



Minister of Climate and Environment Republic of Poland

Anna Moskwa

\$Znak pisma.JM
2589012.10151081.8143864
Warsaw, 25-05-2023

Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Room 429-2 Palais des Nations
CH-1211 Geneva 10
Switzerland

Dear Ms Marshall,

I am writing with reference to the letter of 22 March 2023 from the Communicant in Case ACCC/C/2017/154 to the Secretariat of the Aarhus Convention Compliance Committee.

The Ministry of Climate and Environment would like to address and provide further clarification on the assertions of the Communicant regarding the judgment before the Court of Justice of the European Union on 2 March 2023 in the Case C-432/21.

As regards the failure to comply with the obligations arising from Articles 6, 12, 13 and 16 of the Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora and Articles 4, 5 and 9 of Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds (derogations from the obligations arising from the directives granted for forest management activities, lack of possibility to challenge before a court the forest management plans) – the action brought before the CJEU (Case C-432/21), the provision which is the subject of the first allegation of the European Commission – Art. 14b(3) of the Forest Act of 28 September 1991 – was repealed as of 13 February 2022 as a result of the enactment of the Act of 17 November 2021 amending the Forest Act and the Nature Conservation Act. Furthermore, the issue mentioned above does not concern matters related to the Aarhus Convention.

With regard to the second allegation, the Court pointed out that the Republic of Poland had failed to fulfil its obligations under EU law: Article 6(3) of Directive 92/43, as amended by Directive 2013/17, in conjunction with Article 6(1)(b) and Article 9(2) of the Aarhus Convention.

The infringement procedure allows the Court to exercise control over the fulfilment of Member States' obligations under Union law. Thus, the judgment concerns Poland's obligations as a member of the European Union. The Court confirms the above distinction. It is also confirmed by the content of the information on the European Commission's portal, where it is indicated that the infringement of INFR(2018)2208 concerns the incorrect transposition of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora and Directive 2009/147/EC on the conservation of wild birds.

info [redacted]
www.gov.pl/klimat

ul. Wawelska 52/54, 00-922 Warszawa
Ministry of Climate and Environment

At this point, it should be pointed out that the Court, in paragraph 166 of its judgment in Case C-432/21, rightly concludes that Article 6(1)(a) of the Aarhus Convention provides that each party shall apply the provisions of that Article to decisions to authorise proposed projects listed in Annexe I. Under (b) of that Article, each party shall also apply the provisions of that Article, following its national law, to decisions on proposed projects not included in Annexe I which may have significant effects on the environment, and the parties shall determine in each case whether the proposed project is subject to those provisions.

Thus, the Court held that each State decides on a case-by-case basis in its domestic law whether proposed activities are subject to provisions such as those of Article 6.1(a).

The Court recognised the rights conferred on the parties to the Convention by Article 6(1)(b), pointing out in paragraph 175 that (...) the Aarhus Convention, and in particular Article 6(1)(b) thereof, leaves States parties a certain degree of discretion to examine the significant environmental impact of a project (...). Nevertheless, the Court considered that the Habitats Directive concretises the requirements to be formulated concerning the significance of the ecological implications in European nature conservation. Accordingly, the Court ruled on the interpretation of Article 6(3) of the Habitats Directive by accepting that adverse effects on the conservation objectives of European nature conservation areas should, in principle, be considered significant within the meaning of that provision of the Aarhus Convention.

In paragraph 179, the Court does not challenge the argument that the forest management plan is an internal act. This paragraph refers directly to paragraph 116 of the judgment, where we read: "The exclusively internal nature of acts approving forest management plans is confirmed by the case law of the Supreme Administrative Court (Poland)", and therefore the Court, in accordance with the position of Poland communicated to the Secretariat of the Aarhus Convention Compliance Committee in the letter of 13 October 2022, confirms that a forest management plan does not have the legal character of an act of a general nature and therefore, regarding the recommendation in Case ACCC/C/2014/105, does not constitute a typical plan or programme within the meaning of the Convention.

In conclusion, the Court pointed out in paragraph 176 that it is Article 6(3) of the Habitats Directive (...) which provides that the Republic of Poland is obliged to ensure that a court may request an adequate review of the substantive and formal legality of forest management plans within the meaning of the provisions of the Forest Act, in so far as those plans fall within the scope of Article 6(3) of the Habitats Directive.

It is also worth pointing out the difference between the issues in Case C432/21 and Case ACCC/C/2017/154

Case C432/21, in its basis, refers to an action by the European Commission seeking an examination of whether a Member State of the European Union had failed to fulfil its obligations, under Article 6(3) of the Habitats Directive, in conjunction with the second subparagraph of Article 19(1) TEU, Article 216(2) TFEU, Article 47 of the Charter of Fundamental Rights of the European Union, Article 6(1)(b) and Article 9(2) of the Aarhus Convention, in that it excluded the possibility for environmental organisations to challenge forest management plans before a court.

Meanwhile, Case ACCC/C/2017/154 concerns the alleged incompatibility with Article 9(3) of the Convention regarding access to justice to challenge forest management plans.

In this respect, it should be made clear that there is an essential difference between the wording of Article 9(2) and Article 9(3) of the Convention. Unlike the principles set out in Article 9(2), which require that the community concerned should be granted broad access to

justice, the provision of Article 9(3) sets out the need for access to an administrative or judicial proceeding to challenge acts or omissions. In the case of forest management plans, irrespective of whether these plans are general or internal legal acts, members of the public are guaranteed the possibility to challenge the actions of public authorities that violate provisions of national environmental law.

Your sincerely

Anna Moskwa
Minister of Climate and Environment
Ministry of Climate and Environment
/ – digitally signed/