Response to communication ACCC/C/2015/126

**Overview**

The overhead 400 kV double circuit line from Ełk to the border of the Republic of Poland forms part of the so-called "energy bridge" between Poland and Lithuania. The project is of strategic importance both for Poland and for Lithuania due to the need to enhance energy security in both countries and improve transmission capacity in cross-border networks. The European Union has awarded priority status to the project, as its purpose is to include the Baltic states (i.e. Lithuania, Latvia and Estonia) to the common energy market in the EU.

Decisions and rulings on the case:

- decision on the environmental conditions of 4 July 2013 (ref. No. WOOŚ-II.4202.1.2012.AS), issued by the Regional Directorate for Environmental Protection (RDEP) in Białystok (hereinafter referred to as the Decision of July 2013). The Parties appealed against that decision to the General Directorate for Environmental Protection (GDEP);
- appeal decision of 16 December 2013 (ref. No. DOOŚ-OAI.4202.3.2013.AŁ.7), issued by GDEP, partially amending the decision of RDEP (hereinafter referred to as the Decision of December 2013). The Parties appealed against that decision to the administrative court;
- judgment of 25 September 2014, ref. No. IV SA/WA 308/14, issued by the Voivodeship Administrative Court in Warsaw. The Court dismissed the complaints, arguing that the administrative bodies had acted in accordance with the legislation in force, that they had accurately gathered and assessed the evidence in the case, as well as they had ensured adequate participation of the public and the parties to the case, and that the selection of a project option was preceded by an in-depth environmental impact assessment and analysis of alternative options. The Parties filed a cassation appeal against that judgment to the Supreme Administrative Court (hereinafter referred to as the SAC);

- judgment of 28 July 2016, ref. No. NSA-, dismissing the cassation appeal.

Moreover, after the recognition of the complaint of 29 August 2014 regarding Poland's breach of the Bern Convention (Convention on the Conservation of European Wildlife and Natural Habitats) with regard to the construction of said power line from Ełk to the Polish border, filed by Stowarzyszenie "Zdrowa Gmina" (Healthy Municipality Association; the Association), during the 34th meeting of the Standing Committee of the Bern Convention in Strasbourg, France (between 2 and 5 December 2014), the participants approved the extent of environmental protection measures taken into account at the stage of project preparation (e.g. in the report and in the decision on the environmental conditions). This opinion was also shared by a representative of EUROBATS, according to whom the measures taken under the project to protect bats were satisfactory. The Standing Committee decided to close the case for Poland.

Pleas:

In their communication of 10 November 2015, the Association argued that provisions of Articles 6 and 9 of the Aarhus Convention had been breached. However, it should be pointed out that when referring to specific articles of the Aarhus Convention with regard to the alleged breach, the Communicant presented a justification that often did not correspond to the wording of such Convention articles, in particular to the wording of Article 9.

The abovementioned pleas concern two aspects, i.e. non-compliance of Polish law with the Aarhus Convention and breach of the Aarhus Convention in the course of specific proceedings aimed at determination of the environmental impact of the project.

1. Pleas relating to the non-compliance of Polish law with the Aarhus Convention
1.1. lack of clear requirement to inform the public about the proceedings within a specific deadline and in a specific and efficient manner;
1.2. too short deadlines for the public to submit comments as part of public participation.

2. Pleas relating to the breach of the Aarhus Convention in the course of the proceedings, concerning:
2.1. public project status;
2.2. effective public participation with regard to disclosure requirements;
2.3. failure to guarantee effective public participation with regard to submission and consideration of comments;
2.4. lack of option analysis;
2.5. data manipulation;
2.6. lack of access to the decision on the environmental conditions;
2.7. failure to organise meetings with the public;
2.8. failure to carry out transboundary consultations;
2.9. immediate enforceability of the decision on the environmental conditions;
2.10. local spatial development plan;
2.11. failure to provide assistance to the Parties to the proceedings, or to protect their rights;
2.12. Other.

Having received the communication, the Minister of Environment, in order to determine the state of affairs, requested clarifications from the General Director for Environmental Protection, the Regional Director for Environmental Protection in Białystok, the Voivode of Podlaskie Voivodeship, as well as from Polskie Sieci Energetyczne S.A. (PSE), who presented their information.
In his response, the Minister of Environment refers to all the abovementioned pleas, although some of them clearly fall beyond the scope of the Aarhus Convention.

**Re 1.1. Lack of clear requirement to inform the public about the proceedings within a specific deadline and in a specific and efficient manner**

