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# Access to Justice in Environmental Matters



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**Report on Access to Justice  
in Environmental Matters**

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## **Practical application of Article 9 of the Aarhus Convention in 10 EU countries – comparative remarks**

Pavel Černý

The Aarhus Convention<sup>1</sup> (hereinafter also “the Convention”) is a unique international legal instrument, which combines the subject of environmental protection with human rights and simultaneously with the responsibilities of public institutions and also individuals and their associations towards the environment.

The application of the Convention in the practice by its Parties (including the European Union) has recently been reflected by several representative studies.<sup>2</sup> In spite of their partial differences, these studies come to similar conclusions, with regard to the chief insufficiencies in implementation of requirements concerning access to justice in environmental matters according to Art. 9 of the Convention.

In accordance with these previous findings, the following text which is based further on the outcomes of subsequent national studies on selected aspects of access to justice in environmental matters, discusses several specific topics from this field, which can be considered as crucial in relation to the practice of legal protection of the environment, namely:

- 1. Definition of terms for access to justice by individual members of public (“standing conditions”)**
- 2. Scope of the court review of acts and omissions, related to the environment**
- 3. Effectiveness of a court review, particularly its timeliness.**

In relation to this, several more general subjects are discussed, specifically:

- the difference between the requirements of individual paragraphs of Article 9 of the Convention (particularly between its 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs) and how they are reflected in national legislation
- the position of the Convention in the legal systems of its Parties (namely the matter of direct application of the Convention by courts)
- the implementation of the Convention on the EU level and by the EU bodies

The most important overall aspect, which this study aims to reflect on, is the question of (dis)unity of the application of the Convention requirements by its individual Parties (mostly the EU Member States) with regard to the above mentioned issues and the consequences therein.

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<sup>1</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted in Aarhus, Denmark, in 1998.

<sup>2</sup> *Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, Millieu Ltd., 2007 ([http://ec.europa.eu/environment/aarhus/study\\_access.htm](http://ec.europa.eu/environment/aarhus/study_access.htm) ; *How far has the EU applied the Aarhus Convention ?*, European Environmental Bureau, 2007 (<http://www.eeb.org/activities/transparency/AARHUS-FINAL-VERSION-WEBSITE-12-07.pdf>) and *Implementation of the Aarhus Convention in EU Member States*, Justice & Environment, 2006 (<http://www.justiceandenvironment.org/wp-content/wp-upload/JE2006Aarhuslegalanalysis.pdf> ).

## 1. Terms of the right to sue (standing conditions)

The specification of who, and under what terms, shall have the right to ask for the court to review acts or omissions concerning the environment is evidently the key matter related to application of the “3<sup>rd</sup> pillar” of the Aarhus Convention. With that regard, differences between paragraphs 2 and 3 of Art. 9 of the Convention and their requirements should be mentioned.<sup>3</sup>

Art. 9(2) grants the persons to whom Art. 2(5)<sup>4</sup> definition of “public concerned” applies “*access to a review procedure before a court of law and/or another independent and impartial body established by law, to **challenge the substantive and procedural legality of any decision, act or omission***” subject to the provisions of Art. 6 of the Convention. Art. 6 concerns public participation rights in permitting procedures for certain activities that could be harmful to the environment (listed in Annex I of the Convention). The parties may impose additional standing conditions, based either on the concept of “sufficient interest”, or “impairment of rights”. However, Art. 9(2) further states that what constitutes a sufficient interest and impairment of a right shall be determined “*in accordance with the requirements of national law and **consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.***” Art 9 (2) of the Convention has been implemented to the EU law by Directive 2003/35/EC on public participation amending in particular the EIA and IPPC Directives.<sup>5</sup>

According to Art. 9(3) of the Convention each Party shall ensure that *members of the public* (i.e. not only “public concerned, as in the previous paragraph), **where they meet the criteria, if any, laid down in its national law ...have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.**” In contrast to the former one, paragraph 3 does not explicitly state the limits of the possible “*criteria laid down in national law*”. However, from the Preamble and general provisions of the Convention, it can be deduced that also in this case, the criteria must allow a broad access to the review procedures.<sup>6</sup> This was also confirmed by the Compliance Committee of the Aarhus Convention<sup>7</sup> (see below). Also contrary to paragraph 2, paragraph 3 has not been transposed by European secondary legislation yet.<sup>8</sup> Only the 2004 adopted directive on Environmental

<sup>3</sup> Art. 9(1) ensures the possibility of judicial protection in cases that are related to application access to environmental information, which is granted by Art. 4 of the Convention. This topic is not discussed further in this article.

<sup>4</sup> “The public concerned” means the public affected or likely to be affected by, or having an interest in the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

<sup>5</sup> Directive 85/337/EEC, on the assessment of the effects of certain public and private projects on the environment, as amended by directives 97/11/EC and 2003/35 EC, and Directive 96/61/EC, concerning integrated pollution prevention and control, as amended by directives 2003/35/EC and 2003/87/EC.

<sup>6</sup> See also Pallemarts, M.: Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention. An IEEP report for WWF-UK (available at [http://www.ieep.eu/publications/pdfs/2009/aarhus\\_report.pdf](http://www.ieep.eu/publications/pdfs/2009/aarhus_report.pdf)), page 15.

<sup>7</sup> The Compliance Committee of the Convention is a body consisting of nine independent members, elected by the Meeting of the Parties, which was established in 2002 in accordance with Art.15 of the Convention. The main task of the Compliance Committee is to review if the Parties fulfill the requirements of the Convention, report the findings to the Meetings of the Parties and make recommendations. Most of the Compliance Committee activities are based on the individual complaints of the members of public. For more information see <http://www.unece.org/env/pp/compliance.htm#Documents>

<sup>8</sup> On 24 October 2003 the Commission presented a Proposal for a Directive of the European Parliament and of the Council on **access to justice** in environmental matters [[COM\(2003\) 624](#)]. It has been however not adopted

Liability (2004/35/EC) contains a provision (Article 13) that was directly derived from Art. 9(3) of the Convention.

It can be said that so far, neither legislation nor judicial practice of many Parties to the Convention has been dealing with the differences between the requirements of paragraph 2 and paragraph 3 of Art. 9. Attempts to justify the accord between the existing status quo (legal order and practice of the courts) with the requirements of the Convention (if these are taken into account at all) are more typical. This chiefly concerns the concepts conditioning access to justice (both to administrative and civil courts) by the impairment of petitioner's "subjective rights". However, as the following text shows, the general "impairment of right doctrine" can be interpreted very differently and lead to diverse results.

### **1.1 Impairment of right doctrine as a limit of access to courts**

In many countries, access to review (judicial) procedures is (also in environmental cases) granted only to persons "maintaining impairment of a right." It is also typical for this concept that access to justice (standing to sue) is closely related to participation in administrative procedures in the position of "party". A "party" to the proceeding usually defined as a legal subject taking part in the proceedings on the basis of affected subjective rights, legal interest or other legal title. For example, in the German and Austrian legal theory, this concept of "subjective rights" which need to be impaired so that a person has access to court, is labeled as "Schutznormtheorie" (literal translation would mean "protective provision theory", we use the term "impairment of rights doctrine").

This theory, especially if applied rigorously, often leads to deficiencies in application of both Art. 9(2) and Art. 9(3) requirements of the Convention by the Parties.

#### **a) Implementation of Art. 9(2) of the Convention**

As stated above, Art. 9(2) of the Convention aims to ensure that "members of the public concerned" have a right to initiate judicial review of acts and omissions, which are related to permission of the projects subject to Art. 6 of the Convention. The parties may impose additional standing conditions, based either on the concept of "sufficient interest" or "impairment of right". In some of the countries applying the "impairment of rights doctrine", the latter one is interpreted very restrictively, namely with regard to the standing rights of the **individuals (natural persons)**.

In **Austria**, legislation usually expressly defines which specific rights can be impaired with respect to certain parties (e.g. usually neighbours concerning noise, smell, property; municipalities concerning their finances). Consequently, only infringement (violation) of these specific rights (only and exclusively) can be claimed by respective persons in court, i.e. forms a basis for their standing. For example, neighbors of a polluting facility may address air or water quality issues concerning their health or pollution of their private wells, but may not refer to general environmental considerations. This fully applies also for legal procedures falling into the scope of Art. 6 and consequently of Art. 9(2) of the Convention. The only exception is the position of the NGOs in EIA and IPPC procedures (see below).

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so far due to negative attitude of the majority of the Member States representatives in the Council. See e.g. the EEB study quoted supra note 2 for more details on this topic.

In the **Czech Republic**, the possibility of starting the review procedure at court is de facto predetermined by previous participation as a “party” in the respective administrative procedure. The general provision defining who is a party of an administrative procedure is relatively broad (or at least can be interpreted broadly). However, for the development consent procedures on issuing land use permits and building permits, which are the most important ones for realizing an investment, there is a special and more restrictive regulation. Only the owners of the affected building and plots (“the neighbours”) can act as parties to these procedures. Other people likely to be affected by the decision (for example flat-renters) who can be affected in other than property rights (e.g. right for favourable environment, which is granted by the Czech Constitution) are omitted. Therefore, they are also not granted standing to sue these important decisions. The same applies for the review of the land use plans.<sup>9</sup> Similar concepts are applied, e.g. in **Belgium, Germany, Malta and Slovenia**.<sup>10</sup>

This approach does not take into account the possibility that the condition of “impairment of rights” can also be fulfilled for instance in relation to rights to protection of privacy or a favourable environment. It provides individuals with access to justice to protect (mostly) only their property rights, whereas the Aarhus Convention aims to enable (also) the affected (concerned) individuals to protect the environment. At the same time, it does not seem to correspond to the objective of giving the public concerned wide access to justice within the scope of the Convention, expressed in Art. 9(2).

The **NGOs** in most countries do not have problems with standing to sue the decisions falling within the scope of Art. 6 and therefore also Art. 9(2) of the Convention. Mostly the legislation makes it possible for them to participate in EIA and IPPC procedures and subsequently to ask courts to review the final decisions.

Until recently, the important exception was the situation in **Slovakia**, where the amendment of the EIA Act from 2007 only granted the NGOs with limited participatory rights without the possibility of access to justice. However, as a result of an infringement procedure started by the European Commission, the EIA Act has been changed by another amendment, which came into force in May 2010. This last amendment established a new definition of “public concerned”, which now includes

- environmental NGOs which actively participate in the EIA procedure
- ad hoc public initiatives (2 or more people), under the same conditions
- individuals (natural persons) actively participate in the EIA procedure and prove interest on decision-making for the activity which is the object of the EIA procedure.

If these subjects reach fulfilment of the above conditions, they have a right to become parties in the relevant decision making procedures and subsequently access to court. This can be considered as a very progressive regulation meeting the requirements of Art. 9(2) of the Convention.<sup>11</sup>

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<sup>9</sup> There has been the same situation in Slovakia until recently. An amendment of the EIA Act, adopted in 2010, has broadened the possibilities of individuals to participate in the procedures falling under Art. 6 of the Convention and gain standing to sue in the “Art. 9(2) cases”.

<sup>10</sup> See also the Milleu Ltd. Summary Report on the inventory of EU Member States’ measures on access to justice in environmental matters, supra note 2, page 7.

<sup>11</sup> In the same amendment, the Slovak Parliament adopted changes in the Nuclear Act, which states that all documents concerning the building of a nuclear power plant are secret and the public is not allowed to see them in the decision making procedure. That means that there is a broad standing also in decision making procedures concerning a nuclear power plant, but all information about it except those published during the EIA procedure is secret.

In some countries, the legislation is anchoring detailed and difficult to fulfil terms, under which the NGOs can acquire a specific status, enabling for them access to justice according to Art. 9(2) of the Convention, such as for instance in **Germany** or **Slovenia**<sup>12</sup>.

The impairment of right doctrine usually influences not only the conditions of the NGOs terms of standing, but also (and more importantly) the scope of their “permissible complaint arguments” (see below part 2.2).

### **b) Implementation of Art. 9(3) of the Convention**

As stated above, according to Art. 9(3) the Parties of the Convention should grant to the “members of the public” (i.e. not necessarily the “public concerned”) also access to review acts or omissions with environmental concerns, to which Art. 6 does not apply.

What was said in the previous part about consequences of the (restrictively interpreted) “impairment of rights doctrine” for the possibilities of **individuals** (natural persons) to review environmental decisions at courts fully applies also to those which are not “covered” by Art. 9(2) of the Convention and which therefore fall into the scope of Art. 9(3). Also here, some countries are limiting the scope of individual rights which an individual can refer to when claiming access to court (e.g. only property rights etc.).

The situation is even worse when specific laws explicitly state that in some procedures only the applicant (i.e. mostly the investor in environmental matters) has the position of a party, and therefore also the standing for a court action. Such provisions completely preclude application of art. 9(3) with regard to some environmental procedures and permits. For example, in the **Czech Republic**, this concerns procedures according to the Noise Protection Act, Nuclear Act or Mining Act. In **Austria**, there is the same situation in permitting procedures for railways, roads and shipping (except the EIA procedure), processes on nature conservation or most aspects of the water permission.

With regard to the **NGOs**, it is characteristic for systems based on the “doctrine of infringement of subjective rights”, that the NGOs’ access to justice in environmental matters beyond the scope of Art. 9(2) of the Convention is based on their previous participation in administrative proceedings not “covered” by Art. 6. The situation is again very different in individual countries in that regard.

For example in **Austria**, where the “impairment of rights doctrine” is applied very strictly (see above), the legislation expressly designates the right to protect the environment to NGOs only with regard to the EIA and IPPC procedures (implementing Directive 2003/35/EC) and - in a vaguer way - with regard to environmental liability cases referring to

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<sup>12</sup> In Slovenia, an NGO can obtain the status of “acting in public interest” only if:

- its the founder is not the state, municipality, other public law entity or political party,
- it has a sufficient number of members (in case of associations, at least 30 members), employees (in case of institutes, at least 1 expert employee with a formal degree in the institute’s field of activity), or endowment (in case of foundations, at least 1250 EUR),
- it has been established for the purpose of environmental protection,
- it is independent from public authorities and political parties,
- it has been active in the field of environment for at least five years,
- it is active in the whole territory of the Republic of Slovenia, or at least in five member states in case of foreign NGO that is registered outside Slovenia.



Directive 2004/35/EC.<sup>13</sup> Therefore, according to the jurisprudence, NGOs do not have legal standing in any other cases relating to the environment. Similarly, in **Slovakia** the possibility for NGOs' access to judicial review beyond EIA and IPPC procedures (i.e. beyond Art. 9(2)) is limited on the cases concerning environmental liability and using the GMO (for the latter, the possibility is limited by the condition that at least 100 natural persons must support the NGOs position in the procedure).

In **Slovenia**, the scope of procedures which the NGOs can participate in and subsequently go to court for is defined more broadly (procedures for the issuing of environmental consent, procedures for environmental permit for the operation of an installation which may cause large-scale environmental pollution, procedures affecting nature conservation). However, the rather hard-to meet conditions for obtaining the "status of acting in the public interests" (see above) apply also in the Art. 9(3) cases.

In **Hungary**, the relevant provision regulating the NGOs participation in environmental procedures is very broad – it states that associations formed by citizens for the protection of their environmental interests and other social organizations not qualified as political parties or trade unions have legal standing in the territory of their operation (which they can define at their discretion) in environmental administrative procedures. However, the jurisprudence defined the scope of "environmental procedures" in a way that a case is environmental, if the Regional Environmental Inspectorate is involved in it at least as a consulted authority. This to some extent limits the scope of procedures in which Art. 9(3) is applied.

In the **Czech Republic**, there is not a very systematic and transparent system of provisions in specific laws, making it possible for NGOs to become Parties of administrative procedures (and subsequently to obtain standing to sue). However, as a consequence of it, NGOs can participate in a rather wide range of decision making procedures, going beyond the minimal requirements of Art. 6 and Art. 9(2) of the Aarhus Convention. On the other hand, neither NGOs can participate in cases where the law explicitly states that only the investor has the position of a party (see above). Aside from that, according to the case law, they also do not have a right to ask for judicial review of the land use plans. In addition to that, the application of the "impairment of right theory" weakens the position of the NGOs before the courts, as they can only raise objections against breaching their procedural rights in the decision-making procedure (see below part 2 for more details).

## 1.2 Broad interpretation of standing rights

In some countries, though also their standing doctrine is generally based on the "impairment of rights", ratification of the Aarhus Convention resulted in broadening the possibilities of access to courts in environmental matters. For instance in **Estonia**, the Supreme Administrative Court concluded that in environmental cases, the criterion of "impairment of rights" must be interpreted less restrictively in comparison to other areas, more in the sense of

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<sup>13</sup> The directive on environmental liability contains a provision (Article 13) transposing Art. 9(3) of the Convention. According to the Austrian Environmental Liability Act, NGOs that are registered at the Ministry of Environment to be eligible for public participation and access to justice in accordance with the EIA Act shall also have standing and access to justice in environmental liability cases. However, the NGO standing position is not further defined by this Act. This might lead to problems in practice. Whereas the Austrian EIA and IPPC legislation define explicitly that NGOs can "maintain environmental legislation" in the procedure, it is - from a formalistic perspective - not clear what rights NGOs can claim with regard to environmental liability.

“affecting” a person by a specific act. Similarly the Supreme Court in **Hungary** stated that the government’s duty to harmonise legal order with international obligations results in the necessity of a more general interpretation of terms for access to judicial protection, whereas in some cases concerning the environment, infringement of personal rights does not have to be proven at all.

On the basis of direct application of Article 9 paragraph 2 of the Convention, the **Estonian** courts also decided that the environmental NGOs shall have access to judicial protection without the need to prove violation of their rights and also without the need for special national legislation. They even acknowledged this right to groups (associations) without legal identity under the condition that they “represent the interests of a significant part of the local population”.<sup>14</sup> Also in **Hungary**, in the **Netherlands** and in **Italy** the NGOs do not need to prove infringement of their rights to get standing in environmental cases, as protection of “collective” or “diffuse interests” is considered as sufficient for their standing. Judicial interpretation of the term “affected interests” leads to the same situation in **Great Britain** and **Ireland**.<sup>15</sup>

In **Poland**, a similar concept is applied by means of the institute of “participants with Party’s rights”. It can be seen as an important modification of the “impairment of rights doctrine”: Although this doctrine applies generally for defining parties to the administrative procedures and persons who have standing to sue, there is a specific group of subjects (including the “social organisations” - NGOs) with the same rights as the parties. These subjects do not have to prove affection or infringement of their rights, as they are granted their position to represent and protect various public interests involved in the given decision-making procedure, e.g. the environment. For the same reason, they also have standing to sue in cases where they represent a common interest. In terms of the Aarhus Convention, this principle applies both on implementation of Art. 9(2) and Art. 9(3). The environmental NGOs are also explicitly entitled to file a lawsuit in the public interest of environmental protection in civil cases (against private persons), if there is a threat or violation which affects the environment as a common good.

Finally, when there is “*actio popularis*” anchored in the legal system (as in **Portugal** or **Spain**), there is no doubt that the legislation is fully in compliance with the standing requirements of the Convention. In **Spain** *actio popularis* is recognised in some areas of administrative jurisdiction concerning environmental decision making – namely town planning, costs protection, national parks, and cultural and heritage patrimony - and for any criminal environmental offence included in the Criminal Code. However, in criminal proceedings, *actio popularis* is significantly limited by fee deposits requested by courts from the plaintiffs. Also in **Romania**, both the legislation and jurisprudence recognize standing to sue of all persons, directly or through environmental NGOs, in environmental matters. Theoretically, the general rule of the Environmental Protection Act, shall also be applicable for granting standing based on the *actio popularis* principle in civil procedures, whenever environmental rights are infringed upon. However, some case examples from **Romania** (and also **Croatia**) show that despite very progressive regulation of standing conditions, the judicial protection of the environment is not always functioning sufficiently.

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<sup>14</sup> See also the EEB study *How far has the EU applied the Aarhus Convention ?*, *supra* note 2, page 32.

<sup>15</sup> According to Lord Justice Robert Carnwath speech at the Conference, the courts in the common law countries mostly “welcome the expertise which the NGOs can bring to difficult cases raising technical issues”.

### **1.3 Distinctions in interpretation of the standing rights and their consequences**

As *Prof. Jerzy Jendroska* pointed out in his speech at the “International conference on the implementation of the Aarhus Convention in practice”,<sup>16</sup> the provisions of the Convention were formulated taking into account different legal systems and traditions. At the same time however, it is trying to reach a single standard of standing rights. Therefore, it i.a. directs the states whose legislation requires an impairment of someone’s right as a general standing condition to consider any violation of the Convention’s provisions (e.g. participation rights according to Art.6) as “impairment of rights” with regard to the members of the public concerned. If this it is not so, as some of the above mentioned examples show, the practice of the respective country (Party) cannot be considered as fully in compliance with the requirements of the Convention.

