ClientEarth

2021 Rule of Law Report – targeted stakeholder consultation
About you

I am giving my contribution as:
civil society organisation/NGO

Organisation name:
ClientEarth Prawnicy dla Ziemi (this is the official name now, previously it was ClientEarth Poland)

Main Areas of Work:
Justice System
Other

If "Other", please specify:
Environment, climate

Please insert an URL towards your organisation's main online presence or describe your organisation briefly (500 characters maximum):

ClientEarth Prawnicy dla Ziemi is a Warsaw based branch of ClientEarth, an international environmental non-governmental organisation, consisting of lawyers and environmental experts, which uses law to hold governments and businesses to account over climate change, nature loss and pollution. For the purpose of this contribution, we will focus mainly on environmental democracy matters, that is access to information, public participation and access to justice. https://www.pl.clientearth.org

Transparency register number

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Publication of your contribution and privacy settings:

Public - Your personal details (name, organisation name, transparency register number, country of origin will be published with your contribution)

Member States covered in contribution:

Poland

Justice System

Independence - n/a

Quality of justice

Accessibility of courts (e.g. court fees, legal aid) - 3000 characters maximum

Access to justice and judicial review in environmental matters has been facing difficulties for years. One of the most complex issues in this regard is legal standing, which will be further covered under pillar "Other institutional issues related to checks and balances". At this point it is necessary to mention that deficiencies in accessibility of courts in environmental matters has been observed in relation to legal standing of environmental NGOs or members of the public concerned in administrative proceedings.

Take for example domestic proceedings falling within the scope of Industrial Emissions Directive (IED), EIA Directive and Espoo Convention regarding activities or projects subject to mandatory public participation. Member States are required to provide for public participation and access to justice in respect of certain activities and projects. However, the screening exercise does not result in a decision not to submit a particular project to an EIA, therefore NGOs and other members of public concerned cannot challenge it before a court. This is in breach of EU law.

By analogy, permitting decisions listed in Article 24 IED, like the granting of a permit for any substantial change, the granting or updating of a permit for an installation where a derogation from the usual emissions limits is proposed, also require public participation. Under the Espoo Convention a proposed activity that is likely to cause significant adverse transboundary impact triggers environmental impact assessment and requires public participation.

Nevertheless, in above-mentioned proceedings, the burden of proof of circumstances which would oblige the state to provide public participation and recognize legal standing of the applicant,

is on environmental NGOs and members of the public concerned. In practice, it is often the NGO who has to prove that the activity or project has potentially significant effect on the environment and therefore requires environmental impact assessment or that a permit update for an installation amounts to substantial change or derogation, or that a permit update has significant adverse transboundary impact. For example, the evidence to prove that one of the biggest CO2 emitter in the EU has significant adverse transboundary impact requires an expert opinion costs tens of thousands of euros. A negative decision on granting legal standing may be challenged before the court, but again, it is the member of the public concerned who has to provide credible proof of potential significant environmental impact or technical details of an installation which would require public participation in proceedings and therefore grant access to the proceedings. Given the costs of experts' opinion and lack of screening decisions, accessing proceedings at administrative level or judicial level is often impossible, whereas the burden of the proof of circumstances requiring public participation should be carried by the state.

Anti-Corruption Framework - n/a

Media Pluralism

Media regulatory authorities and bodies - n/a

Transparency of media ownership and government interference - n/a

Framework for journalists' protection

Access to information and public documents - 3000 characters maximum

Access to environmental information can be granted under the law on access to information about the environment and its protection and environmental impact assessments (Polish EIA law).

According to Aarhus Convention and Polish EIA law requested information shall be made available at the latest within two months after the request has been submitted and this period cannot be extended. However, in practice it often takes more than two months.

According to Aarhus Convention and Polish EIA, the refusal of a request shall be subject to a review procedure. In order to enable challenging the refusal, it shall be issued as an administrative decision with information on access to the review procedure. In practice, public authorities often do not issue an administrative decision, but instead inform an applicant who submitted the request about refusal by letter or email. In such a case an applicant who submitted the request cannot challenge the refusal and the applicant is deprived of the review procedure.

If the public authority to which the request is addresses does not hold the environmental information requested, it returns the request. The Polish EIA does not specify in what form such return shall be done. In practice, administrative bodies often do not issue any decision on

returning the request (not holding a requested information is not a reason for a refusal under Polish EIA), which means again that the applicant cannot challenge it. The review procedure is also not available to challenge a charge for supplying the requested information.

Another problem that has been observed is that public authorities do not fulfil their duties to collect information, arising from different EU laws, for example the EU Timber Regulation. According to Timber Regulation the public authorities shall conduct due diligence in regard to timber logging and information gathered by due diligence shall be made available on request. In our experience, the due diligence in question is not carried out in accordance with the Timber Regulation.

Other institutional issues related to checks and balances:

The process for preparing and enacting laws

Framework, policy and use of impact assessment, stakeholders'/public consultations (particularly consultation of judiciary on judicial reforms) and transparency and quality of the legislative process (3000 characters maximum)

Legislative works are often conducted in violation of the principles of proper legislation, provided by the Rules of Procedure of the Council of Ministers, the Rules of Procedure of Sejm and the Rules of Procedure of Senat. This has resulted in a serious limitations of transparency of the legislative process, and has undermined the importance of public consultations and issuing opinions on draft laws.

