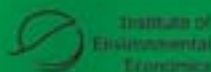


A Legal Analysis



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Environmental
Economics

**Public Participation in Programming,
Implementing and Monitoring
EU Structural Funds and the Cohesion Fund
Environmental Context**

**PUBLIC PARTICIPATION IN PROGRAMMING,
IMPLEMENTING AND MONITORING EU STRUCTURAL
FUNDS AND THE COHESION FUND - ENVIRONMENTAL
CONTEXT**

A LEGAL ANALYSIS

**PUBLIC PARTICIPATION IN PROGRAMMING,
IMPLEMENTING AND MONITORING EU STRUCTURAL FUNDS
AND THE COHESION FUND - ENVIRONMENTAL CONTEXT**

A LEGAL ANALYSIS

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A. THE REPORT'S SCOPE AND AIMS

This report analyses the EU legislation relating to the participation of environmental non-governmental organisations (ENGOS) in the processes of programming, implementation and monitoring of EU Structural Funds and the Cohesion Fund¹.

On the one hand, ENGO impact on the Funds depends on the provisions laying down the general or detailed rules for functioning of the Structural Funds or the Cohesion Fund and directly ensues from the 'partnership principle' as expressed in the aforementioned provisions. On the other hand, this impact may be also defined in special provisions on environmental protection.

The main obstacle identified during the analysis is that the basic EU legal acts regulating 'public participation' are mostly focused on decisions relating to particular projects and not on decisions with a much wider scope. The Directive on the Strategic Environmental Assessment (SEA)² constitutes in this respect a novelty and a turning point, however it doesn't relate to the current programming period. Moreover, EU provisions on public participation relate mainly to investment permits and emission permits, whilst the decisions made with regard to EU Funds are financial decisions, i.e. they either grant or deny financing for a particular project. The SEA Directive constitutes a novelty also in this respect. Furthermore, EU provisions on access to information were not designed as provisions on access to financial information related to decisions with environmental impact (this approach was adopted especially for the Directive 90/313/EEC on the freedom of access to information on the environment). Only further development of these provisions (with the impact of the Aarhus Convention) resulted in regarding economic and financial information as information on the environment (especially in the Directive 2003/4/EC).

¹ In the remaining part of the report, Structural Funds and the Cohesion Fund will be referred to as the Funds or the EU Funds.

² Directive 2001/42/EC

Therefore, the report aims at presenting EU provisions that may be applied for increasing ENGO influence on the Funds, trying to define inter-connections among the particular legal acts. The most significant issues investigated in this report are whether the provisions constitute a coherent system and whether they allow real ENGO influence on programming, implementation and monitoring of EU Funds.

B. LEGAL PROVISIONS REGULATING THE PARTICIPATION OF ENVIRONMENTAL NON-GOVERNMENTAL ORGANISATIONS IN PROGRAMMING, IMPLEMENTING AND MONITORING OF EU FUNDS

1. Regulations on EU Funds

1.1. EU Funds' legal basis

The provisions on Structural Funds and the Cohesion Fund are laid down in Council Regulations or in Regulations of the European Parliament and the Council. Unlike directives, regulations are always directly binding, which means that they do not require transposition to domestic legal orders of particular Member States. According to Article 249 (2) of the Treaty Establishing the European Community, regulations have general application, are binding in its entirety and directly applicable in all the Member States. They are addressed not only to all the Member States but also to natural and legal persons. Moreover, transposition of provisions included in regulations of the Parliament and the Council to a legal order of a Member State is judged as a violation of Community legislation³.

Community structural policy is based on the provisions laid down in the Treaty Establishing the European Community. The provisions provide for strengthening the organisation's economic and social cohesion (Article 158 - 162), with the aim of fulfilling the basic objectives of the European Communities. The objectives are defined in Article 2 of the Treaty and include:

- harmonious, balanced and sustainable development of economic activities,
- a high level of employment and of social protection,
- equality between men and women,
- sustainable and non-inflationary growth,
- a high degree of competitiveness and convergence of economic performance,

³ Compare: decision of the European Court of Justice 34/73 Variola v. Amministrazione della Finanze

- a high level of protection and improvement of the quality of the environment,
- the raising of the standard of living and quality of life,
- economic and social cohesion and solidarity among Member States.

In the 2000 – 2006 programming period, EU structural policy is set out in:

1. Council Regulation (EC) of 21 June 1999 laying down general provisions on the Structural Funds.

Moreover provisions on the particular Structural Funds are included in the following regulations:

2. Regulation (EC) No 1261/1999 of the European Parliament and of the Council of 21 June 1999 on the European Regional Development Fund replaced with the Regulation (EC) No 1783/1999 of the European Parliament and the Council of 12 July 1999;
3. Regulation (EC) No 1262/1999 of the European Parliament and the Council of 21 June 1999 on the European Social Fund replaced with the Regulation (EC) No 1784/1999 of the European Parliament and the Council of 12 July 1999;
4. Council Regulation (EC) No 1263/1999 of 21 June 1999 on the Financial Instrument on Fisheries Guidance;
5. Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund.

The following legal acts regulate the functioning of the Cohesion Fund:

1. Council Regulation (EC) No 1164/1994 of 16 May 1996 establishing a Cohesion Fund;
2. Council Regulation (EC) No 1264/1999 of 21 June 1999 amending Regulation (EC) No 1164/94 establishing a Cohesion Fund;
3. Council Regulation (EC) No 1265/1999 of 21 June 1999 amending

Annex II to Regulation (EC) No 1164/94 establishing a Cohesion Fund;

4. 96/455/EC: Commission Decision of 25 June 1996 concerning information and publicity measures to be carried out by the Member States and the Commission concerning the activities of the Cohesion Fund under Council Regulation (EC) No 1164/94;
5. Commission Regulation (EC) No 1831/94 of 26 July 1994 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Cohesion Fund and the organization of an information system in this field.

Moreover, the report analyzes a Proposal for a Council Regulation laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund of 17 July 2004 (in this report referred to as the Proposal for a Regulation on the Funds)⁴.

As far as ENGO impact on the Funds is concerned the following legal acts are most significant: Council Regulation (EC) of 21 June 1999 laying down general provisions on the Structural Funds (hereinafter referred to as 'Regulation 1260/99/EC') and the Council Regulation (EC) No 1164/1994 of 16 May 1994 establishing a Cohesion Fund (hereinafter referred to as 'Regulation 1164/94/EC').

1.2. The partnership principle

Whether EU activities for social and economic cohesion are efficient and effective depends on the enforcement of the principles that constitute the basis for community regional policy. The principles are aimed at coordination and support of regional policies of the respective Member States, and include:

1. the subsidiarity principle, which is one of the basic EU system principles,
2. the concentration principle,

⁴Proposal for a Council Regulation laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund {SEC(2004)924}/* COM/2004/0492 final

3. the multiannual programming principle,
4. the partnership principle,
5. the additionality principle.

In EU legislation on the Funds, and especially in the Regulation 1260/99/EC, the partnership principle is defined as an obligation to consult with partners all the decisions made during programming stages. Partners should include representatives of public authorities, social and economic circles, entrepreneurs, professional organisations and academic circles. The responsibility of designating partners on different levels of territorial organisation rests only with the particular Member State (i.e. central state authorities).

A Member State is free to specify who should be considered a partner. In practical terms, the implementation of the partnership principle depends on institutional solutions, political culture and experiences in conducting social dialogue in a particular Member State.

1.3. The origin of the partnership principle

The partnership principle directly results from the objectives of the Structural Funds. According to Point 5 of the Preamble of the Regulation 1260/99/EC:

“in its efforts to strengthen economic and social cohesion, the Community also seeks to promote the harmonious, balanced and sustainable development of economic activities, a high level of employment, equality between men and women and a high level of protection and improvement of the environment; those efforts should in particular integrate the requirements of environmental protection into the design and implementation of the operations of the Structural Funds and help to eliminate inequalities and promote equality between men and women; the Funds’ operations may also make it possible to combat any discrimination on the grounds of race, ethnic origin, disability or age by means in particular of an evaluation of needs, financial incentives and an enlarged partnership”.

Article 1 of the Regulation 1260/99/EC provides a more detailed definition of these objectives. Objectives 2 and 3 more directly relate to 'social affairs'. The Funds' operations should contribute to "supporting the economic and social conversion of areas facing structural difficulties" (Objective 2) and "supporting the adaptation and modernisation of policies and systems of education, training and employment" (Objective 3).