It can be added that the practice of the Parties to the convention is generally not taking into account the specific character of Article 9(3) of the Convention, as mentioned above. Concerning this provision, the Parties evidently have greater freedom in defining the limits of standing (“...where they meet the criteria, if any...”. However, also here the general principles, expressed in the Preamble of the Convention and in its Articles 1 and 3 must be respected. The Compliance Committee of the Aarhus Convention has pointed out in its findings in the 2005/11 (Belgium)<sup>17</sup> case, that the rationales of paragraphs 2 and 3 of Art 9 of the Convention are apparently not identical. Subsequently, the Compliance Committee stressed that despite the fact that the Convention gives a great deal of flexibility in defining which subjects (namely environmental NGOs) have access to justice under Art. 9(3), the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all environmental NGOs from challenging acts or omissions that contravene national law relating to the environment. Access to such procedures should thus be the presumption, not the exception.<sup>18</sup>

## **2. Scope of the judicial review in environmental matters**

Delimitation of subjects authorized for access to justice in environmental matters is closely related to the scope of the judicial review of actions, proceedings and other legally important circumstances. This scope can be examined from 2 basic viewpoints:

- which actions and other circumstances can be subject to judicial review, and
- to what degree the courts address the applied arguments.

### **2.1. What is subject to review ?**

In theory, most of environmental acts (and all having the character of “development consent”) can be subject to judicial review. In practice, however, the scope of the scope of actually “reviewable” acts is influenced by the limited number of potential plaintiffs in some areas

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<sup>16</sup> The conference was organized in April 2009 in Brno, Czech Republic, in the scope of the Czech EU presidency., More information about the conference can be found at [http://www.mzp.cz/en/event\\_aarhus\\_convention](http://www.mzp.cz/en/event_aarhus_convention) and at <http://www.justiceandenvironment.org/2009/04/je-internationalaarhus/#more-1>

<sup>17</sup> Decision ECE/MP.PP/C.1/2006/4/Add.2

<sup>18</sup> See namely points 35 and 36 of the Compliance Committee findings and recommendations in the 2005/11 case - <http://www.unece.org/env/documents/2006/pp/ece.mp.pp.c.1.2006.4.add.2.e.pdf>.

(see previous part). If the legislation and/or practice of the courts of a country is based on the (strictly applied) doctrine of “impairment of rights”, the group of “reviewable” acts is limited thereby.

For example, as already mentioned, according to the existing judicial interpretation in the **Czech Republic**, the affected persons cannot claim a decision on permitting exception from noise limits or on approval of putting nuclear facilities into operation be reviewed. Therefore, such decisions are de facto never subject to judicial control; only in case (theoretical) the application for them would be rejected, the applicant (investor) would have standing to sue. Similarly, in **Austria** and **Slovakia**, permits for railways, roads, and shipping projects (except for EIA decisions), or permits according to the Nature Conservation Act are in fact not subject to the judicial review, for the same reasons. In the **Netherlands**, some decisions are expressly excluded from review with reference to the so-called “general rules for enterprises”, replacing individual permits.<sup>19</sup>

This situation is in general not in compliance with the intentions of Art.9(3) of the Convention. Although the national legislation may limit the scope of members of the public with access to the review procedures (set up criteria they must meet), such criteria shall not lead to the conclusion that acts and omissions falling into the scope of Art. 9(3) (i.e. relating to the environment) can de facto never be subject to the review. See also the findings of the Compliance Committee in the 2005/11 (Belgium) case, as mentioned above.

In addition to this general finding, some specific and important kinds of environmental acts are discussed in more details.

#### **a) EIA statements**

Review of outputs of the processes of environmental impact assessments (EIA) represents a specific problem. Where the final output of this process does not have the character of a final decision (for instance an “EIA statement” in the **Czech Republic** or in **Slovakia**) the concept based on the requirement of proving infringement upon petitioner’s rights leads to the conclusion that (separate) judicial review of this act is not possible.<sup>20</sup> Also in **Spain**, difficulties were encountered with regard to review of the administrative appeals against decisions on EIA screening, as these decisions have so far been taken as merely procedural acts.

The same applies for the screening decisions in cases concerning the “Annex II projects”, i.e. projects on which the countries can decide, upon the basic information about the project and criteria laid down by the EIA directive, whether an EIA is conducted or not. Here it is even more evident that the acts are directly influencing the rights of the affected persons, namely the investor, but also the public. Since EIA screening decisions are “acts” of a public authority that could “contravene national (including European) environmental law” such decisions need to be subject to legal review by members of the public. This argumentation can

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<sup>19</sup> See also the Milleu Ltd. *Summary Report on the inventory of EU Member States’ measures on access to justice in environmental matters*, supra note 2, page 7.

<sup>20</sup> It can be considered as questionable, if the Czech Supreme Administrative Court acted correctly when refusing to file a preliminary question to the ECJ concerning the possibility (necessity) of direct review of the EIA statement (with regard to the timeliness and efficiency of judicial review of the EIA procedure) with justification that the interpretation of EC law (Art. 10a of the 85/337/EEC “EIA directive”) is completely clear at this point.

be supported by reference to the principle according to which in the EU member states, European law has to be seen as “national law”.<sup>21</sup> Art.4(2) of the EIA directive provides the criteria that member states shall take into account in the screening procedure. The national (screening) procedure in which these criteria are applied shall therefore be classified as procedure subject to Article 6 of the Aarhus Convention.

Despite this, for example in **Austria**, the jurisprudence maintains the position that members of the public (any person, including directly affected individuals and environmental NGOs) are excluded from EIA-screening and therefore there is no one with standing to sue the screening decision.<sup>22</sup>

On the contrary in **Estonia** the Supreme Court stated, that “*even though procedural decisions are generally not subject to judicial review, it is necessary to proceed differently in cases concerning encroachment upon the environment, because in these cases procedural aspects have a fundamental impact on the final result of decision making*”. In most countries, an “EIA decision” is subject to judicial review, as it is the principal development consent (or one of the most important) for the project.

## **b) Land use plans**

Another specific area is reviews of land use plans. The contentious matter here is whether and under what circumstances, the plan can be considered a decision regarding the permission of a specific activity in accordance with Article 6 of the Convention and whether the provisions on access to judicial protection according to Art. 9(2) of the Convention apply to it. According to the findings of the Compliance Committee in the 2005/11 (Belgium) case (see above), the town plans can be considered as permitting decisions, if they are sufficiently specific. If not, it is also possible that they fall within the scope of Art. 9(3).

Despite that, for example in **Austria**, there is no right for any person to review decisions regarding land use plans. A similar situation seems to exist in **Slovakia**.

In the **Czech Republic**, land use plans have been subject to judicial review since 2005, when a special regulation on this issue was adopted. There have however been numerous disputes of how broad the review shall be; within this discussion is also the problem of the position of the Aarhus Convention in the national law. According to the Czech case law, the NGOs do not have standing for judicial review of the land use plans.<sup>23</sup>

There are also examples of the most open models of access to courts with regard to land use plans, based on the system of “*actio popularis*”. One of them is **Estonia**, where land use (spatial) plans can be disputed by anybody “*whose rights have been violated or anybody who finds that the plan is not in accordance to law*”. In Estonia this is an exception from the standing provisions in environmental matters, which are generally not based on this principle (in spite of that fact, the access to courts is very broad – see above). In **Spain**, as mentioned

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<sup>21</sup> The Compliance Committee clarified this in different cases (e.g. 2006/11 Denmark, namely point 27 - [http://www.unece.org/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_4\\_e.pdf](http://www.unece.org/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_4_e.pdf)).

<sup>22</sup> It shall be added that in Austria a very small number of “full” EIA procedures is conducted (20 to 25 a year). About 81 % of screening decisions neglected the need for an EIA in the period January 2000 to March 2009

<sup>23</sup> See the Czech national study, chapter 2.1 point d) for more details.

above, *actio popularis* is recognised in some areas of administrative jurisdiction concerning environmental decision making, including also land use planning.

### c) Administrative omissions

Both according to paragraph 2 and 3 of the Aarhus Convention, not only acts (decisions), but also omissions of the administrative authorities in environmental matters shall be subject to judicial review upon requests of members of the public meeting the (broadly defined) criteria for standing. In most countries, there is a possibility of court protection when an authority in a procedure, once initiated, does not issue a decision in the prescribed time limit. More problematic is, however, a situation when the authority fails to start the procedure itself (*ex officio*), under occasions when a law requires it to do so.<sup>24</sup>

For example in the **Czech Republic**, the legislation on the judicial protection against administrative omissions does not include the latter situations. In such event, the affected person can ask the superior administrative authorities to remedy it. However, if it fails to do so, the courts cannot order the passive authority to act (to make a decision). The Supreme Administrative Court confirmed this interpretation, not considering that it can lead to serious infringement of rights of the affected persons and that it is not in compliance with the requirements of the Convention. Also in **Austria**, it is not possible to initiate judicial review procedures on omissions that contravene environmental law of public authorities. The only possibility is to inform the authority about the situation. If there is a breach of law the authority is obliged to act, but there is no legal possibility to enforce this for members of the public. A similar situation exists in **Hungary**.

On the contrary e.g. in **Poland**, the law explicitly states that any NGO (social organisation) with “rights of a party” (see above part 1.2) can ask the authority to initiate the proceedings *ex officio* and, if such request is refused, may appeal in court. In **Estonia**, a person who proves impairment of his/her rights by the omission to start administrative procedure can start a court procedure (it has not been approved yet whether courts would apply a similarly broad approach to these kinds of lawsuits in environmental cases, i.e. NGOs would file them).

### d) Acts and omissions of private persons

Application of the principle of “impairment of rights” restricts also access to review of actions and omissions by private persons if these actions do not have direct and immediate consequences on the personal rights of the plaintiff, but rather on the environment as a public interest. In some countries, e.g. **Austria**, the **Czech Republic**, **Hungary** or **Slovakia** there are no special provisions relating to judicial review of acts or omissions of private persons in environmental matters. It is therefore, only possible to use the general provisions on compensations of damages and protection against the risk of injury.

An example of progressive legislation with regard to judicial review of actions by private subjects is the **Polish** Environmental Protection Act, according to which NGOs may file an action in cases where the threat or violation affects the environment as a common good. In **Spain**, access to civil courts is limited to persons or groups of people affected by the environmental damage or threat (as in the countries mentioned above), but in addition to that,

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<sup>24</sup> For example, if a relevant authority learns about the fact that a person has built a house or started a project (operations) without the necessary permit.

a group of affected people, if forming a majority of the local community, can act on behalf of the whole community affected.

The **criminal procedures** are in most countries traditionally not open to outside influence, including participation of the public or civil society organizations in any phase of the process. Persons affected by this (possibly) illegal behaviour, as well as anyone else, can only report their suspicions to the responsible public authorities, who decide at their own discretion if a criminal procedure is to be started. Only if this happens, do the directly affected persons (victims) usually have some procedural rights. The same principle mostly applies also to administrative penalties. A significant exception from this model is represented by **Spain**, where every person has the right to exercise *actio popularis* in respect to criminal offences, including environmental crimes. Individuals and NGOs can therefore become Party to criminal proceedings and help protect the environment by assisting the public prosecutor in the investigation of offences.

## 2.2 What can be objected ?

With regard to the issue of “permissible complaint arguments”, or the scope in which the courts deal with individual acts, the situation is again problematic in countries where the strictly interpreted doctrine of “impairment of rights” is applied. For instance, according to **Austrian** legislation, the affected individuals (e.g. landowners) may only ask for a review of infringement upon their ownership rights and rights to protection of health. They cannot object to violation of other provisions of environmental laws. This significantly restricts the scope of judicial review of official decisions. Environmental NGOs can raise any arguments (relating to the environment) in an EIA and IPPC procedures because legislation expressly designates such rights to them.

Concerning actions by the NGOs in the **Czech Republic**, courts have declared that permissible complaint objections are only those that concern infringement of the procedural rights of these petitioners during administrative proceedings, not the substantive legality of the reviewed acts (permits). However, the actual method of application of this principle differs greatly in individual cases (in some it is very strict,<sup>25</sup> in others the courts address substantive objections either “by means” of the review of the right to due settlement of objections, or without any theoretical justification). In practice, the formal insistence of courts on this concept leads to a differing and unbalanced scope of review in similar cases. The whole concept is based on confusion of the terms of standing (where it can be in compliance with the Aarhus Convention to limit the scope of persons with access to courts by the requirement of “impairment of rights”) and the scope of review of the challenged decision. In relation to the lastly mentioned aspect, the concept clearly contravenes Art. 9(2) of the Convention, which clearly indicates that members of the public can challenge both procedural and substantive legality of the decision.

In **Hungary**, environmental NGOs can challenge the illegality of an administrative decision and claim its annulment only in relation to its environmental aspects (this seems a more logical limit, however still not compatible with the requirements of the Convention). On the other hand, the Hungarian courts often not only review the formal legality of an

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<sup>25</sup> In one of the cases the court dismissed consideration of the arguments that the project was not assessed in the EIA procedure, although it should have been, and that the impact of the project on the Natura 2000 area was evaluated wrongly, as these objections are not related to the plaintiff’s procedural rights. See the Czech study, for more details.

administrative decision, but also the scientific correctness of the supporting technical documentation, most prominently the environmental impact statement documentation.

In a number of other countries, it is accepted that the petitioner, if having standing to sue, may apply any arguments in the lawsuit. More problematic seems to be to which extent the courts shall review the discretionary powers of the administrative decisions. For example, in **Estonia**, according to judicial practice, the courts cannot re-evaluate the political rationality of a discretionary decision. However, courts are allowed to intervene in discretionary decision-making, if the administrative body has taken into account unacceptable considerations or left some important aspect unnoticed.<sup>26</sup>

### 3. Effectiveness of judicial protection (injunctive relief)

Access to justice in environmental matters has real sense only if there is a literal possibility of preventing encroachment upon the environment by that means. Art. 9(4) of the Aarhus Convention therefore expressly specifies the duty of the Parties to secure the opportunity of achieving preliminary measures, including injunctive relief. It was stressed on many occasions that the Convention requires injunctive relief and other remedies to be “adequate and effective”. Adequacy requires that the measures can fully compensate past damage or at least prevent future damage. The requirement that the remedies should be effective means that they should be capable of efficient enforcement. Parties should try to eliminate any potential barriers to the enforcement of injunctions and other remedies. Lengthy court proceedings in combination with restricted or a wholly excluded option of achieving an injunctive relief, leading to “academic victories” (canceling the permits for already executed projects) is in conflict with these requirements of the Convention.

The legislation<sup>27</sup>, and until recently also court practice in the **Czech Republic**, represented such a combination. The courts interpret the conditions for injunctive relieves in general rather restrictively. They use to stress that the harm must be really “irreparable” – i.e. “very serious” – and it must be directly related to the rights of the claimant. Concerning the public interests, the courts sometimes tend to say “if the responsible authorities approved the action in question, than we have to consider it to be in the public interest”. In addition to this, the ability of the NGOs to gain injunctive relief position is strongly influenced and weakened by the general approach to their lawsuits, based on the doctrine of “maintaining impairment of a right” (see above). This leads to the conclusion that an NGO can never meet the conditions for it, (if they are interpreted in the standard way), as NGOs do not have any (substantive) rights, which could be harmed. However, in several of its recent judgments, the Czech Supreme Administrative Court expressed the legal opinion that in spite of the strict legislative terms for acknowledgement of the suspensive effect of the action (i.e. requirement of the petitioner being at risk of “irrecoverable harm”) the courts shall acknowledge a suspensive effect to complaints by members of the public concerned in cases that are subject to the Aarhus

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<sup>26</sup> See the Estonian study part 2.2 and Case 3 for more details.

<sup>27</sup> According to the Czech legislation, the court may acknowledge injunctive relief under the following conditions:

- the claimant must prove that “enforcement or other legal consequences of the decision would cause him/her an “irreparable harm”
- the acknowledgement of the suspensive effect would not “in a disproportionate manner” affect the vested rights of third parties, and
- it is not in conflict with the public interest.



Convention. The practice of administrative courts reflected this opinion in a few recent cases, while in many others, the requests for injunctive relieves continue to be refused.<sup>28</sup>

A similar situation exists in **Slovakia**, despite the fact that the legislation conditions for granting injunctive relief seems to be easier to meet (only “threat of a serious harm” is needed).

In **Austria**, the legislation would in theory be open for injunctions in environmental matters.<sup>29</sup> However, in practice injunctions are not being granted at the Highest Courts. This is particularly problematic in cases where Highest Courts are the only independent tribunals to decide on appeals, such as federal transport projects. The problem lies in the courts interpretation of the relevant provisions, providing that injunctive relief shall be granted when “no coercive public interests” are opposed to this and if the applicant would be faced with “disproportional harm” when the injunction is not granted. The Highest Administrative Court constantly sees coercive public interests that make injunctions impossible namely in the case of infrastructure projects. In other cases the courts do not see a disproportional harm for the applicant when the injunction is not granted. Not a single case where a court granted an injunction in an environment related procedure has been detected. In addition to that a provision has been recently added to the EIA Act, which enables the operator to proceed with the activity for one more year in case the court abolishes the EIA permit. Such approach is clearly not compatible with Art. 9(4) of the Aarhus Convention.

In **Spain**, the application of injunctive relief is significantly limited by the usual settlement of unaffordable fees by the courts; there are, however, individual cases in which the courts decided not to impose the fee or to reduce it to allow access to justice on the grounds of the Aarhus Convention requirements. In **Croatia**, the law states that if the injunctive relief was granted, but later the lawsuit dismissed, and if it is ascertained that the applicant has “abused the right” the investor or other person affected has the right to request a compensation for ordinary damages and lost profit from the applicant.

The practice of some other countries is more accommodated to the preliminary protection against irrecoverable encroachment of the environment, and thus more compatible with the requirements of the Convention. For instance the **Estonian** law requires an evaluation of whether or not the fulfilment of a court decision would become impossible, if suspensive effect was not awarded to a complaint. This provision was interpreted by the Supreme Court in a way that starting construction works in a protected area would create irreversible consequences (because demolition of already constructed buildings is not reasonable). Apart from this, Estonian courts may issue various types of preliminary measures – for instance forbid offices to issue subsequent decisions or suspend running activities. Risk of serious damage to the environment represents an important aspect for decisions if the suspensive effect would be awarded to a complaint also in **Hungary, Slovenia and Belgium** (here also expressly in relation to non-government organisations).<sup>30</sup>

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<sup>28</sup> The courts now do not say that NGOs can never meet the conditions, but interpret them in a way that NGO would have to prove really strong and serious threat of damage of the environment. At the same, namely concerning highways, they mostly tend to say there is a public interest in continuing with the building.

<sup>29</sup> Environment related permitting procedures are regularly decided by independent tribunals in second instance where injunctive relief is the rule. In other cases the Highest Courts are the only independent bodies that decide on appeals.

<sup>30</sup> See also the Milleu Ltd. *Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, supra note 2, page 13.

In relation to judicial review of actions by private individuals, achieving issue of preliminary measures is generally more difficult and frequently related to the requirement of depositing a guarantee in case of subsequent disputes on compensation of damages. In **Poland**, however, the law enables the courts to impose preventive measures, in particular by putting in place an installation or equipment to protect against the threat or damage. Where taking such measures is impossible or too difficult, the court may impose ceasing the activity causing the threat.<sup>31</sup>

#### **4. Additional remarks**

##### **a) Costs of the court procedures**

The mentioned list of problematic matters concerning application of Article 9 of the Aarhus Convention in individual states is certainly not exhaustive. For instance, the barrier of access to court consisting in high costs, the proceedings and risk of compensations if losing a case was mentioned only briefly, though it represents a fundamental problem in some states.<sup>32</sup> The “Price of Justice” analyses<sup>33</sup> conducted by J&E in parallel with this one, confirmed that financial barriers (including costs of evidence and the danger resulting from the loser pays principle) represent one of the major obstacles with regard to access to justice namely in **Spain** but to some extent also in other analyzed countries.

##### **b) Direct application of the Convention**

Aside from the concrete problems of that kind, some more general aspects influencing the implementation of the Convention by the Parties can be mentioned, namely the matter of the overall position of the Convention in the national legal systems (or in other words, the question of its direct applicability). It is evident from the above-mentioned examples that in some countries the courts have acceded to direct application of the Convention (e.g. **Estonia, Romania or Spain**, while in others they have refused it (as in **Austria, the Czech Republic or Poland**).

It should be mentioned in that regard that the Compliance Committee repeatedly stated that (some) provisions of the Convention should be directly applicable by the Parties.<sup>34</sup> However, regardless of the issue of whether the Convention is “capable of direct application”, the courts of the Parties should always interpret the relevant national provisions in accordance with the requirements of the Convention. In line with Article 31 par 3a) and b) of the Vienna Treaty, the Parties are also obliged to consider any later agreement regarding interpretation of the Convention (i.e. also the findings of the Compliance Committee).

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<sup>31</sup> At the Conference working group, the opinion prevailed that it is not contrary to the Convention if members of the public concerned cannot challenge omissions of the authorities to stop illegal activities on the basis of administrative law, in case that they at the same time can challenge these illegal activities directly (on the basis of civil law). However, this can be seen as an academic concept, as civil lawsuits against private persons often require high costs and it is up to the plaintiff to carry the burden of proof. As a result, civil law on its own usually does not provide for effective remedies in environmental matters.

<sup>32</sup> See e.g. the Milleu Ltd. *Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, *supra* note 2, pages 13-16.

<sup>33</sup> See <http://www.justiceandenvironment.org/wp-content/uploads/2009/12/price-of-justice.pdf>

<sup>34</sup> See the findings in the 2006/17 (European Community) case, points 59.-61, or findings in the 11/2005 (Belgium) case, point 16.

