ClientEarth
Prawnicy dla Ziemi

Dear honorable Chair and Vice-Chairs,
Dear honorable members of the Compliance Committee,
Dear members of the Secretariat,

My name is Małgorzata Kwiędacz-Palosz, I am a Senior Lawyer in the Environmental Democracy team at ClientEarth and I will deliver the opening and final statements for the cases C151 and C154. Three other lawyers from ClientEarth, Agnieszka Warso-Buchanan, who is leading our Clean Air work in Central Eastern Europe, Agata Szafraniuk who is leading our Wildlife work in the same region and Sebastian Bechtel, also from our Environmental Democracy team, are here to support and available to answer, to the best of their abilities, any questions that you may have.

We would like to thank the Committee and the Secretariat for the opportunity to participate in this hearing.
Poland ratified the Aarhus Convention in 2001. It therefore had a lot of time to align its legal system with the Convention's requirements. However, as we will discuss today, there is still a flagrant non-compliance of the Polish legal system with Article 9 (3) of the Convention in respect of local laws and forest management plans, both of which have the potential to contravene national law relating to the environment.

I would like to shortly recall the content and scope of both communications.
Case C151 concerns the systemic failure of the Polish legal system to grant environmental NGOs standing to challenge local laws which contravene national law relating to the environment in line with Article 9 (3) of the Convention.
Under the notion of 'local laws' we refer to acts enacted by local authorities, such as the municipal council[1], the poviat/county council[2] and the voivodeship/provincial assembly[3].
Under the existing legal framework, ENGOs are not able to challenge local laws which contravene national law relating to the environment.

[1] *Rada gminy*.
[2] *Rada powiatu*.
[3] *Sejmik województwa.*

First of all, Article 44(3) of the Polish EIA law[4] only grants ENGOs the right to challenge administrative decisions. As local laws are not administrative decisions, this legal avenue could not be used by ENGOs to challenge local laws which contravene national law relating to the environment.

Secondly, under the general standing provision, Article 50(1) of the Law on Proceedings before Administrative Courts[5], an NGO is entitled to lodge a complaint to an administrative court after fulfilling cumulatively the following three conditions: (i) in matters relating to other persons' legal interests, (ii) only "within the scope of its statutory activity" and (iii) only "if it participated in the prior administrative proceedings". The third requirement is impossible to fulfil in the context of local laws because there is no prior administrative proceeding leading to the enactment of local laws.

Nevertheless, in any case, above-mentioned Article 50 (1) does not apply to local laws as the provisions on the challenge of local laws are embodied in the Acts on Self-Government, namely Article 101 (1) of the Act on Communal Self-Government, Article 87 (1) of the Act on Poviat Self-Government and Article 90 (1) of the Act on Regional Self-Government. These provisions provide that legal standing to challenge a local law is granted to those whose legal interest or right had been breached by the local act in question.

Unfortunately, legal standing in such a challenge is severely limited. Individual and legal persons (including ENGOs) have a possibility to seek judicial review of local laws only if they demonstrate an infringement of an individual and specific legal interest. Merely having a legal interest is not sufficient to successfully challenge local laws which contravene national law relating to the environment. Moreover, according to the case law and jurisprudence, the infringement of legal interest must occur in a "direct, objective and real manner". Thus, the circle of parties entitled to initiate a judicial review of a local act is smaller than the circle of parties entitled to appeal against an administrative decision.

This is well demonstrated in the example of air quality plans which are adopted by local self-government authorities at the voivodeship level. Article 90(1) of the Act on Regional Self-Government grants NGOs legal standing to challenge such acts, only when the legal interest or right of an NGO itself has been infringed (which in practice is basically reduced to its property rights). Therefore, ENGOs cannot use this legal avenue to challenge an air quality plan because

[4] Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment of 3 October 2008.
[5] The Law of 30 August 2002.

they do not have a “right to clean air”, which could have been infringed by the plan. Even if an air quality plan contravenes the Air Quality Directive[6], there is no legal avenue open to raise such a violation on the national level.

In order to substantiate this claim, the Communicant provided[7] the judgments denying the legal standing to ENGOs and individuals to challenge air quality plans, including seven judgments of the Regional Administrative Courts, two judgments of the Supreme Administrative Court and one judgment issued by the Constitutional Court.