Therefore, the objectives of the Structural Funds constitute to a large extent social objectives and the Funds are to be utilized for strengthening social and economic cohesion. It would be impossible to implement such objectives without society's direct involvement in planning and monitoring of the Funds' utilization. The importance of civil society organisations (CSOs) for conducting social dialogue should be stressed here. The special role CSOs play in the European Community ensues from citizens' fundamental right to freedom of association, which is guaranteed by the Article 12 of the European Charter of Fundamental Rights. According to the Communication from the Commission "Towards a reinforced culture of consultation and dialogue – Proposal for general principles and minimum standards for consultation of interested parties by the Commission"⁵ CSOs play an important role in conducting a wide political dialogue with the society. For this reason, when establishing minimum standards for social dialogue, the Commission has analysed in the aforementioned communication CSOs' role and position.

1.4. Which partners does the partnership principle encompass?

Partnership is implemented on two levels:

- a) Commission – Member State,
- b) Member State – bodies, institutions and organisations within this Member State.

Point 26 of the Preamble to the Regulation 1260/99/EC states that operations of the Structural Funds are to be effective and

⁵Communication from the Commission.: Towards a reinforced culture of consultation and dialogue – Proposal for general principles and minimum standards for consultation of interested parties by the Commission, COM(2002)0704 final; p. 5;

transparent. Point 27 defines the primary objective of 'strengthening the partnership', which is 'ensuring significant added value'. This point specifies to whom the partnership principle applies. It includes regional and local authorities, other competent authorities, including those responsible for the environment and for the promotion of equality between men and women, the economic and social partners and other competent bodies.

The Preamble to the Regulation 1260/99/EC implements the Community's intention to include in Structural Funds management: central administration bodies, regional administration bodies, local administration bodies, bodies related to major social issues, such as equal status of men and women. Apart from involving the aforementioned public partners, the Regulation 1260/99/EC requires involving 'social and economic partners'. This category (which will be described in greater detail below) undoubtedly constitutes a category of organisations and groups not included in traditionally understood administration. Regulation 1260/99/EC clearly defines the obligation to involve relevant partners in the process of preparation, monitoring and evaluation of assistance, referring to both public partners as well as social and economic partners.

Point 26 of the Preamble is further elaborated in Article 8 of the Regulation, which states that partnership should be implemented in close consultation between the Commission and the Member State, together with the authorities and bodies designated by the Member State, namely: the regional and local authorities and other competent public authorities, the economic and social partners, any other relevant competent bodies within this framework. Therefore, the partnership also encompasses the European Commission.

It should be stressed that with respect to the second level of partnership (b), the Regulation 1260/99/EC leaves the decision on the selection of partners in Structural Funds' management to the relevant Member State. Article 8 (1) stipulates that the partners should include "authorities and bodies designated by the Member State within the framework of its national rules and current

practices.” This clearly provides a Member State with power to designate its partners and refers to national provisions and practices as far as interpretation of the following legal terms is concerned:

- a) the regional and local authorities and other competent public authorities,
- b) the economic and social partners,
- c) any other relevant competent bodies within this framework.

Therefore, these terms should be reinterpreted each time according to national provisions. It should be assumed that their scope may differ among the Member States. At the same time, this interpretation has to comply with “the respective institutional, legal and financial powers of each of the partners.” It has to be stressed that social organisations, non-governmental organisations (or possibly environmental organisations) are just one of the many ‘social and economic partners’, which on the other hand constitute just a sub-group of ‘other’ partners (self-governmental bodies, etc.).

By means of the partnership principle the Community implements the culture of consultations and dialogue. This principle imposes the ‘obligation to consult’ certain important decisions (specified in EU legal acts) with ‘partners’, in soft law also referred to as ‘interested parties’. The Communication from the Commission COM (2002) 0704 final enumerates the interested parties: regional and local authorities, civil society organisations, entrepreneurs and associations of entrepreneurs, individual citizens concerned, academics or technical experts⁶

According to the EU legislation, social organisations (and in particular environmental non-governmental organisations) are considered only as one of the many subjects that should be consulted on particular decisions within the Funds’ operations.

⁶Communication from the Commission.: Towards a reinforced culture of consultation and dialogue - Proposal for general principles and minimum standards for consultation of interested parties by the Commission, COM(2002)0704 final; p. 4;

1.5. “Social and economic partners”

The term ‘social partners’ has a very wide scope of application, wider than the commonly used terms, such as: civil society organisations (CSOs), non-governmental organisations (NGOs), or environmental non-governmental organisations (ENGOS). The European Commission, in its Communication 2002/0704, identifies lack of common legal definition for the term ‘civil society organisations’. According to the Commission, CSOs include the labour-market players (i.e. trade unions and employers federations - “the social partners”); organisations representing social and economic players, which are not social partners in the strict sense of the term (for instance, consumer organisations); NGOs (non-governmental organisations) which bring people together in a common cause, such as environmental organisations, human rights organisations,, charitable organisations, educational and training organisations, etc.; CBOs (community-based organisations, i.e. organisations set up within society at grassroots level which pursue member-oriented objectives), e.g. youth organisations, family associations and all organisations through which citizens participate in local and municipal life; religious communities⁷. This enumeration could be judged as a definition of ‘social partners’ sensu largo. Therefore, ‘social partners’ include different types of ‘civil society organisations’. Non-governmental organisations are only one of CSO types. Among NGOs there is a group of organisations whose activities are aimed at environmental protection, i.e. environmental non-governmental organisations. The term ‘economic partners’ is not so vague and it includes employers organisations and their associations.

As already mentioned, Article 8 (1) of the Regulation 1260/99/EC refers to national provisions and practices when designating social and economic partners. The Community legislation does not provide a more detailed or more precise definition of ‘social partners’. Therefore, Member States’ legislation and practice is of

⁷ Communication from the Commission.: Towards a reinforced culture of consultation and dialogue - Proposal for general principles and minimum standards for consultation of interested parties by the Commission, COM(2002)0704 final; p. 6;

primary importance here. Let us turn to the Polish example to see what a wide scope this term may have.

1.6. “Social partners” according to Polish legislation – an example

In Polish conditions the following legal acts should be considered:

1. Act of 20 April 2004 on the National Development Plan (Dz.U. of 2004 No 116, item 1206), which defines the term “social and economic partners”;
2. Act of 24 April 2003 on Public Benefit Activity and Voluntary Assistance (Dz.U. of 2003 No 96 item 873), which defines the term “non-governmental organisation”.

The Act on the National Development Plan specifies social and economic partners as “organisations of entrepreneurs and employers, trade unions, professional self-government, non-governmental organisations and academic units, whose activity is related to the issues covered by the National Development Plan and by the Operational Programmes or the Reference Framework for the Cohesion Fund” - Article 2 (8).

The Act on Public Benefit Activity and Voluntary Assistance defines non-governmental organisations as “corporate and non-corporate entities not forming part of the public finance sector as described in the Public Finances Act, not operating for profit, and formed on the basis of relevant legislative provisions, including foundations and associations.” It is possible to make this rather general definition more specific by enumerating basic types of non-governmental organisations in Poland (the list should not be by any means regarded as closed):

1. associations and their local units with legal personality;
2. associations of associations;
3. foundations;
4. farmers’ associations;
5. farmers’ trade unions;
6. unions of farmers, farmers’ associations and farmers’ organisations;

7. unions of farmers' trade unions;
8. trade unions of individual farmers;
9. guilds;
10. artisans' society;
11. Polish Scouting Association;
12. trade and services unions;
13. national representations of trade and services unions;
14. national representations of transport unions;
15. other organisations of entrepreneurs, i.e. organisations specified in the Act of 30 May 1989 on professional self-government of some entrepreneurs;
16. chambers of commerce, including the Polish Chamber of Commerce;
17. trade unions, including their organisational units with legal personality;
18. nationwide inter-trade unions;
19. associations of employers;
20. federations and confederations of associations of employers;
21. physical culture associations;
22. sport associations;
23. Polish sport associations;
24. nationwide physical culture associations;
25. voluntary fire brigades;
26. regional and local tourism organisations;
27. Polish Red Cross;
28. Polish Hunting Association;
29. Polish Angling Association;
30. students' organisations;
31. farmers' wives' associations.