### c) Implementation of the Convention on the EU level

The question of the Convention's position with regard to the EU law and inferential consequences represents a specific and very complex problem. The EU ratified the Convention with the Council Decision 2005/370/EC from 17 February 2005. The EU therefore declared its willingness to be bound by the provisions of the Convention and to apply them to its own institutions. Through these means, the Convention has become a so called "mixed agreement",<sup>35</sup> a part of the EU law.<sup>36</sup>

Consequently, the EU Members should also apply the provisions of the Conventions as EU legislation in force and EU institutions shall use their powers to enforce correct application of the Convention requirements by the Member States. In that regard, it should be mentioned in the first place that the NGOs as well as other stakeholders have on various occasions repeatedly criticized the fact that the proposal of the directive on access to justice in environmental matters, which would implement the requirements of Art. 9(3) of the Convention into the EC law in detail, has not been approved yet.<sup>37</sup>

As regards the application of the Convention in the scope of and by the EU institutions, the very restrictive approach of the ECJ to the issue of the standing of environmental NGOs and other members of public concerned<sup>38</sup> before this court represents the most fundamental problem. The ECJ approach is based on the very strict interpretation of the requirement of "direct and individual concern", which can be seen as an extreme example of applying the "impairment of rights doctrine". The current ECJ case law effectively denies all members of the public access to judicial review procedures with regard to the acts and omissions of the EU bodies. Such situation, as already confirmed by the Compliance Committee (see above) is not in compliance with the requirements of Art. 9(3) of the Convention.<sup>39</sup> So far, there are no signs that adoption of the 1367/2006 "Aarhus Regulation"<sup>40</sup> has changed anything on that conclusion. In addition to that, the "internal review procedure", established by this regulation, has itself proven to be inefficient to a great extent.<sup>41</sup>

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<sup>35</sup> See e.g. R. Leal-Arcas, *The European Community and Mixed Agreements*, *European Foreign Affairs Review* 6, 483-613 (2001).

<sup>36</sup> See e.g. the findings of ECJ expressed in the case C-239/03 (*Etang de Berre*): *Any agreements made by the Community institutions and non-member countries have equal competence as pure Community agreements so long as they fall within the jurisdiction of the Community.*

<sup>37</sup> See supra note 8.

<sup>38</sup> They fall into the category of "non-privileged claimants" in procedures according to former Art. 230 (now Art. 263) of the EU Treaty. See e.g. Pallemarts, M., supra note 8, page 31

<sup>39</sup> For details see e.g. the communication to the Compliance Committee by ClientEarth, Belgium, concerning the alleged non-conformity of the European Communities with the requirements of Art. 9 of the Aarhus Convention (available at <http://www.unece.org/env/pp/compliance/C2008-32/communication/Communication.pdf>)

<sup>40</sup> Regulation 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 Community institutions and bodies.

<sup>41</sup> For details, see the special study on that issue, conducted by J&E in parallel with this one at <http://www.justiceandenvironment.org/wp-content/uploads/2009/12/rir-in-practice.pdf>.

## 5. Conclusions and recommendations for the EU institutions

### 5.1. Conclusions

**The above mentioned examples show that Art. 9 of the Aarhus Convention is interpreted and applied very differently by the Parties. Terms for access to judicial protection in environmental matters are therefore substantially diverse in individual countries, including EU Member states.** This comparative study, as well as the following country reports, presents a great number of specific examples of problematic or clearly non-compliant national provisions and/or practices, concerning implementation of the Convention requirements in the given field.

**The disunity is probably to the greatest extent manifested with respect to the scope of subjects (members of public) who have access to judicial protection in environmental matters.** The restrictive attitude of national courts to this issue, based on the “impairment of right doctrine”, limits in many countries the scope of subjects having the right to initiate legal procedures which can lead to effective protection of the environment, beyond the minimal requirements of both paragraphs 2 and 3 of the Convention. In some countries (Austria, the Czech Republic) not all individuals falling into the scope of “public concerned” have access to review procedures according to Art. 9(2). Mostly the access is granted only to affected property owners, while possible infringements of other rights are neglected. In other countries (Slovenia, Germany), the NGOs must meet restrictive conditions to gain standing rights. Similar limits apply also with regard to implementation of Art. 9(3), whereas other restrictions are often imposed in that area. Specific laws in some cases explicitly state that in some procedures only the applicant (i.e. mostly the investor in environmental matters) has the position of a party, and therefore also standing for a court action. In some countries, the NGOs cannot generally gain standing in cases going beyond the scope of Art. 9(2) of the Convention (e.g. Austria and with some exceptions Slovakia).

**Another result of the different standards of implementing the access to justice requirements of the Convention is that the substantial scope of decisions, actions or proceedings with serious consequences on the environment are not subject to the review in some countries.** This concerns namely those acts which are not “covered” by Art. 6 of the Convention and therefore Art. 9(2) does not apply to them either. It is evident that in accordance with the general goals of the Convention and also with the purpose of its Art. 9(3), in cases such as industrial accidents, operation of unauthorized waste dumps or exceeding emission of harmful substances or noise limits, the public should be granted access to judicial protection. Therefore, it is not in accordance with the Convention if the Parties specify overly strict criteria for access to justice in such cases that they cannot be satisfied by most members of the public and the acts therefore remain “de facto non-reviewable”. This type of situation is connected with applying the restrictive conditions for standing e.g. in Austria, the Czech Republic or Slovakia. Similarly there are serious limits in possibilities to review administrative omissions (namely in a situation when the authority fails to start a procedure *ex officio*, when a law requires it to do so) e.g. in Austria, the Czech Republic or Hungary.

**Court practice in some countries applying the “impairment of rights doctrine” also limit the “permissible complaint arguments” of the members of public (concerned), i.e. the scope in which the courts deal with the acts and decisions which are subject to judicial review.** It can concern both the actions of affected individuals (Austria) or the NGOs (the Czech Republic, Hungary). This approach seems to be clearly contradicting the explicit

wording of Art. 9(2) “...both procedural and substantive legality...”, but does not seem to be in line with the intention of Art. 9(3) either.

**Finally, with regard to the requirements of Art. 9(4) of the Convention, i.e. effectiveness of the judicial review in environmental matters, it can be said that the situation is not satisfactory in any of the studied countries. Despite that, also here there are important differences concerning the accessibility of preliminary measures (injunctive reliefs) and possible types of preliminary remedies the courts may issue.** In some countries (Austria, the Czech Republic) injunctive relief is not accessible at all or only very rarely in environmental matters. In others (e.g. Spain) application of injunctive reliefs is significantly limited by the risk of costs.

**On the contrary, the studies also show that in countries where the “impairment of rights” doctrine is formally applied, it can be interpreted in a way that leads to broad and relatively efficient access to justice.** The approach of e.g. the Estonian Supreme Court to the standing of NGOs, scope of the judicial review as well as to the possibility of preliminary measures (suspensive effects of the lawsuits) influenced by direct application of the provisions of the Convention, prove that. Hungarian courts often not only review the formal legality of an administrative decision, but also the scientific correctness of the supporting technical documentation, most prominently the environmental impact statement documentation. Also, the Polish Environmental Protection Act, according to which NGOs can take legal action in cases of risk or damage of the environment as “common welfare”, is an example of good implementation of the Aarhus Convention principles.

We are convinced that the significant disunity in fulfillment of the requirements of the Convention by individual parties is not consistent with the declared goals of the Convention. It is also not desirable from the aspect of the Convention’s position as part of EU law, which should also indicate the requirement for a basic common standard of its application in all EU member states. **Proper and equal implementation of the Convention, and namely its Article 9 by the Member States is not only needed for better environmental protection and proper enforcement of the EU environmental law, but also for supporting equal terms on the common EU market.**

## **5.2 Recommendations for the EU institutions**

As stated above, the EU institutions should use their powers to enforce correct application of the Aarhus Convention, as a part of the EU law, by the Member states. It seems to be self evident that with regard to the requirements of Art. 9(3) and Art. 9(4) of the Convention, the **Directive on Access to Justice in Environmental Matters, specifying minimum common rules for transposition of these provisions by Member states, should be adopted.** As a first step, discussions about the Commission proposal of 2003 (including its possible improvements) should be re-started.

As it is not likely that the directive will be adopted soon, the **Commission should start a conformity - checking procedure concerning implementation of the Convention provisions which have not been transposed to the EU secondary legislation – i.e. Art. 9(3) and Art. 9(4) - by the Member States.**<sup>42</sup> In our opinion, it should namely concern the

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<sup>42</sup> In fact, the Commission has already made steps of that nature, though preliminary ones, at least in one case – towards Slovakia.

issues covered by these (and others here quoted) studies – i.e. scope of subjects with standing in environmental matters (and conditions for gaining it), scope of the review of acts and omissions in environmental matters (both with regard to what act and omissions can be subject to review and if the admissibility arguments of the applicants are somehow limited) and the efficiency of the judicial review, namely access to the injunctive relief and other preliminary measures. Also the problem of costs as barriers to the access to justice in environmental matters should be considered.

**With regard to the application of Art. 9(3) and 9(4) of the Convention on the EU level (towards EU institutions), the Commission should review the application of the request for internal review procedure according to the Aarhus Regulation, namely the criteria applied for the admissibility of the requests.** Especially criteria set in Art. 2.1.g) of this Regulation, concerning the characteristics and act taken by the EU institution or body must be a subject of the review procedure (i.e. “binding and external effect”) should be interpreted in a non-restrictive, lenient manner so as to ensure wider access to the merits of the cases. Whenever the environment is influenced by an act of the Commission, the act should be issued in the form of a formal decision, to avoid non-standard forms of decision-making to the utmost extent. The Commission should also consider creating a platform for accessing all such decisions, i.e. creating an internet website under the Commission’s webpage for environmental administrative acts.

Finally, as *Prof. Marc Pallemmaerts* rightly points out,<sup>43</sup> **“the EU institution that has the most immediate power to act to ensure compliance by the EU with its obligations under Article 9(3) of the Aarhus Convention is the ECJ, which could, within the limits of its judicial prerogatives, interpret the provisions of the EC Treaty and of the Aarhus Regulation in a manner consistent with those international obligations.”** If, however the ECJ will also in the future confirm its traditional case-law on standing for non-privileged applicants, it will be up to the EU as a whole and the Member States (also as Parties to the Aarhus Convention) to extend access to the Community judicature. A special amendment of the current wording of the Treaty (Art. 263) would be one of the possibilities in this respect. An alternative solution would be using the possibility anticipated in Art. 257 (former Art. 225a) of the Treaty, which empowers the European Parliament and Council to create, by means of adopting a regulation, “specialised judicial courts to hear and determine at first instance certain classes of action or proceeding brought in specific areas”. Such a regulation could set up rules concerning the jurisdiction of the specialised courts differently from the Treaty, which would then apply only as “*lex generalis*”. On this basis, **it would be possible to establish a special court for environmental disputes to provide judicial review of acts and omissions of EU institutions and bodies which contravene EC environmental law and which jurisdiction (namely conditions for standing) would be in accordance with the requirements of the Aarhus Convention.**

This requirement is consistent with the opinion, presented by *Lord Justice Robert Carnwath* on a number of occasions.<sup>44</sup> According to him, if the legislative and administrative instruments of protection of the environment are not developed sufficiently or do not work properly, the courts and judges shall “fill the gaps”, namely by “creative interpretation of the constitutional laws”. This shall be an integral part of their task to promote efficient and fair enforcement of the principles and standards anchored in laws, as well as individual rights, even if this could be in conflict with political preferences of the majority.

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<sup>43</sup> Pallemmaerts, M., *supra* note 8, page 45.

<sup>44</sup> See e.g. *supra* note 23.

## Selected problems of the Aarhus Convention application in Austria

Thomas ALGE, OEKOBUEIRO

Whereas Austria implemented those provisions of the Aarhus Convention that are reflected in European legislation to a large extent (in particular Directive 2003/35/EC on public participation, Directive 2001/42/EC on SEA or Directive 2003/4/EC on environmental information), **Article 9 par 3 of the Convention has neither been transposed nor implemented yet in practice.** Austria can be regarded as one of the most restrictive European countries with regard to Access to Justice for the public in environmental matters.<sup>1</sup>

Austria ratified the Aarhus Convention in January 2005. In the explanatory notes to the parliament's ratification act the legislator stated that the Convention is **not open for direct applicability.** Austria confirmed this position in the Aarhus Convention Compliance Committee procedure in Case ACCC/C/2008/26.<sup>2</sup> However, direct applicability is formally possible since Austria did not make use of the constitutional provision that prohibits self execution of international treaties

### 1. Standing conditions for members of the public concerned, access to review conditions

#### 1.1 The impairment of rights doctrine

Access to Justice in environmental matters in Austria is closely related to **standing** (locus standi) requirements in administrative procedures. The general rule is that only "parties" to an administrative proceeding have standing. And the latter implies access to review procedures in specific issues. It is thus important to be aware who is eligible as administrative party, who has standing. A "party" to the proceeding is defined as a legal subject taking part in the proceedings on the basis of a **legal interest** or a legal title. Such a legal interest aims to protect the rights of a person. In Austrian literature and jurisprudence this is labeled as "Schutznormtheorie" (literal translation would mean "protective provision doctrine").

It is therefore crucial what the term "legal interest" means. To have legal interest a "**subjective right**" needs to be **impaired** or at risk (impairment of rights doctrine). What is a subjective or **individual right** is determined by **legislation** (to protect the individual). In fact, legislation expressly defines which specific rights could be impaired with respect to certain parties (e.g usually neighbours concerning noise, smell, property; municipalities concerning

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<sup>1</sup> *Kerschner/Raschauer*, RdU 2008, 145, the editors of the Austrian environmental law journal, raise the question how deep „fear and persistency tendencies“ Austria appear to be that Austria continues to ignore any case law of the European Court of Justice requesting access to justice such as *Janecek* ECJ C-237/07.

<sup>2</sup> <http://www.unece.org/env/pp/compliance/Compliance%20Committee/26TableAustria.htm>. The case was closed with decision FINDINGS OF THE COMPLIANCE COMMITTEE WITH REGARD TO COMMUNICATION ACCC/C/2008/26 CONCERNING COMPLIANCE BY AUSTRIA WITH ITS OBLIGATIONS UNDER THE CONVENTION as adopted on 25 September 2009 by the Compliance Committee at its twenty-fifth meeting, held in Geneva from 22 to 25 September 2009

their finances)<sup>3</sup>. Sometimes standing rights are derived by legal interpretation of sectoral legislation (e.g. waste, forestry, soil) in line with general administrative rules and constitutional principles (Schutznormtheorie). To avoid the latter some acts, such as the Federal Road Act state explicitly that no subjective rights can be derived from this act.

## 1.2 The issue of individual vs public interest

As stated above Article 9 par 3 (par 2 is similar) enables members of the public concerned to *challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*. The impairment of rights doctrine would only be compatible with Article 9 par 3 of the Convention when the impairment of environmental rights would be “subjective rights” and “legal interests” respectively that provide for standing and respective access to justice. We therefore assess whether this is the case in Austria.

The Austrian laws only provide for locus standi regarding individual (protection) rights (Schutznormtheorie) that are basically not related to “public interests” such as environmental law. Only sometimes the **individual and public interest might overlap** (e.g. aspects of nuisance from noise, air quality). However, they **do not overlap** regarding the vast majority of environmental laws. In principle only individuals directly and personally affected (**neighbours**) by an activity or emission would be granted standing rights.

This legal position limits standing rights to a group of persons (neighbours) that’s standing rights hardly relate to “public” environmental interests as stated in the Aarhus Convention, but to the protection of **property and health** of the persons concerned. Environmental concerns can only be addressed regarding a concrete issue, take the threat to health due to noise emissions as an example. **Water or noise** quality standards and laws that serve for public environmental protection are **not** subject to neighbour’s standing rights. The same is true for **air quality standards** that are reflected in Austrian and European legislation.

### Court case Example: Enforcing air quality standards in Graz

In March 2005 a citizen of the second largest Austrian city, *Graz*, filed a civil lawsuit against the Austrian province of *Styria (Steiermark)* and the Republic of *Austria*. The lawsuit aimed at the determination that the Province and the Republic were to be held responsible for damages to health resulting from not undertaking measures against exceedances of PM10 limit values as provided under European and national laws. After a defeat in first instance, a victory in the second instance, the Highest Civil and Criminal Court (OGH, Oberster Gerichtshof) referred to case back to the first instance in order to repeat the procedure considering the highest courts legal determination (OGH 10b151/06x) in October 2006.

The Highest Court rejected the claim, but opened another opportunity. The court’s dismissal was based on the view that the plaintiff would need to exactly specify the measures the province Styria should have, but has not taken and what would have been the difference as to the plaintiff’s health. So the procedure re-started at the first instance. However, such evidence

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<sup>3</sup> e.g. Art 42 AWG (Federal Waste Management Act): This provision clearly defines who has standing in waste permit proceedings (the applicant, neighbours, the industrial site owner etc. Its however not clear what is the „subjective“ right concerned defining the scope of their standing rights.



is hard to provide and expensive. The plaintiff finally failed to do so. Only in summer 2009 the highest court of justice finally dismissed the claim due to lack of the right to make such an appeal without providing specific evidence on damages and exact measures that should have been taken by Styria (OGH Ob 68/09w). Four years of litigation ended without any success. Costs of more than 16.000 EUR occurred for the plaintiff.

This case clearly shows the difficulties citizens are confronted with when they try to take legal steps to push for compliance with rules of environmental law. The **administrative legal process is not open** to them. In theory it is possible to file a **civil lawsuit**, but in this case the plaintiff has to prove that specific omissions by the authorities have led to a concrete personal damage and the plaintiff has to describe in detail the measures the authority should have taken to avoid the damage. This is very hard to prove as well as **costly, timely, not effective** and thus in conflict with Article 9 par 4 of the Aarhus Convention. Furthermore such a procedure is clearly in contradiction to Article 3 par 1 of the Aarhus Convention providing for a clear, transparent and consistent framework to implement the Convention.

Another example is **water quality**. A neighbour of an industrial facility may address water quality issues concerning the polluting of his private well, but may not refer to general water quality considerations (eg those based on the Water Framework Directive) in the context of the proceedings.

Furthermore **limiting standing** provisions can be found in **EIA and IPPC proceedings**, where neighbours standing rights are limited to their individual concern, but are not open for public interests such as nature protection, water and air quality standards. This appears to be in conflict not only with Article 9 par 3 but also with **Article 9 par 2** of the Aarhus Convention providing for review procedures on “*substantive and procedural legality of any decision, act or omission*” subject to Article 6 of the Convention. A provision limiting access to Justice to **health and property** impairments appears to be incompatible with paragraph 2 of Article 9.

#### **1.4 Environmental organizations are excluded from Austrian access to justice**

Whereas neighbours have at least and in certain cases some limited possibilities for access to justice, **NGOs** (and other “members of the public”) **do not have legal** standing in any cases relating to the environment because the Austrian legal position and jurisprudence follows a very formalistic **impairment of rights doctrine**.<sup>4</sup> The legislator would need to expressly designate the right to protect the environment to NGOs. This was done in case of EIA and IPPC procedure (please read below) when implementing Directive 2003/35/EC on public participation and - in a vaguer way - with regard to environmental liability cases referring to Directive 2004/35/EC. This legal position can be illustrated by the following case.

#### **1.5 Court case example skiing region Mellau/Damüls: No standing regarding nature conservation procedures, no direct applicability of the Convention**

Two ski resorts in the western province of Austria (province *Vorarlberg*) should be united by major investments (such as new pistes and ski-lifts; the project was finalized during 2009). The project is located in the alpine regions and covers a construction site of **almost 20**

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<sup>4</sup> It was already mentioned above that Austria appears to strive degenerating the Aarhus Convention into meaninglessness, as this was stated by the editors of the Austrian environmental law journal in 2008.

**hectare.** An EIA-screening procedure (case by case examination) ended with the decision (Decision IVE-415.13 from 17.08.2004) that no EIA is necessary since the project has not sufficient environmental impact. In Austria the screening decision can not be legally reviewed by NGOs or any other members of the public according to the prevailing Austrian case law.

A major regional nature conservation NGO, *Naturschutzbund Vorarlberg*, claimed legal standing in the following **nature conservation procedures** by directly referring to Art 9 par 3 of the Aarhus Convention. The provincial administrative court dismissed (the claim. The court ceded that in principle the Aarhus Convention is open for direct application since the parliament adopted the treaty under the constitutional legislative procedure that does not prohibit treaties being self executing.

According to the prevailing case law of the Austrian constitutional court provisions of international treaties can be directly applied if they are not too vague and if it is not obvious that the signatories of an international agreement aimed to avoid direct application. However, the court referred to this judgment, but put down the argument of direct applicability because this is stated in the parliamentary notes to ratification, secondly that the wording of Article 9 par 3 of the Convention that “each Party shall ensure” implies that it is not directly applicable and thirdly Article 9 par 3 is not sufficiently precise.<sup>5</sup>

This case demonstrates that not even an NGO specialized in nature protection (that is registered in the some province as the location of the case) has standing in nature conservation permitting procedures. With regard to **direct applicability** the view of the court (and parliamentary materials) is in **conflict** with the interpretation of the Convention by the Aarhus **Compliance Committee** that stated at different occasions that major provisions of the Convention are directly applicable. This concerns in particular the decision on Article 9/3 in a case concerning Belgium. In line with Article 31 par 3a) und b) of the Vienna Treaty Convention parties are obliged to consider any later agreement regarding interpretation of international agreements as well as its application. It is therefore evident that provisions of Article 9 par 3 could be directly applicable when applying principle of international law.

