Warsaw, 09-11-2022

MINISTER OF CLIMATE AND ENVIRONMENT

Anna Moskwa

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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 Mrs. Marshall,

in accordance with the position presented during the hearings before the Aarhus Convention Compliance Committee (hereinafter: the „Committee") in joined cases ACCC/C/2016/151, ACCC/C/2017/154 and ACCC/C/2018/158 and with further e-mail correspondence, the Ministry of Climate and Environment would like to refer to the statements of the Communicants which were presented during the hearings on 16th June and to provide further clarifications with regard to the individual cases.

Exhaustion of domestic remedies

In the opinion of The Ministry of Climate and Environment the exhaustion of domestic remedies by the Communicants remains a prerequisite for considering the communication admissible. Building only on the claims of the Communicants that, for a given administrative measure, an appeal procedure is not available, without providing the evidence for this fact, is insufficient.

The communications that were the subject of the hearing on 16 June concerned a number of plans and programmes, but in many cases the Communicants did not show in any way that the domestic appeal path had been exhausted. This situation takes place with respect to the following plans and programmes:

1. Waste management plan;
2. Multiannual hunting and breeding plan;

3. Annual hunting plan;
4. Water maintenance plan;
5. Flood risk management plan;
6. Drought risk management plan;
7. River basin management plan;
8. Natura 2000 area protection plan;
9. National park protection plan;
10. Landscape park protection plan;
11. Nature reserves protection plan.

Moreover, in the case of spatial management plans, the Communicant did not invoke any judgment that would allow him to show that it was he who used the domestic appeal path (exhaustion of local remedies rule). With regard to noise protection plans, the Communicant invoked only a judgment where the applicant was a natural person.

Forest management plans

It should be pointed out that forest management activity, including the forest management plan, which has been mentioned in Case ACCC/C/2017/154, is not explicitly indicated in Annex I to the Convention and therefore the Convention does not clearly indicate this type of activity, as such, in relation to which access to justice should be guaranteed.

The Committee, in point 127 of the above-mentioned findings and recommendations in Case ACCC/C/2014/105[1], pointed out that *„A typical plan or programme:*

a) *is often regulated by legislative, regulatory or administrative provisions;*

b) *has a legal nature of a general act (often adopted finally by a legislative branch);*

c) *is initiated by a public authority, which*

d) *provides an organized and coordinated system that sets, often in a binding way, the framework for certain categories of specific activities (development projects), and which*

e) *usually is not sufficient for any individual activity to be undertaken without an individual permitting decision"*

In connection with the above, it should be indicated that, with respect to point 127(a) of the above-mentioned document, a forest management plan, as defined in the Act of 28 September 1991 on forests (Journal of Laws of 2022, items 672, 1726), hereinafter referred to as the „Act on forests", is a basic forest management document developed for a specific object and containing a description and assessment of the forest condition as well as objectives, tasks and methods of forest management (Article 6(1)(6) of that Act).

In addition, according to Article 18(1) of the Act of forests: *A forest management plan is drawn up,*

[1] https://unece.org/sites/default/files/2021-12/ECE MP.PP C.1 2021 16 E.pdf

subject to paragraph 2, for 10 years, taking into account:

1) natural and economic conditions of forest management;

2) objectives and principles of forest management and methods of their implementation, defined for each forest stand and object being managed, including forests under special protection.

On the other hand, pursuant to Article 19(5) of the Act on forests, forest management plans **are drawn up by specialist units** or other entities of management performance.

Pursuant to the Regulation of the Minister of the Environment of 12 November 2012 on the detailed conditions and procedure for drawing up a forest management plan, a simplified forest management plan and an inventory of the forest condition (Journal of Laws, item 1302), *the preparation of a forest management plan for forests owned by the State Treasury is ordered by a forest owner, and in the case of forests managed by the State Forests National Forest Holding – by the director of the regional directorate of the state forests.*

In view of the above, and with reference to point 132 of the conclusions and recommendations in Case ACCC/C/2014/105, in the case of a forest management plan as referred to in Case ACCC/C/2017/154, it must be concluded that the preparation of forest management plans is governed by statutory regulations, however:

1. **this plan does not have a legal nature of a general act**. As it results from the definition indicated in the Act on forests, a forest management plan is a *basic forest management document developed for a specific object,* adopted for implementation pursuant to the following provisions of the Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessment, hereinafter referred to as the „EIA Act", [2]:
   a) Article 55(2) - *The project referred to in Article 46 and Article 47(1) may not be adopted provided there are the conditions referred to in Article 34 of the Act of 16 April 2004 on nature conservation, if a strategic environmental impact assessment shows that this project may have a significant negative impact on the Natura 2000 site*;
   b) Article 56 – *The provisions of this section also apply to entities developing the draft document, **which are not administrative bodies***) – for Case ACCC/C/2017/154, it is the director of the regional directorate of the State Forest National Forest Holding (who is not an ***administrative authority)***, hereinafter referred to as the „director of the regional directorate".