The above list shows that a number of organisations that under normal circumstances would be considered as economic partners, according to the Polish Act on Public Benefit Activity and Voluntary Assistance fall within the definition of non-governmental organisations. The definition from the Act on the National Development Plan is in practical terms covered by the above enumeration, with one reservation that the organisation's activity should be "related to the issues covered by the National

Development Plan and by the Operational Programmes or the Reference Framework for the Cohesion Fund". This, in turn, can be verified only by reference to the organisation's statutory purposes.

The term social and economic partners encompasses in Poland a very wide variety of organisational forms of different organisations whose interests may be conflicting. According to this definition, CSOs or traditionally understood NGOs, i.e. associations and foundations, constitute just one of many possible organisational forms. Moreover, ENGOs (i.e. social organisations whose statutory aim is environmental protection) do not enjoy a privileged place in the whole array of different NGO types under this definition.

The Polish example shows that defining the term 'social partner' according to the legislation of a particular Member State may lead to an erroneously wide understanding of the term NGOs. Such a liberal definition contradicts both common and customary understanding of this term in the international community. According to the definition of the United Nations Environment Programme, an NGO is a non-profit group or association organized outside of institutionalized political structures to realize particular social objectives (such as environmental protection) or serve particular constituencies (such as indigenous peoples). NGO activities range from research, information distribution, training, local organisation, and community service to legal advocacy, lobbying for legislative change, and civil disobedience. NGO's range in size from small groups within a particular community to huge membership groups with a national or international scope⁸ Neither this definition nor common understanding of the term 'non-governmental organisation' comprises employers organisations, trade unions or trade entrepreneurs' organisations.

⁸ http://biodiversity-chm.eea.eu.int/CHMIndexTerms/Glossary/N/non-governmental_organization_ngo, quoted after Janis Brizga, Teodóra Dönsz, István Farkas, Piotr Handerek, Katalin Hargitai, Paul Kosternik, Petr Pelcl, Juraj Zamkovský (2004) Partnership for sustainable development? Report on the structural funds programming process in central Europe

1.7. Special position of partners dealing with environmental protection and equal status of men and women

The Regulation 1260/99/EC in several places highlights a special role of two issues, especially important from the Community's point of view, namely: 1) supporting equal status of men and women and 2) ensuring sustainable development through integration of environmental protection requirements to other Community policies. In several places, when regulating the partnership principle, the Regulation highlights the importance of those two issues, however, not referring directly to bodies and organisations dealing with 'gender' matters or sustainable development. For example: when designating the most representative partnership at national, regional or local level, the Member State is obliged to create a forum of all the relevant bodies, "taking account of the need to promote equality between men and women and sustainable development through the integration of environmental protection and improvement requirements" (Article 8 (1)). Similarly, point 27 of the Preamble to the Regulation stipulates that "partnership should be strengthened," adding that "this concerns the regional and local authorities, the other competent authorities, including those responsible for the environment and for the promotion of equality between men and women, the economic and social partners and other competent bodies."

On the basis of Article 8 of the Regulation it is possible to draw a legal norm that bodies, institutions and organisations dealing with equal status of men and women and sustainable development should participate in all organisational realisations of the partnership principle. Nonetheless, the provisions justify neither a special role of NGOs (even of environmental or gender NGOs) nor any quantity or quality indicators that a Member State should consider when designating its partners. On the other hand, if a Member State fails to designate bodies, institutions or non-governmental organisations dealing with the aforementioned issues to any of the advisory bodies established for Structural Funds, it clearly violates the provisions of the Regulation 1260/99/EC.

Summing up, the partnership principle, as understood in EU legislation, refers to involving a very wide variety of bodies, institutions and organisations. Non-governmental organisations (as understood by national legislation) are one of the possible partners and in itself constitute a very diversified group. EU law does not allow for prioritising one particular group or social interest in this respect. The only exception is the imprecise regulation guaranteeing that social and economic partners should include bodies, institutions or organisations dealing with equal status of men and women and with sustainable development issues. The general character of this provision does not allow for establishing more precise requirements that a Member State should fulfill with respect to the qualitative and quantitative scope of such organisations' participation in steering and monitoring committees.

1.8. When, where and how should partnership principle be implemented

Partnership should cover: 1) preparation, 2) financing, 3) monitoring and 4) evaluation of assistance.

Member States are obliged to establish an "association of the relevant partners," which involves creating special advisory bodies for each of the aforementioned stages, such as: working groups, steering committees, monitoring committees, consultation groups, etc. The association of the relevant partners should be established at the different stages of programming, taking account of the time limit for each stage. It should be noted that programming means means organising, decision-making and financing (Article 9 (a)). The association of the relevant partners should be "wide and effective," which means that there should be balance between the wide variety and representation of partners advocating different interests, and a limited number of members in a particular body so that it can pursue its activities in an effective manner.

Implementation of the partnership principle does not mean that "the association of the relevant partners" makes final decisions on granting or denying assistance from the Structural Funds.

Regulation 1260/99/EC leaves no doubts that it is the Member State who is responsible for implementing this assistance.

Regulation 1260/99/EC provides a special status of the European social partners. According to Article 8 (5), each year, the European Commission should consult the European-level organisations representing the social partners about the structural policy of the Community.

All in all, provisions on Structural Funds do not establish clear and effective framework for implementing the partnership principle. The provisions do not establish minimum standards on social consultations, such as: provision of information, specification of deadlines for collecting comments, or the manner of informing society on the results of consultations of different documents.

1.9. Does the partnership principle apply also to the Cohesion Fund?

Even a preliminary comparison of the Regulation 1260/99/EC on the Structural Funds and the Regulation 1164/94/EC on the Cohesion Fund shows that in the case of the Structural Funds partnership principle is more clearly referred to. Unlike the Regulation 1260/99/EC, the regulation 1164/94/EC mentions neither the partnership principle nor the social and economic partners. Moreover, the Regulations amending the Regulation 1164/94/EC (i.e. Regulation 1264/99/EC and the Regulation 1265/99/EC) also do not refer to the partnership principle or social and economic partners.

Here, it should be noted that the Cohesion Fund has a bit different character than the Structural Funds. This difference is best expressed in the formulation of the Cohesion Fund's objectives. The Preamble to the Regulation 1164/94/EC refers to the Article 130 A of the Treaty establishing the European Community, according to which the Community should develop and pursue its actions leading to the strengthening of its economic and social cohesion, and in particular it should aim at reducing disparities between the levels of development of the various regions and the backwardness

of the least-favoured regions. The Preamble to the Regulation stipulates that the Community, through the Cohesion Fund, should support the achievement of the objectives set out in Article 130 A. It should be noted that social and economic cohesion is to be achieved through co-financing only of investment projects solely in two fields: environmental protection and transport infrastructure. Transport projects should constitute a part of the Trans-European network, whilst environmental projects should include goals and principles of sustainable development specified in the VI Environment Action Programme.

This does not mean, however, that detailed Cohesion Fund objectives do not require programming with participation of social and economic partners. On the contrary, Cohesion Fund programming, i.e. preparing the Reference Framework for the Cohesion Fund, involves making strategic decisions. Therefore, the programming stage should include social and economic partners. It has to be stressed, however, that it does not clearly result from the provisions of the Regulation 1164/94/EC.

The partnership principle is not a general principle of EU legislation; it is not present in the primary Community legislation (treaties), but it appears in legal acts on regional policy. Nevertheless, steering and monitoring committees have been established for the Cohesion Fund in some Member States. NGO participation in such bodies results from the tradition of social consultations on the decisions significant for the environment (among others decisions on environmental and transport infrastructure) rather than from the general partnership principle. NGO participation in such committees results from the spirit of the Aarhus Convention (for details see: 2.1.) rather than from the partnership principle.

As far as the Cohesion Fund is concerned, the partnership principle can have only ancillary application. This means that if legislation does not forbid it, a Member State, when establishing steering and monitoring committees for the Cohesion Fund, can apply similar rules as for Structural Funds' committees.

The Cohesion Fund, like Structural Funds, requires programming, and involving social and economic partners in the processes of planning, implementing and monitoring is justified and necessary. Moreover, this involvement is allowed in some Member States, but it does not stem from the EU legislation. Therefore, legal acts regulating the Cohesion Fund should clearly refer to the partnership principle.

