

ALTERNATIVE REPORT ON THE IMPLEMENTATION OF THE AARHUS CONVENTION IN CROATIA



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Alternative report on the implementation of the Aarhus Convention in Croatia

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1. The analysis of the 3rd Aarhus Convention National Implementation Report

In December 2013 Croatia prepared its 3rd National Implementation Report¹ and sent it to the Secretariat. The report should contain all the measures taken by the state for the implementation of the provisions of the Convention, as well as all the obstacles and difficulties in its implementation. The first two Croatian reports contained mainly positive assessment of the measures taken by the state in order to show that the spirit of the Aarhus Convention is present also in practice – although the practice was far from the idyllic image that was presented. The obstacles in exercising the right to information, participation and access to justice in Croatia undeniably exist, as well as the difference between the spirit of the Aarhus Convention and its implementation in practice. Information which supports the improvements in exercising those rights is eagerly presented. However, information of the non-compliance of the legislation and its poor implementation are not included in official reports so clearly because they are a proof of the poorly-performed work. Therefore, the environmental civil society organizations, members of the Zeleni forum (Green Forum) network decided to prepare this alternative report, in order to provide a more realistic picture. Identifying weaknesses is the first step in solving them.

In 2013 the Ministry of Environmental and Nature Protection, responsible for the preparation of the report, established a working group for the preparation, which included environmental organizations. NGOs from Zeleni forum were represented by the member of NGO Zelena Istra (Green Istria), who submitted their comments during the drafting of the report. After that the Ministry prepared a Draft Proposal of the National Report, which was the subject of the public hearing from October, 25th to November, 23rd 2013. It was the first time since the existence of the obligation to prepare Aarhus Convention national implementation reports that NGOs have summoned up their comments and acted together in a public hearing.

The report on the conducted consultations², which briefly listed the accepted and denied comments and objections, was published on the Ministry's website and delivered to all the participants of the public hearing in written form.

Although everything seems to be appropriate and conforming with the Aarhus Convention, and there is a progress in public involvement compared to the two previous national reports, the main accent is still on the form, while there is still plenty of room for improvement in terms of the content of the discussion. Because of the desire to highlight the positive measures, the report ignored the fact that, despite many improvements, exercising the right of access to information is often difficult or impossible, and public participation often reduced to bureaucratic procedure of organizing public hearing, after which the received opinions of the public are usually discarded. Based on the report, it cannot be concluded that the right to access to justice, partly due to non-compliance of regulations and partly because of the misinterpretation of the provisions of the Aarhus Convention, the slowness of the courts, and the ineffectiveness of legal remedies, is a pillar of the Aarhus Convention the implementation of which includes great difficulties.

¹ http://aarhus.zelena-istra.hr/sites/aarhus.zelena-istra.hr/files/III_lzvjesce_Aarhuska_2014.pdf

² http://aarhus.zelena-istra.hr/sites/aarhus.zelena-istra.hr/files/lzvjesce_o_provedenom_savjetovanju_20_01_2014.pdf

The Ministry did include some of the comments of the members of Zeleni forum in the final draft of the report, but in a shortened form and without explanations, which are necessary for their understanding. This is also, to a large extent, case with comments prepared for Zeleni forum by a legal expert, whose speciality is precisely the Aarhus Convention, and who pointed out to many misinterpretations of the Convention in Croatian practice regarding access to justice. Some of the comments were not even included in the final draft of the National Report, like the one that it is contrary to the Constitution of the Republic of Croatia to shift the burden of inspection cost in matters of environmental protection to the applicant, even if the inspection finds that there is no reasonable cause for further proceedings. The Environmental Protection Act stipulates that the burden of the costs of procedure initiated ex officio falls on the applicant of the report to the inspection. The position of the applicant as a party in the administrative procedure is denied by that, and consequently the applicant does not have any procedural rights guaranteed to the party by the General Administrative Procedure Act. Such a provision is therefore contrary to the guarantee of fairness of the proceedings and equality before the law.