   In its decision of 17 October 2017, file ref. No. II OSK 2336/17[3], the Supreme Administrative Court clearly indicated that *the position contained in the judgment of the Supreme Administrative Court of 12 March 2014, file ref. no. II OSK 2477/12, that the approval of a plan*

[2] Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessment (consolidated text Journal of Laws 2022, item 1029, as amended)

[3] https://orzeczenia.nsa.gov.pl/doc/0E07A55164

is an internal activity undertaken in connection with the implementation of tasks of an ownership nature, thus, an activity from the sphere of the sovereign or proprietary capacity – and therefore it does not have a legal nature of a general act.

It should be noted that the approval of a forest management plan by the Minister of Climate and Environment based on the provisions of the Act of forests and referring to the above-mentioned judgment of the Supreme Administrative Court is declaratory, not constitutive (it does not introduce a new legal or factual status, but only confirms the actual state of forest land as of specific date) and defines the tasks to be implemented within 10 years of the plan's validity. Thus, the Minister approves a forest management plan, which, in fact, forms the basis of forest management from the beginning of its validity period, thus authoritatively confirms the existence and scope of the document, which has already been in force under legal provisions.

Declaratory decisions may be issued at any time, as they do not create new legal statuses, but only confirm their existence. In this regard, a declaratory decision is similar to a certificate which only states the existence of a certain factual or legal situation established before.

Thus, the legislator granted broad powers to a head of forest district as regards the possibility of adjusting the implementation of a forest management plan to the current situation, including responding to the forest condition changing, e.g., as a result of disasters, while maintaining the supervision of relevant units and authorities, i.e. the director of the regional directorate, the General Director of the State Forests, or the minister in charge of the environment.

Therefore, the lack of approval of a forest management plan by the Minister of Climate and Environment does not constitute an obstacle to a head of forest district to fulfill the obligation to conduct forest management and respond to the forest condition, and the above activities are implemented in compliance with the applicable legislation, including the provisions of the Act of 16 April 2004 on nature conservation and plans of conservation tasks for Natura 2000 areas.

2. **It has not been initiated by a public authority, but by a forest owner**. In addition, forest management plans are drawn up by specialist units or other entities of management performance.

   In the case of a forest management plan referred to in Case ACCC/C/2017/154, the plan is initiated, by order on behalf of a forest owner (the owner is the Polish State Treasury) – by the director of the regional directorate of the State Forests, while the plan itself is drawn up by a specialist unit selected as part of the tendering procedure.

   In addition, like the plans described in point 134 of the conclusions and recommendations in Case ACCC/C/2014/105, the forest management plan does not provide an organised and coordinated system that sets the framework for certain categories of specific activities (investment projects), but rather defines the forest condition in the given area, objectives,

priorities and tasks for the State Treasury – the forest owner.

As for Case ACCC/C/2014/105, the Committee considered that a document of this nature is not a plan or programme within the meaning of the Convention.

In conclusion, based on an analysis of Case ACCC/C/2014/105 and the Committee's findings presented as part of this case, it must be stated that the forest management plan referred to in Case ACCC/C/2017/154 is not a plan or programme within the meaning of the Convention.

Hunting plans

Just like in the case of the forest management plan, a multiannual hunting breeding plan or an annual hunting plan are not activities listed in Annex I to the Aarhus Convention. Therefore, in view of point 127 of the findings and recommendations in Case ACCC/C/2014/105, in the case of annual hunting plans and multiannual hunting breeding plans referred to in Case ACCC/C/2017/158, the following reference to the criteria invoked by the Committee should be presented.

The preparation of both an annual hunting plan and a multiannual hunting breeding plan is governed by the statutory regulations, however:

1. **this plan does not have a legal nature of a general act –** in accordance with the Act of 13 October 1995 – *Hunting Law* (Journal of Laws of 2022, item 1173), an annual hunting plan is drawn up by a lessee of a hunting district, after consulting competent heads of the municipality (mayors of a town or city) and a competent agricultural chamber and is subject to approval by a competent head of forest district of the State Forests National Forest Holding in consultation with the Polish Hunting Association. Where a hunting district is situated within the boundaries of more than one forest district, an annual hunting plan for this district is approved by a head of forest district competent for the area in which the largest part of this district is situated. An annual hunting plan for a hunting district: 1) bordering on a national park is additionally reviewed by the director of this national park; 2) in which a breeding section is located, is additionally reviewed, with regard to acquiring the muskrat and Eurasian coot, by persons authorised to fish, referred to in Article 4(1) of the Act of 18 April 1985 on inland fishing (Journal of Laws of 2022, item 883).

   Pursuant to the Act – *Hunting Law*, a multiannual hunting breeding plan is drawn up by the director of the regional directorate, in consultation with competent marshals of the voivodeships and the Polish Hunting Association, after consulting the competent agricultural chambers. A multiannual hunting breeding plan is approved by the Director General of the State Forests National State Holding. A multiannual hunting breeding plan is drawn up for adjacent hunting districts with similar natural conditions (breeding area), for a period of 10 consecutive hunting years.