1.10. The Partnership Principle in the Proposal for a Regulation on the Funds

The Proposal for a Regulation laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund introduces certain changes in relation to the partnership principle. The Proposal is to replace on 1 January 2007 the Regulation 1260/99/EC.

The most significant change is that the Proposal is binding not only for the Structural Funds but also for the Cohesion Fund (Article 1, Article 31 (1)). Therefore, since 1 January 2007 the rules for different funds will be uniform. At the same time the number of the funds will be limited from six to three (European Regional Development Fund, the European Social Fund and the Cohesion Fund). All this is supposed to increase the transparency and contribute to greater cohesion of activities related to the common regional policy. Apart from this general regulation establishing rules for all the Funds, there will also be regulations laying down more detailed rules.

The Proposal for a Regulation on the Funds clearly recognizes 'partnership' as a general rule for the assistance granted from the Funds. Article 10, which defines the partnership principle, is included in Chapter IV - Principles of Assistance. Moreover, Article 10 of the Proposal defines 'partnership' a bit differently than the currently binding Article 8 (1) of the Regulation 1260/99/EC. The Proposal develops the point referring to "any other relevant competent bodies" (Article 8 (1) (3)) speaking about "any other appropriate body representing civil society, environmental partners, non-governmental organisations, and bodies responsible for promoting equality between men and women." This is a significant

change, as civil society organisations, and especially NGOs, also environmental NGOs, are not included in the category of economic and social partners (defined in Article 10 (b) of the Proposal, Article 8 (1) (2) of the Regulation 1260/99/EC). The Proposal grants CSOs a special role, thus attempting to guarantee their participation in the process of programming, implementation and monitoring of EU Funds. Article 8 (1) of the Regulation 1260/99/EC allows for NGO participation, including ENGOs, but does not guarantee this participation. In order to fulfill the requirements of this article it is enough to involve economic partners, whilst social partners may be organisations that do not represent civil society. Therefore, this change should be viewed as a step in right direction.

2. Legislation on access to information

Provisions on EU Funds do not specify minimum standards on consulting decisions on programming, financing, monitoring and evaluation of assistance under the Funds. However, in some contexts general provisions on access to information, strategic environmental impact assessment, or public participation in decision-making relating to the environment can be also applied with regard to consulting decisions relating to the EU Funds. Access to information is of key importance for consulting any documents.

The following legal acts should be considered as far as access to information is concerned:

1. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 (The Aarhus Convention);
2. Council Directive (EEC) 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment;
3. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents;
4. Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC;
5. Proposal for a Regulation of the European Parliament and of the Council of 24 October 2003 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)622 final⁹

⁹Proposal for a Regulation of the European Parliament and of the Council of 24 October 2003 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)622 final. The position of the European Parliament on the Proposal was adopted during the first reading on 31 March 2004 (EP-PE_TC1-COD(2003)0242).

2.1. The Aarhus Convention

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in 1998 in Aarhus, also by the EU, has not been ratified by the Community yet. However, the will to ratify it is quite visible, the Community has adopted a number of Directives transposing the provisions of the Convention (e.g. the new directive on access to information, the new directive on public participation, a draft directive on access to court in environmental matters). The Convention's provisions on access to information are much more precise than that of the Directive 90/313/EEC. The authors of the Convention had drawn conclusions from the experiences with implementation of the Directive 90/313/EEC in Member States and tried to avoid the deficiencies that hindered access to information relating to the environment.

The Aarhus Convention constitutes an international agreement, and as such it is binding for the countries that have signed it and ratified it¹⁰. In legal orders of many Member States ratified international agreements constitute a part of a domestic legal order and can be applied directly¹¹. The Aarhus Convention stipulates that each Party will guarantee that public authorities, when asked to provide information relating to the environment, will provide such information. The definition of 'public authority' is very broad (Article 2(2)):

- a) government at national, regional and other level;
- b) natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
- c) any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

¹⁰ Many Member States have ratified the Aarhus Convention, e.g. Poland

¹¹ For example in Poland, Article 91 (2) of the Constitution stipulates that a ratified international agreement is applied before a national act, if the two legal acts are conflicting.

- d) the institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity. In most of the cases bodies involved in the decision-making on planning, financing, monitoring or controlling EU Funds fall within the scope of the term 'public authority'.

Another important term is 'environmental information.' The term is defined in Article 2 (3): environmental information means any information in written, visual, aural, electronic or any other material form on:

- a) the state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- b) factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
- c) the state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.

As far as the Funds are concerned, point (b) is of greatest significance, and especially the passage: "activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes (...) and cost-benefit and other economic analyses and assumptions used in environmental decision-making." According to this definition information of economic or financial character is considered as environmental

information as long as it relates to the decision-making on environmental issues. Decisions relating to the environment are inter alia decisions such as permits for particular investments.

The Aarhus Convention also includes a record of exceptions justifying denial of disclosure. It is possible to deny provision of information if its disclosure adversely affects commercial or industrial secret, provided that this secret is protected by law for safeguarding legitimate economic interests. The Convention provides for an exception to the exception: within this framework, information on emissions which is relevant for the protection of the environment should be disclosed.

It is possible to apply the provisions of the Aarhus Convention solely in those Member States where legal systems allow for direct application of provisions of international legislation. Provisions of this Convention can be applied for requesting information relating to the operations of the Funds.

2.2. Directive 90/313/EEC on the freedom of access to information on the environment

The Directive will enter into force on 14 February 2005 and it relates to environmental information in the possession of administrative bodies in Member States, but it does not relate to EU bodies and institutions. Therefore, it does not oblige EU bodies to provide information. According to this legal act, Member States should guarantee “everyone” access to environmental information. The Directive provides for exceptions from the rule on provision of environmental information.

It is, however, of key importance how it defines “information relating to the environment.” Article 2 (a) provides the following definition: “any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental

management programmes." The definition is wide enough to include information relating to the environment of economic character, e.g. economic information on projects with potential negative impact on the environment. On the other hand, lack of clear reference to economic and financial aspects in the definition gave rise to numerous disputes. A lot of Member States did not consider this type of information as information on the environment, which resulted in criticising the definition of "information relating to the environment"¹² and changing it in subsequent legal acts, i.e. in the Aarhus Convention and in the new Directive on Access to Information (2003/4). Nevertheless, even under the Directive 90/313/EEC, it is possible to demand from the authorities to grant access to information relating to the environment of financial character. The Directive defines authorities as "any public administration at national, regional or local level with responsibilities, and possessing information, relating to the environment with the exception of bodies acting in a judicial or legislative capacity."

Difficulties with applying this Directive to information relating to the environment in the context of EU Funds stems from the definition of public authorities included in the Directive. It refers only to the authorities "with responsibilities relating to the environment." In some Member States this definition will exclude such bodies as Ministries of Transport or Infrastructure, as they do not directly deal with environmental matters. The same problem may appear with relation to self-government units with general competences or steering and monitoring committees established for the Funds. On the other hand the Directive 90/313/EEC establishes minimum standards on provision of information relating to the environment and Member States can describe society's rights in a much broader manner. As far as new Member States are concerned, domestic legislation that transposes the Directive usually contains broader definitions of public authorities and information relating to the environment, adjusting these provisions to the wider definitions from the Aarhus Convention.

¹²See: R.Hallo (ed.) Access to Environmental Information in Europe. The Implementation and Implications of Directive 90/313/EEC, Kluwer Law International

Among the exceptions from the rule on the provision of information the Directive specifies inter alia public security reasons (Article 3 (2)). Due to this standard restriction (almost every act on access to information has it), access to information relating to certain types of investment projects is denied (e.g. military investment projects). Basic rights of the applicants include the following: a public authority is obliged to respond to a person requesting information as soon as possible and at the latest within two months; the reasons for a refusal to provide the information requested must be given; a person who considers that his request for information has been unreasonably refused or ignored, or has been inadequately answered by a public authority, may seek a judicial or administrative review of the decision in accordance with the relevant national legal system (Article 3 and 4).

2.3. Regulation 1049/2001/EC regarding public access to European Parliament, Council and Commission documents

Access to information on the Funds and the decisions relating to the Funds with potential impact on the environment may be obtained under the Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. Since 1997 access to community documents has constituted a public right (Article 255 (2) of the Treaty establishing the European Community). This served as basis for establishing the Regulation 1049/2001. The Regulation refers to access to all kinds of information, not only information relating to the environment. It relates only to European Community bodies and not bodies in Member States.

