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CONSIDERING LEGAL ISSUES OF STAKEHOLDER INVOLVEMENT IN THE DECISION-MAKING PROCESS – LESSONS LEARNED AND CHALLENGES AHEAD

1. Stakeholder involvement – the theoretical background

It is a truism to say that public involvement is one of the key elements of capacity building and should be one of the priorities of any democratic government. Moreover, it is one of the crucial elements forming the concept of sustainable development, which is a principle of law outlined in the Polish Constitution of 1997. As far as the instruments that serve the fulfillment of the principle of sustainable development are concerned, one should consider the contents of supranational law, both international and European. Before I present these regulations, it is worth outlining various goals of public involvement, both conceptual and practical. Conceptual goals may be understood as meta-goals, such as: strengthening democracy, enhancing human rights or downward accountability of the development process. However, some of these issues are more closely connected with environmental issues, such as improving decisions and expanding awareness. Practical goals are connected with effectiveness and efficiency – public involvement is necessary to win support or deter opposition, stimulate action, inform decision-makers, obtain information, understand issues, concerns, effects and causes [George, 2006]. Conceptual goals are more important in post-communist countries, because they are an element of capacity building and creating civil society in every field of application [Jacobs, 2005].

Bisset [1997] states that there are four major types of involvement: first, there is the dissemination of information. In this case, the proponent provides information to stakeholders at regular intervals or whenever the need occurs. The flow of information is one-way and there is no provision for responses to be taken into consideration. The second type is consultation involving the exchange of information between the proponent and stakeholders in a two-way process. Also, during consultation there are opportunities for stakeholders to express their views on issues related to any proposal. Nevertheless, the proponent is not legally bound to take account of these views in decision-making. Consultation may also include mechanisms for feedback between a proponent and stakeholders, so the latter may learn the extent to which their views were taken into account in the final decision. Thirdly, there is participation – this requires shared involvement and responsibility. Basically, it implies an element of joint analysis and control over decisions and their implementation. In participatory decision-making there is no single source of ultimate control or authority. The participating parties must discuss and reach a decision by means of an agreed process – for example by mediation or consensus-building. Finally, there is empowerment and local control. This means delegating the powers of authorities to local communities and representatives (initiated and led by authorities or the local community) [Ennesser, 2000a, 67].

There are not only different levels of public involvement, but also different groups of stakeholders. Broadly speaking, stakeholders may be divided into two groups, professional and non-professional stakeholders. The following are professional stakeholders: public authorities, donors and beneficiaries, the private sector, academics, scientific and technical institutes and, last but not least, non-governmental organizations [George, 2006]. Non-professional stakeholders are local people affected by a proposal/draft and their elected representatives – usually informally cooperating groups – such as kinship societies, neighbourhood associations, recreational groups and hobbyists (*e.g.* anglers), church associations and youth groups etc. [Lenart et al., 2002, 71].

Both groups of stakeholders should be taken into account when preparing a proposal/draft, nevertheless each group needs a different approach and expects different results. Moreover, non-professional and professional stakeholders should be involved at different stages of the decision-making process. Non-professionals should be involved at very early stages of the procedure, during the conceptual phase of preparing a draft, whereas professionals should also be involved at advanced stages, when the detailed criteria of a project are known and the final decisions are due to be made.

There are a variety of forms of public involvement: comments on published documents, public meetings, open houses (a manned facility in an accessible location, which holds information on the project/draft, members of the public can obtain information there and make their own concerns/ views known) [Bisset, 1997], advisory panels, questionnaires/interviews, working groups and focus group discussions [Ennesser, 2000b, 11]. The instruments chosen to involve different groups of stakeholders should be based not only on the experience or capacity of public authorities, but should be aimed mainly at meeting stakeholders' needs and expectations and be connected with the character of the stakeholders (professional or non-professional). Hence, open houses will be most suitable in order to get in touch with the local community, whereas advisory panels are more appropriate when cooperating with representatives of chambers or lobbyists.

