ClientEarth

Communication to the Aarhus Convention Compliance Committee

November 2017

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II. STATE CONCERNED

Republic of Poland.

III. FACTS OF THE COMMUNICATION

1. The subject of this communication is the lack of proper implementation of Art. 9(3) of the Aarhus Convention with relation to Forest Management Plans (FMPs) – the most important administrative documents regulating the management of state-owned forests in Poland.

2. In Poland around 80% of forests are owned by the state and around 30% of the country is covered by forests. This means that FMPs form a basis for the management of a quarter of the territory of Poland.

3. Polish law requires FMPs to be prepared for each Forest District every 10 years and states that FMPs need approval by the Minister of the Environment. Until the FMP is approved by the Minister it cannot be applied. The act of approval is in fact the final act in the whole process by which the FMP would eventually entry into force and constitute a legal basis for forestry activities in the particular Forest District. Therefore, in order to challenge the FMP it would be necessary to invoke as the basis not the FMP itself but the act constituting its legal existence.

4. However, there are no administrative and judicial remedies through which individuals or NGOs can challenge the legality of the FMPs.

5. The facts from which this communication arose are related to a controversy surrounding increased logging in Bialowieza Forest in north-eastern Poland – a Natura 2000 and UNESCO Natural World Heritage site – however, the problem is systemic.

6. On 25 March 2016, the Minister of Environment approved an annex to the FMP of the Bialowieza Forest District. The annex amended the FMP itself, which had been approved in 2012. With this decision, the limit on timber harvest for the 2012-2021 period was raised to 188 000 m^3. This is a threefold increase of the limit previously set for this Forest District and will lead to increased logging in the Natura 2000 site which is very likely to adversely affect this precious ecosystem.

7. Bialowieza Forest District falls within a Natura 2000 site – Bialowieza Forest (PLC 200004). The site was chosen for protection by Poland and was designated as a Natura 2000 site in 2004 because it is home to a number of species and habitats which are protected under the EU Habitats Directive.

8. Due to its status as a Natura 2000 site, special rules apply when projects are planned to take place in that area.

9. An appropriate assessment, required by Art. 6(3) of the Habitats Directive and Article 33 of the Polish Nature Conservation Act, must be conducted before any steps likely to adversely affect the integrity of the site are taken.

10. These rules were not followed by the Minister of the Environment when he approved an increase of the limit of timber harvesting in this area.

11. The act of approving the annex to the FMP (hereinafter: the 'decision') was challenged by Polish Ombudsman in the two-stage procedure before the Regional and the Supreme Administrative Court. However, the complaint filed by the Ombudsman has been recently dismissed by both Courts as explained in section VI.

12. The act could not be challenged in an administrative or judicial procedure for reasons further explained in section V of this communication. There is no legal procedure in which NGOs could ask for a revision of the act in terms of its compliance with national environmental law.

13. Therefore ClientEarth, as a member of the public concerned, is deprived of rights that should be conferred on it in accordance with Art. 9(3) of the Aarhus Convention.

IV. PROVISIONS OF THE CONVENTION ALLEGED TO BE IN NON-COMPLIANCE

Article 9, paragraph 3 of the Convention.

V. NATURE OF ALLEGED NON-COMPLIANCE

1. The non-compliance is systemic and general in its nature, as it relates to the failure to implement Article 9(3) of the Aarhus Convention properly.

2. Plans and programmes, such as FMPs, fall within the scope of Article 9(3) of the Convention and the public concerned should be able to challenge them in the court or in an equivalent impartial procedure (see ACCC/C/2005/11, ACCC/C/2011/58).

3. The Forest Act[1] is the Polish law which governs forest management of state-owned forests. According to Article 22 sec. 1[2] of the Forest Act, the approval of a FMP is to be granted by the Minister of the Environment. Amendments to the FMP are made under the same procedure as the approval for the FMP itself (Article 23 of the Forest Act[3]). It is worth noting that the Forest Act does not determine the legal form of this approval.

[1] The translation of the Forest Act of September 28th 1991 is provided in attachment number 5 (translation from Polish by National State Forests up to date until 2009).
[2] The translation of Chapter IV 'The Forest Management Plan' (Art. 18-25) of the Forest Act of September 28th 1991 is provided in attachment number 2 (translation from Polish by the correspondent).
[3] See attachment number 2.

4. The correct legal form of the approval of a FMP (and, by analogy, any annexes to the FMP) has legal consequences, as the competence of Polish administrative courts is limited to acts, situations and actions enumerated in the Law on Proceedings before Administrative Courts, (hereinafter LPAC).