The most significant definition is that of 'a document': "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility" (Article 3 (a)). Institutions obliged to provide information under this Regulation include: the European Parliament, Council and Commission (Article 1 (a)). The Regulation applies to all documents in the possession of these

institutions, i.e. prepared and received by the institutions, remaining in their possession, in all the areas of EU activity.

Clearly, information on the Funds as well as information relating to the environment fall within the scope of this Regulation. The definition of the term 'document' is very broad, which stems from the legislators assumption to provide the broadest possible access to information. The definition of the term 'institution' raises, however, certain problems, as it is unclear whether it includes the delegations of the Commission in the Member States. Although the definition does not clearly state so, the delegations also fall within the scope of the Regulation and are, consequently, obliged to provide information.

All in all, information on planning, implementation and monitoring of EU Funds operations as well as information on particular investment projects, if possessed by EU institutions, should be publicly available. By and large this will relate to documents possessed by the European Commission, DG Regio and DG Environment. The documents are publicly available regardless of the fact whether they were prepared or adopted by the EU institutions or whether the institutions just received them from a third party.

It may be worthwhile to look at the exceptions from the rule on provision of information. The Regulation 1049/2001 specifies a closed list of exceptions. The following may apply to information relating to the Funds: 1) public security; 2) defence and military matters; 3) the financial, monetary or economic policy of the Community or a Member State; 4) commercial interests of a natural or legal person, including intellectual property; 5) the purpose of inspections, investigations and audits. Some of these exceptions may refer to information on particular projects co-financed from the Funds. For example, an application for co-financing may include information whose disclosure would violate commercial interest; or a monitoring report prepared for a particular project co-financed from the Funds may be also excluded from disclosure, if it reveals the purpose of inspections, investigations and audits.

All in all, access to public information, including information on the Funds and on environmental matters, constitutes the right of any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State. The Regulation specifies in detail the procedure of providing information. This legal act is directly applied, i.e. the institutions enumerated in it have an obligation to directly conform to its provisions.

2.4. Directive 2003/4/EC on public access to environmental information

On 28 January 2003, the European Parliament and the Council adopted a Directive on public access to environmental information and repealing Council Directive 90/313/EEC. Member States are obliged to implement it by 14 February 2005. On 14 February 2005 the Directive 90/313/EEC will cease to be binding. The new Directive considerably widens the scope of accessible environmental information. It includes a broader definition of environmental information than the definition from the Directive 90/313/EEC. Environmental information includes *inter alia* cost-benefit and other economic analyses and assumptions used within the framework of administrative and other measures as well as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the environment. This definition includes measures and activities aimed at environmental protection as well as measures and activities which may impact the environment. Both general plans as well as individual decisions on financing an investment under the Funds may constitute environmental information and be subject to disclosure, according to the provisions of the Directive 2003/4.

The definition of public authority is also broader here than in the Directive 90/313/EEC. According to the Directive 2003/4/EC, “a public authority” is:

- a) government or other public administration, including public advisory bodies, at national, regional or local level;
- b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and

- c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).

Various single person, group, local, regional or central bodies, including advisory bodies and bodies fulfilling commissioned functions, fall within the scope of this Directive, i.e. are obliged to provide environmental information. Therefore, bodies for programming, financing, monitoring and evaluation of assistance under Structural Funds and the Cohesion Fund also fall within the scope of the Directive.

According to Article 4, confidentiality of industrial and commercial information is one of possible exemptions from the rule of disclosure.

2.5. The Proposal on the application of the Aarhus Convention to EC institutions

The European Parliament and the Council are working on the Proposal for a Regulation of 24 October 2003 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 (later referred to as a Proposal for a Regulation on the application of the Aarhus Convention). The report analyses the version of the Proposal after the first reading in the European Parliament on 31 March 2004.

Article 1 of the Proposal guarantees the right of access to environmental information in relation to information that is in the possession of the EC institutions, was obtained, or prepared by those institutions. EC institutions and bodies are "any public institution, body, office or agency established by, or on the basis of, the Treaty establishing the European Community and performing public functions except when and to the extent to which they act in a judicial or legislative capacity" (Article 2 (c)). The definition of environmental information is also very important, as it comprises information on plans, programmes and policies (Article 2 (e)) and,

what is even more important, this includes plans, programmers and policies which are subject to preparation and/or funding and/or adoption by a Community institution or body, (Article 2 (f) (i)). Therefore, information on plans relating to the Funds constitutes environmental information in this legal act. Access to information standards are based on the requirements of the Aarhus Convention (compare: 2.1.)), with minor changes that extend the right of access to information.

2.6. Conclusions

Although regulations establishing Structural Funds or the Cohesion Fund do not include any provisions on access to information, be it information relating to the environment or general public information, such access is possible under other legal acts binding in the Community.

Regulation 1049/2001 is a legal act analogous to Freedom of Information Acts that are binding in many countries and it regulates access to all public information. It refers, however, only to documents in the possession of the European Parliament, Council and Commission. It does not oblige Member States to provide public information. On the other hand, the Directive 90/313/EEC and the Directive 2004/3/EC that will replace it, have to be transposed to the domestic legislation of the Member States, but they refer only to environmental information. The binding Community legal acts, however, provide for broad definitions of bodies obliged to disclose information as well as types of information to be disclosed. Bodies responsible for Funds' operations fall within the scope of such definitions. All the information possessed by such bodies, if it relates (even indirectly) to the environment or to the decisions with possible environmental impact, including information of economic or financial character, has to be disclosed as environmental information.

Community legislation also provides for exceptions from the obligation to disclose information, which very frequently relate to protection of economic or commercial interests. On the one hand, current Community legislation facilitates access to certain

significant information on the functioning of the Funds, especially in the context of environmental protection. When the Proposal for the Regulation on the application of the Aarhus Convention enters into force, this access will be extended on the EC institutions and bodies. On the other hand, access is to a certain extent limited, due to protection of entrepreneurs' economic interests.

Provisions on access to information are of horizontal application. Therefore, introducing special clauses regulating this issues to the regulations establishing Structural Funds and the Cohesion Fund does not appear to be necessary.

3. Regulations on public consultations

As already stated, provisions regulating issues connected with EU Funds do not define minimum standards of public consultations on programming, financing, monitoring and evaluation of assistance under the Funds. This raises the question whether it is possible to apply here general provisions on public participation in the decision-making relating to the environment and on environmental impact assessments (EIA), including strategic environmental assessment (SEA).

3.1. The Aarhus Convention

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters contains detailed provisions on public consultations. The provisions on public participation are divided into two groups: a) public participation in decisions on specific activities (Article 6) and b) public participation concerning plans, programmes and policies relating to the environment (Article 7). The provisions on specific activities define a very detailed procedure, whilst provisions on strategic decisions are much less precise and contain much less stringent requirements.

Provisions on public participation in decisions on specific activities can be applied in the context of the Funds provided that a specific investment activity is financed under one of the Funds. This public participation procedure does not constitute a part of the decision-making procedure on granting co-financing, which is carried out by a relevant body. Currently, the Aarhus Convention does not formally constitute a part of environmental *acquis communautaire*, as it has not been ratified by the Community. This is why the requirements of the Article 12 of the Regulation 1260/99/EC or Article 9 of the Regulation 1164/94/EC do not refer to the requirements of the Aarhus Convention (according to these Articles, operations financed by the Funds shall be in conformity with the provisions of the Treaty, with instruments adopted under it and with Community policies and actions, including *inter alia* environmental protection). Therefore, from a formal perspective,

investment projects should not be assessed for compliance with the Aarhus Convention.

Nevertheless, those Member States who have ratified the Convention have to respect public participation requirements with relation to the majority of investment projects (activities) financed under the Funds. Annex 1 to the Convention specifies the list of such activities. Moreover, the provisions have to be applied also for activities not included in the Annex but which, according to national legislation, can have a significant impact on the environment. The public participation procedure as defined in the Aarhus Convention constitutes a blueprint for analogous procedures provided for in the community legislation (the directive on public participation of 2003, the SEA directive) and in domestic legislations.