It still must be borne in mind that there are some drawbacks connected with public involvement such as longer and more expensive procedures. Moreover, while the stated aim of stakeholder involvement is to empower citizens, it can have the opposite effect in what has been termed "the tyranny of participation." A process may be deliberately designed to give participants a sense of control over decisions that have, in fact, been made for them. In other cases, facilitators may be unaware of the subconscious influence of their own views and attitudes on the way a process is conducted [George, 2006]. Other hazards include raising expectations beyond what can be realistically achieved, domination of the process by vociferous individuals or groups, inadequate representation of stakeholders as a whole and "participation fatigue" from participants who would prefer to delegate tasks to their elected representatives.

2. Stakeholder involvement – the legal framework

Nevertheless, the arguments for involving the public in decision-making processes outweigh the arguments against. Hence, public participation was regulated for in the Rio Declaration. According to Principle 10 of this Act, "Environmental issues are best handled with the participation of all concerned citizens at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceed-

ings, including redress and remedy, shall be provided". Similar regulations are expressed in Principle 22: "Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."

To discuss more specific solutions, it is necessary to analyze the resolutions of the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) and two of the most important EC Directives: Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes related to the environment, which amended Council Directives 85/337/EEC and 96/61/EC with regard to public participation and access to justice, together with Directive 2003/4/EC of the European Parliament and Council of Jan 28, 2003 on public access to environmental information, which repealed Council Directive 90/313/EEC. Both directives conform to the Aarhus Convention and fulfil its requirements at the European level. Proposals are being made for an Act on the Regulation of the European Parliament and Council on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC Institutions and Bodies [COM/2003/0622 final] to promote public participation in the preparation of UE drafts (plans and programmes). Since the basic assumptions of the directives in question are already (more or less) implemented in national law, I shall not explain their provisions, but I intend to pinpoint the general rules (objectives and definitions) of the Aarhus Convention before I start analyzing domestic law in this respect.

The main objectives of the aforementioned documents are enhancing the quality and the implementation of decisions, contributing to public awareness of environmental issues, giving the public the opportunity to express its concerns and enabling public authorities to take due account of such concerns. Other reasons for accepting the convention are the strengthening of public support for decisions on the environment and developing accountability and transparency in decision-making and also the strengthening of democracy. As one can see, the majority of the goals of public participation (in both groups – conceptual and practical) are taken into account in the preamble to the convention. Its regulations focuses on two groups of stakeholders: the public and NGOs. The convention distinguishes between "the public" and "the public concerned". According to Art. 2.4. „the public" means one or more physical or legal

persons and, in accordance with national legislation or practice, their associations, organizations or groups, whereas „the public concerned" means the members of the public affected, likely to be affected by or having an interest in a decision-making process. For the purposes of this definition, non-governmental organizations promoting environmental protection and meeting the requirements of national law shall be deemed to have an interest (Art. 2.5.). It must be borne in mind that the rights of these stakeholder groups are different: being a member of "the public concerned" only means being properly informed about a proposed activity, the nature of a possible decision and the envisaged procedure – during which comments and questions may be submitted to the relevant public authority. Environmental NGOs (ENGOs) have more rights because they are deemed as having an interest, which means they can act as a party in the procedure. Due to specific legal solutions the position of ENGOs in the legal procedure is specific and I would like to focus on this aspect in my further considerations.

Knowing the legal framework of public participation outlined in the Aarhus Convention, it is worth analysing domestic law in this respect. The procedure of public involvement is regulated by the Environmental Protection Law Act of 27th April 2001 (hereafter referred to as EPLA).

According to Art. 10 and Art. 31 and following of EPLA, members of the public concerned are able to submit petitions and motions in legal procedures concerning environmental issues, while not being a party of the procedure. Much broader competence has been given to ENGOs, which have the right to act as a party in legal procedures concerning environmental issues, as long as they satisfy the appropriate criteria. According to Art. 34 of EPLA, stakeholder involvement is obligatory in the following cases: creating state ecological Policy, creating programmes of environmental protection at local, district and regional level, creating strategic documents requiring the SEA creating an environmental protection programme reducing noise levels, creating a programme of reducing air pollution, creating an external plan for operating and rescue activities. According to Art. 53 and 218 of EPLA, stakeholder involvement is also necessary during the EIA procedure and when extending or changing an integrated permit.