The Ministry also did not include in the report the following important objection to the violation of the Aarhus Convention: Art. 171 of the Environmental Protection Act is contrary to the Constitution and provisions of the Aarhus Convention, stipulating the possibility that a company or other legal or natural person has a right to seek compensation for damages and lost gain from a person who has disputed a decision, action and omission relating to environmental protection. The condition is to establish that the applicant has "abused its right under the provisions of the Environmental Protection Act". The criteria for the malpractice assessment are not listed anywhere, and therefore a company (investor) or later a judge are free to decide on that matter. The reason why the criteria are not included is explained in the report on the public hearing as follows: "The explanation is that the aforementioned article wanted to ensure that environmental protection procedures are not used for other purposes. To abuse the right means that legal remedies, which are by the Environmental Protection Act available to the public concerned exclusively for public interest, are used by somebody for financial or other interest. The aforementioned provision complies with the Criminal Code and appears here as a warning to potential misusers of this right. Regardless of this article of the Environmental Protection Act, the right to submit a claim for compensation in the case of lost gain due to misuse of the right exist in the legal system of the Republic of Croatia. The applicant has to prove the groundedness of a lawsuit for violation in court. By this provision the public interest (that lawsuits are only submitted if and where justifiable), as well as the interest of the project holder/operator are protected." The Ministry "forgets" the fact that decisions relating to environmental protection are usually disputed by individuals or NGOs, which are confronted with the powerful financial companies that can afford many years of court trial, and even failing to "prove in court", unlike individuals or NGOs that cannot bear such a financial burden. Therefore, even the possibility of them being sued by the investor is a very effective mean of intimidation.

Considering that the 3rd Aarhus Convention National Implementation Report prepared by Croatia does not give the real picture of the obstacles to exercising the rights arising from the Aarhus Convention, environmental NGOs gathered in Zeleni forum prepared an alternative report. It will be submitted to the Aarhus Convention Secretariat before the 5th session of the Meeting of the Parties to the Convention in June 2014.

2. Non-compliance of the Environmental Protection Act and other acts with the Aarhus Convention

Every time new laws and regulations are being adopted, special attention should be paid to ensuring the consistency of the new provisions of the law with the standards guaranteed by the Aarhus Convention. We shall present a few examples which show that by the Environmental Protection Act (Official Gazette no. 80/13), as well as some other laws, a regime of public participation in decision-making and access to justice in environmental matters is established which results in restricting the rights guaranteed by the Convention. This is an absurd situation in which legal regulation that existed before the harmonization of the Croatian legislation with the Aarhus Convention was more harmonized with it than it is today. Such a situation, at least, causes unnecessary confusion and demands extra efforts from the part of officials and judges who will have to establish the proper application of standards in a situation of mutual non-compliance of the provisions of the law with the Aarhus Convention. This could, beyond doubt, lead to a danger of incorrect application of the law, legal insecurity and the violation of rights guaranteed by the Convention, since the public law bodies and courts, as a rule, are more prone to applying the provisions of domestic legislation than the provisions of international agreements. The examples of non-compliance are as follows:

2.1. Article 19, Paragraph 2 of the Environmental Protection Act is contrary to the Constitution of the Republic of Croatia (OG no. 85/10 – consolidated text, 5/14) and to the Aarhus Convention.

Article 19, Paragraph 2 of the Environmental Protection Act stipulates: „For the purposes of protecting the right to a healthy life and sustainable environment, as well as protection of the environment and particular components of the environment, and the protection from the harmful effect of a load, a person who proves the probability of his legal interest and a person who, due to a location of the project and/or the nature and/or impact of the project can, in accordance with the law, prove that his rights have been **permanently** violated (emphasized by the authors), have the right to dispute the procedural and substantive legality of decisions, acts and omissions of public authorities bodies at the competent body and/or competent court, in accordance with the law.”

By this provision, the principle of access to justice, as one of the principles of the environmental protection, is established. This principle contains a stipulation of “permanent violation of rights” which is not in compliance with the Aarhus Convention. There is not a single other example in the Croatian legislation where a permanent violation of a right is condition for the admissibility of the lawsuit in an administrative dispute. It is enough for the plaintiff to believe that his rights have been violated. Violation does not have to be permanent. Besides the fact that condition of “permanent violation of rights” is contrary to Article 9, Paragraph 2 of the Convention, it is contrary to the Constitution of the Republic of Croatia as well, because it restricts disproportionately the right to judicial review of particular decisions of administrative authorities and bodies with public powers (Article 19, Paragraph 1 of the Croatian Constitution). This provision has probably arisen as a result of incorrect translation of Art. 10 of the Directive 2003/35 into the Croatian language³. However, this does not justify the violation of the Constitution and the Aarhus Convention committed by the legislator and included in the text of the Environmental Protection Act from 2007 (Official Gazette no. 110/07, see Article 18, Paragraph 2⁴ and Article 144, Paragraph 1⁵ of the Act of 2007). That error was only partially corrected by the legislator in the new Environmental Protection Act of 2013 in a way that the word “permanent” in Article 166, Paragraph 1 (which is by everything else identical to Article 144, Paragraph 1 of the Act of 2007) was erased. However, a condition of permanent violation of the rights is retained in Article 19, Paragraph 2 of the Environmental Protection Act, which determines the principle of access to justice, which makes this provision contrary to the Aarhus Convention.

