulgaria).

⁷ ACCC/C/2008/32 (European Union), Part II, paras 52 and 101.

⁸ ECLI:EU:C:2018:255.

affect the integrity of a Natura 2000 site, had contravened the requirements of Article 6(3) Habitats Directive,⁹ implemented by relevant Articles of the Nature Conservation Act, which is undoubtedly national law related to the environment.

In light of the foregoing, the Communicant submits that forest management plans fall under “all acts and omissions by private persons and public authorities contravening national law relating to the environment” as provided in Article 9(3) Aarhus Convention.

No effective judicial remedy to challenge forest management plans

As mentioned by the Party concerned, the decision issued by the Warsaw District Court on 30 July 2021 (case no. III 1697/190) and the decision issued by the Krosno District Court on 17 August 2022 (case no. I C 563/22) are not publicly available, thus the Communicant will comment only on the decision issued by the Warsaw District Court on 8 November 2021 (case no. IV C 264/18).

With regards to the submission made by the Party concerned in respect of allegedly available legal remedies in relation to forest management plans,¹⁰ the Communicant notes that the decision issued by the Warsaw District Court on 8 November 2021 (case no. IV C 264/18) constitutes **injunction relief (i.e., an interim measure)** (*decyzja o zabezpieczeniu powództwa*) issued in civil proceedings based on the alleged violation of Article 323 Environmental Protection Law ('EPL'). Therefore, it is a civil legal avenue which requires and is dependent on ongoing civil proceedings stemming from Article 323 EPL pending before the court.

The Communicant recalls that the legal remedy in form of the right to file a civil claim according to Article 323 EPL, has been already presented by the Party concerned in its Response to the Communication submitted in 2018.¹¹

Article 323 EPL states that:

- 1. Każdy, komu przez bezprawne oddziaływanie na środowisko bezpośrednio zagraża szkoda lub została mu wyrządzona szkoda, może żądać od podmiotu odpowiedzialnego za to zagrożenie lub naruszenie przywrócenia stanu zgodnego z prawem i podjęcia środków zapobiegawczych, w szczególności przez zamontowanie instalacji lub urządzeń zabezpieczających przed zagrożeniem lub naruszeniem; w razie gdy jest to niemożliwe lub nadmiernie utrudnione, może on żądać zaprzestania działalności powodującej to zagrożenie lub naruszenie.*
- 2. Jeżeli zagrożenie lub naruszenie dotyczy środowiska jako dobra wspólnego, z roszczeniem, o którym mowa w ust. 1, może wystąpić Skarb Państwa, jednostka samorządu terytorialnego, a także organizacja ekologiczna.*

- 1. Everyone who through unlawful impact on the environment is exposed to injury or upon whom the injury was inflicted may demand from the subject, who is liable for this danger or violation, restitution of the lawful state and the undertaking of**

⁹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2013/17/EU of 13 May 2013.

¹⁰ Party concerned's letter of 10 November 2022, pp. 6-7.

¹¹ Party concerned's response of 22 August 2018, p. 5.

preventive measures, especially through placing installations or equipment safeguarding against the danger or violation; in the case this is impossible or excessively difficult, it might be demanded that the activity causing the danger or violation be discontinued.

- 2. If the danger or violation concerns the environment as a public good, the State Treasury, territorial self-governing unit as well as an ecological organization can file the above mentioned claims.***

Article 323 EPL regulates two claims. The first is related to an immediate threat of harm caused by environmental impacts. The subject who feels threatened can demand restoration and preventive measures. This means that he is entitled to a restitution claim, which consists of restoring the environment to its previous state. Such a subject is also entitled to demand that preventive measures be taken. For this claim, the mere threat of environmental damage is sufficient, regardless of whether the damage actually occurs.

The second claim concerns damage to the environment that has already occurred. It is primarily restitutionary in nature. The entity that has damaged the environment can be obliged to restore the environment to its previous state and take preventive measures for the future.

The Communicant has already submitted that Article 323 EPL does not enable members of the public to challenge forest management plans before an independent court. It merely allows to demand preventive measures to avoid environmental harm or to claim remedial measures after the harm is done, with no impact on the form of the approved plan.¹²

Accepting the argument of the Party concerned would mean that Article 9(3) Aarhus Convention only permits environmental NGOs to bring claims when they allege the existence of an imminent or already materialised environmental damage. In light of the wording of the Convention and the Committee's findings listed above, this is clearly not a correct reading of the Convention.

The above should be sufficient to demonstrate that Article 323 EPL is insufficient to ensure full implementation of Article 9(3) Aarhus Convention as regards forest management plans.

Therefore, the Communicant considers that the assessment of the compliance with the requirements of Article 9(4) Aarhus Convention of the injunction relief of a remedy that is not compliant with Article 9(3) Aarhus Convention aims only at unnecessarily prolonging the proceedings before the Committee.

The Communicant submits that a civil claim according to Article 323 Environmental Protection Law does provide access to justice to challenge forest management plans if they contravene national law relating to the environment. This civil remedy has no impact on the form of the approved forest management plans.

¹² Communicant's update of 18 February 2022, p. 5.

Conclusion

In the communicant's view, the above information demonstrates that the claims included in the Communication should be declared admissible and upheld in its entirety.

Yours sincerely,










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