Under EPLA there is no statutory obligation to carry out the procedure of public participation. However, public participation is assured by other acts, such as the Water Law Act, the Spatial Management and Planning Act, and the Genetically Modified Organisms Act. These acts concern somewhat more specific regulation in the field of public participation in the context of space and water management and GMO management and I shall not discuss their provisions.

3. Involvement of ENGOs in decision-making processes

As underlined above, this paper focuses on one aspect of public involvement in decision-making processes, namely the participation of NGOs in such procedures.

First and foremost the term "non-governmental organization" needs an explanation. At European level another term is also used – "civil society organization". Nevertheless, there is no commonly accepted definition of this term. It can be used as shorthand to refer to a range of organizations which include: labour-market players, organizations representing social and economic players which are not social partners in the strict sense of the term (such as consumer organizations), NGOs which bring people together in a common cause, such as environmental organizations, human rights organizations, etc.; CBO (community-based organizations) *i.e.* organizations set up within society at grassroots level which pursue member-oriented objectives, *e.g.* youth organizations, family associations and all organizations in which citizens participate in local and municipal life, as well as religious communities [COM(2002) 704 final]. To sum up, the term "civil society organization" has the benefit of being inclusive, because it covers all the principal structures formed by society outside of government and public administration, including economic operators not generally considered to be NGOs or part of the "third sector". What is worth bearing in mind is that NGOs are a subset of civil society organizations.

In Poland there are also two legal terms in use – "non-governmental organization" and "civil society organization". Nevertheless, there is no legal definition of the latter and for the purposes of this paper I will only use the term "non-governmental organization", which is defined in Art. 3 Item 2 of the Act on Public Utility Activity and Voluntary Work. According to this act, non-governmental organizations are non-profit organizations which are not organizational units of the public finance sector and may or may not have a legal entity. This includes foundations and organizations.

Legally (the Organizations Law Act), a distinction is made not only between "registered organizations" (having a statute and legal entity, registered by a court) and "non-registered organizations" (with no statute but having by-laws, no registration needed, no legal entity), but also foundations which were created (the Foundations Law Act) to achieve tasks such as health protection, developing the economy, science, education, culture and welfare, as well as environmental and monument protection. The founder may be a physical or legal individual and a foundation is actually a body of assets established to achieve some of the aforementioned tasks.

EPLA regulated the status and rights of ENGOs only. According to Art. 3 Par. 16 of EPLA "Environmental NGOs are non-governmental organizations which have promotion of environmental protection as one of their statutory goals". Theoretically, these goals should be expressed in the organization's statute. However, a very important question arises regarding the position of non-registered organizations and foundations, which may also be active in environmental matters and have no statute, but possess by-laws or a deed of foundation? Would their representatives be excluded from the legal procedures regulated by EPLA? Bar [2002, 23] underlies that the expression "statutory goals" should be broadly interpreted to also cover non-registered organisations [unlike Sommer, 2001, 24]. This interpretation of legal terms was recently accepted and even more broadly interpreted by the Supreme Administrative Court [II OPS 4/05]. According to the Court's verdict, there are no constitutional reasons to exclude foundations from legal procedures in environmental matters. Thanks to this verdict, other organizations (foundations etc.) may also act as a party in legal procedures regarding environmental matters.

The general rules connected with NGO participation in administrative procedures are regulated by the Administrative Procedure Code. However, as mentioned before, the Environmental Protection Act includes its own rules regarding the participation of ENGOs in this respect.

According to Art. 33 EPLA, an ENGO may act as a party in a procedure as long as: appropriate petitions and motions are submitted before the deadline and a motion to be accepted as a party in the procedure is additionally submitted. Moreover, the scale of activity of an ENGO must justify its participation in a procedure. These three requirements must be simultaneously fulfilled. It is worth mentioning that public authorities are not allowed to verify whether an ENGO has any interests justifying its participation in the procedure. As one can see, during a procedure an ENGO represents the public interest – to be precise: the interests of the environment and – in some cases – also the interests of groups that may be affected by the decision/programme: indigenous people, communities or other associations. However, in some cases the interests of ENGOs and the local community may be completely different (see case study II).