5. There are contradicting interpretations on the correct legal form. Certain commentators argue for approval to be granted by administrative decision. Administrative decision is a type of an administrative act that defines rights and/or obligations of an individual external addressee. It can be a subject of a complaint lodged in an administrative court *(*Article 3 § 2 point 1 LPAC[4]).

6. The idea that FMPs are approved through administrative decisions is supported by Bartosz Rakoczy in his *Comments on the Forest Act*: "*Assent should be granted by administrative decision. There is no doubt what we are facing here is an individual case under the scope of public administration, in which rights and obligations of an individual are established. Therefore, control of decisions to grant or deny assent to the draft version of a plan needs to be assured via rules of procedure*"[5].

7. The judiciary, however, has presented a different opinion. As stated in the judgment of the Supreme Administrative Court (hereinafter SAC) of 12th March 2014 (citation II OSK 2477/12)[6], the approval of a FMP by the Minister of the Environment is not an administrative decision, but rather an 'internal act'.

8. Bialowieza District, being a property of the State Treasury, is managed by the State Forests Service (a state entity without legal personality), which provides legal representation of the Treasury in matters related to said property.

9. The State Forests Service falls under the supervision of the minister responsible for environmental protection. The State Treasury is a legal person that represents the interests of the state as proprietor (dominium, as opposed to imperium – the sphere of sovereign rights of state) – such as the state's interest in this particular case.

10. Since the forest in question is a state property, approval of the revised FMP by the Minister of the Environment is an internal act undertaken in the sphere of proprietary rights of the state (dominium)) deriving from the concept of superiority and subordination between state authorities and other state organizational units.

11. According to the judgement, the approval of a FMP also cannot be classified as "another type of public administrative act or decision concerning rights and duties stemming from the law" (Article 3 § 2 point 4 LPAC[7]), because every act or decision made under provisions of Article 3 § 2 point 4 LPAC has to be addressed to an external entity. This type of acts or

[4] The translation of Article 3 of the Law on Proceedings before Administrative Courts (LPAC) is provided in attachment number 3 (translation from Polish by the correspondent).
[5] B. Rakoczy, 'Comments on the Forest Act', Wolters Kluwer, 2011.
[6] The translation of the Judgment of the Supreme Administrative Court of 12th March 2014 is provided in attachment number 1 (translation from Polish by the correspondent with the most relevant sections highlighted).
[7] See attachment number 3.

decisions are also subject to revision by administrative courts, but since the SAC considered the approval of a FMP to be an internal act, the condition of addressing the act to an external entity is not fulfilled.

12. The LPAC describes the procedure used in administrative courts and Article 3 § 2 contains an exhaustive list of acts, decisions and facts that can be revised by administrative courts. "Internal acts" fall outside of the scope of Article 3 § 2.

13. Therefore the approval of the revised FMP under Article 22 of the Forests Act is not an administrative decision as defined by the Code of Administrative Procedure (hereinafter CAP). Nor it is another public administrative act or decision concerning rights and duties stemming from the law (Article 3 § 2 point 4 LPAC, SAC judgment cit. II OSK 2477).

14. Under the CAP there is no other procedural legal basis under which the administrative court could examine the approval of the revised FMP given by the Minister of the Environment. As a result, the approval of the annex revising the Bialowieza District FMP given by the Minister of Environment cannot be challenged.

15. However, based on the Article 8 § 1 and 50 § 1 LPAC[8] as well as the Article 14 of the Act on Ombudsman, the Ombudsman may file a complaint to Administrative Courts in cases where, in his judgment, the rule of law or human and civil rights protection requires it. In such cases the Ombudsman has a status of a party to proceedings.

16. On 25th March 2016, the Minister of the Environment approved the annex to the FMP for the Bialowieza Forest District calling the document "the decision"[9], which means an administrative decision within the meaning of the CAP. However, the "decision" headline of the document, as well as typical administrative instruction, are not relevant to the legal form of the act and do not predetermine it as an administrative decision.

17. Each administrative decision contains legal instructions on appealing procedure of that specific decision. In recent years, all issued approvals of the FMPs had instructions, based on Article 127 § 3 of the CAP[10], stating that "decision" may be revised by the Minister of the Environment.