The procedure comprises five main steps:

- a) informing the public on initiating the decision-making procedure;
- b) securing access to documents important for the decision-making process;
- c) securing possibilities for submitting comments to the decision proposal;
- d) considering the submitted comments and making the decision;
- e) making the decision and its justification public.

The Aarhus Convention provides for detailed requirements for each of the aforementioned stages. Violation of at least one of the requirements constitutes a significant procedural negligence in the decision-making process. Depending on domestic legislation, this may have different repercussions (e.g. invalidating the decision, performing the procedure once again, etc.).

According to the provisions of the Convention on strategic decision-making, each Party (state) will make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, the following provisions of the Convention have to be applied: informing the

public; securing the possibilities for submitting the applications; securing participation at an early stage, when all the variants are still possible and public participation can be effective; incorporating the results of public participation into the decision.

In a way procedural steps (a-e) should be applied also in relation to decisions on plans, programmes, policies and strategies, i.e. inter alia decisions on programming of the Funds utilisation.

Development Plans prepared by respective Member States as well as certain operational programmes (those that relate to the environment) fall within the scope of plans referred to in Article 7 of the Aarhus Convention. The requirement to conduct the public participation procedure is binding provided that a particular Member State has ratified the Aarhus Convention.

3.2. Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment

In order to adjust Community legislation to the Aarhus Convention in the field of public participation, the European Parliament and Council adopted the Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. The Directive is to be implemented by 25 June 2005. It draws up a framework for public participation in respect of decisions on particular investments (amending the directives on environmental impact assessment) as well as decisions of a strategic character (certain plans and programmes).

Following the Aarhus Convention, the Directive introduces a uniform definition of "the public", i.e. "one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups." The Directive provides for a five-step public participation procedure for plans and programmes as well as for particular investments. All the procedural steps are defined in detail.

As far as plans and programmes are concerned, the provisions of the Directive 2003/35/EC are binding only for plans and programmes specified in Annex I, i.e. plans and programmes on waste, on batteries and accumulators containing certain dangerous substances, on protection of waters against pollution caused by nitrates from agricultural sources, on hazardous waste, on packaging and packaging waste, and on ambient air quality assessment and management. This is a closed list and other plans or programmes do not fall within the scope of the Directive. Therefore, the Directive's provisions do not apply for plans and programmes regarding Structural Funds and the Cohesion Fund.

As far as provisions on specific projects are concerned, the Directive 2003/35/EC amends the Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (the EIA Directive), introducing new requirements on public participation. The EIA Directive refers to investment projects, i.e. for example to infrastructure investments (transport and environmental infrastructure), such as motorways or water treatment plants. Consequently, requirements on the public participation procedure, according to the Aarhus Convention's standards, have been incorporated into the EIA procedure for specific projects. According to Article 12 of the Regulation 1260/99/EC and Article 9 of the Regulation 1164/94/EC projects financed from the Structural Funds and the Cohesion Fund have to comply with environmental protection requirements. Therefore, for all the investment project specified in Annex I to the EIA Directive the EIA procedure has to be conducted, together with the public participation procedure. Violating these requirements constitutes a breach of not only the provisions of the amended Directive 85/337/EEC and the Directive 2003/35/EC but also of the directly binding Regulations 1260/99/EC and 1164/94/EC. If a project falls within the scope of Annex I of the Directive 85/337/EEC, it cannot be co-financed under Structural Funds and the Cohesion Fund

without having the EIA procedure conducted, together with the public participation procedure¹³.

3.3. Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment

Yet another document that refers to public participation is the Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive). Its provisions require conducting a strategic environmental assessment for certain plans and programmes. Within the SEA, public participation procedure should also be conducted. Article 7 of the Directive provides for a public participation procedure that follows the standard set up in the Aarhus Convention.

Article 2 defines the plans and programmes that fall within the scope of the Directive: “plans and programmes, including those co-financed by the European Community, as well as any modifications to them: (a) which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and (b) which are required by legislative, regulatory or administrative provisions.” According to Article 3 of the Directive, SEA has to be conducted for all plans and programmes which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC (the EIA Directive), or which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC (the Habitat Directive).

¹³ See: Case C-321/95P *Greenpeace v. Commission*, in which Greenpeace sued to the court of I instance and later to the European Court of Justice the decision of the Commission (DG XVI Regio) on granting Spain assistance from the ERDF for constructing a power plant on the Canary Islands, made on the basis of the Council Regulation 1787/84. Greenpeace claimed that the requirements of the Directive 85/337/EEC had not been fulfilled. Greenpeace lost the case, but due to being unauthorised to bring the case to the European Court of Justice.

On the basis of a clear norm under Article 3 (9) of the SEA Directive, the Directive does not apply to plans and programmes co-financed under the current respective programming periods for Council Regulations (EC) No 1260/1999 (Structural Funds) and (EC) No 1257/1999 (European Agricultural Guidance and Guarantee Fund). This exception does not refer to the Cohesion Fund (Regulation 1164/94/EC). On the other hand, the Regulation on the Cohesion Fund does not provide for any plans or programmes. The question arises whether a reference framework for the Cohesion Fund, adopted in certain Member States, constitutes a plan or programme as understood in the SEA Directive. Let us turn to the Polish example. The Reference Framework for the Cohesion Fund in Poland for 2004 – 2006 constitutes a plan of allocating the Cohesion Fund's resources in two fields: environmental protection and transport. It was adopted by a central administration body – a resolution of 30 July 2004 of the Minister of Economy and Labour. The document is required by the Act of 20 April 2004 on the National Development Plan. The document fulfills the definition criteria for a plan under the SEA Directive, therefore SEA, together with the public participation procedure, should be conducted.

Summing up, plans and programmes adopted for Cohesion Fund programming require conducting the SEA procedure, whilst plans and programmes adopted for Structural Funds programming do not require conducting the SEA procedure and, consequently, public participation procedure. Such an exception is unjustified, as programming documents for Structural Funds govern financing of particular types of investments with possible environmental impact. Exempting them from the SEA requirements opposes the main objective of the SEA Directive, i.e. guaranteeing high level of environmental protection, in line with the precautionary principle.

The deadline for implementing the SEA Directive by the Member States expired on 21 July 2004 (Article 13 (1)).

3.4. The Proposal for the Regulation on the application of the Aarhus Convention

The Directives analysed in this section impose obligations on Member States but do not refer to EC bodies and institutions. The Proposal for the Regulation on the application of the Aarhus Convention introduces very significant changes in this respect. As already mentioned in 2.5., the Proposal imposes obligations on EC bodies and institutions defined in Article 2 (c) of the Proposal. Public participation rules are described in Title III of the Proposal and are binding for those plans, programmes and policies that relate to the environment and are adopted by EC institutions and bodies. Articles 9 and 10 of the Proposal are based on the standard established by the Aarhus Convention. Therefore, Community institutions and bodies have to provide opportunities for members of the public to participate in the preparation, modification or review of plans, programmes or policies (later referred to as 'documents'). The bodies are obliged to identify the parties interested, especially organisations dealing with environmental protection and promoting sustainable development, to take part in the public participation procedure.

The bodies are especially obliged to (Articles 9, 10, 11):

- provide early and effective opportunities for members of the public to participate, including the stage of document's preparation;
- inform members of the public prior to making a decision, whether by public notice or other appropriate means such as electronic media, presenting a document's proposal;
- inform members of the public about the practical arrangements for consulting a document and guarantee the possibility to submit comments at the early stage of document preparation, prior to making a decision;
- guarantee reasonable time-frames for the different phases of document preparation; in written consultations on a document relating to the environment, guarantee a time-limit of eight weeks for receiving comments;

- when making a decision take into account the results of public participation;
- inform members of the public about the adopted document, including its text, and of the reasons and considerations upon which the decision is based, including information about the public-participation process.

The definition of plans, programmes and policies includes inter alia those documents that are subject to preparation and/or funding and/or adoption by a Community institution or body (Article 2 (f) (i)). Therefore, public participation procedure, as defined in the proposal, will be also applied for plans or programmes adopted for the Funds, provided that EC bodies and institutions are responsible for preparation, modification or review of such documents.