In order to satisfy the EU requirements deriving from Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, an amendment of EPLA was approved in May 2005. Before this amendment came into force, the only requirement for an ENGO to act as a party in a procedure was to submit a formal motion. Two additional requirements (mentioned above) were added in the amendment to create stricter rules of access to procedures. Considerable doubts arise on reading the content of this amendment

– according to these documents each ENGO should be deemed to have an interest in the procedure – which means Polish law is not congruent with supranational law in this respect.

A very important question arises from this conclusion – why do the Polish authorities risk administrative and judicial procedures (from the European Commission and European Court of Justice) by creating more restrictive rules for the participation of ENGOs? What are their rights in the procedure that an investors' lobby introduced in Parliament to reduce the involvement of ENGOs?

Indeed, being a party means having various legal rights during procedures, such as having the right to be properly and punctually informed about all the stages of the procedure, have access to all documents, but also to submit motions and file petitions for inspection and expert statements and finally – to have the right of appeal, both to an appellation agency and administrative court.

Using these rights, an ENGO may block procedures and endanger the interests of investors. Moreover, procedures themselves are getting longer. These are reasons for reducing the rights of ENGOs in procedures, which are supported by arguments following from various cases of "eco-bribes" (see case-study I). Moreover, the official losses of investors connected with procedural obstructions by ENGOs are more than 300 million złoty per year [Walencik, 2004].

4. ENGO participation – case studies

What is the truth? Are ENGOs only focused on blocking investments? Do they represent their own (economical) interests in the procedures? Are they expecting eco-bribes to ensure smooth progress of procedures? An eco-bribe is usually a donation to an NGO or payment for certain activities. Theoretically, such donations and payments are lawful. Nevertheless, according to the judgment of the Supreme Court, a donation made to avoid protests and appeals is invalid by law [II CK 202/04].

Some cases will be reviewed, in which both negative and positive examples of ENGO involvement appear in the procedures.

Case study I – "Przyjazne miasto" (Friendly City). This is an example of an abuse of legal rights given to ENGOs according to domestic law. The "Przyjazne miasto" organization (I would call it a "quasi-ecological NGO") has abused legal procedures to achieve its own goals at least three times. The first case was connected with protests against the building of the Arcadia Shopping Centre. The organization resigned from obstructions in

return obtaining a 2 million złoty eco-bribe to build a roof garden on the shopping centre [Jałoszewski et al., 2005]. A similar situation was connected with another project, the "Blue City" shopping centre. "Przyjazne miasto" obtained 300 000 złoty for a space management plan around the centre [Jałoszewski et al., 2005]. The third case started in 2004. "Przyjazne Miasto" blocked the "Golden Terraces" project in downtown Warszawa. Due to some procedural loopholes the organization was not informed in an appropriate way about future stages of the procedure and appealed to an appellate agency and both instances of the administrative court simply for this reason [Jałoszewski et al., 2005]. The legal system allows this, since according to Art. 11 of EPLA, any decision taken in a manner infringing environmental law is invalid. This is an overly strict rule, because each mistake – however minor – makes a decision invalid. The organization probably expected another eco-bribe, but it it did not get one. The Supreme Administrative Court finally rejected the appeal in June 2005. The project was blocked for more than a year causing huge losses. The problem is that this case destroyed the image of the whole green movement in Poland and became the main reason for the aforementioned amendment of the the Environmental Protection Law Act.

Case study II – NATURE 2000 areas. This case study shows that not only investors are in opposition to ENGOs, but even the Ministry of the Environment. In March 2004 the Ministry of the Environment opened a list of projected NATURE 2000 areas to public consultation. The project was very limited in comparison with the draft that had been prepared by experts from 2000 onwards. This project was going to discredit Poland in the eyes of the European Union, because it greatly reduced the scope and scale of protected areas. A coalition of ENGOs Lubuski Klub Przyrodników (the Lubuski Club of Nature Lovers), PTOP Salamandra, WWF prepared a wider list of such areas, but most of these were not accepted by the Minister. In reply to this, these ENGOs sent this complete "Shadow List" to the European Commission [Wojciechowski, 2004, 319]. According to the Habitats Directive, areas proposed on an official state list or on a shadow list have the same legal status. Until the EC decides whether an area is going to be protected or not, it should be deemed as being a NATURE 2000 area. Nevertheless, the Nature Conservation Act remains silent regarding the issue of the shadow list and covers only the official list. Recent incidents have demonstrated that this is still the case. Admittedly, the official list of NATURE 2000 areas was recently brought up to date. Nevertheless, conflicts between nature conservation and projects have arisen in these areas. On 26th January 2006 WWF and CEE BankWatch Poland, together with Ogólnopolskie Towarzystwo Ochrony Ptaków (National