## **1.6 Latest development: NGO-standing in environmental liability cases - and limiting implications**

In June 2009 the **Federal Environmental Liability Act** (B-UHG) entered into force. Since then neighbours and certain NGOs have standing and access to justice in respective procedures. This legislation was necessary in order to comply with Directive 2004/35/EC. This directive on environmental liability contains a provision (Article 13) transposing Article 9 par 3 of the Convention. certain<sup>6</sup> environmental organizations have standing and access to justice (Article 12 and 13 B-UHG).

However, the NGO standing position is not further defined in B-UHG. This might lead to problems in practice. Whereas the Austrian EIA and IPPC legislation define explicitly that NGOs can “maintain environmental legislation” in the procedure, it is - from procedural perspective - not clear what rights NGOs can claim with regard to B-UHG. This problem derives from another aspect of the (Austrian) impairment of rights doctrine. It was mentioned

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<sup>5</sup> In this case the NGO did not makes us of the right to submit and extraordinary appeal to the federal highest administrative court due to unlikely success chances and the cost risk.

<sup>6</sup> NGOs that have registered at MoE to be eligible for public participation and access to justice in accordance with the Austrian EIA act.

above that neighbours standing rights are derived from a “legal interest” defined in legislation that aims to “protect” interests of legal subjects (Schutznormtheorie). Such rights focus on protection of health and property in particular. But there is also another group of procedural parties that’s rights are not derived from a rule that aims to protect their personal interest (Schutznorm), but for other reasons. Standing positions or rights that go beyond “individual concern” are labeled as “**formal parties**” in Austrian literature and judiciary. Formal parties are established by legislation only (no other principles can be applied). Typically certain public authorities or municipalities have “**formal standing**”, but also the environmental Ombudsman and NGOs in EIA and IPPC procedures are formal parties.

For formal parties it is crucial the legislator determines which are the specific rights each formal party can maintain (e.g. according to Article 19 par 1 No 4 Austrian EIA-act the “water management planning organ” has the right to maintain water-management interests in accordance with Article 55 water management act”). On the other hand, since B-UHG has to be interpreted in accordance with European law it is clear that they have the right to “*review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive*” (Article 13 par 1 Directive 2004/35/EC). Since Austrian administration and jurisprudence is very conservative and restricting towards access to justice rights the danger remains that NGOs rights will interpreted as pure formal rights without substance.

### **1.7 Access to review of omissions – and other procedures**

From what we analyzed until now is clear that at least neighbours have (limited) standing (in some) environment related procedures. However, apart from environmental liability cases respective standing rights (of neighbours) are limited to permitting procedures and permitted industrial installations respectively. But there is no access to justice regarding acts and omissions by public authorities (and private persons) that contravene environmental law (as Article 9 par 3 Aarhus Convention provides for) outside permitted facilities. It is also not possible to initiate permitting procedures against third parties, eg against an operator of a site without permit. To be more specific, there is no right to initiate administrative or judicial review procedures on acts and omissions of private persons and public authorities. The only possibility is to inform the authority about the situation. If there is a breach of law the authority would be obliged to act, but there is no legal possibility to enforce this for members of the public.

There are however some limited possibilities to review certain acts or omissions by public authorities or private persons.

#### **a) Supplementary conditions request for a permitted facility**

Neighbours (not NGOs) can request the authority to determine additional conditions for a permitted facility if their interests (property, health, smell, noise etc) are not sufficiently protected under the existing permit (Article 79 GewO, industrial code). However, neighbours are only enabled to request additional conditions if they are not sufficiently protected **when operator complies with the permitted conditions** (because the conditions were not sufficient to protect neighbours). In case the operator does not comply with the permit (e.g capacities and emissions are higher than permitted) neighbours have no right to protect themselves. In this case neighbours can inform the authority about the situation and the

authority would be obliged to act. But there is no right to enforce this and no right to initiate a procedure. This is a constant problem in practice.

#### **b) Cease and desist order under civil law**

Neighbours (not NGOs) have the right to protect themselves from certain immissions under the civil law code (§ 364 par 2 ABGB). Direct pollution (from whoever) is not allowed without legal title (e.g contract, permit). Indirect immissions (e.g noise, smell) are prohibited if they exceed the customary level in the local area AND if they seriously derogate what is customary at this location.

With regard to **public roads** the situation is worse. Public roads are permitted without procedure in accordance with Article 6 ECHR, but the Highest Court neglects the right to request a cease and desist order under civil law and sees a public road as permitted facility in accordance with § 364a ABGB. This is heavily disputed in academic discussions.<sup>7</sup>

### **1.8 Access to justice rights in EIA and IPPC procedures (Article 9 par 2 Aarhus Convention)**

To understand the Austrian legal position it is important to be aware that both EIA and IPPC procedures are by the same time the permitting procedure for a proposed activity. EIA and IPPC procedures are set as „**consolidated permitting procedures**“<sup>8</sup>. Whereas for other projects than IPPC or EIA a developer needs to apply for different development consents (e.g. waste permit, water permit, forestry permit, nature protection permit), EIA- and IPPC-permits consent the full project.

A pre-condition for access to justice is that parties maintain their standing position during the permitting procedure. For this purpose parties have to invoke specific environmental law related objections against the project proposal during the public inspection period that formally initiates the permitting procedure.

There are three different groups of the public concerned that have access to justice in EIA and IPPC procedures.

#### **a) Environmental organizations**

Certain registered environmental organizations have “full” environment related public interest standing. The legislator determined them as “formal party” with the right to maintain environmental law in the procedure. This means to invoke compliance with environmental law standards is their standing right expressly determined by law.

However, regional and local NGOs do only have the right to review decisions located in certain provinces. This appears to be **not compatible with Article 3 par 9 of the Aarhus Convention** since legal persons should not be discriminated “as to where it has its registered seat or an effective centre of its activities”.

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<sup>7</sup> See *Linder*, in *Raschauer/Wessely* (editors), *Handbuch Umweltrecht* (2006), page 61

<sup>8</sup> See legal analysis on „EIA in infrastructure projects“ in Austria, *Justice and Environment* (2006)

## **b) Local groups in (selected) EIA procedures**

Access to Justice rights for local groups is a peculiarity for certain EIA procedures. Standing for local groups used to be the standard in Austria, but has evolved to the exemption in the last year by legislative amendments and court decisions. A „citizen’s group“ is defined by the Austrian EIA-act as at least 200 individuals living in the (surrounding) municipalities of the location submitting a „joint statement“ referring to the project within the six weeks EIA public inspection period. If they do so they have similar standing rights as NGOs, namely the possibility to invoke any environmental law as their individual interest.

Local groups have access to justice only in „regular“ EIA procedures, meaning projects that are listed in the Austrian EIA act Annex I column 1. There are approximately 50 EIA thresholds in this column, whereas column 2 and 3 of Annex I refer to 200 thresholds (simplified procedure). Furthermore any project that needs to undergo an EIA after a positive screening decision (e.g due to cumulative aspects, salami slicing, extension of existing installations) is executed under the simplified procedures and thus without local groups. To worsen the situation recent jurisprudence of the Austrian Constitutional Court (Verfassungsgerichtshof, VfGH) has introduced very strict formal criteria for the establishment process of local groups.

## **c) Neighbours (impairment of rights doctrine)**

Neighbours have standing to protect their health and property in accordance with the impairment of rights doctrine both in EIA and IPPC procedures. This means they are not enabled to claim correct application of environmental law in court procedures.

## **d) Conclusion**

Only some of the 30 registered environmental organizations have standing and access to justice in all Austrian EIA and IPPC procedures in accordance with Article 9 par 2 (and par 3) of the Aarhus Convention. Standing rights of citizen’s group is limited to certain EIA procedures. Neighbours’ standing rights aim only to protect their private well, but not the environment as the Aarhus Convention provides for. It can be doubted that this legal position enables the public concerned to challenge substantive and procedural legality of EIA and IPPC decisions in an appropriate manner, in particular when we consider that Article 9 par 2 of the Convention aims to grant “*wide access to justice*”.

## **2. Scope of judicial review**

### **2.1 Which acts and/or omissions are (not) subject to the review**

As analyzed above standing (and access to justice) is limited to certain procedures. 30 Austrian NGOs can have access to justice in EIA and IPPC permitting procedures and in cases relating to the European Environmental Liability Directive. The same counts for neighbours, but with the limitation of the impairment of rights doctrine. In addition neighbours have standing in permitting procedures for industrial and other installations according to the **Industry Act** (GewO); the Federal **Waste Management Act** (AWG), certain aspect of the Federal **Forestry Act** (ForstG), as well as in some **local building and construction permit** procedures (regulated by provinces) or the Federal **Water Management Act**.

However, there is an endless list of legislation where acts and omissions are not subject to legal review. The most important gaps are elaborated below:

**a) Permitting procedures without access to justice**

Neither NGOs nor neighbours have (apart from EIA and IPPC) access to justice in the following permitting procedures: **railways, roads, shipping, nature conservation** or most aspects of the **water** permitting. The same counts for most procedures on local **building permits**.

**b) Planning and programming procedures**

There is no right to review decisions regarding various planning and programming procedures. This counts both for local and spatial planning procedures, but also for typical environmental planning procedures, such as **waste** management plans, **air** quality plans, strategic **noise** maps or action plans. Most of the before mentioned plans and programmes are subject to an **SEA** under the European SEA-Directive 2001/42/EC or a public participation procedure in accordance with directive 2003/35/EC (both implementing aspects of **Article 7 of the Aarhus Convention**). However, there is no right for the public to legally review respective decisions.

**Case example: SEA procedures on federal transport plans**

Particular problematic are SEA procedures regarding federal transport plans. Different analyses of respective SEA procedures proved evidence for the low quality of the SEA outcome and process and that results of public participation were not taken into account.<sup>9</sup> However, there is, as in any other planning procedure, no right to appeal against the planning decision. The situation is worsened because the federal transport planning “decision” has the legal form of a law adopted by parliament and there is no possibility for the public to legally challenge such laws in this context. This legal position appears to be in clear contradiction to the Aarhus Convention Compliance Committee (ACCC) interpretation of the Convention in its decisions regarding Armenia and Belgium where the ACCC stated that parties to the Convention are obliged to chose a legal format for decisions falling under Article 6 and 7 of the Convention that enable the public to challenge respective decisions either under Article 9 par 2 or par 3 of the Convention.

**c) Acts and omissions of public authorities and private persons outside permitting procedures**

Omissions of public authorities that contravene environmental law are not subject to legal review by the public. The same counts for various violations of environmental law by public authorities or private persons.

**d) EIA-screening vs Article 9 par 3 of the Aarhus Convention**

A particular problem, falling somehow between Article 9 par 2 and par 3 of the Convention are EIA screening procedures. It was mentioned above that Austria conducts compared to

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<sup>9</sup> See for example case study and legal analysis of SEA in Austrian transport planning carried out by Justice and Environment (2007); available at [www.justiceandenvironment.org](http://www.justiceandenvironment.org)

other EU countries with similar size and legal systems only a fraction of annual EIA procedures a year (20 to 25 procedures).

A negative screening decision has the result, that the question whether an EIA would be necessary for a certain project can not be invoked any more in subsequent permitting procedures because this is legal issue is a “res iudicata”. This counts even for administrative parties that had no right to participate the EIA-screening. This legal position on exclusion of the public from EIA-screening and res iudicata is “casted with cement” by the jurisprudence of the Highest Administrative Court (and other courts) that sees no need to change its case law even when it is confronted with the before mentioned ECJ jurisprudence<sup>10</sup>, directive 2003/35/EC or directly the Aarhus Convention<sup>11</sup>. The courts argue that e.g neighbours could protect their water interest in the water permitting procedure, noise or smell pollution in the industrial permitting procedure etc. This view is incorrect for different reasons. Firstly, there are permitting procedures where neighbours don’t have standing at all (see above). Secondly, the courts view is closely related to the Austrian understanding of the impairment of rights doctrine that aims to protect private well of neighbours, but not the (public interest) environment, as the Aarhus Convention does. Furthermore, environmental organizations don’t have the right to participate in any subsequent procedure if no EIA is carried out.

However, since EIA screening decisions are “acts” of a public authority that could “contravene national (including European) environmental law” such decisions need to be subject to legal review by members of the public. The Austrian legal position is thus in clear contradiction to Article 9 par 3 of the Aarhus Convention.

#### **e) EIA-screening vs Article 9 par 2 of the Aarhus Convention**

The lack of access to justice is furthermore a breach of Article 9 par 2 of the Aarhus Convention. Article 9 par 2 of the Convention provides for access to a review procedure “to challenge the substantive and procedural legality of any **decision, act or omission** subject to the provisions of Article 6”. Article 6 par 1 a) obliges the parties to the Convention to provide for public participation in permitting procedures listed in Annex I. Article 6 par 1 b) regulates that parties can determine further activities that fall under Article 6. Annex I par 20 provides that Article 6 is applicable when an EIA has to be carried out under national law.

This means the lack of access to justice against EIA screening decision is both in contradiction to Article 9 par 2 and par 3 of the Aarhus Convention.

#### **f) EIA final inspections**

Article 22 of the Austrian EIA act provides for a final inspection five years after an activity started operation to control whether the operator complies with the EIA permit. The public concerned can not review such decisions. This contradicts Article 9 par 2 of the Aarhus Convention.

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<sup>10</sup> *Delena Wells* ECJ C-201/02, 7.1.2004 – *Christopher Melor* ECJ C-75/08, 30.4. 2009

<sup>11</sup> In judgement VwGH 2006/10/0206 of 26.02.2007 the Highest Administrative Court does not follow arguments that aim to apply the Aarhus Convention directly. In judgement US 7B/2007/20-4 (Pyra II) of 20.12.2007 the court (environmental senate) the court maintains the prevailing case law that directive 2003/35/EC fully implements Article 9 par 2 of the Aarhus Convention and the Article 9 par 3 is not relevant for EIA screening procedures. Furthermore the court understands that Article 9 par 3 would implemented by the standing rights of the Environmental Ombudsman, and leads to no rights for the public concerned.

## 2.2 To what extent do courts review the acts?

The scope of legal review is closely related to the standing position in Austria. The implications of the impairment of rights doctrine and the (advanced) “formal standing” position of environmental organizations were elaborated above and are only summarized here.

Neighbours can invoke rights that aim to protect their personal interests (impairment of rights doctrine) in certain permitting procedures. Property, health and certain pollutions such as smoke or smell that disturb their private well are such legal interests that are typically protected by Austrian legislation. Neighbours can only claim such rights at courts.

Environmental organizations have the right to maintain (any) legislation relating to the environment in EIA and IPPC procedures because legislation expressly designates such rights to them.

Regarding environmental liability the legislator was not sufficiently precise. It is not clear what rights environmental organizations can maintain. However, if environmental liability legislation is interpreted in accordance with the European environmental liability directive it is clear that they can invoke everything relating to environmental damages.

All parties have the right to invoke procedural errors that could have affected their rights.

Only access to justice rights of environmental organizations in EIA procedures are in full compliance with Article 9 par 2 and 3 of the Aarhus Convention.

The Austrian solution regarding neighbours appears to be in line with the Convention only regarding the determination who has standing. It appears appropriate to give standing to those individuals that’s rights are impaired because they are located close to the project neighbourhood. However, there is no reason to limit the scope of standing and access to justice to individual rights since the Convention aims to protect the environment and to give the public concerned “wide access to justice”. More precisely the Aarhus Convention does not aim to protect the individual interest of certain groups, but to protect the environment and provide for “**access to justice in environmental matters**” (Article 1). The Austrian legal position regarding neighbours is thus in breach of Article 9 par 2 of the Convention since it aims to protect personal interests of neighbours and not the environment and the legal correctness of environment related decisions.

Regarding Article 9 par 3 the situation is similar. Access to Justice should cover the right to challenge compliance of acts and omissions relating to environmental law. This means law that aims to protect the environment and not (only) the private well of certain persons.



### **3. Effective remedies (Article 9 par 4 Aarhus Convention)**

#### **3.1 Adequate and effective remedies; including injunctions**

##### **a) Appeals to second instance**

In regular cases the independent provincial administrative tribunals of the federal provinces are the competent redress bodies against decisions of first instance. With regard to EIA procedures (but not federal motorway and rail projects) the redress body is the Federal Independent Environmental Senate. Both courts are adequate bodies and in line with Article 6 of the. Injunctive relief is the legal rule in almost all administrative appeal procedures. Furthermore both courts decide in the subject matter and are able to completely review decisions by amending the decisions (e.g. to cancel certain stipulations and add others).

##### **b) Appeals to Highest Courts**

Most standing parties have the right to appeal to the Highest Administrative and Constitutional Courts against decisions of the before mentioned tribunals and authorities. Injunctions are not granted in environmental procedures. This is problematic in cases where no independent tribunal decided before. Such a legal position is not in line with Article 9 par 4 of the Convention.

This counts in particular for EIA procedures with regard to federal motorway and railway projects that are permitted according to the Austrian EIA-act. In such cases the permitting authority is the Federal Minister of Transport. In contrast to all other EIA procedure the independent federal Environmental Senate is not competent as appeal body. The only redress bodies are the Highest Administrative or Constitutional Courts. Appeal procedures at these courts take in average between 8 to 24 months. At the time of the decision respective projects are already in the implementing status with irreversible environmental and financial effects. This problematic issue can be illustrated by the following case:

##### **c) Case example: S1 motorway Vienna**

The EIA permit was issued in May 2006. A citizen's group appealed to the Highest Constitutional Court. In January 2007 constructions started. In July 2007 the Court abolished the EIA-permit decisions due to serious procedural problems in the case. However, since the project was already under heavy constructions, the Court set a timeframe until 31. Dec 2007 to issue a new EIA permit. In the meanwhile constructions could proceed.<sup>12</sup> The minister of transport pursued the new EIA permit procedure within three months. The public hearing was held just before Christmas and the decision was issued few days after Christmas 2007. The citizen's group appealed to the Highest Administrative Court in February 2008. The court refused to grant an injunction since the project was already under construction and that the road could be abolished in case the plaintiff succeeds. The Court squashed the appeal in December 2008. The motorway will be opened for traffic in January 2010.

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<sup>12</sup> For further details on references to the case and its legal base ready *Alge/Altenburger*, elni review 2/2007, page 9 et seqq

#### **d) Reasons for not granting injunctions in environmental court cases**

The legal position regarding injunctions in appeal procedures at the Highest Administrative Court would in theory be open for injunctions in environmental matters. However, in practice injunctions are never granted. Article 30 par 2 VwGG (Act regulating the Highest Administrative Court) provides that injunctive relief shall be granted when “no coercive public interest” are opposed to this AND if the applicant would be faced with “disproportional harm” when the injunction is not granted.

The problem lies in the interpretation of this provision by the court. The latter constantly sees coercive public interests that make injunctions impossible in the case of infrastructure projects. In a decision regarding a railroad tunnel through the Alps the court argued that the project is in overriding public interest since it is a TEN-T<sup>13</sup> project and thus no injunctions can be granted, even though no independent tribunal examined this EIA-permit. In the case of a comprehensive electric power line the court saw a coercive public interest that this power line is constructed as soon as possible and thus an injunction is not appropriate. In this judgment the court clarified that no injunctions can be granted at all if overriding public interests prevail.

In other cases the court does not see disproportional harm for the applicant when the injunction is not granted. As mentioned above in the S1 west case the court argued that motorway is already under construction and thus not granting the injunction would not further worsen the existing situation. In this decision the court furthermore pointed out that the sealing and concretion of the soil by asphalt coating could be re-installed, however with considerable efforts. Therefore the plaintiff is not burdened with disproportional harm.

We could not detect a single case where the Highest Administrative Court granted an injunction in an environment related procedure. This appears to be in clear contradiction Article 9 par 4 that injunctive relief should be granted as appropriate and legal remedies should be effective.

#### **e) Scope of legal review at the Highest Courts**

The legal position regarding is not only problematic regarding injunctions but also regarding scope of legal review. The Highest Courts are pure courts of cassation. They can only abolish decisions in cases they find severe legal errors, whereas other courts decide in the subject matter and have the possibility to amend the decision without abolishing it. In practice this leads to the situation that almost any EIA permit of the minister of transport has been confirmed until now by the Highest Court, whereas the Environmental Senate that is competent for all other procedures amends almost any decision of first instance. Such limiting access to justice is therefore not effective.

#### **f) The new “anti-injunction” in EIA appeal procedures**

A strange provision has been added to the EIA act in its 2009 review. Article 42a EIA-act enables the operator to proceed the activity for one more year in case the Highest Court abolishes the EIA decision. This concept of an “anti-injunction” follows the same approach as

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<sup>13</sup> Trans European Network: [http://ec.europa.eu/transport/infrastructure/index\\_en.htm](http://ec.europa.eu/transport/infrastructure/index_en.htm)

demonstrated in S1 motorway case above. Even if the Highest Courts abolishes a permit, this has no consequences on the ground. The same concept is used regarding permitting other industrial facilities. We don't see such an approach as compatible with Article 9 par 4 of the Aarhus Convention. However, this rule only counts for cases where the Environmental Senate has decided already in second instance, whereas in cases regarding motorways and railroads, where the Highest Courts are the only appeal bodies, the anti-injunction rule does not apply. However, the jurisprudence of the Highest Courts lead to the same effect in practice since injunctions are never granted in environmental cases.