The Association argues that Polish law is non-compliant with the Aarhus Convention due to lack of clear requirement to inform the public about the proceedings within a specific deadline and in a specific and efficient manner. In the opinion of the Association, publication of information in *Biuletyn Informacji Publicznej* (Public Information Bulletin) is ineffective and individual information of the public in writing and/or through local television channels and radio stations would be much more effective.
In its letter, the Association fails to specify whether the plea concerns the public or the parties to the proceedings. This is crucial, as those groups are differently treated in the Aarhus Convention and in the Polish legislation. Under the latter, separate regulations apply to delivery of letters to the parties to the proceedings and to the disclosure of information to the public.
Deliveries in the proceedings relating to the issuance of a decision on the environmental conditions in cases with more than 20 parties have been regulated in Article 49 of the Code of Administrative Procedure of 14 June 1960 (Dz.U. of 2016, item 23, as amended) (hereinafter referred to as CAP), i.e. through notice or other method of public information generally accepted in a given locality. The

method is adjusted to the practices effective in a given locality so as to reach all parties to the proceedings.
In cases with less than 20 parties letters are delivered individually.
Information of the public (other than the parties) about the proceedings is done through notification of the public. Pursuant to Article 3(1)(11) of the Act of 3 October 2008 on access to information on the environment and environmental protection, public participation in environmental protection and on environmental impact assessment (Dz.U. of 2016, item 353, as amended), hereinafter referred to as the Assessment Act, notification of the public means:
(a) the provision of information on the website of the Public Information Bulletin of the authority competent in the matter,
(b) the provision of information in a customary manner at the seat of the authority which is competent in the matter,
(c) the provision of information by notice in a customary manner at the location of the proposed project and, in the case of a draft document requiring public participation, in the press with an appropriate range in the light of the type of the document,
(d) in the case where the seat of the authority competent in the matter is located in the area of a municipality other than the municipality which is relevant in terms of its location in the light of the subject matter of the proceedings, also by a publication in the press or in a customary manner used in the locality or localities which are relevant in the light of the subject matter of the proceedings.
The plea that Polish law does not provide for a specific deadline for informing the public is unfounded. In accordance with Article 33 of the Assessment Act, the disclosure obligation arises "without an undue delay" (*bez zbędnej zwłoki*). This term is used in Polish legislation to indicate that specific actions must be taken by a given authority immediately.
Pursuant to the Aarhus Convention, the public concerned (parties to the proceedings) must be informed "either by public notice or individually as appropriate" (Article 6(2)).
The solution adopted in Polish law where the parties (the public concerned) are informed individually (in cases with less than 20 parties) or through notice or other generally accepted method fulfils the obligations resulting from the Aarhus Convention.
Information through notification of the public without an undue delay also fulfils the obligations resulting from the Aarhus Convention.
Moreover, the abovementioned solutions have been referred to in the implementation guide1 to the Aarhus Convention as an example of best practices in providing access to environmental information.

**Re 1.2. Too short deadlines for the public to submit comments as part of public participation**

The Association argues that the deadlines for public participation set by the authority competent for the matter were too short.
In accordance with Polish law (Article 33 of the Assessment Act), the public has 21 days for submitting comments and suggestions on the matter. In the event of amendments to case documentation made after the end of public participation, the public participation procedure is repeated. Contrary to the Association's arguments, the public is not required to meet any formal conditions. Any doubts may take form of comments, questions, reservations etc. and they may be submitted in any form to the authority in charge of their consideration.
However, in the case of the parties (environmental organisations participating in the proceedings) the deadlines are different. In accordance with Polish law, the parties are entitled to have access to case files, as well as to comment on the subject matter of the case throughout the proceedings both before the first-instance and before the second-instance authority. Considering the duration of the proceedings from the submission of the first version of the report, i.e. from September 2012, to the issuance of the decision by RDEP in Białystok, i.e. to July 2013, the parties had access to case files and could comment on the matter throughout that period.
Moreover, all parties had access to case files throughout the proceedings before GDEP.

[1] „The Aarhus Convention: An Implementation Guide", second edition 2014.

It should be also pointed out that reports prepared for projects of such complexity are always lengthy and written in a complex specialist language. However, in order to facilitate commenting on the report for the public, Polish legislation stipulates that a non-technical summary must be prepared and made available (Article 6(6)(d) of the Aarhus Convention). This requirement has been met in the analysed case.

**Re 2.1. Public project status**

Polish law defines public projects as tasks performed at the local (municipality) and supralocal level (poviat, voivodeship and national, including international projects) for the purposes referred to in Article 6 of the Act of 21 August 1997 on real property management (Dz.U. of 2015, item 1774, as amended).

In the context of the Association's plea, the crucial aspect is that the project status resulting from the abovementioned Act of real property management does not entitle the investor to evade or neglect in the course of the project implementation process any obligations relating to the protection of environment and habitats or species of high nature value, or participation of stakeholders and the public in administrative proceedings. Polish regulations concerning environmental impact assessments do not provide for any special or preferential solutions with regard to public projects.

In this context, the Association's argumentation that the fact that the project had been classified as public project implied more lenient environmental requirements is unfounded.

**Re 2.2. Effective public participation: disclosure requirements**

The Association argues that information about the project was only disclosed to the public in January 2012 and that the periods for verification of the quality of documentation and for preparation of a constructive feedback by the citizens were too short. In the context of the abovementioned pleas, one should differentiate between the legal status of the public and that of the parties.

Regulations concerning notification of the public have been provided for in Article 33 of the Assessment Act. In accordance with that Article, the authority in charge of the proceedings is obliged to inform the public about:

1) the launch of the environmental impact assessment for a project;
2) the initiation of the proceedings;
3) the subject matter of the decision which has to be issued in the matter;
4) the authority competent to issue decisions or the authorities competent to provide opinions and grant approvals;
5) the possibilities of becoming acquainted with the necessary documentation of the case and the place where it is available for review;
6) the possibility of submitting comments and suggestions;
7) the manner and place for submitting comments and suggestions, providing, at the same time, for a 21-day period for their submission;
8) the authority competent for handling comments and suggestions;
9) the date and place of the administrative hearing open to the public referred to in Article 36, where it is to be conducted;
10) the procedure for the transboundary impact on the environment, where it is conducted.

