Position paper of the Ministry of Climate and Environment on the response of the Communicant to the questions of the Aarhus Convention Compliance Committee in case no. ACCC/C/2018/158

Response to question no. 5 - Please clarify what, if any, barriers exist for individuals or non-governmental organizations (NGOs) to have access to justice to challenge plans contained in regulations before the Constitutional Court. Please explain why, in your view, these barriers do not meet the requirements of article 9 (3) of the Convention.

Firstly, it should be pointed out that the nature of plans adopted by way of an regulation of a minister implies that the norms contained therein do not, in principle, contain provisions concerning constitutional rights and freedoms. Indeed, in accordance with the Polish constitutional order, constitutional rights and freedoms represent a statutory matter. The fact that the possibility for natural and legal persons to lodge a constitutional complaint against the plans concerned is essentially limited is only a consequence of the foregoing.

In accordance with the case-law of the Constitutional Tribunal (CT), the construction of a constitutional complaint implies that the purpose of this legal remedy is the protection of constitutional rights and freedoms vested in an individual, infringed as a result of the issuance of a final decision on the basis of a provision the constitutionality of which is challenged. To ensure the effective lodging of a constitutional complaint, a close relationship must exist between the content of the decision, the challenged provision of the normative act and the charged incompatibility of that provision with a specific constitutional norm (decision of the CT of 30 January 2020, Ts 134/18). A constitutional complaint requires an indication of the provisions that lead to a violation of constitutional rights or freedoms of the complainant and, at the same time, constitute the basis of the final decision of a court or public administration authority (decision of the CT of 16 October 2020, Ts 171/18).

A categorical statement by the Communicant that a non-governmental organisation would not be authorised to lodge a constitutional complaint under any circumstances seems inappropriate. Such organisations are not ex officio excluded from the group of entities that can lodge a constitutional complaint. The Communicant has not indicated any rulings that would allow an assessment of how the procedure by which it has exhausted domestic remedies has been followed in this regard. The mere fact that the Communicant interprets the legislation in a certain way can hardly provide a basis for concluding that the exhaustion of the local remedy procedure did not necessarily occur in the case of the plan concerned. It forms a part of the broader problem of exhaustion of the appeal procedure that the Ministry of Climate and Environment highlighted in earlier correspondence in case ACCC/C/2018/158. The exhaustion of the appeal procedure is a prerequisite for assessing whether and how access to justice has been ensured in a particular case. Consideration of this issue cannot be purely theoretical. The foregoing comments also apply to the possibility of lodging a constitutional complaint.

At this point, it should be noted that the Communicant's response does not address the second part of the question posed by the Aarhus Convention Compliance Committee (i.e. “Please explain why, in your view, these barriers do not meet the requirements of article 9 (3) of the Convention.”). Consequently, the Ministry of Climate and Environment will not refer to this part of the question in this position paper either.

Response to question no. 6 - Please provide your comments on the Party concerned position that each of the following plans are acts of generally applicable law, falling within article 8 of the Convention, and are not acts by public authorities under article 9 (3) of the Convention:

a) **Noise management action plans;**
b) **River basin management plans;**
c) **Flood risk management plans;**
d) **Drought management plans;**
e) **Natura 2000 area protection plans;**
f) **National park protection plans.**

Referring to the plans mentioned in items b-f of question 6, it should be indicated that they are adopted by means of a ministerial regulation and therefore constitute the so-called "executive regulations" referred to in Article 8 of the Aarhus Convention. According to the literal interpretation of the provisions of the Aarhus Convention, presented in the response of the Minister of Climate and Environment of 22 April this year to the questions of the Aarhus Convention Compliance Committee, the acts in question do not constitute the activities referred to in Article 9(3) of the Aarhus Convention. The provisions of Article 8 and Article 9(3) of the Aarhus Convention separately address implementing acts and public authority actions, and therefore both categories of plan documents referred to in these provisions should be treated separately.

Moreover, the analysis carried out by the Communicant with regard to the qualification of the plans mentioned in items a-f of question No. 6 as plans referred to in Article 7 of the Aarhus Convention, upon the adoption of which public participation must be ensured, appears to extend beyond the scope of the Committee's question and is irrelevant in the context of responding to that question.

Referring to subparagraph 15 of the Communicant's response, which quotes the provisions of the Act of 20 July 2017 - Water Law (Journal of Laws of 2023, item 1478, as amended), hereinafter referred to as the "Water Law", namely Article 318(1)(22), which indicates that the provision concerned implies that the River Basin Management Plan sets the framework for specific projects, I provide the following additional explanation.

It should be indicated that the list referred to in Article 318(1)(22) of the Water Law, (i.e. a list of investment projects and activities that may contribute to the failure to achieve good water quality or deterioration of good water condition meeting the conditions referred to in Article 68 of the aforementioned Act, including the justification for meeting these conditions) is linked with Articles 323 and 435 of this Act. It is a list of measures with an issued water permit assessment or with a refusal of an issued water permit decision. This means that water management plans do not establish the need for these measures, but provide external information on the impact of these measures on the achievement of environmental objectives. It is a source material rather than an output for the water management plans. Water management plans do not prejudge the implementation of investment projects and activities included in the list referred to in Article 318(1)(22) of the Water Law.