2. **It has not been initiated by a public authority, but, in the case of annual hunting plans, by**

a lessee of a hunting district, and in the case of multiannual hunting breeding plans – by the director of the regional directorate.

An annual hunting plan is a document of hunting management, drawn up for a specific object, specifying the methods of conducting hunting management in relation to game animals being in a free state owned by the State Treasury (Article 2 of the Act – Hunting Law). Therefore, an annual hunting plan is a type of internal technical documentation, drawn up by competent and experienced specialists, and addressed to persons legally obliged to implement, in a given area, permanently sustainable hunting management on the property of the State Treasury. Thus, the development of annual hunting plans is an internal activity undertaken in connection with the implementation of tasks of an ownership nature. The basis for conducting hunting management in the Republic of Poland are the above-described annual hunting plans and multiannual hunting breeding plans. Both of these plans are drawn up separately for each hunting district, except that a multiannual hunting breeding plan is drawn up for a breeding area, which consists of from several to several hundred hunting districts (currently, there are 147 breeding areas, in which there are 5,100 hunting districts).

It should be noted that the procedure for drawing up annual hunting plans excludes any possibility of making a forecast of their environmental impact or conducting a procedure with the participation of the public, as, after carrying out the above-mentioned procedures, an annual plan would be largely out-of-date. An annual hunting plan is submitted no later than by 21 March of each year and the basis for its development is an annual inventory of game animals as of 10 March of each year, while it is necessary to bear in mind that the hunting year begins on 1 April and lasts until 31 March of the following year.

An annual hunting plan is a document of hunting management, drawn up for a specific object, specifying the methods of conducting hunting management in relation to game animals being in a free state owned by the State Treasury. Therefore, an annual hunting plan is a type of internal technical documentation, drawn up by competent and experienced specialists, and addressed to persons legally obliged to implement, in a given area, permanently sustainable hunting management on the property of the State Treasury. Thus, the development of annual hunting plans is an internal activity undertaken in connection with the implementation of tasks of an ownership nature.

Summing up, based on the analysis of Case ACCC/C/2014/105, it should be concluded that the annual hunting plans and multiannual hunting breeding plans referred to in Case ACCC/C/2017/158 are not plans or programmes within the meaning of the Convention.

In addition, it should be noted that the Aarhus Convention sets out a framework for, *inter alia*, the participation of the public in environmental decisions making as well as their cancellation or appealing

against them. However, each state – party to the Convention may specify the possibilities of appealing against documents not included in the scope of the Convention either.

In Poland, there is an effective appeal path, which results in suspending forest management activities. The basis is Article 177 of the Constitution of the Republic of Poland, which states that *the common courts shall implement the administration of justice concerning all matters save for those statutorily reserved to other courts* (including administrative courts).

The fact that forest management is an area falling within the competence of common courts is confirmed by the decision of the District Court in Warsaw 4th Civil Division of 8 November 2021 – case file No. IV C 264/18, which can be found on the Portal of Decisions of the District Court in Warsaw http://orzeczenia.warszawa.so.gov.pl/content/$N/154505000001203_IV_C_000264_2018_Uz_2022-06-10_001, prohibiting the State Treasury to harvest wood in the future (conducting forest management on the basis of forest management plans) in the Białowieża, Browsk and Hajnówka Forest Districts in the areas specified in the decision. A similar decision was issued by the District Court in Warsaw, 3rd Civil Division on 30 July 2021 – case file No. III 1697/19, prohibiting the felling of treestands with the use clear-cutting (forest management on the basis of a forest management plan) in the forest areas located within the Łochów Forest District, marked as sections forest divisions No. 199, 200, 211, 212, 213, Łochów area. The last example of a decision of this kind is the decision issued by the District Court in Krosno, 1st Civil Division, of 17 August 2022 – case file No. I C 563/22 ordering to suspend tree felling (timber harvesting) in the Lutowiska Forest District in the specific area (Lutowiska Forest District, Hulskie Forest Unit, forest division No. 73). The last two decisions are currently not yet available in publicly available lists. In order to make them available, the Ministry of Climate and Environment would have to apply to competent entities for permission to transfer and make public the content of the decisions. If the Committee reports such a need, the Ministry may take steps to make the above-mentioned documents available. At the same time, it should be indicated that all the above-mentioned decisions are similar in nature.

As a rule, the effects of a civil lawsuit essentially depend on the content of the suit prepared by the claimant and the expectations expressed in that suit. **In this context, it should be remembered that the above-mentioned decisions prohibit the implementation of a forest management plan in part and it is due to the fact that such petition has been requested by the claimant, not due to the restrictions imposed by law.**

In all the above-mentioned cases, the courts could have not therefore been able to refer directly to the forest management plan, because claimants in their statements of claims did not submitted such requests.. However, in each of the above-mentioned cases, the courts granted the claimants' requests for security in their entirety.

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Minister of Climate and Environment
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