Definition of notification of the public within the meaning of the Assessment Act has been provided for in response to plea No. 1.

Disclosure obligations of the parties are governed mainly by the provisions of CAP. The authority is obliged to notify the parties of all actions taken in the case, e.g. of the launch of the proceedings immediately after receipt of investor's application, or of the collected evidence in the case - before the

performance of such actions so that the parties could participate in them, of the completion of the evidentiary proceedings, or of the issuance of the decision.

RDEP in Białystok had informed about the following actions:

- Information about the initiation of the proceedings regarding the issuance of a decision on the environmental conditions for the project entitled "Construction of an overhead 400 kV double circuit line from Ełk to the border of the Republic of Poland" had been notified to the public by way of a notice of 6 January 2010, ref. No. RDOŚ-20-WOOŚ-II-66131-105/09/as. The abovementioned notice remained on the bulletin board of the Bakałarzewo Municipality Office from 12 to 26 January 2010, thus much earlier than the Association claims.

- Information on the issuance of a decision specifying the scope of the environmental impact report had been notified to the public by way of a notice of RDEP in Białystok of 30 April 2010, ref. No. RDOŚ-20-WOOŚ-II-66131-105/09/as. The notice was available to the public for 14 days and it was published in the manner generally accepted in the localities of the planned project implementation, e.g. on the bulletin board of the Bakałarzewo Municipality Office, where it remained from 5 to 19 May 2010.

- The stakeholders had been notified of the submission of the report and resumption of the proceedings by way of a notice of RDEP in Białystok of 6 September 2012, ref. No. WOOŚ-II.4202.1.2012.AS. The notice was available to the public for 14 days and it was published in the manner generally accepted in the localities of the planned project implementation, e.g. on the bulletin board of the Bakałarzewo Municipality Office, where it remained from 11 to 29 September 2012.

- The stakeholders had been notified of the public participation by way of a notice of RDEP in Białystok of 10 May 2013, ref. No. WOOŚ-II.4202.1.2012.AS, which for 21 days remained on the bulletin boards of the competent offices, including the Bakałarzewo Municipality Office, where it was available to the public from 14 May to 7 June 2013. The Association's plea that the final version of the report was not notified to the public is untrue. According to the information provided for in the grounds of the decision of July 2013 (p. 18), the report was last supplemented by the letter of 2 May 2013. Public participation commenced in mid-May 2013. The public had thus access to a complete and final version of the report.

- Moreover, the fact of collection of evidence before the issuance of the decision and the opportunity to comment on the evidence as a whole was notified to the Parties by way of a notice of RDEP in Białystok of 7 June 2013, ref. No. WOOŚ-II.4242.1.2012.AS. The notice was available to the public for 14 days and it was published in the manner generally accepted in the localities of the planned project implementation, e.g. on the bulletin board of the Bakałarzewo Municipality Office, where it remained from 7 to 25 June 2013.

- GDEP had also notified the Parties of the initiation and completion of the appeal proceedings.

The abovementioned data prove that the stakeholders were adequately informed of the proceedings and that they had access to case files.

The Aarhus Convention stipulates that the public should be informed about the planned project so that it could effectively participate in the proceedings. In the analysed case, information about the initiation of the proceedings relating to the decision on the environmental conditions, submission of the environmental impact report, or public participation were published in the manner that was generally accepted and well-known to the citizens, i.e. in the Bakałarzewo Municipality Office. Moreover, notices of RDEP and GDEP issued in the course of the proceedings were also published in the seats of those authorities, as well as in the Public Information Bulletin, which is a generally known public medium for the disclosure of such information. It should be also pointed out that throughout the proceedings aimed at the issuance of a decision on the environmental conditions, the Investor

organised meetings with residents (eight meetings). The information notified to the public included all components required under the Aarhus Convention.

**Re 2.3. Effective public participation: submission and consideration of comments**

Similarly to the previous sections, the response to this plea is based on the distinction between regulations applicable to the public and those applicable to the parties to the proceedings.

Regulations concerning public participation have been provided for in the Assessment Act (Article 33). Pursuant to that Article, the public may submit their comments and suggestions for 21 days.

Regulations concerning participation of the parties to the proceedings (submission of comments, suggestions, motions for evidence etc.), provided for in CAP, are quite a different matter. From the initiation of the proceedings until the issuance of the decision, the parties may submit their comments, motions for evidence etc. at any time. Therefore, the 21 days' period referred to in Article 33 of the Assessment Act does not apply to the parties. Environmental organisations which participate in the proceedings as entities with a party status enjoy the same rights as the parties.

With regard to the plea that the period set for the view and assessment of case files by the residents of Bakałarzewo municipality was too short, it should be pointed out that the parties have the right to submit their comments and suggestions at any stage of the proceedings, regardless of the set deadlines which in this case merely inform the parties about the stage of the proceedings. The obligation of public administration bodies to guard public interest and the legitimate interests of members of the public, as laid down in Article 7 of CAP, does not deprive the parties of the right to actively participate in the proceedings on conditions provided for in CAP.

