Shadow Report on the Implementation of Aarhus Convention

Greenmind Foundation

translation: Małgorzata Barnaś

Projekt „Shadow Report z wykonania Konwencji z Aarhus" realizowany jest w ramach programu Obywatele dla Demokracji, finansowanego z Funduszy EOG

The process of preparing the report

why?

For several years now, the Greenmind Foundation[1] has been involved in monitoring the implementation of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters[2]. As part of a project carried out over the period 2013-2014[3], we analysed the practical difficulties in accessing information on environmental matters and public participation in making decisions concerning projects with significant environmental impact. The scope of the analysis was limited though. We managed to identify problems the scale of which had to be quantified. Moreover, we wanted other environmental non-governmental organizations (ENGOs) to share with us their experiences on issues relating to the implementation of the Convention. We wanted to prepare ourselves to act in support of further change, but also to take an active part in consultations on the National Implementation Report for the period 2014-2016[4]. This was made possible thanks to funding obtained from the Financial Mechanism of the European Economic Area under the Citizens for Democracy Programme.

how?

The content of this report is based on the Foundation's own experiences, as well as the experiences gained by other ENGOs and individuals (all those who were willing and able to share them with us). Eight organizations: the Andrzej Czudek Environmental Association of the Upper Silesia Region, Foundation for Sustainable Development, Naturalists' Club, Polish Ecological Club - Wielkopolska Branch, Polish Society for Nature Conservation SALAMANDRA, Society for the Earth, Ecological Association EKO-UNIA, Association Workshop for All Beings, answered around 100 questions we asked during interviews which sometimes took several hours, thus contributing to the development of this report. A lot of people shared their experiences with us by taking part in an online survey as well.

We also conducted some surveys on the difficulties in implementing Articles 4, 5, 6 and 8, which could support the conclusions of the report (always on representative samples to ensure that the results are objective).

Due to the fact that our, and not only our, assessment of the situation regarding the provision of financial support to ENGOs is radically different than the assessment presented in the National Implementation Report for the period 2011-2013 (NIR 2014), we commissioned relevant studies to examine this issue. This report would not have been drawn up either without the legal analyses carried out to assess the level of transposition of the Convention into national legislation.

It should be noted that, due to the time-frames of the project called "Shadow Report on the Implementation of Aarhus Convention", the publication does not concern the whole period 2014-2016 for which the NIR 2017 will be prepared. Information collected for the purpose of this report concerns the period 2014-2015 and, depending on the scope of the studies and analyses, concerns a

[1] hereinafter "the Foundation"
[2] hereinafter "the Aarhus Convention" or "Convention"
[3] project called "The Aarhus Convention in Practice – citizen monitoring of public authorities and a dialogue for change"
[4] NIR 2017

period of 15 up to 24 months[5].

All study reports and analyses on which this publication is based are listed at the end along with links to their electronic versions available on the Foundation's website.

what the report contains and what it does not contain?

This report was not intended to fully correspond with the content of the NIR. We focused on some important aspects, the ones which identify problems and constitute a starting point for the introduction of the necessary changes. Therefore, for Articles 4-9 of the Convention only deficiencies or shortcomings in the transposition of its provisions were discussed as well as the difficulties in their application from a social perspective, mainly from the perspective of environmental organizations and actively involved citizens.

Implementation of Article 3 of the Convention was only assessed taking into account the provision of financial support to ENGOs. Deficiencies in the transposition of this Article were not discussed due to the fact that the general provisions concerning access to information, public participation in decision-making and access to justice in environmental matters are presented in more detail in the subsequent Articles of the Convention. The report deals with the national laws transposing individual provisions of the Convention only where necessary in order to explain the indicated deficiencies or shortcomings. It does, however, contain information on the amendments to the regulations that were not in force when the report was being drawn up, but that are relevant in relation to the NIR 2017.

Deficiencies in the transposition of the Convention into the national law were identified on the basis of the legal analysis conducted by Mr Bolesław Matuszewski, attorney-at-law representing a law firm "BMG Adwokaci Barański Matuszewski Grzelak Spółka Partnerska", and the review of the analysis carried out by Ms Magdalena Bar, legal adviser representing a law firm "Jendrośka Jerzmański Bar & Partners"[6]. The Foundation was responsible, however, for the selection of relevant fragments and the final wording of this part of the report.

what is next?

Please find out more about the results of the Shadow Report on the Implementation of the Aarhus Convention. The aim of the report was to collect arguments supporting the need to introduce certain changes at the legal and functional level. We hope that they will be widely used by public authorities as the basis for amending legislation, but also for improving the practices restricting citizens' access to information, public participation in decision-making and access to justice in environmental matters. We are convinced that the civic society can take an active part in the whole process. This report reflects our public involvement.

Greenmind Foundation

[5] this information is provided every time where necessary
[6] detailed description of deficiencies is provided in the Polish version of the report

Article 3. General Provisions

difficulties in implementing Article 3

The promotion of environmental education and environmental awareness among the public, "especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters", as well as providing for "appropriate recognition of and support to associations, organizations or groups promoting environmental protection" is limited in terms of financing. Although NIR 2014 mentioned broad opportunities for providing financial support to NGOs conducting environmental projects, it should be noted that no broad opportunities can be identified in the current reporting period (2014-2016). The availability of financial resources is significantly lower than the one identified in NIR 2014. The first reason is that the reporting period coincides with the revision of the EU financial perspective, which means that institutions managing the EU funds for 2007-2013 have already closed the calls for applications and are now allocating the funds to final payments in ongoing projects, and most of those managing the funds for 2014-2020 have not launched calls for proposals yet. Another reason is that NIR 2014 failed to identify a number of practical problems that translate into actual availability of funding to ENGOs, within the scope referred to in Article 3(3) and (4) of the Convention.

For the purpose of this report, an analysis of the EU funding that plays a significant role at the national and regional level[7] was conducted. The analysis covered the funding for which applications were submitted in the period from January 2014 to August 2015 (Makles M., 2015). Therefore, in assessing the actual availability of funding to ENGOs we mainly focused on the national sources, and only to some extent on other sources available during the period under examination.

sources of funding for environmental NGOs

Experiences gained by ENGOs from the implementation of the Convention were collected through in-depth interviews[8] with their representatives who were asked about the financial conditions on which their organizations operate, the systemic support they use and what their assessment of the conditions for support is (Engel J., 2016a)[9]. In 2014, resources allocated to the implementation of specific projects constituted the largest share of income achieved by these organizations (on average: 78%, minimum: 63%, maximum: 97%). Other sources of funding for ENGOs included: business activity and paid statutory activities (11%, 3-28%), donations and 1% income tax transfers (6%, 0-20%), agricultural subsidies (7%, 0-32%). In most cases, membership fees constituted only a minor component, not exceeding 1% of the income. This type of income structure shows a very strong dependence of ENGOs on project subsidies. The situation is aggravated by the fact that no financial support system exists to promote the activities undertaken by non-governmental

[7] National Fund for Environmental Protection and its regional branches, LIFE+, Civic Initiatives Fund, Financial Mechanism of the European Economic Area

[8] hereinafter "interviews with ENGOs"

[9] However, in so far as relevant for this part of the report, it should be noted that ENGOs shared their experiences related to project co-financing (obtaining and spending the funds) over the period January 2014 – March 2015 from the following sources: National Fund for Environmental Protection and its regional branches, Operational Programme "Infrastructure and Environment" 2007-2013, Operational Programme for Rural Development 2007-2013, regional operational programmes for 2007-2013, funding provided by local government units, Swiss-Polish Cooperation Programme, LIFE+, Financial Mechanism of the European Economic Area, European Climate Foundation, Education, Audiovisual &Culture Executive Agency, The Heinrich Boell Foundation, EuroNatur.

organizations.