### **3.2 Fair and equitable procedures**

We see the legal position regarding NGOs in IPPC and Environmental Liability procedures as problematic. This problem was already elaborated above in the chapter regarding environmental liability. NGOs have the right to appeal to the independent administrative tribunals of the provinces in environmental liability and IPPC cases. The developer, neighbours and other parties have the right to appeal to the highest courts against the decision of the independent administrative tribunals, whereas NGOs do not. This means an NGO could succeed in IPPC or environmental liability appeal procedure, but the developer could reverse the decision at the highest court, whereas NGO can not refer to this court. This legal position does not provide for a fair and equitable procedure.

The legislator would need to expressly designate the right to appeal to the highest courts to NGOs. This was done only in EIA procedures, but not with regard to IPPC and environmental liability.

### **3.3 Prohibitively expensive procedures**

In general Austrian administrative procedures are not expensive. Neither the loser pays principle is a problem, nor is legal representation by an attorney mandatory (apart from procedures at the highest courts).

Problems occur in EIA and IPPC procedures and these are until today the only procedures where the public concerned has the right to challenge environment related decisions. The few Austrian EIA procedures that take place a year are very complex, permitting any legal aspect of a planned activity. In particular regarding infrastructure activities project documentation is very comprehensive and constantly fills a full room with documents. A big part of the documents are environmental expertise for different aspects of the projects consisting of thousands of pages. If the public concerned makes comments and wants its comments to be taken into account by the authority, its statements need to be accompanied by an environmental expertise. Otherwise the authority can not take it fully into account. In Austrian environmental procedures arguments that are based on technical expertise can only be countered by another expertise. In order to participate effectively in EIA procedures and to have any chance of success in access to justice procedures the public concerned therefore needs environmental expertise issued by authorized experts; and this is expensive. An EIA appeal procedure without representation by an attorney is furthermore more or less useless due to the complexity of respective procedures. According to reported experience costs for an EIA procedure for the public concerned range from 10.000 to 30.000 EUR. This is prohibitively expensive and critical not only as to Article 9 par 4, but also Article 9 par 5 of the Convention.

#### **4. Conclusions**

Basically, Article 9 par 3 of the Aarhus Convention has not been implemented yet in Austria. This view has been confirmed by various recent publications.

Problematic appears to be the so called impairment of rights doctrine that stems from the Austrian administrative and constitutional history. This doctrine provides access to justice only to individuals to protect themselves in particular regarding health and property, whereas the Aarhus Convention aims to protect the environment.

In EIA and IPPC appeal procedures (activities that fall under Article 6 and Annex I of the Aarhus Convention) environmental organisations have the right to maintain environmental legislation as rights and this appears to be in line with Article 9 par 2 of the Aarhus Convention. But other members of the public do not have such rights.

Outside EIA procedures members of the public are completely banned from access to justice regarding acts and omissions from private persons and public authorities in environmental matters. Only neighbours have some limiting rights in exceptional cases. There is however no right to appeal against acts and omissions regarding nature conservation, quality of water, air, noise, planning, and programming or SEA decisions and any other similar issue. Particular problematic is the lack of access to justice as to EIA screening decisions.

There are also conflicts regarding Article 9 par 4 of the Convention. In many cases access to justice is not adequate and effective, injunctions are not granted. This counts particularly for EIA procedures regarding federal motorway and rail projects. Such procedures are by the same time prohibitively expensive. In other procedures access to justice is not fair since the rights of members of the public are far less reaching compared to the other parties to the procedure. Finally the access to justice procedure regarding environmental information requests is not effective, but timely.

To conclude we see Austria in non compliance with major aspects of Article 9 of the Aarhus Convention and by the same time with Article 3 par 1 since the Austrian legal position lacks a clear, transparent and consistent framework to implement the access to justice provisions of this Convention.

## **Access to environmental justice in CROATIA**

Zeljka Leljak Gracin, Zelena akcija/FoE Croatia

The Aarhus Convention (AC) was ratified by Croatia on 8<sup>th</sup> December 2006 when Croatian Parliament adopted Act on promulgation of the Aarhus Convention (AC). Ministry of Environment, Physical Planning and Construction (MoE) is responsible for implementation of the first two AC pillars and the Ministry of Justice is responsible for implementation of the 3<sup>rd</sup> AC pillar. The Act on Ratification of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was published in Official Gazette, International Agreements, No. 01/07 and MoE is responsible for its enforcement.

According to the Article 140 of the Republic of Croatia Constitution international agreements that are concluded and verified in accordance with the Constitution and that are published and are in effect, are part of the internal legislation of the Republic of Croatia, and have precedence before national law. Their provisions may modify or abolish only under conditions and in a way that is fixed in them, or according to general rules of international law.

Legal basis for transposition of Aarhus Convention into national legislation is Environment Protection Act (EPA). The transposition of AC provisions into national legislation was done also in other specific laws and bylaws such as: Act on the Right of Access to Information, Act on General Administrative Procedure, Act on the Administrative Disputes, Regulation on the Environmental Impact Assessment, Regulation on Information and Participation of the Public and Public Concerned in Environmental Matters, Regulation on Strategic Environmental Impact Assessment of the Plan and Programmes, Regulation on the Environmental Information System.

Interpretation of the Aarhus Convention as such by Croatian courts is not yet developed. According to the Croatian Report on implementation of the Aarhus Convention in Croatia Administrative Court of the Republic of Croatia in September of 2008 delivered notification to the Ministry of Environment, Physical Planning and Construction that the Court has no record of any complaints related to the application of the Convention. The Constitutional Court also has never addressed this issue. However, there are few cases submitted to the Administrative Court regarding violation of the right on access to environmental information and regarding violation of the right to public participation, which will be described below. Also, some problems regarding implementation of the AC will be mentioned later in the text.

Article 18 of the Constitution of the Republic of Croatia determines the right to a legal remedy. Also, one of the principles of the Act on the General Administrative Procedure is a principle of assistance to lay clients.

In Croatia, judicial control of individual acts of administrative authorities and bodies that have public authority is responsibility of the Administrative Court of Croatia. This Court, as a specialized tribunal was established in 1977 so it has developed judicial control of state administration for more than three decades.

Act on General Administrative Procedure anticipated an appeal against all decisions issued by the competent authorities in the first instance in accordance with regulations of the state administration, while the Act on Administrative Disputes anticipated a right to initiate an administrative dispute against all decisions made on the second instance of competent authorities and against which it is not allowed to submit an appeal.

## **1. Standing conditions for members of the public concerned**

### **1.1 General standing conditions in administrative cases**

According to the Act on General Administrative Procedure party in the administrative proceeding is: a natural or legal person which initiated the administrative procedure or a natural or legal person against whom the procedure is initiated or a natural or legal person which has the right to participate in the process to protect her rights or legal interest.

The term „members of public concerned” is not defined in the Act on Administrative Disputes. However, there is possibility for such a group to initiate an administrative dispute. According to the Act on Administrative Disputes the right to initiate an administrative dispute has an individual or a legal person if it considers that an administrative act (decision) violated any of its right or personal interest based on law. In addition to that, also “a group of individuals”, which is not a legal person, can initiate an administrative dispute, if it can be a subject to the rights and obligations that are dealt with in an administrative proceeding.

“Administrative act”, according to the Act on Administrative Disputes is an act issued by the public authority, deciding on a particular right or obligation of a particular individual or organization in an administrative issue.

What do these provisions mean? According to interpretations of experts for administrative law, these provisions allow some citizen initiative (a group of individuals, NGOs) who will be affected by some construction or location permit or by EIA statement to initiate an administrative dispute against such a decision. This regards to owners of properties which do not directly borders with the property for which the location or construction permit is being issued. Because such a decision (administrative act) will have impact on their environment and quality of their life, this means that by this decision their particular right was violated.

### **1.2 Access to Justice according to Environment Protection Act**

The new EPA, which entry into force on 2<sup>nd</sup> November 2007 introduced the principle of access to justice in environmental matters. According to this principle, any person who considers that his request for information pertaining to environmental protection matters has been neglected, unfoundedly refused, either in entirety or in part, or that his request has not been answered in an appropriate manner, has the right to defend his rights before a court, in accordance with a special regulation on access to information.

Furthermore, this principle says that for the purpose of protecting the right to a healthy life and healthy environment, a person (citizen or other natural or legal person, their groups, associations and organizations) **who proves the legitimacy of his legal interest** and a person who due to the location of the project and/or due to the nature and/or impact of the project can

prove in accordance with the law that his rights have been permanently violated, shall have the right to contest the procedural and substantive legality of decisions, acts or oversights of public authorities before the competent body and/or competent court, in accordance with the law.

#### **a) The concept of public and public concerned**

EPA provides definitions of „public“ and „public concerned“. The “public“ is defined as one or more natural or legal persons, their groups, associations and organizations in accordance with special regulations and practice.

„Public concerned“, is the public which is affected or likely to be affected by environmental decision-making and which lives or works in an area where adverse environmental effects are possible or likely to occur. Civil society organisations which are active in the field of environmental protection and meet all the requirements in accordance with EPA shall be deemed to be concerned parties

#### **b) Standing conditions in environmental cases – Article 9.2 and 9.3 of the AC**

EPA recognized *the legal interest of persons belonging to the public concerned*. According to the Article 144 of the EPA any natural or legal person which can prove a permanent violation of a right, due to the location of the project and/or the nature and impact of the project, shall be considered to have a justifiable legal interest in the procedures regulated by the EPA in which the participation of the public concerned is provided for.

Moreover, EPA considers that a civil society organization which promotes environmental protection has a sufficient legal interest in the procedures regulated by the EPA provided for the participation of the public concerned, if it fulfils the following requirements:

1. if it is registered in accordance with special regulations which regulate such organizations and if environmental protection and advancement, including protection of human health and protection or rational use of natural resources, is set out as a goal in its Statute,
2. if it has been registered for at least two years prior to the initiation of the public authority's procedure on the request in relation to which it is expressing its legal interest, and if it can prove that in that period it actively participated in activities related to environmental protection on the territory of the city or municipality where it has a registered seat in accordance with its Statute.

The persons which participated in the procedures regulated under the EPA as the public concerned, shall have the right to instigate a legal action against a certain administrative act of a public authority, for which the EPA or a special regulation provides the possibility of instigating a legal action, and may file an appeal to the Ministry or file a plaint to the competent court in conformity with the EPA and a special regulation, for the purpose of re-examining the procedural and/or material legality of acts, actions or oversights.

According to EPA the persons belonging to the public concerned shall be notified of a relevant administrative act issued by a public authority and of their right to file an appeal to the Ministry or file a plaint to the competent court, by the act being delivered to them if the

public authority has their personal information or through a public notice or in any other appropriate manner.

### **c) Re-examination of Decision**

According to Article 146 of the EPA any legal or natural person fulfilling the necessary requirements, which considers that a decision, act or omission of a public authority or an action or omission of a natural or legal person (such as: an operator, company, polluter) in environmental issues represents a violation of EPA or a special regulation on protection of an individual environmental component or protection from the effects of burdening and the regulations adopted on the basis thereof, shall have the right to request a competent court for a re-examination of the procedural and material legality of the issued decision, act or oversight in relation to environmental protection and to contradict the legality of actions or oversights in environmental issues. The request must be submitted in the prescribed form within 30 days from the date on which the contradicted decision was issued or in the case of an act or omission, within 15 days from the date on which the deadline for performing the act or issuing the decision expired. The request shall state and explain what the violation is or what the violation is related to and it must be supported by relevant evidence.

In the procedure aforementioned, the competent court may:

- order the operator, company, polluter or the public authority to undertake all necessary measures, which include the suspension of specific activities,
- oblige the company or the polluter to pay an appropriate fee to the Fund for Environmental Protection and Energy Efficiency,
- establish necessary temporary measures and order the operator, company, polluter or the public authority to implement them, or
- issue another adequate decision in accordance with the law.

In written, this looks like a very progressive legislation does but for now, it does not work in practice. The reason for that is that it is not clearly determined if the EPA which Court is „the competent court“ and not all courts in Croatia can use temporary measures, meaning injunctive relief. Civil courts in Croatia have the practice of injunction relief (or literary translation would be – temporary measure) but a majority of environmental matters are under jurisdiction of the Administrative court (permits, EIA statements, etc) which does not use institute of injunction relief at all.

## **2. Injunctive relief**

Judicial procedures regarding environmental matters should provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Unfortunately, Administrative Court in Croatia does not meet these requirements. First of all, there is only one Administrative Court for the whole country and for all administrative disputes including environmental ones. For that reason, it cannot provide on-time decisions which is of crucial importance for environmental matters. Second of all, it does not include institute of injunction relief which would be also very much needed in environmental cases. What does it mean? This means that if one NGO or concerned citizen launches a dispute against some decision, it cannot ask the Court to order the issuing body not to execute this decision. According to Law on Administrative Disputes such a dispute, in general, does not prevent enforcement of an administrative decision, which was filed against. But, at the request of plaintiff's, body that is responsible for the execution, will delay the legal



effects of the decision and execution of the decision until the final court decision if the execution can cause such damage to the plaintiff which would be difficult to mend, (if the law does not stipulate that the appeal does not delay the execution of the decision) if delay is not contrary to public interest, nor the postponement can cause larger irreparable damage the opposing party.

EPA also determines one rule in favor of investors which could discourage citizens from using the aforementioned possibility. According to the Article 148 of the EPA if the specific official act issued by public authority does not have final force and effect due to the aforementioned request and for that reason the company or another legal or natural person to which that official act refers, decides to wait for the official act to become final and effective, if it is ascertained that the applicant has abused the right to submit such a request, then the company or the other legal or natural person has the right to request a compensation for ordinary damages and lost profit from the person who has submitted the request.

Pursuant to the EPA, court proceedings on all legal actions instigated in the field of environmental protection shall be deemed urgent but it does not say the real deadline.

### **3. Penal/Criminal law**

It is important to mention that Croatian Criminal Code (OG No. 110/07, 27/98, 50/00., 129/00, 51/01, 111/03, 190/03, 105/04 i 71/06, 110/07 and 152/08) in Article 250-262 envisage criminal acts against environment such as Environmental Pollution, Endangering the Environment by Noise, Endangering the Environment by Waste Disposal, Illegal Construction, etc. Anyone can make criminal report to police or State Prosecutor and there is no fee envisaged for that. Additionally, except of crimes against environment one can report responsible person in public authorities for failure in performing their public duties.

Additionally, every Act so EPA as well, envisage penalties for infringements of its provisions and anyone can report, without any fee, violation of specific Act (Waste Act, Act on Waters, EPA, etc.) to the authorized inspection such as Environment Protection Inspection, Nature Protection Inspection, Construction Inspection, etc.

### **Conclusion**

Croatian NGOs share opinion that there is a lot of problem regarding the implementation of the AC, but these are not some new issues, therefore are not bound to just AC but they are standard problems in Croatian system. The problems are not on time and/or inaccurate and/or incomplete information and identification of terms “sharing the information” and “a public participation”. Judicial procedures regarding environmental matters should provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive but unfortunately, Administrative Court in Croatia does not meet these requirements. Aarhus Convention is a valuable legal instrument but there is a responsibility on all of us to learn to use it. It is certain that Croatian judges need additional education on environmental law as well as AC and the other conventions in the area to be a professional in decision-making in environmental issues. Of course, all this is related to lack of funds. The main problem is therefore in the country, which could extract considerably more funds for environmental protection, which means also for the education in the area.

## **CASE 1 - Location permit for Preradovic square in Zagreb (The Flower square)**

Even though Zelena akcija/FoE Croatia (ZA) together with *Pravo na grad* initiative collected 54 000 signatures of citizens of Zagreb against reconstruction of Preradovic Square, City of Zagreb still insisted to assist to private investor and enable reconstruction against public interest.

ZA put a notification to MoE because City of Zagreb violated procedure of changing the General Urbanistical Plan (GUP) for this project, because some amendments did not go to public consultations. MoE decided to stop procedure of GUP adoption in Zagreb Assembly, because of these irregularities and City of Zagreb had to held public consultations for the same amendments of GUP.

Parallel to this process, City of Zagreb issued 3 location permits to private investor to start reconstruction in the block. The worst was location permit where City of Zagreb asked itself to issue location permit in the interest of private investor to decrease existing pedestrian zone (public interest) to allow entrance into big private garage of investor. On these location permits, tenants of the block had right to object but information was poorly advertised by the City of Zagreb so ZA had to inform all the tenants of the block about the permitting procedure. On these location permits, tenants of the neighboring buildings appealed to the Ministry of Environment Protection, Physical Planning and Construction but all of them were rejected so they started procedure before Administrative Court. Parallel to that the tenants requested the Ministry which issued this location permit to delay the legal effects of the permit until the final court's decision but they did not even receive response from the Ministry to their request to delay legal effects of the permit until the final court's decision. The strangest thing is that when this request was submitted to the Ministry they did not know which departments is responsible for is and stated that they did not receive such a request yet (!). Finally, the request was sent to the department which is responsible for appeals (!) but still no response for it.

Since this reconstruction will have big impact on environment, ZA asked City of Zagreb to provide insight into location permits but also into whole documentation submitted to the City for the purpose of issuing the permits. The City rejected it saying that ZA has no right to access such information because ZA is not "party" in such a process and did not prove legal interest to be included in the process. ZA submitted a complaint to City of Zagreb since the Act on the Right of Access to Information does not require prove of legal interest. The complaint was also rejected so ZA put a complaint to the MoE (the second instance) and the MoE decided that City of Zagreb violated right to access to information but the City initiated an administrative dispute against MoE decision. As ZA has the right to participate in the process ZA submitted the response to this suit. In December 2009 the Administrative Court rejected claim submitted by City of Zagreb since it was not even allowed to initiate an administrative dispute according to Law on Administrative Disputes because MoE did not violated any right or interest of the City.

The investor already requested issuing of the construction permit and after that he can start with the construction. Currently, the investor already started preparatory actions so some buildings were already demolished.

## **CASE 2 – EIA for Zagreb Incinerator**

ZA was the first group to become involved in the campaign in 2005 when it was discovered that the EBRD was considering financing the project of Incinerator in Zagreb and that an Environmental Impact Assessment (EIA) was almost ready. Shortly afterwards a public consultation for the second EIA was held (the first had been rejected before it was publicly released). Later in the year the first success in the campaign appeared when the MoE rejected the EIA. It argued that the project was not in the General Urban Plan, that there was a lack of recycling and waste prevention measures in Zagreb; that the city of Zagreb did not have a waste management strategy at that time and that there was an absence of facilities in Croatia for disposing of or storing the toxic ashes and filter residues from the incinerator.

In December 2005 Zagreb City Council and the County Prefect of Zagreb County signed an agreement obliging the County to find a site and construct a landfill for around 100 000 tonnes of ashes per year resulting from the incinerator, in return for the City of Zagreb burning the County's waste in the incinerator. Green Action protested against this, arguing that it was illogical for the County to accept 100 000 tonnes of partly hazardous waste every year when it produces around 85 000 tonnes of municipal waste annually. At that time it seemed that the landfill would be sited in the district of Rakovec and when informed of this the local citizens reacted angrily towards their District Councilor.

This was followed by a secretive approval of the third EIA for the Incinerator, without any new public consultation. ZA launched a court case in November 2006 at the Administrative Court in Zagreb against the MoE decision on approving the EIA for the Incinerator without public inquiry and debate. ZA demanded approval to be cancelled, the whole process to be renewed with proper public involvement and also requested a set of standards that the EIA should have.

ZA received information in March 2008 from Administrative Court that it just began to deal with cases from 2004 (!) so it can take some time for Incinerator case to go into Court procedure. However, there is the rule that if procedure last for more than three years, there is possibility to submit a claim to Supreme Court to protect the right to a trial within a reasonable time, so ZA is forced to do that in December 2009.

## **CASE 3 – EIA for golf course Brkac-Motovun**

If the project Brkac-Motovun golf course will be realized, Istria will lose one of its most beautiful landscapes, one of several that are commonly used in the promotion of Croatian tourism beauty in the world. Procedure of EIA of the golf courses lasted too long and had a series of failures and no compliance with law, a series of remarks that were sent by Zelena Istria and others were rejected without valid arguments. Zelena Istra was not against golf courses because golf is not necessarily harmful but is against the poor planning of golf that can threaten the environment. Project Brkac-Motovun will affect water habitat and fauna and flora, which EIA did not taken into account. There are also two important ecological networks - the Mirna river valley and the Motovun forest. The State Institute for Nature Protection has come to the conclusion that the construction of golf course in selected area could have a significant impact on the natural values and area of ecological networks, but it was ignored while decision on EIA was issued. In this case it is necessary to protect the river's bleeding, in order to protect the Motovun as a cultural entity, with the surrounding villages, which contain historical building structure.