According to case files, both the Parties and the public had been offered the opportunity to submit their comments and suggestions and their opinions had been taken into account before the issuance of the decision on the case. The above findings are confirmed e.g. by the grounds of the decision of July 2013 issued by RDEP in Białystok, containing 20 pages of an in-depth analysis of respective submitted comments.

With regard to the plea that the comments and suggestions submitted by residents of the Bakałarzewo municipality had not been taken into account, Article 6(7) of the Aarhus Convention requires adequate consideration of the results of public participation. However, the Article does not stipulate that all comments should be included, but rather that they should be analysed and the authority should present its position on the matter. The Committee confirmed this interpretation during consideration of Communication ACCC/C/2008/292. With regard to the plea regarding lack of detailed technical data at the stage of issuance of the decision on the environmental conditions, it should be pointed out that the environmental impact report, including all supplements, submitted by the Investor contained the relevant data that enabled RDEP in Białystok and GDEP to include in their decisions specific and enforceable land use conditions at the stage of implementation and operation or use of the project. They particularly emphasise the need to protect areas of high nature value, natural resources and monuments, as well as to limit the nuisance for the neighbouring areas. They also introduce the requirements relating to environmental protection that need to be taken into account in the documentation necessary for the issuance of a building permit.

[2] „The requirement of article 6, paragraph 8, that public authorities Take due account of the outcome of public participation, does not amount to the right of the public to veto the decision. In particular, this provision should not be read as requiring that the final say about the fate and design of the project rests with the local community living near the project, or that their acceptance is always needed".

Therefore, the Association's pleas relating to the submission and consideration of comments and suggestions are unfounded. The requirements set in Article 6 of the Aarhus Convention had been met.

**Re 2.4. Lack of option analysis**

In their further pleas, the Association argues that the route and method of implementation of the option had already been decided at the public participation stage of the proceedings.
This plea is unfounded. Pursuant to the legislation in force, i.e. Article 66(5)(a) and Article 66(5)(b) of the Assessment Act, in an environmental impact report the investor is obliged to indicate the option preferred by the investor, a reasonable alternative, as well as the option which is most favourable for the environment. The option preferred by the investor is subject to a mandatory and in-depth assessment by the competent authority. Pursuant to Article 81 of the abovementioned Act, where the environmental impact assessment for a project indicates the desirability of the implementation of the project in an option other than the one proposed by the applicant, the authority competent to issue a decision on the environmental conditions will, with the applicant's consent, indicate in its decision the option authorised for implementation or, in the absence of the applicant's consent, will refuse to authorise the implementation of the project. The option preferred by the investor, as well as all other alternative options, is verified in the grounds of the decision. The competent authority, on a discretionary basis, selects an option which is most favourable for the environment. The prepared Detailed Multiple-Criteria Decision Analysis allowed for selection of the best option, taking into account various criteria having material impact on the implementation and operation of a given option. Out of the proposed six options regarding the route of the line, four had been selected for detailed analysis. Options W1 and W6 had been rejected as the least favourable for the environment due to the fact that they passed through a Site of Community Importance/Natura 2000 Valley of the Upper Rospuda River (Dolina Górnej Rospudy) (PLH200022) in its broadest part, which implied potential significant negative impact on the protected natural values of that area. Options W1 and W6 had been located south of Bakałarzewo, where the power line would have passed through as much as 2.3 km of the Natura 2000 Valley of the Upper Rospuda River. Rejection of those options at an early stage of the assessment had been also based on the fact that the section of the Natura 2000 area in question was of particular importance due to the occurrence of various hydrogenic ecosystems with many protected species and natural habitats. The width of the collision (2.3 km) would have required construction of 3 or 4 pylons in the valley. According to the analyses, construction works (construction of technological roads, construction of pylons, transport of materials) could have led to local disturbance in the hydrological system and directly destroy the habitats and plant species protected under Natura 2000.
The remaining options (W2, W3, W4, W5) were subject to a multiple-criteria decision analysis, the aim of which was to select the best solution on the basis of various criteria that were hardly comparable and that had significant impact on the implementation and operation of a given option.
The selection criteria had been developed by a team of experts preparing the environmental impact report, which was verified by RDEP in Białystok as part of the proceedings aimed at the issuance of a decision on the environmental conditions, and then by GDEP as part of the appeal proceedings.