In Poland, public consultations are mandatory when a draft law is prepared by the government.

The government uses three methods to avoid public consultations in the legislation procedure. The first method is to have MPs from the governing party submit the draft law. The draft law is in fact prepared by the government, but in order to avoid public consultation, it is submitted in the Parliament by the MPs. The second method is to use a fast-track procedure, provided by the Rules of Procedure of the Council of Ministers, which enables to shorten the deadline for public consultation (which normally should last at least 21 days) or even skip it. Applying fast-track procedure requires a detailed justification. In practice however, the government often violates this rule and overuses the fast-track procedure. The third method of skipping public consultations is hiding a draft law the government is working on. The draft law becomes known to the public only after arriving in the Parliament. Prior to that no documents are published that would suggest ongoing legislative works. These drafts are not formally the object of a separate procedure (like fast-track), and yet they are not subject to consultation and opinion.

The Government often avoids public consultations in the context of legislative initiatives of political or systemic importance. For example, all laws regarding changes in the judiciary or functioning of the civil service.

The recent proceedings of the amendment of the Polish EIA law also raises serious concerns. Although this law concerns the key issue of citizens' participation in decisions affecting the environment in which they live, the voice of society was ignored during the preparation of the law. The version of the draft law that is proceedings through parliament significantly differs from the version from May 2020, which was a subject to public consultation. The current version has not been consulted on, despite the fact the comments of the public applied to a completely different content of the amended provisions. The Committee on Environment Protection, Natural Resources and Forestry in Sejm rejected the request for a public hearing of the draft. Furthermore, the time to analyse the draft after its publication was definitely too short, which was indicated both by the MPs and by the Parliamentary Analysis Office.

Rules and use of fast-track procedures and emergency procedures (for example, the percentage of decisions adopted through emergency/urgent procedure compared to the total number of adopted decisions) (3000 characters maximum)

Since 2015 the practice of public consultations has significantly decreased, and this trend has not changed. According to the Civic Observatory of Legislation, in the period 2015-2019 the government worked on 1427 drafts laws, but only 532 (ca. 40%) were a subject to public consultations (III Komunikat Obywatelskiego Forum Legislacji podsumowujący aktywność legislacyjną rządów Zjednoczonej Prawicy, Sejmu VIII kadencji i Senatu IX kadencji (2015-2019), available at: https://www.batory.org.pl/informacje_prasowe/xiii-raport-obywatelskiego-forum-legislacji-przy-fundacji-batorego/)

Independent authorities - n/a

Accessibility and judicial review of administrative decisions

Transparency of administrative decisions and sanctions (incl. their publication and rules on collection of related data) and judicial review (incl. scope, suspensive effect)

There are serious deficiencies with regard to access to justice in environmental matters. The EC has initiated three infringement procedures against Poland concerning: 1) failure in implementation of Article 11 of the EIA, 2) lack of access to justice in regard to air quality plans, 3) lack of access to justice in regard to forest management plans.

Regarding the first of these infringement procedures, the list of identified deficiencies is quite long. There are no effective interim measures with regard to decisions covered by the EIA Directive, in particular:

- it is not possible to suspend the execution of the decision on environmental impact assessment, especially when it is made immediately enforceable;
- the proceeding in regard to a final decision (permit) is not suspended in a case when a decision on environmental impact assessment is challenged before a court;

- it is not possible to suspend the execution of a permit issued on the basis of so-called special acts.

Furthermore, for certain infrastructure projects under special acts, such as road construction projects or airports, the effects of the judicial review are limited. The courts can state that the decision infringes the law, but court rulings will not affect the permit and will have no consequences on the implementation of the project rendering the review procedure ineffective

Environmental NGOs have no legal standing to challenge final permits in terms of their compliance with the decisions on environmental impact assessment. Environmental NGOs also cannot appeal against a so-called screening decision, that is a decision not to conduct environmental impact assessment.

Currently, at the Parliament there is an ongoing amendment to the Polish EIA law, which was supposed to ensure compliance with the EIA Directive. Although the draft law does not cover all the issues indicated by the EC, it is a step in the right direction.

Environmental NGOs do not have legal standing to challenge plans and programs that are significant to the environment, while other members of the public concerned, i.e. entities acting in their own interest, have legal standing if the prove a breach of their legal interest. Having a legal interest is not sufficient to effectively challenge an environmental plan or program. In addition, "legal interest" is understood quite narrowly, since it is limited to the protection of property.

The current domestic regulations prevent the public from challenging air quality plans before an administrative court, although air quality plans require public participation (ACCC/C/2016/151/Poland).

Polish law also does not provide access to justice in relation to forest management plans (ACCC/C/2017/146/Poland), on the basis of which the State Forests manage almost a quarter of the country. These plans are likely to have a significant impact on Natura 2000 sites. Consequently, the public is deprived of effective judicial protection in regard the compliance with the Habitats Directive.