Zelena Istra in April 2009 initiated an administrative dispute against approval of EIA study for golf course and shortly after administrative dispute was launched, Zelena Istra requested the Ministry to delay legal effects of the decision on EIA approval until the final court's decision. The Ministry claimed that it is not responsible to decide about it but the Istria County. After that, Istria County stated that there is no possibility for any department in the County to decide about any decision which was issued on the higher level, meaning the Ministry. After several letters between the County and the Ministry, the County finally informed Zelena Istra that it will decide about its request after investor will submit request for permits needed for realization of the golf course and that Zelena Istra will be informed about it.

### **AMENDMENT - Report on Aarhus Convention implementation in Croatia**

ZA prepared comments on the Draft Report on Aarhus Convention implementation in Croatia (issued in March 2009) in which 11 cases of violation of provisions on public participation determined in Aarhus Convention were listed. The most common problem is infringement of the deadline for public participation in environment legislation process (EPA, Regulation on informing public and the public interested in environmental issues, Regulation on the EIA, Regulation on the SEA, Water Act, Nature Protection Act, etc.) and violation of right to participate in public hearings (National Waste Management Plan, Waste Management Plan Split-Dalmatia County), etc. The first national Report on implementation of the Aarhus Convention was sent to the Convention Secretariat on 14 May 2009 and it was accepted.

#### **a) Non-compliance of Environment Protection Act with the AC**

There is one important inconsistency of the EPA and the AC regarding the concept of the "public concerned" since EPA narrowed the circle of persons who fall under that term. Specifically, the definition of the EPA is missing persons who are interested in "decision making about the environment".

Another example of inconsistency is not so essential to the process of public participation, but for the exercise of the right to access to information, but it still shows errors that occurred during the transposition of the Convention in the Croatian legislation. It is about the definition of bodies of public authority that are required to act in accordance with the Convention. Definition of the Law on Environmental Protection was again narrowed, and not in accordance with the definition of the Convention. Therefore it is likely this will lead to problems in practice when information will be requested from the body, which is not considered proper to provide requested information because it does not fall under the definition of public authority bodies envisaged in the EPA.

Furthermore, the Act on the Right of Access to Information (which was up to the moment of entry into force of new EPA, applied to the exercise of the right to access information about the environment) as the deadline for providing information prescribes not later than 15 days, with the possibility of prolongation this period to 30 days if the seat of the body of public authority or an application needs more diverse information. But new EPA, which as a special law (*lex specialis*) in relation to the Act on the Right of Access to Information has the precedence in the application, extended the deadlines to one month or two months from the date of receipt of the request, if the scope and complexity of the information is such that the month is insufficient. Although such deadlines are in accordance with the AC, the Convention determines that its provisions do not affect the right of states to maintain or introduce

measures to ensure wider access to information than it is required in the Convention and that it does not require any reversal of the existing rights. However, during process of making the new EPA this possibility was not used.

### **b) Opportunities for major future improvements**

In the process of accession of the Republic of Croatia to the European Union Administrative Court is facing three major tasks that require new solutions:

- non compliance of the procedural rules with the *acquis communautaire* - the current provisions of the Law on administrative disputes do not meet all the standards set in the *acquis* in relation to two key issues - the Court right to determining the facts and the right to conduct an oral hearing (as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms),
- inability of legal remedy to the decisions of this Court, and this issue is set as one of the key assumptions of harmonizing of Croatian legislation with the *acquis*, (as guaranteed by Article 13,1 of the Convention for the Protection of Human Rights and Fundamental Freedoms),
- a very long procedure and a large number of unresolved cases - the current Act on administrative disputes must be changed in order to increase the efficiency of Court procedures and shortening their duration

It is obvious that the plan is to make major improvements of the Act on Administrative Disputes what will speed up and enhance the Administrative Court procedure.

## **Selected problems of the Aarhus Convention application in the CZECH REPUBLIC**

Pavel Černý, Environmental Law Service

The Aarhus Convention (AC) was ratified by the Czech Republic on July 6, 2004. It has been in force from October 4, 2004 (published under no. 124/2004 Coll. of international treaties). It's transposition into the Czech legislation is, generally speaking, not complete, and it's interpretation by Czech courts not consistent and rather limitative.

In a few decisions, the courts presented relatively positive opinions about the AC influence on the rights of public concerned – mostly when this argumentation was not decisive for the case (as “obiter dicta”).<sup>1</sup> On the contrary, in a number of cases the courts refused to overcome their previous restrictive case law (mostly with regard to standing requirements and scope of review in environmental cases), with main argument that the AC is not a “directly applicable” international treaty in Czech legal system.<sup>2</sup>

### **1. Standing conditions for member's of public concerned access to review procedures**

Czech legislation does not contain any definition of the “public concerned”. There is also no provision directly transposing the “standing requirements” of art. 9 of the AC (or the relevant provisions of EC law). Subsequently, the Czech law does not distinguish between the standing requirements of individual paragraphs of art. 9.

In the area of court review of administrative acts, which can be considered as the most important for environmental protection, the standing rights are generally regulated by art. 65 of the Code of Administrative Judiciary (CAJ). This provision grants standing to start a review procedure of an act of administrative authority to

- a) persons whose rights or obligations were “created, changed, nullified or bindingly determined by the act”, or
- b) other parties to administrative proceedings who assert that their rights have been infringed in these proceedings (and this could cause illegality of the final act)

Wording of this “general standing provision” of administrative justice, as well as it's common interpretation by the Czech courts, leads to the conclusion that access to review procedures is

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<sup>1</sup> For example, in the decision canceling part of land use plan of the city of Prague, relating to the development of the Ruzyně airport, the Supreme Administrative Court held, i.a., that art. 1.2 of the Czech Constitution requires that the national law is interpreted consistently with the international obligations arising out of the Convention. The same must be deduced from the EC law, as EU as a whole is a party to the AC. In another interesting decision, the Court of the City of Prague held, on the basis of the AC, that the NGOs have equal rights in administrative procedures as other parties, which means that the court deciding on the lawsuit of an NGO must review also substantive legality of the decisions in question. These conclusions have however not been followed in many other court decisions....

<sup>2</sup> According to art. 10 of the Constitution, promulgated international agreements, the ratification of which has been approved by the Parliament and which are binding for the Czech Republic, shall constitute a part of the legal order; should an international agreement make a provision contrary to a law, the international agreement shall be applied. According to legal theory and jurisprudence, for direct application of international agreements there are two other conditions: they must be sufficiently specific and grant rights to private persons. In most cases, the Czech courts said that these conditions are not fulfilled with regards to the AC art. 9 rights. Nevertheless, there is still the obligation to interpret the relevant provisions of national law in accordance with the AC requirements (according to art. 1.2 of the Constitution – see previous note).

(also in environmental cases) granted only to persons “maintaining impairment of a right.” It also in practice mostly pre-determinates possibility of starting the review procedure at court by previous participation in the respective administrative procedure.

The scope of persons having standing to sue the acts of administrative authorities is therefore in practice limited by (in some fields of law very restrictive) determination of parties to individual administrative proceedings. By reason of that, often only a part of the “public concerned” has access to court. For more detailed analysis of this topic, it is necessary to distinguish between the situation of individuals (natural persons) and NGOs.

## **1.1 Individuals (natural persons) access to courts**

### **a) general regulation**

The general provision regulating possibility of any person to participate in an administrative decision making procedure is art. 27 of the Administrative Procedure Code. According to it, next to the person who submitted the request for a permit (a developer in environmental cases), also other persons “whose rights can be directly affected by the administrative decision” have a status of a party to administrative procedure.

This provision applies i.a. in the IPPC procedures, procedures for issuing permits according to the Air Protection Act, Water Management Act, Nature Protection Act etc. It is general enough for possible interpretation consistent with the requirements of art. 6 and, subsequently, art. 9.2 of AC. The practice of administrative authorities is very different and sometimes unsuitably restrictive. The main problem, however, is that other individuals than the applicant (developer) only rarely try to act as parties of the procedures according to the mentioned acts.

### **b) special regulation - land use and construction permits**

By far most often the individuals participate in the development consent procedures according to the Building Act (namely procedures for issuing the land use permits and building permits, which are also the most important ones for realizing an investment). At the same time, the scope of parties to these procedures is restricted compared to the general definition quoted above. Only the owners of the affected building and plots (“the neighbours”) can act as parties to these procedures. Other people likely to be affected by the decision (for example flat-renters), who can be affected in other than property rights (e.g. right for favorable environment, which is granted by the Czech Constitution) are omitted (leaving aside the NGOs – their position is described below). Therefore, they are also not granted standing to sue these important decisions. The same applies for the review of the land use plans.

#### **Case 1 – standing with regard to the land use plans**

The approach of the SAC to the question who can have standing to start a review procedure against land use plans has differed in a number of its decisions. In some judgments, SAC stated that in the land use planning procedure “all persons who are directly affected by the results of the proposed measures, for example noise or emissions, must be considered to be the “public concerned” and therefore shall have standing. This approach was, however, not applied generally. In other cases, lawsuits of people affected by land-use plans were dismissed with the argument they are not real property owners, or even if they are, that the property is

not “close enough” so that the claimant could prove “direct infringements of their rights. SAC tried to unify its position by the decision of so called “Extended Senate”, which concluded that only the landlords can have standing in the cases concerning the land use plans. To meet the criteria of standing, they must assert that there is a “relation between the legal sphere of the claimant and the contested plan” and this assertion must be “logically consistent and possible”. This interpretation still gives a relatively big freedom to evaluate the specific position of the claimant in individual case..

SAC also referred to the AC generally in the decision of its “Extended Senate”,, stating that “the standing of members of public in the sense of art. 9 of this convention cannot be excluded”. However, all lawsuits of the NGOs against the land use plans have been dismissed so far, as the law does not specifically grant them standing in this procedure.

The situation is even worse in some procedures according to the Noise Protection Act, Nuclear Act or Mining Act, in which only the investor has a position of the party, and therefore also standing for a court action. There is also a possibility for an investor to make use of an institute of so called “authorised certificate” instead of the building permit, and by that means to limit public participation and judicial review opportunities.

### **c) EIA procedure**

With that regard, a position of the EIA procedures and its outcomes in the Czech legal system shall be mentioned. EIA procedure is in general considered as the most important one for fulfilling the requirements of art. 6 of AC and therefore also closely related to art. 9.2. This is based on the presumption that EIA is, more or less closely related to the development consent procedures for the projects which are subject to the assessment.

In the Czech system, however, EIA is not an integral part of a development consent procedure, but a separate process ended by a non-binding “statement”, which represents an obligatory basis for further decision-making. One of the reasons of this model is also a considerable difference (a gap, we can say) between the possibilities for the public (namely for the individuals) to participate in the EIA procedures at one side and in the subsequent development consent procedures on the other side. In the EIA procedure as such, there is no limit (criteria) for the public to participate. Any natural or legal person has access to information gathered during this procedure, submit the comments and take part at the public hearing (if there is any).

The laws, however, do not ensure that the public comments raised during the EIA procedure should be dealt with in the subsequent decision making procedures. This could make, and often does make, public participation in EIA process a mere formality. What is even more important and regrettable, active participation in the EIA procedure does not change anything for the individual people with regard to their possibilities to influence the final development consent. The above mentioned (restrictive) restrictive provisions apply without any modification. Consequently, individuals who fall into the scope of “public concerned”, but not considered as “the neighbours”, have no access to courts. This situation is currently subject to an infringement procedure against Czech Republic started by European Commission for insufficient transposition of art. 10a of the EIA directive (case C-378/09 at the ECJ).



## 1.2 NGOs access to courts

Also standing of the NGOs depends on their position as parties to the administrative proceedings. In most of the environmental procedures, it is not difficult for an NGO to obtain a status of a party, as a number of environmental act grants them this possibility, if they meet some formal (rather easy to meet) conditions.

### a) NGOs as parties of administrative procedures

Most frequently, the NGOs use art. 70 of the Nature Protection Act to become parties of administrative procedures. The formal requirements are rather easy to meet - an NGO must have legal status<sup>3</sup> and its main objective, according to its by-laws, must be nature conservation and landscape protection. NGOs must also declare their will to participate within a specific time limit. The provision is applicable not only for the procedures according to the Nature Protection Act, but for all procedures when “interests of nature conservation and landscape protection” are affected by the project (i.e. not “interests of environmental protection”, which is a broader term). This formulation makes it possible for NGOs to use the provision to become parties also of e.g. the land use permit procedures. On the other side, it can also be interpreted restrictively in some cases.

There are similar provisions in the Water Protection Act and IPPC Act (for procedures performed according to them). Another possibility for NGOs is to participate in the EIA procedure (which itself is not a development consent procedure - see above) and consecutively, according to Art. 23. 9 of EIA Act, to obtain the right to participate in subsequent development consent procedures. This provision seems to be the most direct transposition of the requirements of art. 6 of AC. It is not so widely used by the NGOs because in practice, they prefer the above mentioned provision of the Nature Protection Act.

This system of provisions is not very systematic and transparent, but in consequence of it, NGOs can participate in rather wide range of decision making procedures, going beyond the minimal requirements of art. 6 of the AC. On the other hand, neither NGOs can participate in cases where the law explicitly states that only the investor has a position of the party – see above. Next to that, according to the case law developed by the SAC, they also do not have right to ask for judicial review of the land use plans (see above case 1).

In all cases where NGOs can obtain a position of party of the administrative procedure, they also, formally, have standing to sue the final decision (permit). The position of NGOs before courts is, however, strongly influenced and weakened by the above mentioned doctrine of “maintaining impairment of a right.” In accordance with this doctrine, NGOs can only successfully enforce court protection against intervention into their procedural rights in the decision-making procedure. In some cases, mostly in the past, the courts interpreted this doctrine in a way that the NGOs can not meet the standing requirements at all. Namely in first years after the NGOs have been granted the formal right to sue administrative decisions (permits) in environmental matters, the courts generally rejected their claims as “made by evidently unauthorized persons”. The courts’ arguments were based (explicitly or implicitly) on the assumption that there are no subjective rights that could be infringed by the decision

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<sup>3</sup> To obtain legal status (according to Act n. 83/1990 Coll., on Association of Citizens), at least 3 persons have to prepare the by-laws and send them to the Ministry of Interior for registration. The by laws must show that the NGO will have a non-commercial character will not struggle for political power.

and upon breach of which an NGO could base its standing to sue.<sup>4</sup> Later this completely negative court's attitude to the lawsuits of the NGOs has been modified, but the doctrine has still been used for refusing individual arguments of the NGOs - and consequently often whole their lawsuits. This approach is further discussed in next part of this study (see also case 3 below for more details).

## **b) new kind of NGO action – in public interest ?**

It must be added that in December 2009, an amendment of the EIA Act was adopted as a reaction on the above mentioned infringement procedure (ECJ C-378/09). The amendment states that environmental NGOs which submitted comments in the EIA process, have the right to initiate a review procedure before the court against the development consent decision, issued after the environmental assessment procedure. It means that the NGOs, if meeting the condition as mentioned, can challenge the development consent decision, even if it was not a party of the preceding administrative procedure.

This amendment, however, causes very little – if any – change of the current situation. As described above, it is possible for NGOs, also under current legislation, to become parties of the development consent procedures subsequent to EIA and consequently to ask for judicial review of the development consent decisions. It is therefore very unlikely NGOs would make use of this new provision. There are serious problems concerning efficiency of this possibility (even worsened by the fact that in the Parliament, the proposal was modified in a way that the NGO if filling a lawsuit according to the new provision, cannot ask for the injunctive relief – see part 3. for more details).<sup>5</sup>

## **2. Scope of judicial review of environmental acts and omissions**

Delimitation of subjects authorized for access to justice in environmental matters is closely related to the scope of the judicial review of actions, proceedings and other legally important circumstances. This scope can be examined from 2 basic viewpoints:

- which actions and other circumstances can be subject to judicial review, and
- to what degree the courts address the applied arguments

### **2.1 Which acts/omissions are subject to the review**

#### **a) de facto non-reviewable acts**

In theory, most of environmental acts (and all having the character of “development consent”) can be subject to judicial review. In practice, however, the scope “really reviewable” acts is

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<sup>4</sup> A typical court argumentation of that kind can be summarized as follows: It is not important, that the plaintiff was deprived of his right to participate in the administrative procedure. The critical point is that the decision did not grant him any right nor did it impose any duties to him.

<sup>5</sup> At the same time, the adopted amendment has not at all solved the core problem, i.e. the limited scope of persons (individuals) having access to the court review of the EIA and subsequent development consent procedures, as compared to the requirements of Article 1(2) and 10a of the EIA Directive. This problem cannot be solved by constructing special standing rights (or special kind of lawsuit) for NGOs, but only by “opening” the subsequent development consent procedures to all subjects which fall into the scope of the definition of “the public concerned” and subsequently giving them the right to access to courts.

influenced by the limited number of potential plaintiffs at some areas (see previous part). Decisions as “noise exemptions”<sup>6</sup>, approvals of nuclear operations or delimitations of protected areas for mining are de facto non-reviewable, according to current legislation and case-law. Article 9.3 of the AC has not been transposed into Czech legislation with regard to these decisions.

## **b) outcomes of EIA procedure**

The outcomes of the EIA procedure represent a special subject in Czech law. As described above, EIA is a separate procedure ended by non-binding “statement”, which represent an obligatory basis for further decision-making. The statement is in no doubt an “act” in the sense of art. 9.2 of AC (and art. 10a of EIA Directive). Administrative courts have, however, so far dismissed all lawsuits recently lodged against EIA statements. According to the SAC, the requirements of AC and the EIA Directive are met if the statement is subject to judicial review together with consequent development consent decision. This approach can be seen as contravening both the requirements of effective and timely measures according to art. 9.4 of AC (see the case 4 below for more details).

The same applies for the screening decisions in cases concerning the “Annex II projects”. Here it is even more evident that the acts are directly influencing the rights of the affected persons, namely the investor, but also the public. The SAC, however, maintained the same position and argumentation as developed in cases of EIA statements.

## **c) land use plans**

Another special case represent “measures of a general nature”, including land use plans, which are subject to judicial review since 2005. There was a dispute if an act must be explicitly proclaimed by a law as this “measure”, or if it’s “legal nature” is decisive. Development of the case law with regard to this legal issue was rather curious, and concerned partially also the position of the AC in Czech law.

A first decision of SAC dealing with question of the land use plans review was the already a few times quoted judgment in the „Prague airport“ case. SAC referred in this case to AC (see footnote 1 for more details) to support the argument that the question if an act shall be subject to judicial review must be answered on the base of legal nature of the act, not it’s formal “label”. SAC has than fundamentally departed from the opinions declared in this judgment in it’s latter decision from 13.3.2007. It has not impugned the general conclusion that national law must be interpreted in accordance with the requirements of the AC in this decision, but explicitly stated that the Convention does not require that the land use plans are subject to judicial review. Finally, this second decision was canceled by Constitutional Court, which confirmed that the “material” attitude expressed by the SAC in the “Prague airport” decision was correct and constitutional. It also referred to the AC requirements as supporting arguments for this attitude (though very shortly and generally) .

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<sup>6</sup> In the disputes concerning the „noise exemptions“ (decisions permitting operations exceeding the noise limits), the courts, including the SAC, have so far refused the arguments that the law granting the position of the party to the permission (development consent) procedure, and therefore also access to courts, only to the applicant (operator) is unconstitutional and inconsistent with the AC.

#### **d) administrative omissions**

As for the administrative omissions, there is a special legal gap consisting in impossibility to initiate any review procedure in situation when the authority fails to start the procedure itself, under occasions when a law asks it to do so. The legislation on the judicial protection against administrative omissions does not include the latter situations. In such event, the affected person can ask the superior administrative authority to take a remedy. However, if it fails to do so, the courts cannot order the passive authority to act (to take a decision). The SAC confirmed this interpretation, not considering that it can lead to serious infringement of rights of the affected persons and that it is not in compliance with the requirements of the Convention.

#### **Case 2 – omission of the building office to protest a historical building**

One of the part owners of a historical (protected) building made a construction works on the building without consent of other part owners and without a building permit. The part owners asked a building office to order removing the construction works, what the building office rejected. The part owners therefore asked a court to protect them against illegal omission of the building office. The courts (including SAC) have however refused the claim stating that according to the Czech law, the courts do not have power to order an administrative authority to start a procedure on removal of an unpermitted building or construction works, or any other procedure *ex officio*. Courts only can order an authority to pass a decision, when a claimant has a power to formally initiate a procedure (by an application) and the authority fails to issue a decision within a time limit. On the contrary, there is no right for judicial protection for persons who are only entitled to make an impulse to start an *ex officio* procedure.

#### **e) acts and omissions of private persons**

Concerning judicial review of acts or omissions of private persons, the Czech legal system does not contain any special provisions relating to environmental protection. It is therefore only possible to use the general provisions, which allow to claim damage compensation and protection against the risk of injury.

### **2.2 To what extent do courts review the acts ?**

#### **a) lawsuits of the individuals (property owners)**

When a natural person (individual) or any other property owner has standing to sue in a specific case, there are mostly no problems with regard to the requirement of challenging both substantive and procedural legality of the contested act. This means they can successfully object to any breach of their (substantive) rights - not only ownership, but also, for example, their right to favorable environment, assured by the Czech constitution by Art. 35 of the Charter of Fundamental Rights and Freedoms. Enforceability of this right has repeatedly been confirmed by the Constitutional Court.<sup>7</sup> In some judgments the administrative courts have ruled, in relation to a more detailed look into the special regulations<sup>8</sup>, that this constitutional right has been infringed as a result of permitting a variety of encroachments upon the

<sup>7</sup> First in findings of reg. no. III.ÚS 70/97 dated 10.7. 1997.