Therefore, a claim that option selection had been already made at the time is unfounded, as the selection is made by the authority on a discretionary basis.
The claim that the route of the project had not been known at the stage of proceedings concerning the issuance of the decision on the environmental conditions is untrue. The route of the project had been known to the Parties and to the public from the beginning of the proceedings. As it has been mentioned above, in the environmental impact report attached to the application for the issuance of a

decision on the environmental conditions, the investor indicates the preferred option and provides graphic presentation of its route. In Chapter 2.3 *Analysed Options* of the environmental impact report of June 2012, detailed routes of respective options, including the option selected for implementation, had been presented, whereas the maps attached to the report (*Optional Routes for the Planned 400kV Line from Ełk to the Border of the Republic of Poland*, sheets 1-7) presented the route of the power line in the graphic form. The documents were available for the public at the stage of public participation, thus the residents of Bakałarzewo could review their contents. Moreover, between February 2012 and April 2013, eight meetings took place in Bakałarzewo with the representatives of the Contractor and the Investor, as well as with the residents of Bakałarzewo, during which the detailed route of the power line was discussed.
For the avoidance of doubt, slides and maps were produced to present project location. As a result of those meetings, the route of the line was slightly adjusted. In the context of the abovementioned facts which are confirmed in the documents gathered in the case, the public pleas are unfounded. In the light of the submitted comments and suggestions relating to the route of the project, there is no doubt that the public was fully aware of the route of the planned project.
To sum up, it should be pointed out that public participation was guaranteed already at the first stage of the administrative proceedings, i.e. after submission of application for the issuance of a decision on the environmental conditions by the Investor. At that stage, the public had access to all documents attached to the application by the Investor, in particular to the description and analysis of the preferred option and of the remaining options, which presented the route of the project and the environmental impact assessment. Therefore, it should be concluded that public participation had been guaranteed at such early stage that all options of project implementation were possible and public participation could be effective, which is in line with Article 6(4) of the Convention. The administration bodies also fulfilled their obligations resulting from Article 6(6)(e).

**Re 2.5. Data manipulation**

The Association claims that information and data relating to impact on the environment and human health had been allegedly manipulated, yet they do not provide any examples of data the Association considers unreliable, or any basis for such conclusions.

The plea is unfounded as the environmental impact report was prepared upon Investor's request by the Contractor, who employs experts with vast experience in environmental impact assessments. The report cannot be considered unreliable as evidence merely due to the fact that it was drawn up upon request of the Investor. One should also bear in mind that proceedings relating to environmental conditions apply to the projects that are planned, not completed. Therefore, detailed technical data of the planned project may only be provided by the applicant. In the light of the current legal status, a situation where the report is drawn up by an entity upon request of the investor is acceptable in EU law and does not constitute a breach of the Aarhus Convention. The report forms evidence that is assessed by the decision-making authorities. In the event of any doubts or deficiencies, the authority requests appropriate supplements. The findings included in the report were assessed at the time of issuance of the decision on the environmental conditions by RDEP in Białystok, and then by GDEP under the appeal proceedings.

Both Regional Directorates for Environmental Protection and GDEP are authorities specialising in environmental protection, including environmental impact assessments. The environmental impact report was subject to in-depth verification in terms of its compliance with the requirements laid down in Article 66 of the Assessment Act. The report submitted by the Investor, including the attachments thereto, contains all components listed in Article 66 of the Assessment Act and allows for full assessment of the results of the evidentiary proceedings.

Moreover, in accordance with the procedure resulting from the Assessment Act, the Voivodeship State Sanitary Inspector in Białystok and the Voivodeship State Sanitary Inspector in Olsztyn issued their

opinions on the matter. Pursuant to Article 3(2) of the Act of 14 March 1985 on State Sanitary Inspection (Dz.U. of 2015, item 1412), the tasks of the State Sanitary Inspection with regard to preventive sanitary supervision include e.g. verification of design documentation in terms of health and hygiene requirements. In their letters of 29 May 2013, ref. No. NZ.9027.8.2.2013, and of 16 May 2013, ref. No. ZNS.9082.3.5.2013.W, the sanitary authorities approved the conditions of project implementation. Therefore, it should be concluded that the conditions of project implementation were assessed by public administration bodies specialising, as the legislator had required, in sanitary, health and hygiene conditions, and that they approved the implementation of the project in question.

The impact of the planned project on human health and life had been discussed in Chapter 5.12 *Impact on Human Health and Life* of the environmental impact report, where the impact of respective options of the project had been analysed both at the construction stage and at the operation stage. Provided a buffer zone is secured, implementation of the project will not have negative impact on the environment, including human health, thus, contrary to the allegation of the Association, residents will not be forced to change jobs or relocate.

Acceptable values of electromagnetic radiation for publicly accessible areas have been provided for in Ordinance of the Minister of Environment of 30 October 2003 on the permissible levels of electromagnetic fields in the environment and on the methods to verify the compliance with these levels (Dz.U. of 2003, No. 192, item 1883): 10 kV/m for the electric component and 60 A/m for the magnetic component, with maximum frequency of EMFs emitted by power lines of 50 Hz. For areas planned for housing development, the strength of an electric field with frequency of 50 Hz must not exceed 1 kV/m, and of a magnetic field - 60 A/m.

According to the information provided for in the report, both at the construction and at the operation stage the strength of the electric and magnetic components beyond the designated 70 m buffer zone (35 m in each way from the line axis) will not exceed the maximum acceptable values. However, housing development will not be allowed in the buffer zone if the strength of the electric field might exceed 1 kV/m.

The width of the buffer zone for the analysed project had been set on the basis of calculations presented in the environmental impact report. It should be pointed out that the buffer zone does not overlap the area of breach of the environmental quality standards with regard to electromagnetic field emissions and noise, as in many locations those value can be lower than acceptable and the buffer zone is also necessary for the performance of construction and maintenance works, as well as for emergency situations.