18. Typically, lodging a motion to revise the decision in accordance with the act's instruction and Article 127 § 3 CAP, followed by upholding the primary decision by an administrative entity (in this case the Minister of the Environment), enables filing a complaint to the District Administrative Court, which starts a two-stage judicial procedure; the District Administrative Court issues a judgment as the court of first instance, which then may be appealed to the Supreme Administrative Court.

[8] The translation of Art, 8 § 1 and 50 § 1 LPAC is provided in attachment number 3 (translation from Polish by the correspondent).
[9] Link to the document: http://bip.lasy.gov.pl/pl/bip/px_dg~rdlp_bialystok~aneks_pul_n.bialowieza.pdf.
[10] The translation of Art. 127 of the Code of Administrative Procedure (CAP) is provided in attachment number 4 (translation from Polish by the correspondent).

19. The procedure regulated in Article 127 § 3 CAP constitutes an internal review procedure, which was a subject of the Committee's statement in the case regarding compliance by the European Union (ACCC/C/2008/32) in the document Draft findings and recommendations of the Compliance Committee (part II): "Had the internal review procedure been the only available remedy, the Committee would have questioned whether the procedure met the requirements of the Convention; there would be doubts about whether the procedure was adequate, effective, fair, and equitable as required by the Convention." The same doubts shall be raised in this particular case.

20. Indeed, contrary to the contents of approvals of the FMPs and for the reasons explained above, it is not a decision within the meaning of the Code of Administrative Procedure and it cannot be appealed[11].

21. There are number of statements of Aarhus Convention's Compliance Committee supporting ClientEarth's standpoint on the matter:

    a. In the case regarding compliance by Belgium (ACCC/C/2005/11) in the document ECE/MP.PP/C.1/2006/4/Add.2, the Committee stated in para. 28 that: "Article 9, paragraph 3, is applicable to all acts and omissions by private persons and public authorities contravening national law relating to the environment. For all these acts and omissions, each Party must ensure that members of the public "where they meet the criteria, if any, laid down in its national law" have access to administrative or judicial procedures to challenge the acts and omissions concerned.";

    b. In the same case, the Committee stated in para. 29 that: "When determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, whether the decision should be challengeable under article 9, paragraph 2 or 3, is determined by the legal functions and effects of a decision, i.e. on whether it amounts to a permit to actually carry out the activity.";

    c. In the case regarding compliance by Austria (ACCC/C/2011/63) in the document ECE/MP.PP/C.1/2014/3, the Committee stated in para. 51 that: "The Committee recalls that "the criteria, if any, laid down in national law" in accordance with article 9, paragraph 3, should not be seen as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national laws relating to the environment (see findings on communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C/1/2006/4/Add.2, paras. 35-37) and ACCC/C/2006/18 (Denmark) (ECE/MP.PP/C/1/2008/5/Add.4, paras. 29-31)).";

    d. In the case regarding compliance by Denmark (ACCC/C/2006/18) in the document ECE/MP.PP/2008/5/Add.4, the Committee stated in para. 28 that: " Access to justice in the sense of article 9, paragraph 3, requires more than a right to address an administrative agency about the issue of illegal culling of birds. This part of the Convention is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene environmental laws, and with

[11] Link to the article in the legal newspaper about this topic: http://serwisy.gazetaprawna.pl/samorzad/artykuly/930611,plan-urzadzenia-lasu.html (in Polish).

the means to have existing environmental laws enforced and made effective. Thus, Denmark is obliged to ensure that, in cases where administrative agencies fail to act in accordance with national law relating to nature conservation, members of the public have access to administrative or judicial procedures to challenge such acts and omissions.";

e. In the same case, the Committee stated in para. 30 that: "When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e. to what extent national law effectively has such blocking consequences for members of the public in general, including environmental organizations, or if there are remedies available for them to actually challenge the act or omission in question. In this evaluation article 9, paragraph 3, should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.”, the same was stated in the case ACCC/C/2008/32 (Part I); ECE/MP/PP/C.1/2011/4/Add.1 in para. 79;

f. In the case regarding compliance by the European Union (ACCC/C/2008/32) in the document Draft findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II), the Committee stated in para. 46 that: "the Committee agrees with the General Court’s analysis that »there is no reason to construe the concept of “acts” in article 9, paragraph 3 of the Convention as covering only acts of individual scope«”;

g. In the same case, the Committee stated in para. 48 that: "It is also important to note that whilst article 9, paragraph 3 allows Parties a degree of discretion to provide criteria that must be met by members of the public before they have access to justice (see findings on communication ACCC/C/2005/11 (Belgium), para. 35), it does not allow Parties any discretion as to the acts that may be excluded from implementing laws.", the same was reiterated in paras. 75 and 97;

h. In the same case, the Committee stated in para. 96 that: "the concept of “acts” in article 9, paragraph 3 of the Convention must not be construed as covering only acts that have legally binding and external effects. It follows that Article 10(1) of the Aarhus Regulation fails to implement correctly article 9, paragraph 3 of the Convention in so far as it covers only acts that have legally binding and external effects".