Reasons for the limited availability of financial support to a number of organizations, identified during the analyses and interviews, are outlined below.

financial envelope available for ENGOs

Due to the subject of the analysed calls for applications, ENGOs had only a very limited possibility to apply for funding related to their statutory activities involving nature conservation and environmental education, also in the field covered by the Convention. Authorities designated to manage the funds for environmental protection do not seem to pay much attention to nature conservation and environmental education. These issues were marginalised by the vast majority of the analysed sources of funding available to non-governmental organizations. It is particularly evident when we look at the activities undertaken by the Regional Funds for Environmental Protection and Water Management (RFEP&WMs) which allocated only 0.3 – 8% of their resources for nature conservation and 0.2 – 6% for environmental education. Effectively, individual RFEP&WMs allocated only 1.5% of their budgets to support nature conservation and environmental education projects carried out by ENGOs (as a type of their beneficiaries). No financial resources were allocated from the National Fund for Environmental Protection and Water Management (NFEP&WM) nor from its regional branches to finance watchdog activities related to public scrutiny over actions taken by the State in the field covered by the Convention.

conditions for support

Another major problem lies in the fact that the conditions for support are inadequate to the specific nature of certain operations taken by individual beneficiaries, which is of particular importance as far as ENGOs are concerned. The authorities are demonstrably reluctant to provide financing for general project costs, i.e. expenditure on administrative management of the project, purchase of office supplies and office maintenance, and even personnel costs and travel expenses incurred by NGO employees in carrying out tasks assigned to them in the projects which have received funding. Another common practice is to prevent beneficiaries from making their own, non-financial contribution (e.g. voluntary work), which is so important for low budget ENGOs. In some of the analysed RFEP&WMs the level of funding for projects covered up to 60% of eligible expenditure, which basically excluded environmental NGOs from the group of applicants in situations where an own financial contribution was required. In many cases organizations were also required to document their ability to cover all costs of the project from resources other than the ones applied for, which made the whole application process seem rather paradoxical: in order to obtain funding for certain tasks organizations had to prove that they were able to finance them from their own resources. Our analysis revealed another mechanism with a potentially unfavourable impact on the financial stability of ENGOs, i.e. funding for projects undertaken by beneficiaries was often based on the reimbursement of the actual costs incurred, as a result of which they had to use their own resources first or take up a loan. Access to funding is also impeded by the fact that VAT is often not regarded as eligible expenditure (mainly by RFEP&WMs), even if it is non-recoverable for the ENGOs.

In the context of eligibility, more attention should be paid in this report to one of the problems identified in the course of the analysis and stressed by the interviewed ENGOs, i.e. the problem of recognising expenditure on administrative management of the project as eligible. ENGOs that took

part in our survey pointed out that in small projects this type of expenditure is often not reimbursed. The same limitation applies to the spending of EU funds (some regional operational programmes, 2007-2013 Operational Programme for Rural Development), funds allocated by some RFEP&WMs and by the majority of local government units. Recognising eligibility of expenditure on administrative management is not the only problem though. ENGOs drew our attention to two other major issues:

- the limit for expenditure on administrative management is defined as a % of the total budget of the project; if there are any savings in other budgetary lines, the expenditure on administrative management is automatically reduced; consequently, organizations carrying out projects are punished for making effort to reduce their expenditure (managing authorities rarely agree for these costs to be settled per actual amount),

- expenditure on administrative management accounting for up to 10-20% of eligible costs is often insufficient to ensure effective execution of projects (multi-annual projects with relatively low expenditure on other purposes) and, as such, it does not support the creation of jobs and the building of organizational capabilities.

What is also noticeable, and relevant from the point of view of ENGOs, is the fact that financial support is often not provided for the development of planning documents and for the conduction of preparatory work (concept, technical documentation and documentation required in order for certain administrative decisions to be taken), which is necessary if a project is to be effectively implemented and completed. On the other hand, managing authorities often expect applicants to submit such documents along with their applications for funding, which means that organizations have to bear heavy expenditure before they can even submit an application for funding.

Finally, we also need to mention the “contract negotiations” (after the call for applications has been officially closed) – practised by NFEP&WM and RFEP&WMs. Such negotiations come down to amending the material and financial scope of the applications to the detriment of the beneficiary without enabling the latter to actually negotiate any conditions made by these institutions. Beneficiaries can either accept the amended conditions or not. This leads to a reduction in the level of funding (beneficiary agrees to cover a part of expenditure from own resources) or to the removal of a certain element of the project while maintaining, however, its declared effect (financial consequence is in fact the same). It often happens that personnel costs are cut, also by reducing the number of persons involved in the project. Although this aspect is not so relevant for the analysis of the programming documents themselves, it does contribute to limiting the availability of funding for ENGOs. This problem was identified both in the analysis (Makles M., 2015) and in the interviews with ENGOs. Representatives of organizations that took part in our survey pointed out that the “negotiation process” can result in reducing the funding by up to 50% and that it significantly extends the period between closing the call for applications and signing a contract (to over half a year). During the negotiations, managing authorities use a table of standardized costs, as a result of which project costs are evaluated by being compared to the lowest recorded costs of purchasing services or goods and, consequently, beneficiaries are not able to buy better quality equipment or order specialized services.

Limited support for actions taken by ENGOs in the field relevant to the Convention also resulted from the adopted selection criteria. As the analysis shows, in selecting the projects the authorities often:

- gave priority to entities that were able to declare a more significant own contribution in setting up financing for projects while treating the stability of income as, for example, one of the formal criteria, which discriminated against ENGOs;

- took into account, for example, the principal place of business, size of the locality in which an applicant has its registered seat and whether or not a given organization had applied for funding in previous years – factors that have nothing to do with the value of the project's actual substance or with the applicant's readiness to execute it;

- set up criteria that were imprecise and intransparent for potential beneficiaries (no information about what and how is assessed and analysed as part of the project assessment process);

- paid little attention to the actual substance of the projects while focusing mainly on their compliance with the formal criteria, e.g. whether or not they tied in with relevant programmes or regional policies;

- promoted "priority" projects the list of which was subjective and intransparent.

The above identified barriers and constraints, lack of mechanisms to support organizations already carrying out projects and lack of separate calls for applications (a financial envelope) addressed specifically to ENGOs meant that these organizations were often at a disadvantage from the very beginning in relation to other applicants, e.g. hunting associations, forest district offices or local government units.

As regards the support for ENGOs provided for by the Convention, it is worth pointing out that during the analysed period the two main sources of institutional support (non-equipment) related to the operation of and activities undertaken by ENGOs, including support for training or other forms of competency building, included the Financial Mechanism of the European Economic Area (FM EEA) and the Civic Initiatives Fund. The level of funding was insufficient though.

The level of own contribution in the analysed projects that could have been executed by ENGOs ranged from 0% (some RFEP&WMs) to 50% (LIFE+). Mechanisms enabling applicants to obtain co-financing of their own contribution, e.g. in the form of an additional subsidy[10] or a low-interest loan (1% per annum), were used only in some cases, i.e. LIFE + or Citizens for Democracy Programme (FM EEA). According to information gathered during the interviews, ENGOs chose those sources of co-financing for their projects which required an own contribution of up to 20% and in many cases also those where in-kind contributions were accepted.

In the context of the information contained in the NIR 2014, regarding the level of project co-financing and subsidies to support ENGOs in securing their own contribution under the Operational Programme "Infrastructure and Environment" 2007-2013, it must be noted that in the 2014-2020 Financial Perspective ENGOs are at a disadvantage in relation to other beneficiaries. Detailed description of the Priority Axes of the Programme from March 2016 indicates that ENGOs will be able to receive up to 85% of co-financing for their projects, no system for supporting organizations in their

[10] As far as the Citizens for Democracy Programme is concerned, in certain cases the additional subsidy was provided by the Stefan Batory Foundation from its own resources (fund operator).

efforts to secure own contributions is, however, envisaged[11] (possible co-financing from the state budget or other sources refers to public authorities and government bodies).

Article 4. Access to environmental information

Difficulties in implementing Article 4

In 2014, Greenmind Foundation[12] carried out a study which is relevant to this report. The study covered a representative sample of municipalities and all regional directorates for environmental protection (Chylarecki P., Wiśniewska M., Engel J. 2014). Our aim was to exercise scrutiny over practices applied by public authorities relating to: the provision of access to information about the environment and its protection and public participation in making decisions concerning the environment. Mention should be made here of the results of our study relating to the provision of access to environmental information, i.e. to environmental impact assessment reports (EIA reports) which must be submitted by investors, also in electronic form, along with an application for environmental impact decision (EIA decision)[13].

refusal to provide access to environmental information

74% of municipalities and 70% of regional directorates for environmental protection (RDEPs) provided access to environmental information (EIA reports) in the requested way and form (sent by e-mail). 12% of municipalities and 19% of RDEPs made the EIA reports available in electronic form, but not in the requested way (sent by post). 14% of municipalities and 11% of RDEPs refused to provide access to EIA reports. The grounds for refusal given by the public authorities were mainly as follows[14]:

- making the EIA report available constitutes an infringement of the copyright,

- EIA report has been submitted to a higher body in a review procedure along with all documentation (the request for access was not transferred to the relevant body holding the information),

- the report can only be accessed in person at the municipal office in the course of the ongoing procedure (conducting the proceedings does not, however, preclude the obligation to provide access to environmental information, i.e. to the EIA report),

- EIA report has been submitted to the competent body along with a request for approval, which means the report may have to be supplemented upon the request of that body and, as such, it is not treated as the final document,

[11] NFEP&WM is planning to launch a financial envelope addressed to ENGOs to subsidise 10% of their own contribution (ENGOs will still have to make an own contribution of 5% of the projects' value), but these subsidies are to apply only to the proposed projects operated by the NFEP&WM as part of the Programme. No official and detailed information on that matter has been made available yet – the only information available was supplied orally during the workshop held by NFEP&WM to which beneficiaries were invited.