2.2. Some provisions of the Building Act, the Physical Planning Act, the Act on Sustainable Waste Management and the Mining Act are not in accordance with the Croatian Constitution nor the Aarhus Convention.

The following provisions of the Building Act, the Physical Planning Act, the Act on Sustainable Waste Management and the Mining Act are not in accordance with the Croatian Constitution nor the Aarhus Convention:

- Building Act (OG no. 153/13) – Article 115, Paragraphs 1 and 3⁶ and Article 138⁷.
- The Physical Planning Act (OG no. 153/13) – Article 141, Paragraphs 1 and 2⁸ and Article 154⁹.
- The Act on Sustainable Waste Management (OG no. 94/13) – Article 93, Paragraph 3¹⁰ and Article 95¹¹.
- The Mining Act (OG no. 56/13) – Article 15¹².

³ See a draft translation of the Directive 2003/35, <http://www.prevodi.gov.me/15.10.10/32003L0035.pdf> (accessed: December, 6th 2011). The relevant part of the incorrect translation says: "Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned (a) with sufficient interest, or (b) **permanently violating a right** (emphasised by authors) where administrative procedural act of a Member State stipulates this as a precondition, have access to a questioning at a court or another independent and impartial body defined by law to dispute the substantive or procedural legality of decisions, acts or omissions, in accordance with the provisions of this Directive relating to public participation."

⁴ "For the purpose of protecting the right to a healthy life and sustainable environment and particular elements of the environment and protection from the harmful impact of load, a person (citizen or other natural or legal person, their groups, associations and organisations) who proves the legitimacy of his legal interest and a person who due to the location of the project and/or due to the nature and/or impact of the project can, in accordance with the law, prove that his rights have been permanently violated, have the right to dispute the procedural and substantive legality of decisions, acts and omissions of public authorities before the competent body and/or competent court, in accordance with the law." (Article 1, Paragraph 2 of the Environmental Protection Act of 2007)

⁵ „Having a probable legal interest in the procedures regulated by this Act which provides the participation of the public concerned will be considered any natural or legal person who, due to the location of the project and/or the nature and impact of the project can, in accordance with the law, prove his right is permanently violated." (Article 144, Paragraph 1 of the Environmental Protection Act from 2007)

⁶ Article 115

„(1) A Party in the building permit procedure is an investor, owner of the property for which the building permit is issued and the holder of other real rights on the property and the owner and holder of other real rights on the property adjacent to the property for which the building permit is issued.

(3) "As an exception to Paragraph 1 of this Article, the party in the process of issuing a building permit for the construction of interest to the Republic of Croatia or issued by the Ministry of the investor and the owner of the property for which the building permit is issued and the holder of other rights to the property."

⁷ Article 138

„The party in the procedure for issuing an operational licence is an investor, i.e. owner of the property on whose request the procedure of issuing the permit is instituted."

⁸ Article 141

„(1) The party in the location permit issuance procedure is the applicant, the owner of the property for which the location permit is issued, and the holder of other real rights on the property and owner and holder of other real rights on the property adjacent to the property for which the location permit is issued.

(2) As an exception to Paragraph 1 of this Article, the party in the procedure for issuing the location permit for the implementation of the project in the area of significance for the Republic of Croatia or which is issued by the Ministry are the applicant, the owner of the property for which the location permit is issued and holder of other real rights on the property."

⁹ Article 154

„The parties in the procedure of issuing the change of the purpose and usage of the building permit are the applicant, the owner of the property for which the permit is issued and the holder of other real rights on the property."

¹⁰ Article 93

„(3) There is no need for the implementation of the procedure for public information and participation defined in Paragraph 1 of this Article if such public information and participation was implemented within the procedure defined by a special regulation regulating environmental protection."

¹¹ Article 95

„(1) The party in the permit issuance procedure is the applicant, the owner of the property for which the location permit is issued and the holder of other real rights on the property and the local self-government unit in whose area operation defined in the permit is conducted.

(2) As an exception to Paragraph 1 of this Article, the party in the temporary permit issuance procedure shall be the applicant, the owner of the property for which the permit is issued and the holder of other real rights on the property."