VI. USE OF DOMESTIC REMEDIES

Taking into consideration the nature of the problem described in section V of the communication, according to Polish law, the decision issued by the Minister of the Environment which approves the FMP (including the revised FMP for the Bialowieza Forest District) could not be challenged in the Administrative Court.

However, the Polish Ombudsman filed a complaint against the "decision" of the Minister of Environment to the District Administrative Court in Warsaw on 22th September (reference number V.7200.23.2016V.7200.23.2016.ŁK/ZA). ClientEarth as well as the supporting communicant Pracownia Na Rzecz Wszystkich Istot supported the complaint and participated in the proceedings before the Court.

The complaint was based on the alleged non-compliance with the Aarhus convention, the EU and Polish law, including the breach of the Article 6(3) of the Habitats Directive, the breach of the Article 96 (1) of the Act of 3 October 2008 on sharing information about the environment and its protection, public participation in environmental protection and environmental impact assessment through refraining from conducting the Natura 2000 impact assessment before the issuance of the Decision which prevented environment NGOs from taking part in the procedure pursuant to the Aarhus Convention. The Ombudsman also indicated that the Minister had not taken into consideration opinions expressed against planned increase of logging.

Furthermore, there were doubts raised concerning the legal form of the authorization of the Annex to the FMP, i.e. whether it was an administrative decision (which is a single form that would enable NGOs to participate in the proceedings), administrative act other than decision which could be a subject of the complaint to the Administrative Court or an internal act that cannot be a subject of such complaint.

On 14th September 2017 the District Administrative Court (reference number IV SA/Wa 2787/16) ordered that the judicial control of the said decision is inadmissible since through this act the State Forests exercised its ownership rights to the forests and such acts cannot be challenged in Administrative Court.

The Ombudsman disagreed with the above order arguing that the authorization of the FMP concerns not only the issue of ownership rights but also environment protection. Taking account of the civil right to the environment protection derived from the Polish Constitution, the issue of environment protection within the area of almost quarter of the country (forests managed by the State Forests) cannot be considered an internal matter of the owner (the State Treasury) that would not be a subject of any control. Therefore the Ombudsman filed a cassation appeal to the Supreme Administrative Court. Both ClienEarth and Pracownia na rzecz Wszystkich Istot filed separate cassation appeals as well.

The Supreme Administrative Court dismissed the complaint (reference number II OSK 2336/17) on 19th October 2017 maintaining the view of the District Administrative Court that the "decision" of the Minister was an internal act over which administrative courts do not have jurisdiction. This order is final and it cannot be a subject of any further appeal. Therefore, no means of challenging the decision in question are left available at national level.

VII. USE OF OTHER INTERNATIONAL PROCEDURES

On 19 April 2016 ClientEarth and six other Polish environmental NGOs lodged a complaint to the European Commission, asking for an infringement procedure (Art. 258 of the Treaty on the Functioning of the European Union) to be started against the Polish government. The specific arguments raised were as follows:

1. Before taking the decision the Minister failed to carry out an assessment to determine whether the increased logging would have an adverse effect on the integrity of the Natura 2000 site. This assessment is known as an 'appropriate assessment' and is distinct from the strategic environmental assessment that was carried out in relation to the annex to the FMP. An appropriate assessment is required by Article 6(3) of the Habitats Directive and by Article 33 of the Polish Nature Conservation Act.

2. The approval of the increased logging breaches Article 6(3) of the Habitats Directive and Article 33 of the Polish Nature Conservation Act because the law prohibits Member States from approving activities like this if the decision-maker cannot be certain that the activity will not cause an adverse effect on the site, unless certain limited derogations set out in Article 6(4) of the Habitats Directive are relevant. In this case, the limited derogations do not appear to be relevant.

3. By increasing logging, the Minister's decision breaches Article 6(2) of the Habitats Directive because it clearly fails to take appropriate measures to

    a. avoid the deterioration of natural habitats and the habitats of species for which the site has been designated; and

    b. avoid the disturbance of the species for which the site has been designated.