Moreover, according to the available studies, *there is no sufficient and real evidence that would permit a conclusion that a long-term stay in magnetic and electric fields with levels that may occur in publicly accessible areas or workplaces is detrimental or causes disease* (Stefan Różycki, *Ochrona przed polami elektromagnetycznymi. Informator dla administracji samorządowej*, Warsaw 2011).

Acceptable levels of electromagnetic radiation have been defined by way of Ordinance of 30 October 2003 by the Minister of Environment in cooperation with the minister competent for health, in accordance with the statutory delegation referred to in Article 122(1) of the Act of 27 April 2001 - Environmental Protection Law (Dz.U. of 2016, item 672), hereinafter referred to as EPL. Therefore, such levels take into account medical aspects of the impact of EMFs on human body and apply to high-risk groups as well, including pregnant women, seniors and children. The acceptable levels of EMFs that may occur in the environment in publicly accessible areas have been defined on the basis of an assumption that continuous stay of persons of any age and health in fields with lower levels cannot have any negative impact on their health.

It should be pointed out that acceptable levels of electromagnetic radiation in the environment form part of the environmental quality standards being one of the main tools of environmental protection. Public administration bodies in charge of the proceedings regarding the issuance of a decision on the environmental conditions are mandatorily obliged to comply with the environmental quality standards specified in the national legislation in force.

As implementation of the project with creation of a specific buffer zone and thus maintenance of the acceptable levels of electromagnetic radiation in the environment will not significantly affect human health, the Association's plea should be considered unfounded.

With regard to the plea concerning "interpretation of the law in favour of the Investor", the authority competent for the issuance of a decision on the environmental conditions conducts the proceedings and issues the decision within the scope defined by the investor in their application. Pursuant to the legislation in force, the decision takes into account public interest and the legitimate interests of members of the public. In this case, both RDEP in Białystok and GDEP included in their decisions on the environmental conditions the requirements whose satisfaction, according to the available knowledge, would lead to a situation where project implementation does not have any significant impact on the environment, including human health. If the abovementioned impact cannot be eliminated, the authority should refuse to issue the decision on the environmental conditions.

Considering the above facts and the clarifications provided for in Section 2.2, throughout the proceedings both administration bodies and the Investor informed the public about the environmental impact of the planned project in accordance with Article 6(6) of the Convention.

**Re 2.6. Lack of access to the decision on the environmental conditions**

The Aarhus Convention requires immediate notification of the public about the issuance of the decision. Moreover, each Party makes accessible to the public the text of the decision along with the reasons and considerations on which the decision is based (Article 6(9) of the Convention).

The plea regarding ineffective search for information about the decision in the Bakałarzewo Municipality Office is not confirmed by case files, as both RDEP in Białystok (letter of 4 July 2013, ref. No. WOOŚ-II.4202.1.2012.AS) and GDEP (letter of 17 December 2013, ref. No. DOOŚ-OAI.4202.3.2013.AŁ.9) had requested the Bakałarzewo Municipality Office to publish the notices of the issued decisions, attached to the abovementioned letters, on the Office bulletin board and/or to publish the information in other manner that was generally accepted in that locality. The notices contained information regarding the place where the decision was made available for the public; in the case of the decision of the first-instance authority, it was the seat of RDEP in Białystok, while in the case of the appeal decision, the decision was made available in the seats of GDEP, RDEP in Białystok, RDEP in Olsztyn, as well as respective offices of the cities and municipalities on the area of which the project was to be implemented, including the Bakałarzewo Municipality Office. The second-instance authority had attached a copy of the decision to the abovementioned letter of 17 December 2013. Confirmations of receipt of the abovementioned documents by the Bakałarzewo Municipality Office have been included in case files.

Considering the fact that in accordance with the Assessment Act information about the environment should be made available in the form that is the most desirable for the applicant, the residents of Bakałarzewo who were interested in the content of the decision on the environmental conditions did not need to send their representative to the seat of RDEP in Białystok 120 km away. Pursuant to the Assessment Act (Article 15), as a rule, information on the environment and its protection is made available in the manner and form specified in the request. Information is published e.g. in electronic

form. It was enough to file a request for the provision of access to the decision, using available means (such as e-mail). The decision is made available free of charge and, in accordance with Article 14(3) of the Assessment Act, it is made available on the day when the request is submitted.

The abovementioned procedure is compliant with the Aarhus Convention. During consideration of the case ACCC/C/2006/16, the Committee concluded e.g. that:

*The Convention does not require the decision itself to be published. It only requires that the public be informed about the decision and has the right to have access to the decision together with the reasons and considerations on which it is based.*

**Re 2.7. Failure to organise meetings with the public**

The next plea concerns failure to organise meetings with the public during the proceedings aimed at issuance of the decision on the environmental conditions. It should be pointed out that neither the Aarhus Convention nor the Assessment Act provide for mandatory organisation of such meetings. In accordance with Polish legislation, before the issuance of a decision that requires public participation, the authority may hold an administrative hearing that is open to the public.

In this case, the assessment of relevance of such a meeting was the task of RDEP in Białystok. Acting in accordance with the law, the authority did not consider it necessary to hold such an open hearing.