3.5. Conclusions

Regulations establishing the Funds do not provide for precise public participation rules. The fact that the Community signed the Aarhus Convention has shaped the development directions for the Community legislation on public participation. Directives 2003/35/EC and 2001/42/EC establish public participation rules in respect of both, specific projects as well as plans and programmes. Although public participation legislation evolves in the right direction, i.e. strengthening public participation, but as far as the Funds are concerned, the provisions can be hardly judged as sufficient.

The Aarhus Convention establishes public participation standards that should be applied also for decisions relating to the environment made within the framework of Structural Funds and the Cohesion Fund. EIA and public participation procedures (in relation to specific investment projects) required in the Convention are conducted independently of the decision-making on co-financing of the projects under the Funds. The requirements on public participation in relation to plans, programmes, policies and strategies are applicable also in the context of Development Plans and those Operational Programmes for the Structural Funds that have impact on the environment. Currently, the Aarhus Convention

does not constitute a part of *acquis communautaire* and is binding in those Member States which have ratified it.

The Directive 2003/35/EC provides for a very precise framework for public participation. However, its provisions on plans and programmes are not applicable in the context of Structural Funds and the Cohesion Fund. The provisions on particular projects have to be respected independently of the decision-making on co-financing from the Funds. Breaching the requirements of this Directive constitutes a clear violation not only of the Directive but also of the Regulations establishing the Structural Funds and the Cohesion Fund.

As for public participation in the decision-making on the Funds, the SEA Directive (2001/42/EC) appears to be the most significant. The SEA procedure, including the public participation procedure, on the basis of a separate norm does not apply to Structural Funds and the European Agricultural Guidance and Guarantee Fund in relation to the current programming period 2004 - 2006. This exemption is not binding for the Cohesion Fund and therefore plans and programmes prepared under this Fund have to undergo SEA procedure. Exemption of Structural Funds from this requirement should be considered as the most significant flaw of Community legislation on the Funds.

Therefore, the Proposal for the Regulation on the application of the Aarhus Convention constitutes a step in the right direction. When the Regulation becomes binding, it will facilitate public participation in relation to plans, programmes and policies which are subject to preparation and/or funding and/or adoption by a Community institution or body (Article 2 (f) (i)), thus also documents prepared for the Funds, provided that EC bodies and institutions are responsible for preparation, modification or review of such documents.

4. Steering and monitoring committees and other advisory bodies established for the Funds

Apart from utilising the mechanisms for access to information, public participation and strategic environmental assessment, environmental non-governmental organisations can try to influence the management of EU Funds through participation in steering and monitoring committees established for the Funds. Different advisory bodies, some of them obligatory and some optional, embody the partnership principle, which is proclaimed in the regulations establishing the Funds. This section attempts to verify whether community legislation on the committees and other advisory bodies secures real public impact on the decisions made in respect of the Funds.

4.1. Structural Funds

4.1.1. *Steering Committees*

The term 'steering committee' or 'steering institution' or any similar term does not appear in the EU legislation on Structural Funds, at least in legal acts such as: regulations, directives, decisions, etc. Therefore, when analysing the institution of steering committees one has to start with the term 'managing authority' or rather from its structure, composition and institutions acting within its framework.

The Regulation 1260/99/EC defines 'managing authority' as "any public or private authority or body at national, regional or local level designated by the Member State, or the Member State when it is itself carrying out this function, to manage assistance for the purposes of this Regulation. If the Member State designates a managing authority other than itself, it shall determine all the modalities of its relationship with the managing authority and of the latter's relationship with the Commission. If the Member State so decides, the managing authority may be the same body as the paying authority for the assistance concerned." The Regulation clearly states that full responsibility for internal (on the national level) management of Structural Funds stays with the Member State. The State can differently define the responsibility of particular

bodies. However, the managing body should be an administrative authority. This is why, steering committees established in some Member States, composed of representatives of various stakeholders, are not entitled to make final decisions on granting of financial assistance from the Funds. Steering Committees or other bodies of such type fulfil an advisory function for the managing authority, e.g. for a relevant minister.

Article 34 of the Regulation 1260/99/EC specifies the rights and obligations of the managing authority. It stipulates that the managing authority is responsible for the efficiency and correctness of management and implementation, and in particular for:

- a) setting up a system to gather reliable financial and statistical information on implementation, for the monitoring indicators;
- b) drawing up and, after obtaining the approval of the Monitoring Committee, submitting to the Commission the annual implementation report;
- c) organising, in cooperation with the Commission and the Member State, the mid-term evaluation;
- d) ensuring that the bodies taking part in the management and implementation of the assistance maintain either a separate accounting system or an adequate accounting code for all transactions relating to the assistance;
- e) ensuring the correctness of operations financed under the assistance, particularly by implementing internal controls in keeping with the principles of sound financial management and acting in response to any observations or requests for corrective measures;
- f) ensuring compliance with Community policies as stipulated in Article 12 of the Regulation; in the context of the application of Community rules on the award of public contracts;
- g) compliance with the obligations concerning information and publicity.

Moreover, according to the Regulation, when fulfilling its tasks, the managing authority shall act in full compliance with the institutional, legal and financial systems of the Member State concerned.

Clearly the aforementioned provisions define in a very general manner the institution and the composition of a managing body, leaving more detailed provisions to the Member State. Directing some of the managing task to advisory bodies (e.g. steering committees) is left at the Member State's discretion and is not regulated by Community legislation. Regardless of how a given Member State defines competences of a steering committee, it is the Member State that is responsible for managing the assistance.

4.1.2. Monitoring Committees

Unlike steering committees, monitoring committees are regulated in the Community legislation. According to Article 35 of the Regulation 1260/99/EC, each Community support framework or single programming document and each operational programme has to be supervised by a monitoring committee. Monitoring Committees are set up by the Member State, in agreement with the managing authority after consultation with the partners. The Monitoring Committees are set up no more than three months after the decision on the contribution of the Funds. The Monitoring Committees act under the authority and within the legal jurisdiction of the Member State. A representative of the Commission and, where appropriate, of the EIB, participates in the work of the Monitoring Committee in an advisory capacity. The Monitoring Committee draws up its own rules of procedure within the institutional, legal and financial framework of the Member State concerned and agrees them with the managing authority. In principle, the Monitoring Committee is chaired by a representative of the Member State or the managing authority. The Monitoring Committee should guarantee the effectiveness and quality of the implementation of assistance.

Clearly, unlike with steering committees, Member States are obliged to establish monitoring committees. The aims of the monitoring committees are different than those of the steering committees. Monitoring committees are responsible for post factum evaluation, they do not recommend decisions on granting or denying assistance, but supervise the implementation of projects that have already been approved.

4.2. The Cohesion Fund

The Regulation establishing the Cohesion Fund does not include comprehensive provisions on steering and monitoring committees. As in the case of the Structural Funds, the regulation does not provide for steering committees. Provisions on monitoring committees are general and fragmentary. According to Article F of Annex II to the Regulation 1164/94, the Commission and the Member State shall ensure effective monitoring of implementation of Community projects part-financed by the Fund. Monitoring is carried out by way of jointly agreed reporting procedures, sample checks and the establishment of ad hoc committees. Monitoring is carried out by reference to physical and financial indicators. The indicators relate to the specific character of the project and its objectives. They are arranged in such a way as to show:

- the stage reached in the receipt in relation to the plan and objectives originally laid down;
- the progress achieved on the management side and any related problems.

Monitoring committees are set up by arrangement between the Member State concerned and the Commission. The authorities or bodies designated by the Member State, the Commission and, where appropriate, the EIB are represented on the committees. Where regional and local authorities are competent for the execution of a project and, where appropriate, where they are directly concerned by a project they are also represented on such committees. On the basis of the results of monitoring, and taking account of the comments of the monitoring committee, the Commission adjusts the amounts and conditions for granting assistance as initially approved, as well as the financing plan envisaged, if necessary on a proposal by the Member States. The monitoring arrangements shall be laid down in the Commission decisions approving the projects.

4.3. Conclusions

Community legislation does not contain detailed provisions on the composition or functioning of steering and monitoring committees

for Structural Funds or the Cohesion Funds. The Regulation 1260/99/EC and the Regulation 1164/94/EC provide only very general statements on inclusion of social and economic partners. Therefore, it may be concluded that Community legislation does not sufficiently guarantee ENGOs' impact on the operation of Structural Funds and the Cohesion Fund. In practical terms, apart from very general statements on e.g. the necessity to support equality between men and women, *acquis communautaire* refers to national legal orders, leaving the issues of monitoring committees at the discretion of Member States. As already stated, Community legislation does not provide at all for the institution of steering committees.