[12] as part of the project called "The Aarhus Convention in Practice – citizen monitoring of public authorities and a dialogue for change"

[13] Requests for access to information (384) were submitted both by natural persons (192) and by the Foundation (192). The same proportion of them concerned EIA reports in closed and in ongoing procedures. Applicants requested access to electronic version of the EIA report (the investor is obliged to submit the report in this form to the competent authority) and indicated an e-mail address to which they wished it to be sent.

[14] public authorities (as defined in the Convention)

- the report is unavailable in electronic form,

- entity requesting access to the report does not have sufficient interest to do so.

All identified cases in which municipalities or RDEPs refused to provide access to the EIA reports constituted an infringement of the national law (Act of 3 October 2008 on sharing information about the environment and its protection, public participation in environmental protection and environmental impact assessment (AEIA); Journal of Laws 2008, No 199, item 1227) and of the letter and spirit of the Aarhus Convention. A special group consisted of 25 municipalities which failed to respond at all to the requests for access to EIA reports submitted to them in writing. It is worth pointing out that the lack of any response was twice as frequent if the requests were made by a natural person (11% of requests, 18/160 requests) than if they were filed by the Foundation (5%, 8/160; the difference between the entities is statistically significant).

failure to meet deadlines

The main identified problem lies in the fact that the authorities hardly ever meet the standard laid down in the provisions of Article 14(3) of the AEIA, according to which, documents contained in publicly available lists of documents (PALDs), referred to in Article 21 of the same Act, should be made available on the day on which the request is received. Therefore, this standard also refers to environmental impact reports, which follows directly from Article 14(3) in connection with Article 21(1) and with Article 21(2)(16) of the AEIA. According to our study, only 15% of municipalities and 20% of RDEPs were able to make the requested reports available within 3 days from receipt of the request thus meeting the liberally interpreted criteria specified in the above mentioned standard and fulfilling their obligation "as soon as possible" in line with the provisions of the Convention.

The time for responding to requests for access to EIA reports submitted to municipalities varied widely (between 0 and 101 days). On average, a response was received after 13.8 days and 50% of responses were received within 10 days[15]. 35% of municipalities responded within a week after the request was submitted and 25 municipalities delayed giving their response for over a month. What is worth pointing out is the fact that the authorities responded more promptly to requests submitted by a legal person (Foundation), whereas natural persons had to wait a few days longer.

The time for responding to requests for access to EIA reports submitted to RDEPs also varied widely (between 0 and 44 days). On average, a response was received after 8.4 days. 50% of responses were received within 6 days and slightly more than 50% of responses were received within a week. One of the 64 RDEPs made the EIA report available after a month. It is worth pointing out that in cases where the request for access concerned documents collected in procedures that ended with an approval issued by the RDEP, the EIA report was made available almost 3 days earlier than in cases where the procedures were still in progress (7.0 days vs 9.8 days).

charges for supplying information

Another significant problem relates to charges levied by administrative authorities for supplying environmental information. As a general rule, documents contained in PALDs can be accessed (searched for and browsed through) free of charge at the head office of the competent authority

[15] It did not matter whether the request concerned a procedure that was still in progress (i.e. no decisions had been taken yet by the competent authority) or a closed procedure in which a decision had already been taken.

(Article 26(1) of the AEIA). The authorities may levy a charge for searching information, converting it into the requested form, making copies of documents or data and for sending the information to the applicant, but such charge cannot exceed a reasonable amount reflecting the cost actually borne by the authority (Article 26(2) of the AEIA). In compliance with the principle of the rule of law, public authorities may only levy charges which are prescribed under the applicable law. It means that in all cases where the requested information does not have to be searched for, converted, copied or sent to the applicant, no charges should be levied. However, according to the study carried out by Greenmind Foundation in 2014, there are no uniform rules for levying charges for supplying access to environmental information and the authorities use varying interpretations, often inconsistent with the AEIA, which leads to undue charging. Moreover, as for when the charges are to be paid, it must be pointed out that as laid down in sentence 1 of Article 6 of the Regulation of the Minister of Environment of 12 November 2010 on the charges for supplying environmental information (Journal of Laws 2010, No 215, item 1415), "Charges referred to in Articles 2-5 shall be paid within 14 days at the cashier's window, by bank transfer to the account of the competent authority or upon receipt of the requested information." The Regulation does not specify, however, the date from which the period of 14 days should be calculated. It is therefore unclear whether the payment should be made before or after the requested information has been supplied, which makes the whole process even more chaotic.

It was a common practice for municipalities (6% of requests for access to EIA reports) and RDEPs (31% of requests for access to EIA reports) to levy a charge for supplying (searching or converting) information which is to be supplied free of charge in line with the AEIA. 16 out of 278 municipalities which provided access to EIA reports levied a charge for searching and/or supplying environmental information. In the vast majority of cases (12/16, i.e. 75%) the supply of information was conditional upon the advance payment of such a charge. In one case, the applicant was notified of the costs involved, but the report was supplied before the payment was made. Three other municipalities sent the report along with information about the charges levied for searching or supplying the information. Regional directorates for environmental protection levied a charge in 17 out of 58 cases where they provided access to the EIA report. The supply of information was conditional upon the advance payment of such a charge less often though than in the case of requests submitted to municipalities (4/18, i.e. 22%).

As far as municipalities are concerned, charges were levied almost three times more often for supplying information about procedures in which EIA decisions had not yet been issued (12/143) than about procedures in which the decisions had been issued during the previous several months (4/135). As for the procedures carried out by RDEPs, the difference was much smaller. For the overall analysed sample, charges were levied in 8.7% of ongoing procedures and in 6.1% of closed procedures.

Another factor that increased the likelihood that a charge would be levied was the status of the applicant requesting access to information. Natural persons submitting requests had to make a payment much more frequently than the Foundation, i.e. a legal person. As for all analysed municipalities (278), the difference was 9.1% vs 2.7%, whereas for the overall sample (336) – 8.6% vs 2.0%, respectively.

Finally, RDEPs levied charges much more frequently than municipalities. Taking into account the

cumulative impact of all the three factors mentioned above (type of authority, status of procedures and the applicant), the likelihood that a charge would be levied for searching and converting information by these authorities was respectively: 30.0% and 5.2%. It is worth pointing out as well that the charge levied was often lower than the cost of sending the relevant notification to the applicant.

experience gained by other ENGOs

Foundation for Sustainable Development identified similar problems in gaining access to environmental information while carrying out its own project[16] as part of which RDEPs and urban municipalities were analysed (16 voivodeships). The Foundation submitted requests for access to information that should be contained in PALDs in line with Article 21(2) of the AEIA. Numerous cases where rights of access to information were impaired, mentioned in the final project report, (Lubaczewska S., 2014) include:

- failure to meet deadlines for processing requests (RDEPs delayed giving their response even for 3 months and voivodeships even for 4 months),

- undue charging (for searching information in the list) and making the supply of information conditional upon the advance payment of the charge levied.

The above conclusions concerning problems in gaining access to environmental information were also confirmed by the interviews with ENGOs (Engel J., 2016a)[17]. Six organizations submitted a total of 641 requests for access to environmental information to various institutions. Only in 4.5% of cases was the requested information made available in the requested form within one week from receipt of the request. In 10% of cases processing of requests took over one month; sometimes, due to the inaction by the competent authority, a review procedure had to be initiated before a Provincial Administrative Court in order to gain access to information requested. In 3.1% of cases no response was given and in 1.9% of cases access to information was refused. It must be noted that over 50% of the refusals (7 out of 12) did not comply with the statutory requirements – reasons for refusal were not stated and information on access to the review procedure was not given. Taking into account all the identified responses to the submitted requests given by the competent authorities, it may be concluded that Article 4 of the Convention was violated in 14.2% of cases. Frequent violations of the same kind were also mentioned by the respondents in our online survey: in 29% of cases it took over a month before the information was supplied, in 11% of cases it was not supplied at all (Engel J., 2016b).