Nevertheless, according to the information from the Investor, the Contractor selected by Polskie Sieci Elektroenergetyczne S.A. in a public procedure, acting in accordance with the best practices took certain social communication measures. The measures mainly consisted in organisation of meetings with citizens, preparation of materials and publications concerning the technology and method of project implementation, as well as launch of a website dedicated to the power line in question (http://liniaelkgranica.pl/), containing all information and folders relating to the project.

According to the provided information, as part of public consultations, e.g. between February 2012 and April 2013, before and in the course of execution of planning procedures (e.g. during the required public consultation of the proposed provisions of the local spatial development plan), multiple meetings with residents had been organised in the area of the planned project implementation, including in the Bakałarzewo municipality. At times, more than 40 persons participated in those meetings. In Bakałarzewo, from where the complaint was filed, as many as eight meetings were held with groups of residents. Representatives of the Contractor and of the Investor presented all aspects of the project, including precise route of the planned line. For the avoidance of doubt, project location was presented both in the form of slides and on the maps. Citizens had an opportunity to learn the designed route and to express their opinion on the matter. As a result of those meetings and talks with the residents, certain adjustments were made to the route that could be introduced taking environmental conditions into account. The Contractor heard suggestions of the residents regarding the location of pylons and the line route; this was e.g. how location of respective pylons was adjusted (on axis, along the planned line). In addition, many meetings were held in small groups or even on an individual basis. As the route of the planned 400kV line was discussed many times, local communities obtained detailed information about the planned project and its options and could participate in every procedure required by law.

Considering the abovementioned facts, the plea is unfounded.

**Re 2.8. Failure to carry out transboundary consultations**

With regard to the planned connection of the currently constructed power line from Ełk to the Polish border with a similar line planned on the territory of Lithuania, the Republic of Poland and the Republic of Lithuania, in accordance with the Convention on Environmental Impact Assessment in a

Transboundary Context (Espoo), carried out proceedings relating to transboundary environmental impact assessment with respect to the planned project. Poland notified Lithuania of the project in a letter of 17 February 2010, with the attached main details of the planned project and all available information about the potential transboundary impact that could occur on the territory of Lithuania as a result of project implementation. Having analysed the submitted materials, the Lithuanian party, in its letter of 1 March 2010, withdrew from the performance of a full environmental impact assessment in a transboundary context. The Polish party also withdrew from any further transboundary proceedings. The point where said power line was to cross the border was mutually agreed by the parties at a bilateral meeting.

The actions taken to date confirm that Polish authorities acted in accordance with the law, thus the Association's plea is unfounded.

**Re 2.9. Immediate enforceability of the decision on the environmental conditions**

The circumstances justifying immediate enforceability of a decision have been provided for in Article 108(1) of CAP. The Article reads as follows: [a] *decision against which an appeal may be brought can nevertheless be given immediate enforceability if this is essential for the protection of human life or health or for the protection of the national economy from major losses or for reasons of public interest or the exceptionally vital interests of a party to proceedings. In the latter case the public administration body shall make a ruling requiring the party to provide the appropriate guarantee.*

Immediate enforceability of the decision on the environmental conditions means that the investor may apply for the issuance of the investment decision. Only after the issuance of such decision can the construction works commence. Granting the status of immediate enforceability to the decision on the environmental conditions is not sufficient to commence such works.

Upon request of the Investor submitted in a letter of 19 April 2013, ref. No. TLI/3801/2013, due to vital public interest, RDEP in Białystok had ordered that decision of July 2013 be immediately enforceable. The reasons for such immediate enforceability had been provided in the grounds of the decision so that all Parties to the proceedings and the public could learn the motives of such action of the administration authority.

Immediate enforceability of the decision on the environmental conditions only enabled the applicant to apply for a building permit before the decision on the environmental conditions became final; however, it did not authorise commencement of the construction works. The Association's claim that immediate enforceability allowed for commencement of construction works, thus causing irreparable damage to the environment, is unfounded. The investor may carry out construction works only if he obtains a final building permit, or if the building permit is deemed immediately enforceable.

In accordance with the legislation in force, the appellate authority and the court, upon request of the participants to the proceedings, may stay the enforcement of a decision. The order of immediate enforceability issued by RDEP in Białystok was assessed by GDEP and VAC in Warsaw. Consequently to the submitted appeals and complaints, having considered the requests for cancellation of immediate enforceability, the second-instance authority and the court did not stay the enforcement of the decision on the environmental conditions of July 2013.

Having considered the appeals, in its decision of December 2013, GDEP concluded that: [c]*onsidering the fact that project implementation is of strategic nature from the point of view of the social and economic development of the region and the country, and that, given the possibility that the project implementation could be delayed, there is a risk of loss of considerable funds obtained from public sources for the implementation of the planned project, in the context of the circumstances listed in Article 108(1) of CAP, order of immediate enforceability issued with regard to the planned project*

*should be considered justified. Therefore, the authority finds no grounds for staying the enforcement of the decision on the environmental conditions.*