C. CONCLUSIONS

1. Partnership principle

Provisions on Structural Funds do not establish clear and effective framework for implementing the partnership principle. The provisions do not specify minimum standards on social consultations, such as: provision of information, specification of deadlines for collecting comments, or the manner of informing society on the results of consultations of different documents. Although the Regulations establishing the Funds refer to the partnership principle, it is defined in a very imprecise manner. The partnership principle, as understood in the Regulation 1260/99/EC, refers to involving a very wide variety of bodies, institutions and organisations. EU law does not allow for prioritising one particular group or social interest in this respect. The only exception is the imprecise regulation guaranteeing that social and economic partners should include bodies, institutions or organisations dealing with equal status of men and women and with sustainable development issues. The general character of this provision does not allow for drawing up more precise requirements that a Member State should fulfill with respect to the qualitative and quantitative scope of such organisations' participation in steering and monitoring committees.

Moreover, the imprecise definition of "social partners" and delegating the responsibility of designating the partners to the Member States may lead to considering as social partners organisations that are in fact economic partners. This in turn may result in excessive representation of entrepreneurs' organisations at the cost of civil society organisations. Moreover, environmental organisations do not enjoy a special status in the programming process of the Funds, or at least this status does not result from Community provisions establishing the Funds.

The Regulation establishing the Cohesion Fund does not refer to the partnership principle at all. As far as the Cohesion Fund is concerned, the partnership principle can have only ancillary application. This means that a Member State, when establishing

steering and monitoring committees for the Cohesion Fund and including social and economic partners, can apply similar rules as for Structural Funds committees. Such a situation should be assessed negatively. The Cohesion Fund, like Structural Funds, requires programming, and involving social and economic partners in the processes of planning, implementing and monitoring is justified and necessary. Moreover, this involvement is allowed in some Member States, but it does not clearly stem from the EU legislation.

The Proposal for the Regulation on the Funds recognises partnership as a general rule on the Funds and makes a clear reference to civil society organisations (which means also NGOs or ENGOs) as partners and therefore constitutes a step in the right direction. However, the proposal does not establish clear and effective framework for implementation of the partnership principle nor does it specify minimum standards on public consultations.

2. Access to information

Current community legislation facilitates access to important information relating to the Funds' functioning, especially in the context of environmental information. Regulation 1049/2001 and Directive 2003/4/EC together provide for a quite comprehensive system of legal norms guaranteeing access to basic information held by EU bodies (Commission, Council, Parliament) and by administrative bodies in the Member States (environmental information), including bodies responsible for managing the Funds.

The significance of Directive 2003/4/EC should be stressed. According to this Directive, environmental information includes inter alia cost-benefit and other economic analyses and assumptions used within the framework of administrative and other measures as well as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the environment. However, this access is in a way limited due to protection of commercial interest of entrepreneurs.

When the Proposal for the Regulation on the application of the Aarhus Convention becomes binding, the obligations relating to access to environmental information will be extended on EC institutions and bodies.

Provisions on access to information are of horizontal application and can be used by society in the context of EU Funds' operation. Therefore, introducing special clauses regulating this issues to the regulations establishing Structural Funds and the Cohesion Fund does not appear to be necessary.

3. Public participation

Convention on access to information, public participation in decision-making and access to justice in environmental matters of 1998 contains detailed provisions on public consultations. The Convention's provisions could be applied also to decisions relating to the Funds. The provisions on public participation are divided into two groups: a) public participation in decisions on specific activities and b) public participation concerning plans, programmes and policies relating to the environment. Provisions of the Aarhus Convention define in detail the procedural steps that public participation comprises: a) informing the public on initiating the decision-making procedure; b) securing access to documents important for the decision-making process; c) securing possibilities for submitting comments to the decision proposal; d) considering the submitted comments and making the decision; e) making the decision and its justification public. The European Community has initiated activities aimed at ratification of the Aarhus Convention. Until the Convention is ratified, it does not constitute a part of environmental acquis.

Directive 2003/35/EC on public participation may be applied on **specific activities** co-financed from the Funds. Its provisions on participation in preparation of **plans and programmes** cannot be applied for programming and planning of Structural Funds and the Cohesion Fund. Article 12 of the Regulation 1260/99/EC and Article 8 of the Regulation 1164/94/EC refer to the provisions of this Directive. The Articles stipulate that projects to be co-financed under the Funds have to fulfill the requirements of environmental acquis. The fact that the Directive 2003/35/EC is not applied for plans and programmes prepared for EU Funds constitutes a significant flaw of this legal act. Consequently, the precise public participation procedure, consisting of five detailed steps, does not apply to decisions that are so significant from the environmental point of view.

As far as public participation is concerned, the rules on public consultations provided for in the Directive 2001/42/EC (The SEA

Directive) are also very significant. The Directive defines in great detail the rules for public participation in Article 7 (Consultation). However, this Directive can be only partially applied to strategic decisions made in relation to the Funds. Plans and programmes prepared during the programming process of the Cohesion Fund require conducting SEA, whilst plans and programmes prepared for Structural Funds do not require such assessment, and consequently, do not require public consultations (this exception is provided for in Article 3 (9)). Such an exception is unjustified, as programming documents for Structural Funds govern financing of particular types of investments with possible environmental impact. Exempting them from the SEA requirements opposes the main objective of the SEA Directive, i.e. guaranteeing high level of environmental protection, in line with the precautionary principle.

When the Proposal for the Regulation on the application of the Aarhus Convention becomes binding, it will facilitate public participation in relation to plans, programmes and policies prepared for the Funds, if they are prepared, amended or reviewed by EC bodies and institutions.

4. Steering and monitoring committees and other advisory bodies established for the Funds

Community legislation does not contain detailed provisions on composition or functioning of steering committees, monitoring committees established for Structural Funds or the Cohesion Funds. Regulation 1260/99/EC and Regulation 1164/94/EC provide solely very general statement on inclusion of social and economic partners.

Consequently, Community legislation does not properly secure ENGOs' impact on the operations of Structural Funds and the Cohesion Fund. In practical terms, *acquis communautaire* leaves these matters unregulated, directing the responsibilities to national legal orders of Member States, which enjoy almost unlimited freedom in establishing institutional framework for partnership, such as working groups, steering committees, monitoring committees.

The fact that Community legislation does not provide comprehensive provisions on steering and monitoring committees, stems from the subsidiarity principle. However, leaving it to the Member States to decide on these issues does not always serve well for fulfilling the objectives of the regulations.

D. RECOMMENDATIONS

1. The Regulations establishing the Funds should define the partnership principle in a clear manner and impose specific obligations on Member States in respect of inclusion of social and economic partners and civil society organisations in the process of planning and decision-making on financing, monitoring and evaluation of assistance under the Funds. The obligations should set up a minimum framework for public participation, such as: 1) announcement of initiation of the decision-making process, 2) access to information, 3) specification of deadlines for submitting comments, 4) announcement of the decision, together with information on how the comments were considered.
2. Community legislation should define in greater detail the term 'social partners'. The definition should exclude organisations of employers or business organisations, as they are economic partners. Due to the special role environmental non-governmental organisations play in protecting public interest, they should be granted, according with the principles of the Aarhus Convention, a special status. Community legislation should impose an obligation of including environmental organisations to the advisory bodies established for steering and monitoring EU Funds assistance. The Proposal for the Regulation on the Funds is a step in right direction.
3. The partnership principle as well as provisions establishing the framework for its implementation should refer also to the Cohesion Fund. The regulation establishing the Cohesion Funds should clearly relate to the partnership principle. The Proposal for the Regulation on the Funds meets these expectations, as it refers also to the Cohesion Fund.
4. In order to secure access to information, public participation in decision-making and access to justice in environmental matters, also in relation to decisions on the EU Funds, EU should ratify the Aarhus Convention.
5. In order to implement the partnership principle and facilitate real partnership in EU Funds programming, the provisions of the Directive 2003/35/EC on public participation should also relate to plans and programmes prepared for the EU Funds.

6. Community legislation, especially Regulations establishing Structural Funds and the Cohesion Fund, should define common, minimum requirements on the composition, competences and manner of operation in relation to steering and monitoring committees established for the Funds.