According to ENGOs interviewed, the supply of information was hardly ever made conditional upon the advance payment of the charge levied – 0.8% of cases (according to respondents in the online survey, it refers to 21% of cases[18]). In the vast majority of cases (approximately over 90%) no charges were levied by the authorities. As pointed out by one of the ENGOs, no charges were usually levied by municipal offices. Directorates for environmental protection (both the general directorate and the regional ones), however, often charged a fee for the supply of information despite the fact that they

[16] project called "GUARDIANS OF NATURE – citizen monitoring of environmental protection actions taken by public authorities"
[17] concerning ENGOs' experiences related to the Convention gained between January 2014 and March 2015
[18] respondents in the online survey mainly included individual persons

use systems of electronic document flow and the only cost they have to bear in fact is the cost of sending an electronic message (with attachments) or uploading some files to an FTP server. Another organization mentioned some absurd situations where the cost of sending a written request for payment was twice as high as the payment itself, which confirms the results of the study carried out by Greenmind Foundation (Chylarecki P., Wiśniewska M., Engel J., 2014). As the interviews suggest, costs do not constitute a barrier to accessing environmental information for most of the ENGOs, but they may be an impediment for some ordinary associations.

Article 5. Collection and dissemination of environmental information

Difficulties in implementing Article 5

Public Information Bulletins

In 2015, Greenmind Foundation conducted an analysis of the quality and functionality of Public Information Bulletins (PIBs) in the context of providing access to information in line with the requirements of the Aarhus Convention and of publicly available lists of documents containing environmental information (PALDs)[19]. Results presented in this report are applicable to all Polish municipalities as the sample selected for the analysis was representative (Chylarecki P., 2015a).

Although PIBs are provided by the majority of municipalities analysed, some of them (7%) do not publish notices concerning environmental decision-making procedures in the bulletins. In cases where such notices are published in PIBs, they are usually difficult to find. Users looking for information about procedures related to issuing EIA decisions or about environmental impact assessments of plans and programmes (e.g. specific land development plans) admitted that searching the bulletin was quite an ordeal mainly because:

- environmental information is published in different ambiguously marked locations, often along with information about tenders, competitions for access to official posts, waste disposal schedules, etc.

- in 59% of cases names of documents published in bulletins gave no hint as to what matters they concerned as a result of which users had to dig deeper into other layers of information or they were just misled,

- the vast majority of municipal PIBs (71%) is not equipped with effective search aids,

- information about documents concerning the same matter (procedure) is not usually interlinked or grouped.

It is also difficult to access older information concerning environmental proceedings. 50% of PIBs analysed in 2015 did not contain information dating back to more than four years. Given the widespread lack of PIB archives, it poses a serious problem in gaining access to information on the environment and environmental protection and reduces the transparency of activities taken by municipal authorities.

Pursuant to Article 25(1)(8) of the AEIA, municipal environmental protection programmes and the relevant implementation reports must be published in PIBs. Currently applicable municipal

[19] results for PALDs are discussed later in the report

Environmental Protection Programmes have been published only in 29% of the analysed PIBs, whereas currently applicable programme implementation reports only in 5% of the analysed PIBs.

Access to environmental information via PIBs is much better at the regional level. However, some significant difficulties can be identified here as well. The format of PIBs provided by all RDEPs is the same and the tab with notices is visible, which facilitates the search for information. None of the RDEPs group the notices according to the type of procedure[20], notices concerning the same matter (the same procedure) are not grouped together or interlinked either. Entries[21] relating to EIA decisions are sometimes made in a way that prevents identification of the project which a given decision concerns. Search aids which the PIBs are equipped with are not sufficiently effective for the users: in some RDEPs it is not possible to search information by case reference number or it is only possible for 2014 and 2015. In some cases, notices cannot be searched by key words (name of project, location – city). Although all PIBs provided by RDEPs contain a tab dedicated to historical notices and announcements published between 2008 and 2013, in 11 out of 16 cases the actual contents of the tabs did not correspond to the declared contents (the archive did not contain the declared information). Notices from 2008 were published by only 5 RDEPs, some archives contained information from 2014, whereas in 3 cases no notices or announcements published in PIBs dated back to earlier than 2014.

publicly available lists of documents containing information on the environment and its protection (PALDs)

Pursuant to Article 23(1) of the AEIA, public authorities, including those at the municipal level, are obliged to maintain publicly available lists of documents containing environmental information in electronic form and to publish these lists in PIBs. Only half of the municipal PIBs (48%) include such lists or effectively redirect users to lists maintained in one of the available systems, the most popular of which is the Ekoportal platform[22] (40% of municipalities publish their lists there). In one third of the cases, the name of the list published is not consistent with the terminology used in the AEIA, which may prevent access to environmental information one tries to find. In the remaining two thirds of the cases, there are reasonable doubts as to the completeness of information published in lists maintained by municipalities. The essential questions related to a possible lack of information about decisions passed in environmental procedures. However, even if such information was available, it was often incomplete or the form in which it was presented did not comply with the Regulation of the Minister of Environment of 22 September 2010 on the formula, content and layout of the list of publicly available documents containing information on the environment and its protection. The relevant information files were completed correctly only by 22% of municipalities. Information files were linked to documents which they concerned by only 4% of municipalities. Providing such links is optional, but it greatly facilitates access to the desired information by the users and the officials do not have to provide such access every time it is requested by citizens.

Municipal offices are not the only public bodies that have problems maintaining PALDs. Although

[20] which some RDEPs used to do before PIBs were harmonised
[21] title of a notice that must be clicked in order to read it
[22] http://www.ekoportal.gov.pl/

Chapter 3 of the AEIA: Publicly available lists and dissemination of the information through electronic means, imposes the obligation to maintain publicly available lists of documents, a number of competent bodies fail to meet this obligation. For example, the analysis of websites operated by regional directorates of national forests (RDNF[23]) carried out by the Greenmind Foundation in May 2015 showed that the vast majority of the directorates do not maintain PALDs at all or maintain them in breach of the law. RDNF PIBs contain a tab "Publicly available list of documents containing environmental information", but 6 out of 16 RDNFs posted no content in it. RDNF Lublin informed that the list was available upon request, which was against the law. 7 out of 9 RDNFs which maintain the list (unsystematically though) do not comply with the regulation on the formula, content and layout that has been in force for 5 years and maintain the lists in the old system.

Results of the monitoring carried out by the Foundation for Sustainable Development show that only 9 out of the 23 analysed environmental protection departments and offices for cultural heritage preservation, maintained PALDs (Lubaczewska S., 2014). In the remaining 14 cases the desired information was not found due to the difficult or impossible website navigation.

Although various PALD systems are used, their shortcomings are similar. The main system, i.e. Ekoportal[24], an online platform operated by the Ministry of Environment, contains a number of deficiencies and errors which significantly impair its basic functionalities[25]. Information file search carried out by the Greenmind Foundation as part of the analysis of PALD functionality (Chylarecki P., 2015a) was significantly impeded due to the following errors:

- inconsistent data format incompatible with the requirements causing a confusion concerning the definitions of search criteria, which refers to:
    - names of authorities issuing decisions ("name of authority" field) – in consequence, it is permissible to use two differently worded names of the same authority (e.g. "Municipal Office in Wierzbica" and "Office of the Municipality of Wierzbica"), but positive search result can be obtained only if one of those names is entered in the field, which makes the search much more difficult, especially for an inexperienced user;
    - inappropriate matching of documents to predefined types ("type of document"); e.g. EIA decisions can be categorised as "other" instead of "decisions";
    - too wide definitions of document types, especially of "decisions"; this type currently covers both decisions concerning EIA decisions and permits to remove trees or bushes, as a result of which EIA decisions are very difficult to find given the large number of the above mentioned decisions of the other type;
- no clear relationships (priorities) between searches defined on the basis of the same information that can be entered in different fields; e.g. name of municipality (combined with other criteria or on its own) can be entered in different fields ("name of office", "name of document", "keyword") returning different results which cannot be interpreted in conformity with possible differences in the definitions of the above mentioned criteria; the problem is further compounded by the

[23] http://greenmind.pl/2015/06/a-informacja-w-lesie/
[24] used by, inter alia, 15 out of the 16 RDEPs
[25] here: a set of attributes of the software or system defining its ability to provide features that meet the defined and expected needs while being used in specific conditions

unclear relationship between the main search criteria based on document type and the search criteria based on the administrative division of the country (a group of "area" fields);
- impossibility to combine several search criteria using the conjunction "OR" (or the possibility to do so is not explicitly declared);
- last search criteria are not saved after moving on to the following pages and coming back to homepage, which makes it impossible to gradually refine or expand the search;
- incorrect naming/labelling of documents ("name of document" field), making it impossible to guess what one of numerous "Decisions passed by the head of the Municipality of Wierzbica" refers to;
- instability of results: the system sometimes returns different results (different number of information files) even if the same search criteria are used each time;
- gaps in the geographical coverage of the country as a result of which some municipalities are not assigned to any districts and, as such, they cannot be searched using the criteria of the geographical division of the country (e.g. municipality of Kórnik, in the voivodeship of Greater Poland, in the district of Poznań);
- information files entered into the system unsystematically, a number of information files for the whole outstanding period often entered at the same time (which can be seen in the "date of publication" field), as a result of which some information may be missing;
- frequent problems with page lagging and slow loading on public holidays.