Society of Protection to Birds), submitted to the European Commission a formal question connected with investments regarding national roads in NATURE 2000 areas (the Via Baltica and Augustów by-pass). As a result, ENGOs are looking for allies not only at local/national level, but also may win the support of the EC or other legislative/advisory bodies (*e.g.* the European Environmental Bureau, the Committee of the Regions or the Economic and Social Committee etc.), which is a proven and efficient way of bearing influence [Weihrich, 2003, 24]. This case also shows that conflicts arise not only between the public authorities and ENGOs, but also between the latter and local communities. However, road investments in likely NATURE 2000 areas are at the same time projects exciting huge expectations from the local community. People living alongside present international traffic routes feel their negative effects (noise, vibrations etc.) and expect the building of by-passes as soon as possible. For such people nature conservation is less important than their own quality of health and life. In this case the interested public and ENGOs are opponents and fight for the achievement of completely different goals.

This conflict shows an element of a broader problem: how can we combine the needs of the majority and minorities in a democratic way in a pluralistic society. In resolving this problem, it is worth mentioning that the aforementioned amendment to EPLA from May 2005 simultaneously restricted the rights of NGOs representing other interests than environmental protection in such decision procedures. What is unfavorable about Art. 46a.6 of EPLA is that using the general rules of the Administrative Procedure Code is excluded. This means that no other NGOs (representing *e.g.* the interest of landowners) will be able to act as a party in such procedures.

Case study III – The Steering Committee/Structural Fund is an example of fruitful cooperation between ENGOs and public authorities and their representatives. The Steering Committee approves applications for financing investments from the Structural Fund. It is worth mentioning the transparent procedure for selecting the candidates representing ENGOs. Each ENGO is allowed to suggest candidates and vote for them via the Internet. The two of them with biggest endorsement are accepted by the relevant public authority and cooperate as nominees in the committee's working groups. In this case, deadlines and procedures are strictly executed under the basis of the Steering Committee's by-laws, decisions are effected by the fair and equal treatment of each application submitted by the applicants and leading to a very effective method of distributing money. Nevertheless, this kind of cooperation is still voluntary, not a statutory obligation based on legal requirements.

5. Conclusions

To sum up, some remarks are necessary: first and foremost, the extra requirements for ENGO participation in decision-making processes are, in my opinion, contrary to supranational law [both the Aarhus Convention and Directives 2003/4/WE and 2003/35/WE].

Other objections are of minor weight. Nevertheless, they may ultimately have some influence on an evaluation of the congruity of Polish law and the provisions of community law in force. The directives do not state clearly at what stage of the draft/decision process public involvement should be carried out. However, it is advisable to hold the consultation and draft preparation process in an uninterrupted way. The analysis of Polish regulations shows that public involvement is sought when the draft is ready and this involvement is of non-recurrent character. Thus, if the remarks and motions submitted result in the necessity of introducing some changes to the draft, after their incorporation the process does not go through the public participation procedure any more.

Moreover, there is no good code of practice and conflicts may arise at different levels: between ENGOs and public authorities, investors and the local community. Moreover, both investors and administrative bodies treat the public participation procedure as a necessary evil and endeavour to minimize all the impediments that may follow from the process of draft/project acceptance.

Nevertheless, ENGOs are fighting for public acceptance of their important role. They are active in every democratic country, representing the public interest, such as environmental protection. Moreover, ENGOs may bring added value into the decision-making process, such as increasing the environmental awareness of the general public. Cases of abusing legal rights are – all in all – marginal and should not influence the image of the green sector in Poland.

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