<sup>8</sup> In accordance with Art. 41 of the Charter, some rights guaranteed by the Charter, including the right to a favorable environment, can only be enforced within the boundaries of the laws which execute the relevant provisions of the Charter.

environment. Overall, however, it can be said that relatively small number of people (natural persons) have taken the advantage of the possibilities arising from either the national legislative ruling concerning the right to a beneficial environment, or from the AC.

### **b) lawsuits of the NGOs**

The situation is fundamentally different concerning the NGO's lawsuits. Based on the "impairment of a rights doctrine" (see above part 1.), the courts developed case-law according to which the NGOs can only as successfully state infringement of their procedural rights in their lawsuits – as these are the only subjective rights they can have in the environmental procedures. According to this interpretation, the NGOs can ask the court to review if they could see all the documents related to the environmental permit, if they had enough time to study them and express their opinion, if they were invited to the public hearing etc. However, they cannot claim that the permit (and the investment) breaches the requirements of environmental laws (e.g. limits of emissions or provisions prohibiting some activities in protected areas), as this is not related to any of their "personal rights".

The specific application of this approach is very different in individual cases (and it has in general developed from very restrictive to more "liberal"). The courts have in fact dealt with the "substantive" objections of the NGOs in many cases. They have often explained or justified it in the way that there is a relation between the substantive arguments in the lawsuit and breach of the NGO subjective right that all their comments and objections are dealt with and answered properly by the administrative authority. E.g. in a number of cases related to the traffic infrastructure projects, the courts canceled the land use permits for the reason that the possible alternative corridors, which the NGOs proposed, were not assessed properly.

On the other hand, there are even very recent decisions in which this approach has been applied in a very strict way. The courts refused to deal with the NGOs arguments concerning e.g. not meeting the conditions for permitting logging of the trees, alternatives of the investments or compensations for damaging the environment.

#### **Case 3 - standing of NGOs and scope of review ("admissible NGO arguments")**

A local NGOs asked the court to review a building permit for an approach road to the industrial zone. It argued e.g. that the project was not assessed in the EIA procedure, although it should have been, and that the impact of the project on the Natura 2000 area was evaluated wrongly.

The court rejected the lawsuit. With respected to the above mentioned arguments, the court dismissed to consider them, arguing that they relate to application of the substantive laws, while the plaintiff (NGO) is only entitled to claim infringements of it's procedural rights before court. The court can only review if the administrative dealt with the objections of the NGO sufficiently, but not to review the objections from the merit.

NGO filed a complaint against this decision, arguing that trough participation of the NGOs in environmental development consent procedures, their members protect their (substantive) right for favorable environment (granted by the Czech Constitution). It also referred to the AC which grants right to challenge also substantive legality of the acts related to the environment for public concerned (including NGOs). The SAC rejected the complaint and confirmed the position of the 1<sup>st</sup> stage court, that environmental NGOs "can only successfully claim for

judicial protection against infringements of its own, i.e. procedural rights. Therefore, according to SAC, it cannot claim infringement of the right for favorable environment (neither its own nor for the members). With regard to the AC argument, the SAC only stated that the plaintiff did not raise it at the 1<sup>st</sup> stage court, and for that reason it is not admissible in the complaint procedure.

This approach is further based on the case law of the Czech Constitutional Court, according to which NGOs cannot claim a right for a favorable environment. The argumentation for this conclusion was very simple (and weak): The right for favorable environment (as well as the right for life, health protection etc.) can belong only to “natural persons” (people), not to the “legal persons” as NGOs (as the latter do not breathe, drink etc.).

The environmental NGOs argue that they do not participate in the administrative procedures so that they could “enjoy” their procedural rights, but to protect the environment – and also the rights of their members. It has little if any sense if the courts concentrate on the procedural aspects of the administrative procedures (and force the NGOs to do the same), but the merits of the cases are omitted.<sup>9</sup> This is also not in compliance with the requirements of art. 9.2 of the AC and art. 10a of the EIA directive. These arguments, as already mentioned, have been successful in practice to some extent; the general doctrine concerning the NGOs subjective rights has been, however, so far not rejected.

Under the pressure of all these circumstances NGOs are often basing their suits on the assertion that their right to a fair trial has been infringed, although the real aim of the suit is the protection of environment. Both claimants and courts are therefore focusing on the procedural errors of administrative bodies more than on the essence of the dispute itself. One result of this is that NGOs are being accused of obstructions and formalism (instead of protecting the environment itself).

### 3. Injunctive relief (efficiency of judicial review)

The procedural norms regulating court procedures do not contain any general deadlines for the decisions.<sup>10</sup> Proceedings in the civil and administrative judiciary (in one degree) last from a few months to several years. In combination with the difficulty, or in many cases impossibility of obtaining the injunctive relief or suspensive effect of a lawsuit, this fact leads to the conclusion that **the protection cannot be considered as “timely”**.<sup>11</sup>

Submission of a lawsuit against a decision of an administrative authority generally does not have a suspensive effect. The court may acknowledge it in accordance with § 73 para. 2 of CAJ<sup>12</sup> at the request of the claimant, but only under following conditions, that are usually hard to meet:

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<sup>9</sup> One result of this approach is that NGOs are being accused of obstructions and formalism.

<sup>10</sup> An exception is the review of what the “measures of a general nature” (including the land use plans) by the Supreme Administrative Court. In these cases, there is a 30-day deadline for the court to decide. However, an amendment of this provision has been recently proposed, which would substitute this specific deadline with a vague provision that such cases shall be decided “in preference”.

<sup>11</sup> In many cases (not environmental), the European Court of Human Rights has already ruled on the Czech Republic’s obligation to pay participants compensation for infringing their rights to a fair trial in accordance with Art. 6 of the European Convention on Human Rights as a result of the length of the court proceedings.

<sup>12</sup> The text of CAJ in English is available at <http://www.nssoud.cz/docs/caj2002.pdf>

- the claimant must prove that “enforcement or other legal consequences of the decision would cause him/her an “irreparable harm”
- the acknowledgement of the suspensive effect would not “in a disproportionate manner” affect the vested rights of third parties, and
- it is not in conflict with the public interest.

The courts interpret these conditions – in general – rather restrictively. They use to stress that the harm must be really “irreparable” – i.e. “very serious” – and it must be directly related to the rights of the claimant. Concerning the public interests, the courts sometimes tend to say “if the responsible authorities approved the action in question, than we have to consider it to be in the public interest”.

Preliminary injunction is regulated by § 38 of the CAJ. The conditions seem to be less strict than for granting suspensive effect to the lawsuit: There must be only threat of “serious” (and not “irreparable”) harm, and it is not necessary that it is the claimant personally who is under this threat. The court may, under these conditions, order to the parties of the dispute, or even to third person “if it is just to do so”, to make something, abstain from something or endure something.

The difficulty of this institute, however, consists in the provision of § 38 para. 3 of the CAJ, which states that a proposal for preliminary injunction is not permissible “if it is possible to grant the suspensive effect to the lawsuit”. This formulation is ambiguous. The courts used to apply the interpretation that preliminary injunction is absolutely impossible in cases of lawsuits against individual administrative decisions. The Supreme Administrative Court (SAC) expressed an opinion in 2006 that this interpretation is not correct in one case (as “obiter dicta” – it was not the core of the case). Nevertheless, it is still very rare that an administrative court would issue a preliminary injunction (in civil cases this it happens much more often).

For most investments, the land use permits are the most important development consent decisions. They are issued directly after EIA procedure. It is not possible to start building on the base of the land use permit (another “building permit” is necessary), but the main question if the investment is possible or not, from the legal point of view, is decided by them. Therefore, it should be, in my opinion, considered as a “main decision”, in the sense of the ECJ case law (Delena Wells, C-201/02, point 52, or Diane Barker, C-290/03, points 47. and 48.).

With regard to these important decisions, the crucial problem with the injunctive relief is that according to the constant case law, the first and crucial condition of suspensive effect – the threat of “irreparable harm” - can never be met in these cases. The argument is, that – as mentioned before – the investor cannot directly start building after the land use permit is issued. And therefore, the courts say, there is no possibility of any “harm” caused by the land use permit at all. Only the subsequent decisions, which enable the investor to start with building, can directly lead to the harm.

Individuals affected by building permits sometimes succeed with the requests for suspensive effect of the lawsuit (e.g. on the basis of an expert statement proving they are in a threat of damages on their property).

The position of NGOs as claimant before courts is, however, strongly influenced and weakened by the doctrine of “maintaining impairment of a right”, which the Czech

administrative courts mostly insist on (see above part 2.). This general approach to the lawsuits of the NGOs influences also their ability to gain injunctive relief. It leads to the conclusion that an NGO can never meet the conditions of suspensive effect, if they are interpreted in the standard way. If NGOs do not have any (substantive) rights, there is also no possibility of harming them. As for the preliminary injunction, it would be theoretically easier to meet the conditions (see above), but we are not aware of any such case.

#### **Case 4 – Review if EIA statements and injunctive relief**

Individuals and NGOs filled a lawsuit against an “EIA statement” for a high speed road, with many substantive and procedural arguments. The court dismissed the lawsuit, because according to Czech law, “EIA statements” are not binding decisions- they form basis for later decisions (development consents).

The plaintiffs lodged the complaint to SAC, arguing that the EIA statement shall be subject to judicial review, as it is with no doubt “act” in the sense of art. 9.2 of AC also of art. 10a of the “EIA directive”,<sup>13</sup> transposing the AC requirements (partially) into the EC law. The also referred to the AC and EIA directive requirement of “timely and effective” a judicial review, which shall apply to the initial phases of the process of environmental decision-making.

SAC refused the complaint, confirming the conclusion that the EIA statement cannot be subject to (separate) judicial review.<sup>14</sup> According to the SAC, the requirements of the EIA Directive and the Aarhus Convention will be met if the EIA opinion is judicially reviewable together with consequent development consent decisions.

Next to that, the SAC expressed the opinion that on the base of art. 9.4 of AC, courts must grant injunctive relieves, if the members of public concerned ask for them in their lawsuit concerning environmental protection, so that it cannot happen that by the time of the hearing, the project in question is already realized. If the injunctive relieves would not be issued in such situations, the judicial protection would not be timely and equitable and art. 9.4 of the AC would be breached. This interpretation overturns previous opinion that NGOs virtually cannot meet the criteria for obtaining injunctive relieves.

The practice of administrative courts reflected this opinion of SAC in a few recent cases, in which suspensive effect was granted to the NGO lawsuits. However, with one exception we are aware of, the courts keep the interpretation that this is not possible at all with regard to the land use permits. The suspensive effect was granted to some lawsuits against building permits and (most often) logging permits. But in many more cases, the requests for suspensive effect keep to be refused. The courts now do not say that NGOs can never meet the conditions, but interpret them in a way that to acknowledge the suspensive effect, NGO would have to prove really strong and serious threat of damage of the environment. At the same, namely concerning highways, they mostly tend to say there is a public interest in continuing with the building.

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<sup>13</sup> Directive 85/337/EEC, as amended by Directive 97/11 EC and Directive 2003/35/EC.

<sup>14</sup> The SAC dismissed the motion for the submission of the issue, whether the EIA opinion must be “directly” reviewed by the court, to the European Court of Justice (this would concern proceedings on a preliminary question according to Art. 234 of the Treaty Establishing the European Community)



It must be added that according to the constant case law, it is not possible for the applicant who asked for issuing injunctive relief to appeal against the decision of the court rejecting this request.

Finally, it must be added that the last amendment of the EIA Act, which established specific standing for NGOs participating in the EIA procedure (see above part 1) includes a sentence, according to which the lawsuit cannot have suspensive effect (it was added there in the Parliament). It is uncertain if courts will apply this provision generally – also in cases where the standing of the NGOs will not be based on this new provision of the EIA Act. It would be incorrect in our opinion, but it can happen that (some of) the administrative courts will apply this provision generally towards the lawsuits of NGOs in environmental matters.

In civil court procedures, the court may, at the request of a party, impose injunctive relief “if it is necessary to provisionally amend the conditions of the parties, or if there is a risk that the enforcement of the (subsequent) court decision could be threatened”. The court may apply injunctive relief to forbid the handling of things, laws or particular transactions. Anyone requesting a court to impose injunctive relief is obliged to pay a deposit of 10 000 CZK (approx. 400 Euro) to cover any compensation for damage or other loss which could be caused by the injunctive relief. As the civil judiciary has not been much used in environmental matters, the provisions concerning (civil) injunctive relief is also not applied

## **Conclusions**

Implementation of the Aarhus Convention (Art. 9) in the Czech Republic can be generally evaluated as rather inconsistent and not fully in compliance with the Conventions requirements.

On one hand, it is relatively easy for the members of the public concerned, namely environmental NGOs (including the local and small ones) to participate in the environmental decision making procedures (also beyond the scope of Art. 6 of the Convention. Consequently, they also have access to the judicial review of the decisions according to Art. 9(2) and to some extent also Art. 9(3). In some cases, especially with regard to the land use plans, where there is a short deadline for courts to decide about the lawsuits, the judicial protection of the environment is also quite effective.

On the contrary, there is a lot of partial gaps and shortcomings concerning both the relevant legislation and practice of the authorities and namely the courts.

From the legislative point of view, the most problematic is the fact that there is no or limited right for members of the public to participate in some of the environmental procedures. This concerns the individuals beyond the property owners (neighbours) in the land use permitting procedures and all affected subjects including the NGOs in some specialized procedures (e.g. noise exceptions, procedures according to the Nuclear Act).

There is also no direct access to judicial review of the EIA final statements and screening decisions, what is caused by the legislative status of these acts in the Czech system (they do not have form of binding decisions) but also by the court interpretation.

Particular problem is lack of access to justice against administrative omissions in cases when the authorities fail to start a procedure *ex officio*, despite they are legally obliged to do so.

The explicit interpretation of the Aarhus Convention provided by the Czech courts is not too developed, comprehensive and constant. There are some decisions in which the courts (namely the SAC) used the Convention for supporting the progressive interpretation (concerning e.g. terms for the injunctive relief if an NGO asks for it in environmental cases). However, the prevailing impairment of rights doctrine (which is rooted in the Austrian administrative and constitutional history) in many cases prevents the courts to fully implement the requirements of the Convention.

This relates namely to the problem of “scope of permissible arguments” of the NGOs lawsuits. NGOs are forced by this approach to concentrate on infringements of their procedural rights, and the courts most often cancel the decisions for procedural reasons. It is not very favorable for effective protection of the environment. The same can be said about the length of the court procedures and general praxis concerning the preliminary measures (injunctive relieves), which is, despite of the above mentioned decisions of the SAC, not consistent with the requirement of timely protection. Permitted activity is often finalized before the court decision about the permit.

To conclude it can be said that the Czech Republic is not in compliance with a number of specific aspects (requirements) of paragraphs 2, 3 as well as 4 of Article 9 of the Aarhus Convention. Neither Art. 3 paragraph 1 is therefore fully implemented, as the implementation of the access to justice provisions of the Convention is not sufficiently clear, transparent and consistent.

## Selected issues of application of the Aarhus Convention in ESTONIA

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The Aarhus Convention (AC) was ratified by Estonia on 06.06.2001.<sup>1</sup> The transposition of AC provisions into national law can be considered done via reflection of the principles of public participation and access to environmental information in specific laws (Administrative Proceedings Act, Environmental Impact Assessment and Environmental Management System Act, Planning Act, Public Information Act, Earth's Crust Act, Water Act, Waste Act, Ambient Air Protection Act, Integrated Pollution Prevention and Control Act, Radiation Act (etc)).

However, some of the specific principles of access to justice (A2J) in environmental matters have not been transposed into Estonian legislation in any way and have only been applied by courts directly. Direct application of AC is possible and required by § 123 of Estonian Constitution, which says that “*if laws or other legislation of Estonia are in conflict with international treaties ratified by the Parliament, the provisions of the international treaty shall apply.*” It is worth mentioning that Estonian courts have in general interpreted AC rather widely, concerning issues of A2J.

### 1. Standing conditions for members of public concerned

#### 1.1 General standing conditions in administrative cases

The term „members of public concerned” is not defined in national law.

According to Administrative Court Proceedings Act (ACPA), there are different kind of actions a person can file against administrative act or authority. An action may be filed to apply for:

- 1) annulment of an administrative act or a portion thereof (*nullification action*);
- 2) execution of a suspended administrative act, for issue of an unissued administrative act, or for a suspended or untaken measure to be taken (*obligation action*);
- 3) establishment of the unlawfulness of an administrative act or measure (*establishment action*);
- 4) compensation for damage caused in public law relationships (*action for compensation of damage*);
- 5) the establishment of the existence or absence of a public law relationship (*establishment action*).

The legal effect of these actions is different and so are the deadlines for filing the action.

The term for filing the first 2 kind of actions – nullification action and obligation action - is **30 days**. These actions allow to have **real consequences** – the administrative act will be nullified (as it had never existed), executed or issued, or a measure shall be taken.

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<sup>1</sup> Official Journal II 29.06.2001, 18, 89

The term for filing the other kind of actions is **3 years** (except for an action for the establishment of the existence or absence of a public law relationship – the latter can be filed without time limits). The establishment actions do not affect directly validity of an administrative act or its execution – establishment action **allows only to ascertain a legal situation or fact** (including ascertaining illegality of the administrative act or measure), but the administrative act itself remains valid and may continue to have its effects. Also, a person can claim compensation for damage, but the act that caused the damage remains valid (though illegal), unless the administrative body itself decides to annul the act. Therefore, in practice the establishment actions are to be used when the term for filing the nullification action has been passed or where the nullification action is not possible. For example, in case of wanting to establish that a measure of administrative body was illegal, it is only possible to file an establishment action, because annulment of a measure is not possible.

**As for standing conditions:** in short, “impairment of rights” is necessary precondition to have a standing in administrative court in general or in case of ‘nullification actions’ and ‘obligation actions’, but “sufficient interest” is precondition in case of ‘establishment actions’. In practice, this means that in case of wanting to annul the administrative act or require a measure to be taken, the person has to prove that his rights have been violated. In case he fails to file an action within 30 days or it is not possible to claim for nullification or obligation, he can use possibility to file an establishment action. Because the legal consequences of establishment action are not directly affecting the validity of administrative act, the standing conditions are broader – but still, in order to protect the principle of legal certainty, only persons with sufficient interest may go into court.

**Impairment of rights** can be proved when the administrative act is violating someone’s subjective rights. In environmental cases, the complainants have referred to rights arising from Estonian Constitution (right to inviolability of private and family life (§ 26), right to the protection of health (§ 28)). It has been argued whether Estonian Constitution also gives right to healthy environment (clean environment) – some courts have recognized such right, but it is not provided by Constitution *expressis verbis*.

**Sufficient interest** can be proved when in result of satisfaction of complaint the complainant has further possibilities to protect its rights (eg possibility to present a claim for compensation, claim for annulment of some act based on the disputable administrative act etc).

However, in environmental cases, the approach to standing has been different in judicial practice.

## **1.2 Standing conditions in environmental cases**

First, the courts have applied art 9.2 of the Aarhus Convention directly and granted standing for environmental NGOs without obligation to prove impairment of rights (or sufficient interest).

As for standing criteria: there are no requirements for standing of NGOs in Estonian laws, therefore the courts have interpreted the standing quite widely. Standing has been granted by courts in several cases to non-profit organizations and foundations whose statutory goals include environmental protection. The Supreme Court has stated that “*there is no need for*

*special regulation about standing in national legislation. Standing for disputing the decisions, acts or omissions that have been made under provisions of the Convention is there, in case such decision, act or omission is disputable in court under national law*".<sup>2</sup> So far, the courts have granted NGOs as legal persons standing only on basis of the fact that the NGOs have had environmental protection as their statutory goal. The reason for not setting more criteria has probably been that NGOs in question have been well-known activist environmental NGOs, so the courts have not bothered to analyze their standing more deeply.<sup>3</sup>

Furthermore, standing has been granted to local activist groups that are not legal persons, but so-called "partnerships". "Partnership" is a term from Law of Obligations Act that is defined as situation where "two or more persons (partners) undertake to act to achieve a mutual objective and to help to achieve the objective in the manner established by the contract, above all by making contributions". For such situation, the Supreme Court has, however, determined certain standing criteria - an informal group can be considered as non-governmental environmental organization if it proves that it represents the position of significant part of local population.<sup>4</sup>

Secondly, even in the matter of standing for individuals, the Supreme Court has gone further than ACPA would foresee, stating that in environmental cases the standing may be based not only to impairment of rights, but also the fact that the person is in relation or connection with the administrative act or deed (the person is personally related to the disputed administrative act or measure or has sufficient interest for it). It is still unclear how this interpretation can be used or what exactly it means for the practice, as for now it can only be said that the courts have given up so far very strict requirement to prove impairment of rights.

Thirdly, in spatial planning, there is *de facto actio popularis* – spatial plans can be disputed in court by anybody whose rights have been violated or anybody who finds that the plan is not in accordance to law. Although such standing is not provided by ACPA, there is special provision about such standing in Spatial Planning Act. However, such *actio popularis* does not concern all environmental permits, because not all activities that could affect the environment must be included in spatial plan (for example, there is no obligation for spatial plan in forestry and mining permits or some water use permits).