The above mentioned flaws of Ekoportal are fully reflected in the results of the analysis carried out by the Foundation for Sustainable Development on the basis of which an extensive list of the online platform's functional deficiencies was compiled (Lubaczewska S., 2014). It must be pointed out, however, that although Ekoportal does not function perfectly, the alternative systems providing access to PALDs (Register of Data on Documents Containing Environmental Information (*EDOŚ*)[26], Environmental Information System (*SIOŚ*)[27], own systems used by some municipalities) are even more flawed. As far as own systems used by some municipalities are concerned, the way the search engines worked was usually unacceptable. As for *SIOŚ*, the search process was very unclear as simple and advanced searches returned different results even if the same search criteria were used. According to persons testing the systems, default sets of search criteria in *EDOŚ* and *SIOŚ* required users to enter too much information (Chylarecki P., 2015a).

Article 6. Public participation in decisions on specific activities

Difficulties in implementing Article 6

ensuring public participation in decisions requiring such participation

As mentioned earlier, in 2014 the Greenmind Foundation carried out a study[28] which is relevant to this report, covering a representative sample of municipalities and all regional directorates for environmental protection (Chylarecki P., Wiśniewska M., Engel J., 2014). This is where we would like

[26] system: Register of Data on Documents Containing Environmental Information; cooperates with the ekokarty.pl portal
[27] module: LIST in the Environmental Information System
[28] as part of the project called "The Aarhus Convention in Practice – citizen monitoring of public authorities and a dialogue for change"

to recall the conclusions reached regarding the efforts made to ensure public participation in taking decisions on whether EIA decisions concerning specific projects should be issued or not, with particular focus on how authorities reacted to requests for participation in the procedures submitted in line with the AEIA[29].

It was difficult for ENGOs to participate in procedures relating to EIA decisions as in many cases the authorities required the requesting organizations to submit a copy of their statute and information about the manner of representation. Although this type of data can be easily verified in publicly available electronic databases (electronic version of the National Court Register available on the of the Ministry of Justice), 24% of municipalities and 56% of RDEPs required the ENGOs to send these or similar documents by post. Organizations interviewed for the purpose of this report experienced such problems too (Engel J., 2016a).

The study revealed that general provisions of the administrative law are applied to procedures requiring public participation, i.e. organizations can submit a request to participate if they prove that the public interest requires their participation. This provision (contained in Article 31 of the Polish Code of Administrative Procedure) applies, however, to procedures other than those requiring public participation. Some authorities still have difficulty in establishing the relationship between Article 44(1) of the AEIA and Article 31(1) of the Polish Code of Administrative Procedure, whereas it is quite obvious that Article 44(1) of the AEIA constitutes a *lex specialis* in relation to Article 31(1) of the Polish Code of Administrative Procedure and renders it inapplicable in procedures requiring public participation (which is confirmed by the relevant national case law).

In some cases, environmental organizations were not allowed to take part in procedures requiring public participation due to the large number of participants. However, pursuant to Article 44(1) of the AEIA, only two conditions must be met by organizations wishing to take part in procedures requiring public participation: (i) they must be environmental organizations and (ii) their statutory objectives must justify their participation in a given procedure. Failure to meet one (or both) of these conditions is the only reason why the authority may refuse to allow an organization to take part in a procedure – the number of environmental organizations already participating in the procedure is not a condition to be taken into account.

There are still cases where public authorities refuse to allow foundations to take part in procedures requiring public participation because these foundations are not – according to the authorities – social organizations which are referred to in Article 3(1)(10) of the AEIA. Of the 96 procedures analysed by the Greenmind Foundation in the above mentioned study, one such case was identified. It must be noted, however, that this kind of refusals are absolutely unjustified and based on the wrong legal basis (which is clearly confirmed by the relevant national case law).

Another factor hindering the full and effective participation of environmental organizations in procedures relating to EIA decisions was the dilatoriness of the competent authorities in providing the possible negative responses. Given the possibility of tacit approval, the status of environmental organizations in the course of an ongoing procedure where certain environmental decisions were taken could have been unclear. The current legislation concerning the participation of environmental

[29] requests for participation in procedures with the rights of a party (96) in line with Article 44 of the AEIA were submitted both to municipalities (80) and to all RDEPs (16)

organizations in procedures requiring public participation does not specify the manner in which the approvals are granted. Under this legislation, i.e. under Article 44(4) of the AEIA, public authorities may refuse to allow an environmental organization to take part in such procedures by way of order and the organization may lodge an appeal against that order. This raises obvious practical problems such as, first, the fact that public authorities may accept various forms of admitting participation by environmental organizations in the procedures and, second, the fact that public authorities often do not inform environmental organizations whether or not they have been admitted to participate in a procedure at all, as a result of which these organizations may for some time not even know they are participating in that procedure as a party.

experience gained by other ENGOs

ENGOs interviewed for the purpose of this report were asked to share their experience relating to the way in which they were informed about the ongoing procedures, time-frames for submitting comments and the impact of the comments submitted on the final decision. The questions dealt with the informal consultations (before the commencement of the official procedure) initiated by the investors and opinions on how reliably the assessment of options was carried out (Engel J., 2016a)[30].

- **notifications**

Notices published in PIBs are the main source of information about procedures for ENGOs. Only in a few cases, especially where the organizations acted on the basis of Article 31(4) of the Polish Code of Administrative Procedure (prior expression of interest in a case), did ENGOs receive written notifications of the commencement of a procedure along with an indication of the possibility to examine the relevant documentation and to submit comments or questions.

According to ENGOs, the notification system based on PIBs very often does not work properly at the local level (municipalities). The notices are published later than on the traditional notice boards, but the time-frames for submitting comments and questions are not adjusted accordingly, as a result of which ENGOs have less than the statutory 21 days[31] to examine the relevant documentation, prepare comments and express their opinions during the consultation process.

According to the case law, the period of 21 days is calculated separately for each request, but citizens are unaware of that fact and the authorities do not accept any comments or questions submitted after the date indicated in the notice. Such situations mainly refer to investments that may raise concerns or controversy (e.g. wind farms, skiing infrastructure). During the analysed period, in extreme cases notices were published in PIBs after the deadline for lodging an appeal.

- **comments submitted vs final decisions taken by the public authorities**

According to ENGOs, comments and suggestions they submitted were hardly ever reflected in the final decisions. A reference was sometimes made in the justification for the decision taken by the authority, but not in all cases. These critical observations also apply to specialized bodies such as the RDEPs and the General Directorate for Environmental protection. In some cases, RDEPs did not even take into account the expert opinions submitted by ENGOs. There were, of course, some exceptions

[30] 6 ENGOs exercised the rights granted to non-governmental organizations under the AEIA and, in the analysed period (January 2014 – March 2015), they requested access to procedures requiring public participation 39 times

[31] see below: time-frames

to this rule, i.e. cases where comments submitted by ENGOs were treated seriously and taken into account in the final decisions. The overall picture, however, is not very optimistic – comments and suggestions submitted both during the public participation procedures and by ENGOs participating in procedures with the rights of a party[32] are usually ignored. Low impact of public consultations on the decision-making process is also confirmed by the results of the survey.

- **consultations before the commencement of a procedure**

A few cases of informal consultations organised by the investor in order to reach the best compromise were mentioned. Some ENGOs took part in consultations organised by the road sector early in an environmental decision-making procedure. The aim was to optimise activities aimed at minimising the negative impacts when all solutions were still, at least in theory, possible and the need to revise the project design did not generate additional costs at that stage. Therefore, such consultations were mutually beneficial. There were some disgraceful cases where consultations were initiated by investors only to "sound out" ENGOs opinions, "agree on" the contents of the EIA report before the commencement of the procedure or even to mislead the organization participating in that procedure[33].

- **public participation vs project options**

Almost in all procedures, applicants, supported by the authority, strived to implement one particular option, and the possible alternative options were only presented as a "background" in order to meet the requirements of the AEIA. The options were limited to technological or locational details and no attempts whatsoever were made to identify any other methods of achieving the objectives pursued. In road investments, priority was always given to minimising conflicts with residential developments, often at the expense of areas of great natural value. Cases where authorities conducting a procedure became actively involved in seeking the most sustainable and environmentally sound solutions, in cooperation with ENGOs and the investor, were extremely rare, but some positive examples show that this is not impossible.