In the Polish legal system, it has been assumed that the analysis of the compliance of a planned activity, investment or project with the environmental objectives for uniform water bodies (UWB) is, among others, an element of the administrative proceedings on water permit assessments (Article 429 of the Water Law), water permits (Article 396(1) of the Water Law), decisions on environmental conditions (Article 81(3) of the Act on the provision of information on the environment and its protection, participation of the public in environmental protection and environmental impact assessments

(Journal of Laws of 2023, item 1094, as amended), hereinafter referred to as "the EIA Act"). Each case of implementation of an activity, investment or project that may pose a risk to the environmental objectives of a UWB requires verification and approval in the form of an administrative decision, in the absence of which it cannot be implemented.

The indication of information about a project, an activity or an investment in the list of investments and activities referred to in Article 318(1)(22) of the Water Law does not waive the necessity to obtain administrative decisions required by law for the implementation of the project (activity, investment). It means that the analysis of the compliance of the planned activity, investment or project with the environmental objectives of the UWB, including the reasoning of the premises referred to in Articles 66 - 68 of the Water Law, implementing Article 4(7) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, can be carried out only as part of the administrative proceedings concluding with the issuance of a decision on environmental conditions or a water permit assessment referred to in Article 428 of the Water Law.

Referring to paragraphs 16 and 17 of the Communicant's response regarding flood risk management plans (FRMPs) and drought management plans (DMPs), which also indicate that these documents set a framework for specific projects, I present the following additional explanations.

The DMPs and the FRMPs are planning documents, published and updated in a 6-year cycle, in the form of an regulation by the minister competent for water management. As part of the strategic environmental impact assessment, an analysis of the document's compatibility with other documents is carried out in accordance with Article 51(2)(1)(a) and (2)(d) of the EIA Act. On the other hand, draft plans are subject to semi-annual public consultations in accordance with Article 173(8) and Article 185(5) of the Water Law, carried out in accordance with the procedure defined by the provisions of the EIA Act. During the consultation period all stakeholders may submit comments and proposals to the draft document. Also in this case, the inclusion of any measure in the above-mentioned plans does not prejudge its implementation. This requires separate administrative decisions.

Protection plans for national parks contain indications concerning, among others, the designation of sites for commercial, manufacturing or agricultural activities and the indication of nature protection requirements, in particular for general plans of municipalities and local spatial development plans. According to the Communicant, this makes the protection plans for national parks set the framework for certain projects, which justifies the possibility to appeal against these documents.

However, it should be noted that restrictions concerning the designation of sites for certain activities, as a rule, refer to real estate in perpetual usufruct of a national park or real estate owned by this park. Indeed, a regulation cannot constitute a limitation of citizens rights. Only a statute has such a power. The regulation is issued in order to implement this Act. Consequently, national park protection plans do not have the effect of limiting the rights of individual citizens. Nature protection arrangements refer to acts of local law rather than decisions targeting individuals. A protection plan for a national park does not provide a legal basis for issuing individual acts of law (decisions) with respect to individual recipients.

In addition, it is worth noting that the framework for the implementation of certain projects is defined, for example, by the Act of 16 April 2004 on nature protection (Journal of Laws of 2023, item 1336, as amended), which, for example, in its Article 15(1), defines a catalogue of prohibitions in force in the national park. Such a condition undoubtedly affects the possibility of implementing certain projects and thus sets their framework (defines the framework for the implementation of the project). Both the Act and the regulation establishing the protection plan for the national park are acts of

generally applicable law and thus should be treated as generally applicable normative acts as referred to in Article 8 of the Aarhus Convention.

The rationale presented by the Communicant, according to which a Party to the Convention chooses or may be inclined to choose the form of an regulation for the plan so as it does not fall under Article 9(3) of the Convention and thus avoid the consequences resulting therefrom, is incorrect. First of all, the Aarhus Convention does not indicate that Parties are obliged to prepare plans of a certain type. What kind of plans a Party adopts remains at its discretion. Secondly, it is not the name that determines the nature of a particular act, but precisely the form in which that act is adopted. Therefore, if a Party, in accordance with its own will, adopts a regulation to which it assigns the name of a plan or a programme, in this case one cannot refer to a deliberate action aimed at circumventing the provisions of the Convention, especially as the regulations constituting them were drafted several years before Poland ratified the Aarhus Convention (i.e. in 2004).

In paragraph 29 of its response, the Communicant states that noise management plans are not generally applicable acts of law. However, the legislation clearly indicates that they are such acts. As indicated in the response of 22 April, this programme under Article 119a(9) of the Act of 27 April 2001 - Environmental Protection Law is adopted by the local parliament [Polish: Sejmik Województwa] by way of a resolution. It is a plan within the meaning of Article 84 (1) of the Act of 27 April 2001 - Environmental Protection Law (Journal of Laws of 2024, item 54) and therefore also an act of local law.

At this point, in order to supplement the response of the Ministry of Climate and Environment to the Committee's questions of 22 April this year, it should be pointed out that the enumeration in the last paragraph of Part 1 of the response should include all plans that are acts of local law and adopted by regulation. Thus, the enumeration also refers to the local spatial development plan, the air quality action plan including short-term action plan and the noise management plan (plans marked in the Committee's letter of 13 May 2022 with letters (a), (d) (e) and (f) respectively).