Another example, of such local laws are local spatial development plans adopted on the municipality level. We provided two judgments of the Supreme Administrative Court and one judgment of the Regional Administrative Court confirming that NGOs do not have legal standing to challenge local spatial development plans because NGOs are not able to show a breach of ~~a~~ legal interest or right.[8]

The Party concerned has, on the other hand, not provided even one judgement in which ENGOs have had legal standing to challenge local laws which contravene national law relating to the environment.

As a final point of clarification, according to Article 33 (2) of the Law on Proceedings before Administrative Courts mentioned by the Party concerned in its recent reply to questions,[9] a social organisation may join judicial administrative proceedings as a participant if the outcome of the judicial-administrative proceedings concerns the legal interest of other persons and the matter concerns the scope of the social organisation’s statutory activity. This is essentially a right to intervene in ongoing judicial proceedings. Once admitted to the proceedings, the organisation is entitled to lodge a cassation appeal before the Supreme Administrative Court. However, given that this avenue presupposes that another person has already challenged the local law in question, it does not ensure access to justice for NGOs as foreseen by Art. 9(3) Aarhus Convention.

[6] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.
[7] In its submissions of 26 January 2018, update of 21 February 2022 and reply of 31 May 2022.
[8] In its submissions of 26 January 2018.
[9] Reply to questions from the Party concerned, submitted 8 June 2022, pp. 6-7.

Our second communication discussed today is case C154 on non-compliance with Article 9 (3) of the Aarhus Convention in relation to forest management plans.

We brought this communication in November 2017 after unsuccessfully exhausting all domestic remedies to challenge the decision of the Minister of Environment approving the annex to the Forest management plan for the Białowieża Forest District.

The annex was signed in 2016 and amended the Forest Management Plan itself, which had been approved in 2012. With this decision, the limit on timber harvest for the 2012-2021 was increased threefold compared to the previously set one. This meant a significant increase in logging in the Natura 2000 protected area. The annex was adopted without ascertaining that it would not adversely affect the integrity of this precious ecosystem. In accordance with national law, namely, the Nature Conservation Act, which implements the Habitats Directive into Polish law, authorisation for a plan or project, may be given only on the condition that the competent authorities have become certain that the plan or project will not have lasting adverse effects on the integrity of the site concerned. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

However, such an assessment, called an appropriate assessment, was not carried out correctly, which contravened the national law.

The act of approving the annex to the Forest Management Plan was challenged by the Polish Ombudsman in a two-stage procedure before the administrative courts. ClientEarth joined the proceedings before the Regional Administrative Court based on Art. 33(2) of the Law on Proceedings before the Administrative Courts mentioned above. As a participant to the proceedings, ClientEarth lodged a cassation appeal before the Supreme Administrative Court.

Both courts found that the Forest Management Plan could not be challenged as it is an internal act and not an administrative decision[10]. According to the courts, Forest Management Plans can also not be classified as “another type of public administrative act or decision concerning rights and duties stemming from the law” (under Article 3 (2) point 4 of the Law on Proceedings before Administrative Courts), because every act or decision made under this provision has to be addressed to an external entity.

Thus, there is no legal basis for challenging Forest Management Plans, neither for ENGOs, nor for any other claimant. Article 44 (3) of the EIA law, Article 50 (1) of the Law on Proceedings

[10] The Regional Administrative Court’s judgment of 14 September 2017 the (case no. IV SA/Wa 2787/16) and the Supreme Administrative Court’s judgment of 19 October 2017 (case no. II OSK 2336/17), communication, p. 11.

before Administrative Courts nor any other provision regulating standing before the administrative courts applies to Forest Management Plans.

The Communicant also provided the Committee with a recent judgment of the Supreme Administrative Court[9] dismissing the complaint lodged by a group of individuals challenging the Forest Management Plan as it did not fall within the jurisdiction of administrative courts.

Consequently, under Polish law there is no access to justice to challenge forest management plans which can contravene environmental laws such as, for example, the EU Habitats Directive[11], the EU Birds Directive[12] or the Polish Law on Forests.

In conclusion, the Communicant submits that in the Polish legal system there is no access to justice to challenge local laws, such as air quality plans, and local spatial development plans, as well as forest management plans if they contravene national law relating to the environment.

[11] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2013/17/EU of 13 May 2013.

[12] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, as amended by Directive 2013/17.