- **time-frames for consultations**

The analysis of the content of the notices and of the data characterising the documentation subject to consultations conducted at the municipal level (during the environmental impact assessment procedure, before the EIA decision is issued) shows that, given the statutory 21 days for submitting comments and suggestions, there are numerous obstacles to effective public participation in environmental procedures. Just by dividing the number of pages by the number of days for submitting comments and suggestions we can see that persons wishing to take part in a given procedure have to read a dozen or so pages of a highly specialized text per day[34]. This result does not take into account, however, the most extreme cases identified during the analysis: the most extensive EIA report had 10,516 pages and 500-page-long reports constituted 10% of the analysed sample. Nevertheless, the largest proportion of the statutory time for consultations is wasted due to some other factors (Chylarecki P. 2015b).

[32] see below

[33] entity proposing a project consulted ENGOs as to the scope of tree cutting and the investor applied for a tree cutting permit without taking the consultation results into account

[34] the analysis of corresponding procedures conducted by RDEPs delivers different, more dramatic results; see below

One of those factors is the delayed publication of notices in PIBs. In 20% of cases they are published in PIBs more than 1 day after the date of issuing the notice.

Dilatoriness in providing access to the environmental impact reports is another factor hindering effective public participation in procedures relating to EIA decisions, in situations where citizens wishing to examine the relevant documentation are unable to do it in person at the office and exercise their rights of access to environmental information under the provisions of Section II of the AEIA. In the majority of cases, the report is made available in electronic form in clear breach of the 1-day period provided for in the AEIA. The average time for responding is 14 days. Only 15-20% of the municipal authorities are able to make the report available within 3 days from the date of the request, whereas around 50% of them make it available after more than 10 days.

Making full use of the statutory time is also hindered by the fact that the documentation made available in electronic form by municipalities is in a confusing mess. The analysed EIA reports usually did not form a coherent whole and in 77% of cases they consisted of more than one file. 50% of the analysed reports contained from 2 to 22 files (15 files on average) and their names usually gave no information on what the files concerned.

Moreover, documents that are made available are often incomplete, which forces consultation participants to take additional action. Only in 52% of cases, the EIA reports made available in electronic form contained all files listed in the table of contents. In 36% of cases the set of files was incomplete and in the remaining 12% of reports it was impossible to determine whether or not they were complete as they did not contain a table of contents (list of annexes).

Consultation participants, at the local level, often have to commit some time to identify the address to which they have to send their comments and suggestions. Postal address to which comments and suggestions can be sent is indicated only in 24% and email address only in 29% of notices published by the municipal authorities.

The volume of the documentation concerning a given procedure, including in particular the EIA reports, is of great importance for entities participating in consultations conducted by RDEPs before the EIA decision is issued[35]. For large infrastructural projects, even assuming that the participating entity knows about them and has access to all the relevant documentation from the very first day, it is impossible to examine all the material and prepare comments and suggestions within the statutory time limits. For example, an EIA report concerning the construction of an airport, consulted within the 21-day period, contained over 2,500 pages and its electronic version was made up of 682 files (42 of which were in a format which is unavailable for an average user). It must also be noted that RDEPs, just like municipalities, sometimes publish the notices with a delay (even a few days later than required) indicating the deadline for submitting comments as less than 21 days from the date of the publication[36]. Email address to which comments and suggestions can be sent is often not indicated in notices published by RDEPs.

Allowing up to 21 days or even – as it is supposed to be as of 1 January 2017 – up to 30 days for public consultations in environmental decision-making procedures does not guarantee that the

[35] In this respect, it should be recalled that it takes on average more than a week before RDEPs make the reports available in electronic form (Chylarecki P., Wiśniewska M., Engel J., 2014).
[36] 21 days from the date indicated in the notice

public concerned will be able to express comments and suggestions within "reasonable time-frames". Numerous obstacles created by the competent authorities significantly shorten the time allowed for consultations.

Opinions on the available time-frames for submitting comments and suggestions expressed by the interviewed ENGOs and respondents in the online survey were extremely diverging. For some of them the 21-day period was long enough, for others it was much too short (Engel J. 2016a, Engel J., 2016b). Such diverging assessments depend of course on the level on which a given procedure is conducted and on the type of the project it concerns – its scale, coverage as well as competence and human capacity of an organization. ENGOs also drew our attention to cases where they took part in procedures with the rights of a party and the time allowed by the authorities for the examination of the evidence gathered before making the decision (and after closing the consultations) was very short. In extreme cases it was only 3 days.

- **ensuring participation in procedures not requiring public participation, but concerning projects that have a significant effect on the environment**

Over the analysed period of 15 months[37], 7 ENGOs submitted a total of 65 requests to various authorities for participation in procedures with the rights of a party in line with the provisions of Article 31 of the Polish Code of Administrative Procedure. In 22 cases (over one third), ENGOs were not admitted to participate in the procedures by a body of first instance. In terms of access to the review procedure, the results are even worse: only 3 out of 19 (16%) appeals against the decision lodged with a higher body were effective (Engel J. 2015a). According to ENGOs, in the majority of cases the refusals concerned those procedures in which the projects were supported by the authorities conducting the procedures (commune head, mayor). This interpretation is supported by some of the justifications of the refusals:

- no relationship between the statutory objectives of the organization and the subject matter of the procedure, if environmental matters were not its main subject matter (even though the project undoubtedly had a significant effect on the environment[38]);

- failure to prove that sufficient public interest exists, i.e. failure to demonstrate the ability to participate in the procedure constructively (contribute to fulfilling its objectives more effectively);

- failure to prove that the organization is able to make a meaningful contribution to the procedure (ENGOs were required to take a stance on a case before it was even decided whether or not they would be admitted to take part in the procedure or allowed to demonstrate adequate knowledge).

Another bad practice must be mentioned in this report: there are cases where ENGOs are not admitted to participate in a procedure on the alleged grounds that participation in administrative and judicial procedures is not listed as one of the ways of implementing their statutory objectives.

[37] January 2014 – March 2015

[38] e.g. procedures on the concession for the extraction of shale, drilling appraisal and exploration wells in search of natural gas deposits

Article 7. Public participation concerning plans, programmes and policies relating to the environment

Difficulties in implementing Article 7

- **notifications**

Only 7 out of 35 organizations that were questioned for the purpose of this report about their experiences on the Convention application and participated in consultations on planning documents and environmental impact assessment forecasts[39] were notified of the consultations held, encouraged to submit comments and invited to consultation meetings. 80% of ENGOs learnt about the consultations "through the grapevine" or by following the notices on authorities' websites and Public Information Bulletins (Engel J., 2016a). The organizations surveyed on-line had similar experiences[40] (Engel J., 2016b).

- **comments made and the final form of documents**

Data on the effectiveness of consultations held are alarming. In 40% of cases, the authorities did not even prepare the summaries of comments submitted by the public. Usually, the comments made by ENGOs had little influence on the final form of documents. Nearly all attempts to influence the form of local area development plans and land use plans failed. ENGOs pointed out the fiction of the consultations on amending local planning documents regarding specific projects. According to the interviews conducted with ENGOs, the consultations are usually fake in character, also in the case of regional and national documents (Engel J., 2016a). Respondents to the online survey had a similar opinion – the influence of the comments made on the final form of documents was little or none (Engel J., 2016b).

- **time-frames for consultations**

According to the interviewed ENGOs, in 40% of cases, the authorities did not provide suitable time-frames for submitting comments. Positive opinions on the time assigned for consultations regarded the cases in which the ENGOs prepared in advance for the consultation process or the organizations having appropriate human resources (e.g. participating in consultations as part of watchdog projects).

Article 8. Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments

[39] Six of the interviewed organizations participated in consultations on planning documents and environmental impact assessment forecasts. Altogether, the analysed organizations sent comments and conclusions regarding 35 documents (it is the total number of documents with comments submitted by ENGOs as some documents were assessed by several organizations). Nearly 50% of the consulted documents were local area development plans and land use plans. The remaining documents are mainly national programmes, policies and strategies.

[40] The consultations with the participation of citizens surveyed online (13) and ENGOs' representatives (3) regarded the documents at different levels: national (National Water and Environmental Programme, Infrastructure and Environment Operational Programme, Polish Nuclear Energy Programme, National Waste Management Plan), regional (the so-called master plans concerning river basins, flood risk management plans, updated water management plans and regional water maintenance plans, voivodeship development plans and their amendments) and local (municipal development plan, urban green development plan).

Practical difficulties in implementing Article 8

experiences gained by ENGOs

- **source of information on the legislative process**

According to the answers given by the interviewed ENGOs, the main sources of information on the consulted draft legislation are authorities' websites and the news bulletin "Government Legislative Process" on the Government Legislation Centre (GLC) website. Other sources of information on draft legislation include official documents of the authorities responsible for their preparation, addressed to particular organizations as well as informal contacts with these authorities' employees, Internet forums and discussion lists [41] (Engel J, 2016a).