¹² Article 15

" In the procedures conducted in accordance with the provisions of this Act the participation in the procedures shall be allowed, at the position of the party, to the owners of the land lots in relation to which the mentioned procedures are conducted"

According to the General Administrative Procedure Act (Official Gazette no. 47/09) a party in an administrative procedure is a natural or legal person at whose request the procedure was initiated, against whom the procedure is conducted or who, in order to protect his rights or legal interests, is entitled to participate in the procedure (Article 4, Paragraph 1). This provision is one of the basic provisions of the General Administrative Procedure Act, the one which should not be deviated from in the provisions of special laws. Moreover, by the recognition of the position of the party in the administrative procedure the equality of everyone before the law and the right to a fair trial as guaranteed by the Croatian Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms is ensured. Nonetheless, in the Croatian legislation there are examples of limiting the term 'party' in the special, aforementioned administrative procedures. These provisions are in accordance with Article 6, Paragraph 1 of the European Convention (the right to a fair trial) and Article 14, Paragraph 2 (the equality before the law) and Article 29, Paragraph 1 of the Constitution of the Republic of Croatia (the right to an equitable procedure). Ensuring an economic procedure by having a small number of parties in the procedure is not an allowed goal which could restrict fundamental human rights. In addition, there are other, more appropriate measures by which the same goal could be achieved without encroachment on the constitutional rights or rights protected by the European Convention. Other reasons why these provisions should be abrogated is that they are not in accordance with Article 6 of the Aarhus Convention when they lead to denying of the right to participation of the public and the public concerned in administrative procedures relating to decisions about activities that may have significant effects on the environment. In fact, in administrative procedures in which decisions about whether to allow certain activities that may have significant effects on the environment are made, public participation must be allowed during all the stages of decision-making on that activity, not only in the procedure of the environmental impact assessment (see Aarhus Convention Compliance Committee decision in relation to the Czech Republic ACCC/C/2010/50). If the legislation explicitly states who may be a party in the procedure of issuing location permit, building permit, waste management permit, etc., while at the same time does not prevent public participation in such procedures when it comes to activities under Article 6 of the Aarhus Convention, such provisions of the law are not in accordance with the Aarhus Convention.

2.3. Article 253 of the Environmental Protection Act is not in accordance with the Constitution of the Republic of Croatia or with the Aarhus Convention.

Article 253 of the Environmental Protection Act „Proceeding upon the application” prescribes as follows:

„Proceeding upon the application

Article 253

- (1) The inspector shall inform the known applicant in writing on the facts established by the inspectional supervision within thirty days from the day the facts were established at the latest.
- (2) The applicant is not a party in inspectional procedure within the meaning of this Act.
- (3) If, during the inspectional supervision, it is established that there is no infringement of this Act and regulations adopted on the basis of this Act which environmental inspectorate is entitled to supervise, and no justifiable reason for further conduction of the procedure, and the applicant demands presentation of evidences, the procedure shall be continued upon applicant's request.
- (4) The full costs of further conducting of the procedure from Paragraph 3 of this Article shall be borne by the applicant.
- (5) In the case from Paragraph 3 of this Article the inspector shall by a conclusion request from the applicant to deposit the amount of money covering the costs of presenting other evidences.”

The aforementioned article is contrary to Article 9, Paragraphs 3 and 4 of the Aarhus Convention. The right to a healthy life is one of the fundamental human rights protected by the Constitution. Inspection procedures in environmental matters are procedures instituted ex officio in order to protect the public interest. According to Article 70 of the Constitution of the Republic of Croatia, the state is obliged to provide the conditions for a healthy environment and everyone is required to pay special attention to the protection of human health, nature and the environment.

In this context, it is against the Constitution of the Republic of Croatia to transfer the responsibility of bearing the costs of the inspectional supervision in matters of environmental protection to the applicant, even if the inspection finds that there is no reasonable cause for further proceedings. A healthy environment and nature conservation is an interest that concerns everyone, even the Constitution stipulates that the state is the one that provides the conditions for a healthy environment. The transfer of the responsibility of bearing the costs

of presentation of evidences to the individual in order to examine whether there has been a infringement of environmental legislation represents a disproportionate burden that none of the individual (applicant) should not have to bear alone, as the interest of environmental protection is a general interest.

Surely there are people who wantonly submit ungrounded reports to inspection, just as there are abuses of the rights in other fields of social life. However, since there is a very strong interest in protecting human health and nature and environmental protection which are, in addition, fundamental values of the constitutional order of the Republic of Croatia, such extreme abuses should not be the guideline in formulating a general rule. This general rule, as it is prescribed in Article 253 of the Environmental Protection Act, will be at the expense of everyone who will, feared by possible costs of presenting the evidence, be afraid to exercise their rights and duties which they are entitled to by the Constitution (the right to a healthy life and the duty to pay special attention to the protection of human health, nature and human environment).

