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Ms. Fiona Marshall
Secretary to the Aarhus Convention
Compliance Committee

by email: aarhus.compliance@un.org

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Poland with respect to public participation on farm and hunting plans and access to justice regarding plans relating to the environment (ACCC/C/2018/158)

Dear Ms. Marshall

The Communicant would like to comment on the recent judgment of the Court of Justice of the European Union in case C-432/21 (judgment of 2 March 2023 regarding access to justice re forest management plans in Poland) – in relation to the legal argumentation raised in the communication in case ACCC/C/2018/158.

The communication alleges that lack of access to justice regarding plans and programs relating to the environment (including forest management plans) constitutes non-compliance with Article 9(3) of the Convention.

The CJEU judgment refers to violation of Article 9(2) instead.

This is because the judgment concerns management plans only for those forests that are protected as Natura 2000 sites, and thus the decisions concerning these forests - including their management plans - are covered by the provisions of Article 6 of the Habitats Directive and thus, according to the CJEU case law, belong to the decisions referred to in Article 6(1)(b) of the Convention. Consequently, Article 9(2) of the Convention applies to decisions on these plans.

According to information provided by the Polish authority responsible for Natura 2000 - the General Director for Environmental Protection – 38% of state owned forests in Poland is covered by Natura 2000 sites¹. This means that the CJEU judgement does not apply to the remaining 62% of forests.

¹ <https://natura2000.gdos.gov.pl/natura-w-lesnictwie>

The arguments presented by CJEU in the aforementioned judgment might be probably applicable also to certain other plans covered by the communication ACCC/C/2018/158, e.g. to certain plans regarding water management or hunting plans – to the extent that it is possible to demonstrate that they are, using the wording of Article 6(2) of the Habitats Directive, “likely to have a significant effect” on a Natura 2000 site.

Having said that, the Communicant would like to point out that, according to the Aarhus Convention Implementation Guide, the application of Article 9(2) to a particular situation does not preclude the simultaneous application of Article 9(3)².

This is justified by the fact that the scope of application of the two provisions is different (decisions subject to Article 6 vs. acts and omissions by private persons and public authorities which contravene law relating to the environment) and also the group of persons having standing under the two provisions differs (members of the public concerned having a sufficient interest or maintaining impairment of a right vs. members of the public meeting the criteria laid down in national law, if any).

Also, the mere Article 9(3) indicates that it applies “in addition and without prejudice to the review procedures referred to in paragraphs 1 and 2”.

In the light of the above, the Communicant leaves it to the Committee to decide whether it will consider, and potentially confirm, also non-compliance with Article 9(2) with regard to those plans which – on the case-by-case basis – would be considered by the competent national authorities to be “likely to have a significant effect on a Natura 2000 site”.

In any case, the Communicant maintains the allegation of violation of Article 9(3) with regard to all plans and programmes covered by the communication, including those potentially affecting Natura 2000 sites.

The application of Article 9(3) to these documents does not require an examination of the impact of the plan in question on Natura 2000 sites.

On behalf of Pracownia na rzecz Wszystkich Istot,

Magdalena Bar

² The Aarhus Convention. An Implementation Guide, UNECE 2014, p. 193