- **comments made and the final form of legal acts**

Only in a few analysed cases, did the ENGOs participating in the interviews confirm the actual influence of comments submitted by them on the final version of drafts. In the ENGOs' opinion, in the majority of cases, the comments taken into consideration usually had little influence on the final form of documents – the comments of secondary importance were usually taken into account. In several cases, no consultation report was drawn up or the comments submitted failed to be treated in a satisfactory, i.e. substantive manner (Engel J., 2016a and Engel J., 2016b[42]).

Little interest of citizens and ENGOs in consultations on legal acts results from their negative experiences indicating minor influence of effort taken by the consultation participants on the final form of these documents.

- **time-frames for consultations**

In the vast majority of analysed cases, ENGOs take a critical stand on the time-frames assigned for assessing draft legislation – it is not only about the time assigned for consultations but also about the dates on which they are held. According to ENGOs, the examples of extremely unfavourable dates were those assigned for consultations on amending the Hunting Law Act and the AEIA at the turn of 2014 and 2015 (Engel J., 2016a).

In the interviews conducted with ENGOs, special emphasis was given to the assessment of the GLC website. The ENGOs' opinions on this matter are rather negative and some of them are very critical[43]. The only positive aspect mentioned was the orderliness of information in the legislative process. However, an opinion prevails that this solution is regarded rather as a formality to be completed and some consultations are called "ritual" due to the deadlines that make it impossible for consultation participants to become familiar with the documents. ENGOs point out that, contrary to the Convention requirements, draft legislation fail to be consulted "while options are still open." Quite the opposite, authors present their ideas, allowing only minor amendments with no possibility of discussing strategic guidelines. This limitation also concerns the consultations on draft legislation

[41] The conclusions drawn from consultations on 26 draft legal acts in which ENGOs took part in the period from January 2014 until March 2015 (draft legislation guidelines – 3, draft acts, most frequently draft amendments – 9, draft regulations – 13 and draft order of the RDEP – 1).

[42] The online survey conclusions on the difficulties in implementing Article 8 of the Convention were prepared on the basis of the answers given by one organization and 3 individuals.

[43] For example: "The consultation quality fails to meet the standards of a democratic state of law and satisfies only formal requirements."

guidelines. Moreover, ENGOs paid attention to the effectively avoided obligation to conduct consultations through submitting draft acts in a mode other than the governmental mode (e.g. in the form of draft bills). Taking into account the ENGOs' comments, including the experiences gained by the Greenmind Foundation, more attention was given to consultations by analysing the consultation process documented and run by the GLC.

government legislative process

The analysis included 142 documents released in the Public Information Bulletin of the Government Legislative Centre (GLC PIB) over the period 2014-2015: 130 draft regulations, 10 draft acts or amendments and 2 draft amendment guidelines (Chylarecki P., Babiasz R., 2016)[44].

Out of 142 legal acts available in the GLC system, 26 (18%) were not subject to effective public consultations enabling the public to express their opinion on the proposed regulations. In the majority of these cases, the documents were assessed – according to the generally accepted practice – only by arbitrarily selected entities (in some cases by ENGOs) to which the regulations were sent in paper versions. In one case, the notice on public consultations was entered in the GLC system after the deadline for submitting comments. It resulted in the actual lack of public consultations despite false appearances and despite ensuring the possibility of making comments by individually selected entities that were notified of the legislative process in progress in a standard manner by mail.

The failure to meet the obligation of conducting public consultations regarded almost exclusively regulations. The only exception was the draft amendment to the Forest Law in the case of which the departure from the consultation rule was intentional and conducted with reference to the Work Regulations of the Council of Ministers.

The remaining 116 draft regulations, acts and legislation guidelines were subject to public consultations lasting from 3 to 30 days. The consultations usually lasted 7 days (27%; 38/116) or 10 days (28%; 43/142), more rarely 30 days (9%; 13/142). In six cases (4%), the consultations were shorter than 7 days, which usually resulted from the defects in implementing longer periods (e.g. access to an incomplete text of the act and another access to its full version a few days later, without extending the original consultation period).

Public consultations on draft amendments to acts and amendment guidelines lasted longer than those on draft regulations. Except the cases with no effective public consultations, 48% of regulations (50/105) were consulted not longer than 10 days, whereas in the case of draft amendments to acts or legislation guidelines the consultation periods exceeded 10 days. It should be noted that some of the periods analysed, e.g. in the scope of amending the AEIA and the Hunting Law Act, were extended as a result of active intervention of ENGOs.

The period of consultations on the documents released in the GLC PIB coincided in 20% with the period of summer holidays (25/121 cases). The documents released in the GLC appeared before Christmas and Easter, so the consultation periods overlapped the broadly defined Christmas, New

[44] The sample size varied depending on the analysis as not all information was available for each legal act. In particular, the number of pages was indefinite for 13 draft regulations on water management in which the number of annexes and their format diversity was so significant that precise calculation of their pages number would have been very time-consuming but it would not change the obvious opinion on the effectiveness of citizens' access to these legal acts.

Year and Easter time. The share of such documents amounted to 19% and was statistically non-randomised.

Special cases need to be mentioned here:

1. A special case regarded regulations on flood risk management plans (FRMPs) and updated water management plans (uWMPs). They included 13 drafts (3 FRMPs and 10 uWMPs) of enormous size, difficult to estimate. Each regulation had dozens of annexes including MS Access (mdb) files. A large number of annexes was compressed with the use of 7-zip programme but some archives could not have been downloaded on user's computer, thus remaining illegible for persons willing to view them on the websites on which they were released. The formal connection of particular files with the regulation is unclear as they were not numbered and they were not mentioned in the regulation text, remaining in fact various annexes to the prepared and attached expert report. All 13 drafts were released almost simultaneously (on 2 and 5 October 2015) with a 14-day deadline for submitting comments[45].
2. In the second half of December 2014, draft amendments to a few important legal acts were released simultaneously on the GLC website. They included:
    - extensive amendment to the AEIA (released on 15 December 2014, consultation period: 21 days, until 5 January 2015, extended until 12 January 2015 after ENGOs' intervention),
    - amendment to the Hunting Law Act (released on 17 December 2014, consultation period: 7 days, until 24 December 2014, extended until 7 January 2015 after ENGOs' intervention),
    - the Minister of Environment Regulation on the template list of waste equipment recycling plants (released on 19 December 2014, consultation period: 5 days),
    - the Forest Law amendment guidelines (22 December 2014, consultation period: 14 days),
    - the Minister of Environment Regulation on the documents confirming, separately, recovery and recycling (23 December 2014, consultation period: 3 days).

Moreover, in the period of consulting the three above-mentioned acts, on 30 December 2014, the voluminous (276 pages) draft act Water Law of major importance to ENGOs was released on the GLC website (period: 30 days).

3. On 20 May 2015, information about 10-day consultations on 6 draft regulations concerning genetically modified organisms (GMO) was released on the GLC website. From among these six documents jointly mentioned in the official letter addressing them to consultations and assessments, one document was not released on the GLC website whatsoever (before the consultation completion date) and three other documents were released in versions preventing consultations due to the missing 4, 4 and 2 pages of the draft regulation respectively. The amended versions with the complete number of pages were made available after 7, 7 and 12 days respectively, without extending the consultation period.

Despite an efficient system of information about new draft legislation (GLC PIB), the share of

[45] The draft FRMPs and uWMPs were subject to six-month consultations pursuant to the Water Law Act requirements but they were amended after completing the consultation process, before releasing them in the GLC PIB and the scope of these amendments is unknown.

documents that were not released in this system for public consultation turned out to be surprisingly high. As much as 18% of the government documents that were not subject to consultations is an unacceptably high percentage. It does not matter that a vast majority of these documents was assessed by selected entities to which suitable documents were sent by mail. The selection of these entities is always arbitrary (often discriminating against ENGOs) and there are no reasons to limit this process, having an efficient IT system (GLC PIB), to selected stakeholders, thus excluding a huge part of the public from participation in national consultations on draft legislation. Obviously, some of the regulations excluded from consultations might have remained inaccessible by accident as their Regulatory Impact Assessment states that the document "will be" released for public consultations (which never happened). As regards the regulations of a very limited geographical range, such negligence was not significantly detrimental to implementing the provisions of Article 8 of the Aarhus Convention. However, in other cases regarding important issues, the Ministry of Environment intentionally failed to submit the documents to consultations, explaining it by lack of time and possible departures from this rule, as stipulated in the Work Regulations of the Council of Ministers. That was the case of withdrawal from consultations on the draft amendment to the Forest Law (draft of 2 January 2014[46]) which introduced a very controversial provision that liberalised logging by excluding improvement cutting in the Forest Management Plan (FMP) from the limits of logging expressed in stand volume. As a consequence of adopting such a solution in the final amendment to the act, a controversial annex to the Białowieża Forest Inspectorate FMP was introduced in March 2016, which enabled a significant increase in logging in the Natura 2000 area, with no necessity to plan (and thus without public scrutiny over) felling locations and logged species. Despite various unfavourable consequences of lack of consultations, it is obvious that the Work Regulations of the Council of Ministers cannot cancel or limit the provisions of Article 8 of the Aarhus Convention in the scope enabling actual participation in law-making.