After failing to reach a compromise with the Polish government through the means of an informal dialogue, the European Commission decided to launch an infringement procedure and sent a letter of formal notice on 16 June 2016/. The infringement procedure is based on the same legal arguments as ClientEarth's complaint – violation of Article 6(2) and 6(3) of the Habitats Directive.

In April 2017[12], the Commission issued a reasoned opinion urging Poland to refrain from large scale logging and giving Poland one month to comply. In spite of this, the Polish government insisted on implementing of the Annex. Due to the threat of a serious irreparable damage to the site the Commission urged the Polish authorities to reply within one month instead of a customary two-month deadline.

On 20th July 2017 the European Commission referred Poland to Court (Case C-441/17) over:

[12] http://europa.eu/rapid/press-release_MEMO-17-1045_EN.htm.

- failure to fulfil its obligations under Article 6(3) of the Habitats Directive by approving an appendix to a forest management plan for the Białowieża Forest District without satisfying itself that it will not adversely affect the integrity of the Białowieża Forest Site of Community Importance (SCI) and Special Protection Area (SPA) PLC200004;
- failure to fulfil its obligations under Article 6(1) of the Habitats Directive and under Article 4(1) and (2) of the Birds Directive by not taking the necessary conservation measures corresponding to the ecological requirements of (i) the natural habitat types listed in Annex I and the species listed in Annex II to the Habitats Directive, and (ii) the birds listed in Annex I to the Birds Directive and the regularly occurring migratory species not listed in that annex, for which the Białowieża Forest SCI and SPA PLC200004 were designated;
- failure to fulfil its obligations under Article 12(1)(a) and (d) of the Habitats Directive by not guaranteeing the strict protection of the saproxylic beetles (the Flat Bark Beetle (Cucujus cinnaberinus), the Goldstreifiger Beetle (Buprestis splendens), the False Darkling Beetle (Phryganophilus ruficollis) and Pytho kolwensis) listed in Annex IV to the Habitats Directive, that is, by failing to prohibit the deliberate killing or disturbance of those beetles or the deterioration or destruction of their breeding sites in the Białowieża Forest District; and
- failure to fulfil its obligations under Article 5(b) and (d) of the Birds Directive by not guaranteeing the protection of the species of birds referred to in Article 1 of the Birds Directive, including, in particular, the White-Backed Woodpecker
- (Dendrocopos leucotos), the Three-Toed Woodpecker (Picoides tridactylus), the Pygmy Owl (Glaucidium passerinum) and the Boreal Owl (Aegolius funereus), that is, by failing to ensure that they will not be killed or disturbed during their breeding and rearing periods and that their nests or eggs in the Białowieża Forest District will not be deliberately destroyed, damaged or removed.

On 28th July 2017 the Court decided to apply interim measures in the case recognizing the high potential for serious and irreversible damage to the Bialowieza Forest. Based on Article 278 of The Treaty on the Functioning of the European Union and the Article 160 § 2 of the Rules of Procedure of the Court of Justice the Court ordered to halt logging and removal of old felled trees from the almost whole territory of Białowieża Forest immediately, with a permissible exception in case of a threat to public safety. The Polish authorities, however, decided to keep on logging regardless of the order, with public safety cited as a reason. Two hearings have already taken place. First took place on 11th September before the Vice President of the Court and the second on 17th October before the Grand Chamber consisting of 15 judges of the Court.

Although this procedure may lead to the Polish government annulling the 'decision' in question, it will not address the question of the right of the public concerned to challenge a FMP or annex to a FMP.

VIII. CONFIDENTIALITY

The communicant does not request for any information included in this communication to be kept confidential.

IX. SUPPORTING DOCUMENTATION

List of attachments of supporting documentation:

1. The Judgment of the Supreme Administrative Court of 12th March 2014 (citation II OSK 2477/12) – translation from Polish by the correspondent with the most relevant sections highlighted.

2. Chapter IV 'The Forest Management Plan' of the Forest Act of September 28th 1991 – translation from Polish by the correspondent (the most relevant provisions to the case).

3. Article 3, 8 § 1 and 50 § 1 of the Law on Proceedings before Administrative Courts (LPAC) – translation from Polish by the correspondent.

4. Article 127 of the Code of Administrative Procedure (CAP) - translation from Polish by the correspondent.

5. The Forest Act of September 28th 1991 – translation from Polish by National State Forests up to date until 2009.

X. SIGNATURE

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Date: 14.11.2017

Signature:

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