Besides, it is unacceptable that the burden of the costs of the proceedings initiated ex officio falls on the applicant whose status of a party in the administrative procedure is denied (see Article 253, Paragraph 2), and consequently he has not any of the procedural rights guaranteed to the parties by the General Administrative Procedure Act. Such a provision is therefore contrary to a fair proceeding and equality before the law guarantee.

The provision of Article 253, Paragraph 4 on covering the costs of inspection supervision is also contrary to Article 9, Paragraphs 3 and 4 of the Aarhus Convention, which guarantee that the procedures of assessment of the legality of actions and omissions made by private persons and public authorities, which are contrary to the provisions of environmental law, must be fair, equitable and not overly expensive. In a case led against the United Kingdom before the Aarhus Convention Compliance Committee (case ACCC/C/2008/27) it was found that the United Kingdom violated Article 9, Paragraph 4 of the Aarhus Convention. The Committee believed that fairness, in cases when a member of the public institutes a procedure due to environmental concerns in the public interest (and not in private) implies that the public interest must be taken into account when allocating the costs of the proceedings.

In conclusion, it would be contrary to the fair proceedings guarantee that the individual, even if the inspection procedure finds that there was no infringement of the regulation, must fully bear the costs of the proceeding instituted not to protect personal and individual interests, but to protect the interests which have to be protected by everyone, as it is prescribed in Article 70, Paragraph 3 of the Constitution of Republic of Croatia.

2.4. Article 171 of the Environmental Protection Act is not in accordance with the Constitution of the Republic of Croatia or with the Aarhus Convention.

Article 171 of the Environmental Protection Act prescribes as follows:

„Article 171

If a particular act by a public authority body is not valid due to the request submitted in accordance with Article 169 of this Act, and for that reason the developer, operator or another legal or natural person to which that act refers to, decides to wait until the legal validity of the act, in case it is established that the applicant has abused his right under the provisions of this Act, then the developer, operator or another legal or natural person has the right to demand compensation for damages and a loss of profit from the person who has submitted the request.“

The quoted article is contrary to Article 3, Paragraph 8 of the Aarhus Convention and Article 9, Paragraph 4 of the Aarhus Convention. A provision like this one does not exist in any other law within the Croatian legal system (it is excluded from the new Building Act and the new Act on Physical Planning!)¹³ and it is absurd that it exists in the act which proscribes the principle of access to justice as one of the fundamental principles.

¹³ Article 210 of the Physical Planning and Building Act which ceased to be valid (OG no. 76/07, 38/09, 55/11, 90/11, 50/12, 55/12) says:

„(1) The investor may, at his own liability and risk, start building on the basis of executive decision on building conditions and building permit.

(2) If a decision on building conditions and building permit is not valid, because the party instituted an administrative dispute, and the investor therefore decides to postpone building pending valid decision on building conditions, then the investor is entitled to seek compensation for damages and profit loss from such a party, if it is found that the party abused his right to initiate an administrative dispute.

(3) An administrative dispute referred to in Paragraph 2 of this Article shall be resolved by the Croatian Administrative Court within a year.“

Persons who want to use guaranteed right of access to justice are put in uncertain and unequal position by this provision. Therefore, it is contrary to the equality before the law guarantee. Namely, it is unclear what it means to abuse the right to initiate an administrative dispute, particularly in the context of the right to judicial review of legality of particular acts of administrative authorities and other bodies of public authority (Article 19, Paragraph 2 of the Constitution of the Republic of Croatia).

The formulation "in case it is established that the applicant has abused his right under the provisions of this Act" can easily become the basis for arbitrary proceedings. The provision is vague and does not provide any guidelines to what it means to abuse the right to submit a complaint in the administrative procedure which is a right guaranteed by the Constitution of Republic of Croatia. Therefore, this provision is contrary to the principle of the rule of law (Article 3 of the Constitution of Republic of Croatia), according to which "the laws shall be universal and equal for everyone, and legal consequences shall be certain for those the law applies to" (Constitutional Court Decision no. UI/659/1994 of February, 8th 2006). This means that the "legal consequences must be appropriate to the legitimate expectations of the parties in each particular case where the law is applied directly to them" (see Decision of the Constitutional Court). Laws must be based on the principles of legal certainty, clarity and enforceability of regulations and certainty in achieving the legitimate expectations of the citizens. In situation like this, individuals who exercise their constitutionally guaranteed right to judicial review of acts of public authority bodies are placed in an uncertain position of a possibility of bearing enormous costs of damage compensation, because there are no clear criteria to determine whether they abused their right to complaint defined by law.