When considering the appeal against the decision of the second-instance authority of 13 December 2013, the Voivodeship Administrative Court in Warsaw in its decision of 24 April 2014 (ref. No. IV SA/Wa 439/14) on the staying of the enforcement of the challenged decision concluded that: [u]*pon request of the petitioner, the court may issue a decision on the staying of the enforcement of the challenged act if there is a risk of significant damage or almost irreversible effects.* (...) *In particular, determination of environmental conditions for a specific project does not imply by default consent for the commencement of any construction works related to its implementation. Decision on the environmental conditions is one of the documents required by the legislator to apply for a building permit (Article 33(2)(1) of the Act of 7 July 1994 – Building Law). Only subsequent stages of the investment process may lead to the issuance of decisions the enforcement of which could award specific rights to the parties, or impose specific obligations on the parties. However, in such situation the parties would be entitled to separate means of appeal.*

Review of the grounds for ordering immediate enforceability of the decision on the environmental conditions by GDEP and administrative courts is in line with the Aarhus Convention. It prevents arbitrary and random application of that measure. Both a party and an entity enjoying the rights of the party may apply for a review of immediate enforceability; the application is free of charge and the authority is obliged to present its opinion on the matter in writing. In the analysed case, the petitioners used all available means allowing for verification of the grounds for ordering immediate enforceability of the decision.

**Re 2.10. Local spatial development plan**

As a rule, adoption of a local spatial development plan is the task of the municipality. However, if the local spatial development plan needs to be adopted and the municipality fails to perform that task, the plan is adopted by the voivode. The voivode adopts the local spatial development plan by way of a substitute ordinance.

According to the information provided in the case, the Voivode of Podlaskie Voivodeship initiated the works that ended on 16 July 2014 with the adoption of a Substitute Ordinance of the Voivode of Podlaskie Voivodeship on the adoption of a local spatial development plan due to the Bakałarzewo municipality's failure to adopt local spatial development plan for almost two years and to the need to implement a public project.

According to the clarifications sent by the Voivode, all letters, both the ones covered by the procedure for the preparation of the Substitute Ordinance of the Voivode of Podlaskie Voivodeship (SOVPV) and the ones falling beyond that scope, had been thoroughly analysed by the Voivode's staff and the public received appropriate answers within the defined deadlines. When implementing the Act, the Voivode published the information required by law, relating to the Voivode's commencement of preparation of the local spatial development plan, the followed procedure and the issuance of SOVPV, in the Public Information Bulletin of the Podlaskie Voivodeship Office and in local press with voivodeship range, as well as in the form of announcements and notices on the bulletin board of the PVO within the appropriate deadlines. In addition, in order to guarantee the broadest possible public participation in the conducted proceedings, the abovementioned documents were sent to the Bakałarzewo municipality. Draft SOVPV was made available to the public in the Podlaskie Voivodeship Office. In order to guarantee the broadest possible public participation in the conducted proceedings, the Voivode published draft SOVPV also on PVO websites. There is no doubt that all stakeholders had the opportunity to learn the contents of draft SOVPV.

Moreover, the Voivode, in order to assist local citizens, sent notices to the head of the Bakałarzewo municipality, informing him of publication of draft SOVPV and requesting him to publish it on the municipality's bulletin board. The head of the Bakałarzewo municipality fulfilled the request.

In addition, the Voivode, in the course of the planning procedure, set the 21-day deadlines for the submission of comments to the prepared plan and to the publicly available local spatial development plan, provided for in the Act of 27 March 2003 on spatial planning and development (Dz.U. of 2016, item 778).

11 requests to eliminate breaches of legislation in force were submitted with regard to the Substitute Ordinance issued on 16 July 2014. The Voivode responded to all of them in detail and sent his response in writing to each petitioner.
Therefore, the claim that the public participation in the planning process was ostensible is not reflected in the information provided by the Voivode.

**Re 2.11. Failure to provide assistance to the Parties to the proceedings, or to protect their rights**

As it has been stated in The Aarhus Convention Implementation Guide (p. 206), Polish law provides that individuals, but also organisations which are unable to cover the litigation costs, may use the assistance of a court-appointed lawyer in accordance with Article 9(5) of the Convention.
Furthermore, in accordance with Polish rules of administrative procedure, the authority is obliged to take into account not only the interest of the investor, but also the interests of all other parties to the proceedings when informing about the effects of the actions taken by the parties under the proceedings. It is difficult to comment on the Association's pleas in this respect; however, it should be pointed out that an administration body cannot treat any of the parties in a preferential way. The authority must remain impartial and settle the case in an objective manner.
Moreover, if public authorities ignore applications for access to public information or environmental information, the applicant may always file a complaint regarding such authority's failure to act. There is no evidence in case files of failure to assist the public by the government or self-government bodies or of ignoring applications for access to public information or environmental information.

**Re 2.12. Other**
Although the next plea is unrelated to the case, *ex abundanti cautela*, the authority decided to refer to it as well. The PSE document entitled *Development Plans in the Context of Satisfaction of the Current and Future Demand for Electricity for Years 2010-2025* is not subject to strategic assessment, thus the Association's plea (p. 3 of the petition) that it was not covered by public consultations is unfounded.

For all the reasons set out above, th Polish strongly denies that there has been any non-compliance with its obligations under the Convention in respect of the project of the overhead 400 kV double circuit line from Ełk to the border of the Republic of Poland, and respectfully asks the Committee to dismiss this complaintas without foundation.

PODSEKRETARZ STANU
Sławomir Mazurek