A huge majority of government legislation documents was made available for public consultations for a very short period – in the case of 80% of legal acts that were subject to public consultations, the time limit for making comments did not exceed 14 days. Such a short period is unreasonable if there are no exceptional circumstances. In other words, such short periods of consultations seem incompatible with the requirement of ensuring common public participation in preparing normative acts and generally applicable environmental executive regulations by public authorities. A short period, often lasting a few days, assigned for obtaining information on the access to the draft regulation, studying it and submitting comments constitutes a significant factor that limits public participation in forming the most important legal acts on national nature conservation. It should be noted that draft amendments to acts have a specific form in which only the fragments to be changed (added or deleted) are displayed. It requires reader's effort to assess the relations between new elements and the remaining provisions of the complete act. Assigning a few days for analysing the amendments to an act consisting of 43 pages or so can be interpreted only as effective limitation of public influence on law-making.

Draft acts or draft amendments to acts were subject to longer consultations than draft regulations, which is a positive symptom taking into account commonly used short consultation periods. Unfortunately, the Ministry of Environment did not in general consider the fact that longer

[46] note: other than the previously mentioned one (consulted at the turn of 2014 and 2015)

documents needed longer periods for public consultations, which is proved by a trace (insignificant) correlation between the size of documentation and the consultation period.

Article 9. Access to justice

Difficulties in implementing Article 9

While analysing the ENGOs' access to judicial authorities for the purpose of this report, the emphasis was given to identification of potential barriers preventing or hindering the organizations' participation in proceedings before administrative courts. 6 ENGOs participating in the interviews exercised the rights granted by Article 9 of the Convention. In the period from January 2014 until March 2015, these organizations filed 56 complaints to administrative courts (voivodeship administrative courts and the Supreme Administrative Court[47]). The complaints regarded particularly the decisions made by second-instance authorities (95% of cases).

Before discussing practical limitations in fighting for one's rights in environmental matters, some difficulties should be noted here resulting from legal restrictions that ENGOs may encounter due to the so-called special acts. During the interviews, ENGOs mentioned the case when the Road Act prevented cancellation of a decision allowing a road project implementation despite eliminating a faulty decision on this project environmental constraints from legal transactions (Engel J., 2016a).

The condition for initiating the proceedings by an administrative court is the payment of a court fee. The fees are paid from ENGOs' own funds. When answering the question about the amount of court fees, 2/3 of the organizations regarded them as very high or high. Some organizations did not find the fees for typically environmental matters (PLN 100-200) particularly "painful" but all participants agreed that the costs of appeal proceedings concerning building law or area development (PLN 500) are too high.

Theoretically, on the basis of the so-called assistance mechanism, it is possible to apply for exemption from the fee. The courts consistently denied ordinary associations participating in the interviews the right to assistance, without taking into account poor financial position of these ENGOs (organizations based only on contributions and donations). According to the decisions denying the right to assistance, every entity that files a legal complaint must take these costs into account and cannot expect that the state will subsidise non-governmental organizations. In courts' opinion, ENGOs are able to obtain funds through collecting contributions, conducting business activity, applying for donations and should prove before the court that they made such efforts but they were ineffective.

Attorney's fees constitute another serious barrier to access to courts. In some cases, appeals are written by lawyers engaged for the needs of projects or as part of voluntary service, and in other cases, they are written by organizations' members. All the ENGOs[48] that actively participate in administrative proceedings and take legal action indicate the compulsory representation by a lawyer while preparing a complaint in cassation to the SAC as a major barrier to access to justice in

[47] hereinafter "SAC"
[48] it is also confirmed by those surveyed on-line

environmental matters. Only the ENGOs that have lawyers-volunteers or considerable funds at their disposal (not assigned to specific projects) are able to take full legal action, including proceedings before the SAC[49]. Organizations with the lowest budget, usually small organizations and ordinary associations, are in the worst situation. In this case, they might theoretically enjoy the right to assistance but ENGOs' experience shows that such applications are rejected.

For some ENGOs, the amount of court fees is a major obstacle to access to justice. The compulsory representation by a lawyer in proceedings before the Supreme Administrative Court constitutes a financial and organizational barrier for all entities.

One more thing that hinders ordinary associations from access to justice should be mentioned here. More and more frequently, administrative courts impose an obligation on ordinary associations to sign the legal complaints and other documents by all members of the association. Such a requirement is (1) inconsistent with the Act on Associations and (2) difficult to be met even with a small number of members[50].

[49] the cost of one proceeding is up to several thousand zlotys

[50] The requirement to sign complaints and powers of attorney by all members of an association does not result from amended provisions but from some administrative courts' interpretation that appeared around 2012. Interpretation of the manner of representing ordinary associations is ambiguous and some administrative courts examine the complaints that are filed by persons authorised by the associations.

Sources:

Chylarecki P. 2015a. Badania funkcjonalności BIP i wykazów danych o dokumentach zawierających informację o środowisku i jego ochronie w kontekście zapisów Konwencji z Aarhus; <http://greenmind.pl/ wp-content/uploads/2016/02/wyniki-badania-BIP-w-gminach.pdf>

Chylarecki P. 2015b. Ocena stosowania krajowych przepisów wdrażających art. 6 ust. 3 Konwencji z Aarhus, nakazującego zapewnienie "rozsądnych ram czasowych" na efektywny udział społeczeństwa w podejmowaniu decyzji dotyczących konkretnych przedsięwzięć, mających znaczenie dla środowiska; <http:// greenmind.pl/wp-content/uploads/2016/03/wynik-badania_rozsądne-ramy-czasowe.pdf>

Chylarecki P., Babiasz R. 2016. Ocena rządowego i parlamentarnego procesu legislacji w kontekście art. 8 Konwencji z Aarhus; <http://greenmind.pl/wp-content/uploads/2016/04/Ocena-rządowego-i-parlamentarnego-procesu-legislacji.pdf>

Chylarecki P., Wiśniewska M., Engel J. 2014. Dostęp do informacji o środowisku i udział w decyzjach dotyczących środowiska: społeczna kontrola praktyk administracji publicznej. Fundacja Greenmind. Warszawa; <http://greenmind.pl/wp-content/uploads/2014/09/Greenmind_RaportAarhus.pdf>

Engel J. 2016a. Doświadczenia organizacji pozarządowych z wdrażania Konwencji z Aarhus; <http:// greenmind.pl/wp-content/uploads/2016/04/Badanie_poe_raport_ver3_1.pdf>

Engel J. 2016b. Doświadczenia ze stosowania Konwencji z Aarhus. Podsumowanie ankiety internetowej; <http://greenmind.pl/wp-content/uploads/2016/04/Badanie_internet_raport.pdf>

Lubaszewska S. 2014. Strażnicy natury – społeczny monitoring dostępu do informacji o środowisku. Fundacja EkoRozwoju. Wrocław; <http://dip.natura2000.pl/imgturysta/files/StraznicyNatury04.pdf>

Makles M. 2015. Analiza dostępności źródeł finansowania działań z zakresu edukacji ekologicznej oraz wsparcia funkcjonowania pozarządowych organizacji ekologicznych w latach 2014–2015; <http:// greenmind.pl/wp-content/uploads/2016/04/Analiza-dostępności-źródeł-finansowania-działań-z-zakresu-edukacji-ekologicznej-oraz-wsparcia-POE.pdf>

Matuszewski B. 2015. Analiza transpozycji do krajowego porządku prawnego Konwencji sporządzonej w Aarhus dnia 25 czerwca 1998 r. o dostępie do informacji, udziale społeczeństwa w podejmowaniu decyzji oraz o dostępie do sprawiedliwości w sprawach dotyczących środowiska (wraz z załącznikami); <http://greenmind.pl/wp-content/uploads/2016/04/transpozycja-Konwencji-z-Aarhus_opracowanie.pdf>; <http://greenmind.pl/wp-content/uploads/2016/04/transpozycja-Konwencji-z-Aarhus_załącznik-1.pdf>; <http://greenmind.pl/wp-content/uploads/2016/04/transpozycja-Konwencji-z-Aarhus_załącznik-2.pdf>; <http://greenmind.pl/wp-content/uploads/2016/04/transpozycja-Konwencji-z-Aarhus_załącznik-3.pdf>