In case it is necessary to protect the interests of investors, sufficient protection is provided by the general rules of law of obligations on the prohibition of causing damage.

The provision of Article 171 favours the investor because it allows him to arbitrarily decide to wait with the construction/performance of the activity until the decision is valid (validly court decision on the dispute). Under the Act on Administrative Disputes, only the court is entitled to decide on the deferral effect of the complaint or issuing of interim measures within the framework of administrative dispute against an act of bodies of public law. It should not be left to be decided by the investor (developer, operator) because this creates unequal position of the parties in the dispute, which also leads to the unfairness of the proceedings (contrary to Article 29, Paragraph 1 of the Constitution of the Republic of Croatia and Article 9, Paragraph 4 of the Aarhus Convention). An investor can postpone the construction/operations for other reasons as well, for example because of the lack of funds at that moment.

Investors (developers, operators) and persons performing activities that may have significant effects on the environment, as well as the state and public companies (when they act as developers), may use the provision of Article 171 to intimidate the public. This is contrary to Article 3, Paragraph 8 of the Aarhus Convention. The Convention requires that people who take risks and insist on respecting the legal rules for the environmental protection must be protected from various forms of retaliation.

2.5. The non-compliance of the procedure of assessment of the legality of general acts with the Aarhus Convention

According to Article 83, Paragraph 1 of the Act on Administrative Disputes (OG no. 20/10, 143/12), members of the public are not entitled to initiate the procedure of assessment of the legality of any general act, but only in case that their right or legal interest is violated as a result of a particular decision of public law body based on such general act. Acceptance of such a system is a reason why environmental organizations in general will not be able to submit requests for the assessment of the legality of general act. Environmental organizations act with the purpose of protecting the public interest (protection of the environment, nature, human health, etc.), therefore in most cases they will not be in a position in which their rights or legal interest are violated by some particular decision based on an unlawful general act.

In addition, it is possible that:

- 1) there are general acts containing norms that are directly applicable, but which directly violate the legal rights or interests of individuals (the adoption of some particular decision is unnecessary);
- 2) there was a violation in the very process of adopting a general act contrary to the provisions of the Aarhus Convention and/or certain laws (e.g. Environmental Protection Act, Physical Planning Act).

According to Article 9, Paragraph 3 of the Aarhus Convention members of the public should be allowed to initiate a procedure of the assessment of the legality of general acts, too, since in these cases there will be no particular decisions violating their right or legal interest. The procedure currently prescribed by the Act on Administrative Disputes does not allow members of the public a sufficient access to justice, which would be in accordance with the Aarhus Convention.

2.6. Free legal aid is denied to civil society organizations

In Croatia, only natural persons may get a free legal aid. Access to legal aid is denied to associations, which is not in accordance with the Aarhus Convention (Article 9, Paragraph 4 and Article 9, Paragraph 5, requiring fair and equitable legal remedies and the duty to examine the possibility of establishing appropriate assistance mechanisms to remove or reduce financial barriers to access to justice).

According to the Croatian Free Legal Aid Act, legal persons cannot be beneficiaries of free legal aid. Environmental NGOs should be able to participate equally in judicial and other proceedings. The legislator would have to establish fair criteria according to which the legal persons, especially non-profit organizations, could become beneficiaries of free legal aid.

3. Examples of violations of the Aarhus Convention in practice

3.1. Violation of the provisions on the minimum time frames for public participation in the law drafting process

Implementation of the provisions of the Aarhus Convention is still not at the satisfactory level. Violation of the provisions on minimum time frames for the public participation in the law drafting processes is just one example of the non-compliance of the practice with the provisions of the Convention.

Environmental Protection Act in Article 163 regulates public participation during the drafting of the implementing regulations and/or generally applicable legally binding normative instruments. The article stipulates that "bodies of public authority are obliged to ensure timely and efficient public participation in the process of drafting laws and implementing regulations as well as other generally applicable legally binding rules under their competence which may have a significant impact on the environment, including the procedures for drafting amendments. The Environmental Protection Act also prescribes a minimum term of 30 days for public participation¹⁴. In practice, this term is very often greatly shortened, even by the Ministry of Environmental and Nature Protection itself. This is not mentioned in the report, therefore we will list here a few examples when the term for the public participation in the regulations draft process was significantly shortened:

Draft amendments to the Ordinance on the methods and conditions for the landfill of waste, categories and operational requirements for waste landfills	16 April 2013 – 29 April 2013	14 days
Draft Ordinance on monitoring, reporting and verification of reports on greenhouse gas emissions from installations and aircraft in the period starting from January, 1 st 2013	10 April 2013 – 20 April 2013	11 days
Draft Ordinance on the mutual exchange of information and reporting on air quality	27 March 2013 – 10 April 2013	15 days
Draft proposal of the Ordinance on the conservation objectives and basic measures for birds conservation in the area of the ecological network	31 May 2013 – 14 June 2013	15 days
Draft Ordinance on the amendments to the Ordinance on the management of end-of-life vehicles	13 June 2013 – 28 June 2013	16 days
Draft Ordinance on the amendments to the Ordinance on waste tyre management	20 June 2013 – 26 June 2013	7 days
Draft Ordinance on the amendments to the Ordinance on waste batteries and accumulators management	21 June 2013 – 28 June 2013	8 days
Draft Ordinance on the amendments to the Ordinance on packaging and packaging waste	21 June 2013 – 28 June 2013	8 days
Draft Act on the implementation of (EC) Regulation no. 850/2004 of the European Parliament and Council from April, 29 th 2004 on the persistent organic pollutants, which amends Directive 79/117/EEC	21 June 2013 - 30. June 2013	10 days

¹⁴ At the moment there is a draft process underway for the Regulation on information and public participation by which this term will be additionally regulated.

Draft Ordinance on the amendments to the Ordinance on waste oil management	21 June 2013 – 28 June 2013	8 days
Draft Regulation on the quality of liquid petroleum fuels	20 June 2013 – 1 July 2013	11 days
Draft Ordinance on waste management	24 December 2013 – 8 January 2014	16 days
Draft Regulation on the auction of greenhouse gas emission allowances	13 December 2012 – 23 December 2012	11 days
Draft Ordinance on monitoring air quality	31 October 2012 – 16 November 2012	17 days
Draft Ordinance on the use of the Registry of the European Union	20 November 2012 – 7 December 2012	18 days
Draft Ordinance on monitoring, reporting and verification of reports on greenhouse gas emissions from installations and aircraft	11 October 2012 – 20 October 2012	10 days
Draft Ordinance on the manner of free allocation of emission allowances	17 February 2012 – 1 March 2012	13 days

The aforementioned are just a few examples of violating the provisions on public participation during the regulations draft process made by the Ministry of Environmental and Nature Protection itself. The ministry is responsible for the widest area of environmental protection and enacts the majority of regulations in the field of environmental protection. However, it is not the only one who enacts regulations that could have a significant impact on the environment – some other ministries such as the Ministry of Agriculture or the Ministry of Economy do that, too. Practice shows that these bodies wrongly believe that the provisions of the Environmental Protection Act relate exclusively to the regulations issued by the Ministry of Environmental and Nature Protection. Environmental Protection Act clearly states that this provision applies to all laws that “could have a significant impact on the environment.” Under this misinterpretation, for example, a public hearing on the Draft proposal of Act on the amendments to the Forests Act was not even conducted so the public could see it only when it had already been adopted by the Government. The same thing happened with the Water Act, which was, just as the aforementioned regulation, under the responsibility of the Ministry of Agriculture. While the Act on Strategic Investment Projects was being adopted, the Ministry of Economy organized a public hearing within a period of only 10 days (January 15 to January 24 2013), although it was indisputable that this is the regulation that will certainly have a significant impact on the environment. Only after the extreme pressure from NGOs did the Ministry prolong the public consultation for an additional period of 30 days, but in between the two readings in the Parliament, so the quality of this consultation is questionable.

3.2. Public hearings timing and time-frames for participation

It is important to say that, despite the opinion of the Aarhus Convention Compliance Committee that public hearings should be held in the “appropriate time”, the trend of organizing public participation in the adoption of regulations during the summer holidays, from 15 July to 15 August, continues. The Freedom of Information Act and the Agricultural Land Act were available for public comment during the summer months. We believe that all the abovementioned leads to the conclusion that the public participation in adopting regulations is still organized only pro forma, and not driven by a real desire to gain public opinion.

A period of 30 days for public inspection in cases of extensive environmental impact studies is a term too short. This was confirmed by the conclusion of the Aarhus Convention Compliance Committee ACCC/C/16 in case of environmental impact assessment for the oil refinery in Spain, which is very similar to the Croatian practice. Opinion of Aarhus Convention Compliance Committee was that the Spanish authorities have violated Article 6.6 of the Aarhus Convention when they chose only one city in the region where the documents could have been reviewed and that the period of one month was too short. This is a common practice in Croatia, too. We believe that all projects do not have the same impact on the environment. For example, construction of the refining and processing of leather and fur facility does not have the same impact as buildings for the storage of oil and liquid oil derivatives with the capacity of 50,000 t and more. Therefore, the time-frames should not be the same. In cases of extensive environmental studies and more complex and potentially more damaging projects for the environment, the time-frames should be longer in order to ensure enough time for thorough examination of the studies and carrying out a quality public hearing.

3.3. Narrow interpretation of the term 'public concerned'

When it comes to the quality of public participation in the procedures of the strategic assessment, the environmental impact assessment, estimating the need for environmental impact assessment, instructions on the content of the environmental impact study and environmental permits, there are still deviations in the interpretation of the term "public concerned". The term is still being interpreted quite restrictively and not in the broadest possible sense, which would be in line with the spirit of the Convention.

3.4. Infringement of the provisions of taking into account the outcome of public participation

It seems that the public comments in the aforementioned procedures are still not being taken into serious consideration. All the possible reasons are found for public comments to be simply proclaimed irrelevant, which is contrary to Article 6.8 of the Convention. For example, in the procedure of environmental impact assessment for a chemical industry facility, Zelena akcija (Green Action) submitted comments that were rejected with the explanation that they were not relevant for the environmental impact assessment procedure because they were related to the process of obtaining environmental permit. After that Zelena akcija participated in the process of obtaining environmental permit and submitted identical comments which were rejected as irrelevant with the explanation that they were related to the process of environmental impact assessment. This absurd case illustrates perfectly the attitude and opinion of the bodies responsible for the implementation of procedures for public participation to the public.

3.5. Infringement of the provisions on the timeliness of the legal remedies in the various permits issuance procedures

Court proceedings can be very long, usually more than a year, and a lawsuit filed to the court against the unlawful court decision/solution (permit) does not suspend the execution of the decision/solution (e.g. EIA or environmental permit for the project/installation). Therefore, it happens very often that intervention in the environment starts on the basis of the decision/solution despite the possibility that such decision/solution (permit) is later pronounced as unlawful by the court.

Requirements relating to the issuance of provisional measure (preliminary court's suspension of the execution) in the process of judicial review of administrative decisions (solution/permit) are very vague. The court does not have any obligation to issue an interim measure, and the applicant who submits a request for the issuance of provisional measure does not even have the right to submit an appeal on the court's decision to refuse an interim measure.

In the case of the complaint filed by NGOs Zelena akcija and Zelena Istra and several private plaintiffs against the environmental permit for a coal-fired power plant Plomin C, issued by the Ministry of Environment and Nature Protection, the temporary suspension of the execution of the decision was requested. The court rejected the request for an interim measure because a decision on the acceptability for the environment is not an immediate executive decision for the realization of the project. However, a decision on the acceptability for the environment is a necessary requirement for obtaining such an executive decision later on. The public and the public concerned have no right to participate in these procedures, and, therefore cannot seek suspension of execution of the decision on the admissibility for the environment in such procedures while the case is not completed before the court. The plaintiffs claimed that if the implementation of the project starts at the moment when the litigation case on the admissibility for the environment is still ongoing, due to political and economic pressures as well as reasons of legal certainty, it will be difficult to make a decision that would thoroughly review the impact of the project and consider all options, including the quitting. Thereby, the plaintiffs referred to the practice of the Aarhus Convention Compliance Committee in the communication ACCC/C/2006/16 ("Indeed, it is likely that when the installation built under the building permit, political and economic pressures and the standpoints on the legal security, in fact ending the debate on the building itself, as well as available options in terms of technology and infrastructure").

3.6. Court decisions are not available to the public

Court's decisions in relation to Article 9 are not yet available to the public because the courts do not publish all decisions relating to all environmental issues. Every court publishes its case law according to their own estimation, which means that it is possible to issue just a few environmental cases for example, or even none, if a particular court deems them irrelevant to the development of case law.

3.7. The absence of sanctions for non-compliance with the provisions on public participation in decision-making processes

Measures taken by competent bodies to implement the provisions and principles of the Aarhus Convention relating to the public participation in practice are not sufficient to achieve satisfactory results and should be improved. Violations of the Aarhus Convention are common and therefore it is extremely important to define the means for sanctioning non-compliance with the rules on public participation in decision-making processes in environmental matters. The experience so far has shown that the avoidance of public participation, although visible, regularly remained unsanctioned.



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