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<sup>2</sup> Supreme Court's decision in case No 3-3-1-81-03 from 29 January 2004 (Estonian Green Movement vs Ministry of Economic Affairs)

<sup>3</sup> Some criteria are planned to be established for environmental NGOs in current draft of Environmental Code (expected to become a law in 2011). According to this draft, a non-profit association and foundation can be regarded as „an environmental organisation”, if their statutory goal is environmental protection and if they promote environmental protection with their activity. By evaluating whether an organisation is promoting environmental protection with its activity, the capacity of organisation for pursuing its statutory goals has to be taken into account, including organisation's current activities or when there has been no activities yet, organisational structure, number of members and the statutory criteria for membership. In order to get standing, the issue under dispute has to be related either to statutory goals of the organisation or current field of activity.

<sup>4</sup> same approach has been used in definition of „environmental NGO“ in Environmental Liability Act (2007) and in draft of Environmental Code, prepared in 2008. The draft of Environmental Code includes finally standing criteria for environmental NGOs, but it will not become a law until 2011.

## **2. Scope of judicial review of environmental acts and omissions**

### **2.1 Which acts and omissions are subject to the review**

Environmental decisions as administrative acts (or omissions) are subject to judicial review as mentioned above. The procedural acts are subject to judicial review only in exceptional cases. According to general judicial practice in administrative cases, the procedural acts (ie act within administrative proceedings that end with issuance of “main” or “final” administrative act) cannot be disputed separately from the final administrative act. Such legal review is possible only in case the procedural rules have been violated to the extent that makes it clear already in the stage of proceedings that the violation would inevitably cause illegality of the final act or make the afterwards evaluation of legality of the act impossible.

However, there is again different judicial practice in environmental cases – the Supreme Court has stated that the procedural acts in environmental decision-making are exemption from the general prohibition to dispute the procedural acts separately from final administrative acts and that in environmental cases the procedure has a decisive value in itself. It can be concluded that in environmental cases, the possibilities of dispute procedural acts (including decisions in EIA proceedings etc) are bigger than in usual administrative cases.

As for the omissions, it has not been determined which kind of omissions are subject to review. In order to file an obligation action, the person has to have standing (physical persons should prove impairment of rights), so the omission has to violate his rights.

### **2.2 To what extent do courts review the acts**

Courts can review the acts from legal point of view – they can assess whether substantive legal provisions have been applied correctly and whether procedural provisions have been followed.

In environmental cases, it is sometimes difficult to assess whether some issues are or should be subject to legal review or not – for example, the Estonian courts tend not to assess the rightfulness of contents and conclusions of EIA reports, they rather assess the legality of EIA procedure (especially regarding public participation). However, there have been cases where courts stated that some or other aspect (eg impact to human health) has not been dealt properly in EIA/SEA report.

Another restriction that concerns especially environmental cases, is the restriction of judicial review of discretionary administrative decisions. According to judicial practice, the court cannot re-evaluate the political rationality of discretionary decision, but can control only fulfillment of legal provisions (including rules of discretionary decision-making). However, according to Supreme Court interpretation, courts are allowed to intervene to discretionary decision-making, if the decision is made within limits of discretion, but there are suspicions about rationality of the decision. In case the administrative body has taken into account unacceptable considerations or left some important aspect unnoticed, it can be regarded as discretionary mistake, which in turn can be subject to judicial review.

### 3. Injunctive relief

The regulation of injunctive relief is fairly good. According to ACPA, the court may apply injunctive relief at any stage of the court proceedings at the reasoned request of the person filing the action or on its own initiative, if otherwise execution of a court judgment is impracticable or impossible.

By a ruling on injunctive relief, an administrative court may:<sup>5</sup>

- 1) suspend the validity or execution of a contested administrative act;
- 2) prohibit the issue of a contested administrative act or taking of a contested measure;
- 3) require an administrative authority to issue an administrative act being applied for or take a measure being applied for or terminate a continuing measure;
- 4) apply for other measures for securing an action, specified in Code of Civil Procedure.

In practice, the injunctive relief usually concerns the first possibility - suspension of the validity or execution of the contested administrative act. We have no information of other kind of measures applied by the courts in environmental cases.

There is no deposit obligation or other obligation that the plaintiff should pay when requesting for application of injunctive relief. The situation is different from civil court proceedings where it is possible to set the obligation for guarantee (deposit).

The injunctive relief can be regarded as a **timely** measure. According to ACPA, the courts may give possibility for the opposite party to give an opinion about the request only if it is possible without a delay. The decision is usually made within a short timeframe (sometimes only few days).

It can also be regarded as an **efficient** measure, because a prohibition arising from a ruling on injunctive relief is valid until the final court judgment enters into force, unless the court designates a shorter term. The measure is also efficient in practice, as the court practice, regarding injunctive relief in environmental matters, has been rather supportive to the plaintiffs as the possible environmental harms are regarded to be irreversible.

#### Case 1 – standing for informal groups and injunctive relief

In 2004, a local group of people discovered that several years ago, there had been decision made about issuing mining permit for peat bog in their municipality. Two persons formed an informal group (“partnership”) and disputed the decision about mining permit, claiming that there was no public announcement about the decision and that EIA was not done.

In its decision from 2006, the Supreme Court did not satisfy their action, stating that since they disputed it several years later and before the group was actually formed, it did not have standing. (This position of Supreme Court could be argued because the decision about mining permit was not publicly announced, so the public could not have known about it (otherwise it would have been possible to create a partnership already years ago and dispute the decision)).

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<sup>5</sup> § 12<sup>1</sup> of the Administrative Court Proceedings Act

However, the Supreme Court analysed thoroughly whether such local group could have standing at all and came to conclusion that in this case, the local group might have had standing as such. The Supreme Court stated in its decision that “*informal group can be considered as member of public that owns standing only in case the position of the group and of the significant part of local habitats that could be considered as public coincide and the public in one or another form accepts such representative and its relevant activities.*”<sup>6</sup> The Supreme Court particularly stressed that giving standing to informal groups must not open way to misuse of standing, including unlimited and unreasoned claims in presumable public interests.

In this particular case, Supreme Court stated that the status of “representative of public” was proved by signatures that were collected from people for protection of this peat bog (altogether 2483 signatures, of which 536 signatures from people from the municipality in question).

The case is also example of usual practice of implementation of injunctive relief – the application of the local group for injunctive relief was satisfied by the court in 6 days after filing the complaint and the further proceedings for issuance of mining permit were stopped for 2 years until the final decision from Supreme Court.

## **Case 2 – standing for local municipality as concerned person and legal review of procedural acts**

A local municipality filed a complaint against decision of Ministry of Environment (MoE) about initiating EIA in oil-shale permit proceedings, claiming that MoE should not have initiated EIA, because the permit applications should have been turned down in first place.

The municipality claimed to have standing as “member of public” according to art 9.2 of AC. The case ended up in Supreme Court, who did not agree with this approach, stating that the municipality has to be regarded as body of public authority in the meaning of art 2 (2) a) of AC (government at national, regional and other level). However, the Supreme Court granted standing for the municipality on other basis – as being the “guardian” of rights of local people. Such obligation to protect the rights and interests of local people arises to the municipality by the law. Supreme Court stated that municipalities should have standing in issues that affect significantly government of local life and decision-making about local issues and can therefore damage possibilities for the municipality to fulfill obligations that are of intrinsic nature for it.

As part of these statements, Supreme Court said that “*in matters that deal with environmental decisions, it is not possible to attribute same contents to standing as in usual administrative cases – through impairment of subjective public rights. In environmental cases the impairment of subjective rights may, but does not have to occur. Therefore, in environmental matters the standing may be based not only to impairment of rights, but also the fact that the person is **concerned** by the administrative act or deed.*”<sup>7</sup> Such approach was surprising, taking into account the usual standing conditions in administrative cases (impairment of rights).

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<sup>6</sup> Supreme Court’s decision in case No 3-3-1-43-06 from 28 November 2006

<sup>7</sup> Supreme Court’s decision in case No 3-3-1-86-06 from 28 February 2007



The question is, whether such interpretation can be used in other cases where the complainants might be individuals, not municipalities. So far, this option has been in discussion only theoretically and the consequences of this decision to future judicial practice remain yet to be seen.

Another issue in this case was, whether procedural act (decision to initiate EIA proceedings) was disputable at all – taking into account the general rule that procedural act is not disputable separately from final administrative act (in this case, decision about mining permit). As another revolutionary interpretation, the Supreme Court stated that for correct decision-making in environmental matters, the administrative procedure has a decisive value in itself: *“In most of such cases it is not possible to decide convincingly that despite of the deficiencies in administrative procedure, the final administrative act is lawful. It is only possible to presume lawfulness of the final adopted act, if the decision has been made in result of an administrative procedure that has been carried out according to law and principles of administrative procedure.”*

On basis of the interpretation of this Supreme Court’s decision, the procedural acts in environmental decision-making are exemption from the general prohibition to dispute procedural acts separately from final administrative act. In this concrete case, the court stated that the municipality had indeed standing and right to dispute a procedural act (decision about initiation of EIA proceedings) – but the complaint was still left unsatisfied because at that time there were no legal norms that would have forbidden MoE to initiate permit proceedings.

### **Case 3 – judicial review of discretionary decisions**

Individuals and environmental NGO filed a complaint against spatial plan that allowed building a prison hospital to a park of great natural value (there are numerous species of trees and bushes). The decision of local municipality about plan did not contain any reasoning.

The Supreme Court confirmed that as a principle, the court cannot re-evaluate the political rationality of discretionary decision, but can control only fulfillment of legal provisions, including rules of discretionary decision-making in following respect:

- if there have been no procedural mistakes in decision-making that could have influenced substantial decision;
- if the decision is in accordance to legal norms and general principles of law;
- if the decision is based on legal grounds;
- if the limits of discretion have not been overstepped;
- if no other mistake in discretion has been made.<sup>8</sup>

However, according to Supreme Court’s decision, courts are allowed to intervene to discretionary decision-making, if the decision is made within limits of discretion, but there are suspicions about rationality of the decision. In case the administrative body has taken into account unacceptable considerations or left some important aspect unnoticed, it can be regarded as discretionary mistake, which in turn can be subject to judicial review.

In this particular case, the Supreme Court found that although the local municipality claimed that the prison hospital will bring positive social and economic effects, it is not possible to find out what these effects really are (how many jobs). Since the environmental damage

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<sup>8</sup> The Supreme Court’s decision in case No 3-3-1-54-03 from 14 October 2003

would be remarkable, it was not clear to Supreme Court why this municipality should get the benefits from damaging the environment, while the prison hospital could be built somewhere else without damaging the environment to such extent.

Since the municipality did also not bring out any other special reasons for building the hospital namely to this place (very high rate of unemployment etc), the Supreme Court found that the municipality had given too much weight to considerations about (unspecified) positive social and economic effects, compared to the (proved) environmental damage – this was considered to be significant discretionary mistake by Supreme Court.

## **Selected Problems related to the Implementation of the Aarhus Convention in HUNGARY**

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The Aarhus Convention (hereafter AC) was ratified by Hungary on 2 July 2001 and entered into force on 30 October 2001. It was proclaimed and thus made part of the domestic legal system by Act No. 81 of 2001.

The construction of the Aarhus Convention by domestic courts in Hungary tends to be supportive of access rights in the majority of cases. Although a few examples are reported where the judiciary refused applying the AC directly, it can certainly be concluded that based on both the aforementioned Act of Parliament proclaiming the AC and the Judgment No. 53 of 1993 of the Constitutional Court made in a constitutional matter, the AC is directly applicable in the Hungarian legal system.

Below are a few examples gathered around three distinctive topics having relevance for the implementation of the AC in Hungary. All topics relate to the question of meaningful access to the public, either from a viewpoint of legal standing or from the perspective of substantive and effective remedy.

### **1. Conditions of standing for the public – Access to review procedures**

While rights are basically important attributes of a natural or legal person, their mere existence is of little relevance without a state-supported mechanism to enforce them. The prerequisite of such enforcement is legal standing, i.e. the right to act before a forum and represent rights and/or interests. Legal standing has both subjective and objective criteria, i.e. criteria towards the person who claims legal standing and the case where such legal standing is claimed.

According to the personal characteristics of a potential natural or legal person claiming standing, two basic categories exist in Hungary:

- environmental NGOs who have preferential standing conditions in environmental cases and
- anybody else.

Starting with the second category (“anybody”), it is the closest to the term used by the Aarhus Convention Art. 2.4 as “public” and 2.5 as “public concerned”. Persons belonging to this group have legal standing according to the Administrative Procedure Act 2004 Art. 15 that says (effective of 1 October 2009):

Par. 1 Those natural or legal persons or organizations not having a legal personality have standing whose right or legitimate interest is affected by the case, who is taken under administrative control and whose data is kept in an administrative registry.

Judiciary tends to interpret the circle of such rights and interests narrowly. It is established (and unfortunate at the same time) in the Hungarian court practice that such rights do not

embrace those guaranteed by the Constitution such as right to life or right to a healthy environment. This merely stems from a doctrine widely accepted by the judiciary that constitutional rights cannot be directly invoked in court procedures and lower level norms are supposed to give effect to the constitutional provisions. However, those rights mentioned in the Administrative Procedure Act and which can be invoked as basis for standing of individuals are mostly traditional individual rights stemming from the Civil Code, namely personal rights (e.g. good reputation) and material rights (e.g. property).  
The Administrative Procedure Act 2004 continued (effective before 1 October 2009):

Par. 2 In case a law does not state otherwise, any owner or legitimate registered user of a piece of land being in the impact area has standing in procedures relating to the permitting of installations or activities therein.

This passage of the Administrative Procedure Act 2004 was annulled and Art. 15 Par. 3 was changed to the following wording as of 1 October 2009:

Par. 3 An Act of Parliament or a Government Decree may define in certain types of procedures those categories of persons who have legal standing without examining the fulfillment of the conditions given in Paragraph 1. If law so defines, those have legal standing without examining the fulfillment of the conditions given in Paragraph 1 who own a piece of land in the impact area or whose right relating to that land is registered in the land registry.

This subset of legal standing is more interesting from an environmental point of view, also because most of the projects requiring a development consent have a distinct impact area. Although there is a slight difference between the definitions of impact area of the Administrative Procedure Act 2004 and the Environmental Protection Act 1995, they seem to be unanimous to require a geographical area where an (adverse) environmental impact regulated by law manifests.

How important it is for any potential member of the public whether the impact area covers his/her piece of land is illustrated by a case example from the Hungarian jurisdiction.

### **Case study No. 1.**

#### Airports and noise protection zones

Airport construction is experiencing a boom in Hungary in the recent years with at least four new developments in the pipeline. In one such case a former Soviet military air base near Budapest (currently classified officially as a “non-public site for take-offs and landings”) will be enhanced into a commercial airport. Part of the permitting process is the setting of the so-called “noise protection zone” around the airport, preceding the EIA process. In fact, this zone is delineated around the airport and it signifies that within this zone the ambient noise level will exceed the permissible limit values due to the air traffic. Hence, certain restrictions and adaptation measures have to be introduced within the zone. In the case, a neighboring town’s municipality (Százhalombatta) has complained at the court that it has no standing whatsoever in the process where the National Air Traffic Authority eventually defines the zone and its details. This exclusion from standing was because the boundaries of the protection zone do not cut across the territory of the town (i.e. there is no overlap between the area of the town and of the protection zone of the airport), based on the initial calculations of the project

developer. The final judgment made by the Budapest Capitol Court in June 2008 stated that legal standing should be granted to the municipality based on the notion of affectedness. In its reasoning, the Court held that the specific subordinate legislation prevailing in airport construction cases and limiting the persons to be notified of the decision on the noise protection zone to those only whose territory overlaps with the protection zone (i.e. where ambient noise limit values will be exceeded due to the air traffic) is unreasonably restrictive. It also held that the criteria to be met to have standing are set by an Act of Parliament, the Administrative Procedure Act 2004. This includes a test of affectedness which was clearly met by the plaintiff municipality for at least two reasons. On the one hand, the municipality is obliged by law to implement the protection of environment on its own territory. On the other hand, the affectedness was partly demonstrated by letters of complaints submitted to the municipality by local environmental NGOs who have petitioned even against the current noise of a few take-offs and landings. The Court also held that the conditions required for standing in the Administrative Procedure Act 2004 (“significant adverse effect”) are not identical with the case of exceeding of a limit value. Therefore those who are outside the noise protection zone of the airport, and will presumably not suffer a noise impact exceeding the limit values, can still suffer a significant adverse effect. Ultimately, the Court reaffirmed that a lower level norm on technical details of airport construction cannot in any way overwrite a national Act of Parliament setting the boundaries of standing and ordered the National Air Traffic Authority to involve the municipality into the process as a party. After numerous procedural steps, the project developer ultimately withdrew its claim and the process has been terminated after five years since the filing of the original request.

Since this judgment, another final judgment made by the Budapest Capitol Court in September 2008 reaffirmed these finding regarding another airport noise protection zone.

It is also quite paradox to argue in favor of an exclusion of potential parties from the administrative procedure based on the noise emission calculations and the delineation of the noise protection zone based thereon. Ultimately, the very administrative case on the boundaries of the zone is supposed to discuss whether the calculations of the project developer were correct and whether the area of the zone was correctly defined. Consequently, those who are outside the zone but still question its coverage (and the boundaries of the impact area) should certainly be granted standing; otherwise there would be no forum for them where they could challenge the legality of the administrative decision.

Following with the first category (“environmental NGOs”), the standing of this group is founded on Art. 15 of the Administrative Procedure Act 2004 that says:

Par. 5 In defined cases an Act of Parliament may provide legal standing to organizations of interest and those civil society organizations whose registered activity aims at the protection of a fundamental right or the promotion of a public interest.

This Act of Parliament in Hungary is the Environmental Protection Act 1995 that in its Art. 98 stipulates that

Par. 1 Associations formed by citizens for the protection of their environmental interests and other social organizations not qualified as political parties or trade unions have legal standing in the territory of their operation in environmental administrative procedures.

Although many components of this provision require further interpretation, not many have raised controversies to date. For instance, regarding the expression “territory of operation” of an NGO – although it was challenged many times by project developers and administrative authorities to what extent this can be defined by the NGO itself – the courts unanimously held that this issue belongs to the discretion of the NGO in question. It means, that any NGO can regulate its territory of operation in its statutes as it sees fit.

Nevertheless, immediately after the entering into force of this law, the problem of the construction of the notion “environmental case” also emerged and certain courts settled disputes calling only EIA (environmental impact assessment) cases “environmental.” However in 2004, the Supreme Court declared in its Administrative Legal Unity Resolution No. 1 of 2004 that every case is environmental where the Regional Environmental Inspectorate is at least a consulted authority.

The head of the Administrative Section of the Supreme Court of Hungary initiated a so-called legal unity process and urged the adoption of a Legal Unity Resolution in the following question: do associations formed by citizens for the protection of their environmental interests and other social organizations not qualified as political parties or trade unions have legal standing in administrative procedures where law stipulates that the opinion of the regional environmental inspectorate as co-decision authority must be obtained?

Certainly the question was meant to point out if NGO legal standing prevails in procedures additional to those processes that have been qualified as “environmental” from the beginning, such as EIA and/or IPPC procedures.

The initiator called the attention of the Supreme Court that according to information from NGOs their standing is not interpreted in a unified way in lawsuits relating to environmental procedures. In a number of administrative procedures law prescribes that the opinion of the environmental protection inspectorate as co-decision authority must be obtained for a decision. An example for such an obligation is the general construction permitting where in cases involving environmentally relevant issues the environmental protection inspectorate takes part in the procedure. In the aforementioned cases the potentially environmentally harmful characteristics of a future activity necessitate the participation of the environmental authority. Court cases reveal the practice of judiciary that NGOs are not granted legal standing in construction, forestry and other administrative procedures, only in EIA and IPPC cases.

According to the decision of the Supreme Court of Hungary, both international legal practice and the Hungarian law (partly because of the obligation of Hungary to harmonize its legal system with the requirements of the EU) recognize the importance of environmental protection and broaden the area where law functions as a safeguard. Part of this expansion is that in **certain cases** no personal harm or interest must be proven in order to be able to act in the public interest at legal *fora* in case of an environmental harm or danger for the community. NGOs entitled have legal standing for both initiating a legal procedure at court against polluters and to use court as a legal remedy against administrative resolutions.

Public participation in environmental procedures is a specific occasion of the protection of fundamental rights. The Environmental Protection Act 1995 ensures legal standing to NGOs undertaking environmental tasks as a way of solution to this latter problem. It is the task of the authorities and courts to construe laws and to form legal practice in a way to comply with

the requirements of international law and of the EU. Both the guiding environmental principles of the EU and the international regulation of environmental protection clearly require the participation of public in environmentally related administrative procedures.

As it can be seen in the above paragraphs, dispute – if any – is always about the limits of legal standing of individuals and/or NGOs in administrative procedures and the ensuing court procedures. It also signifies that other processes are not so open to such discussions as administrative law. In private law matters, standing is strictly dependent on the affectedness of rights and legitimate interests, while criminal procedures are traditionally not open to outside influence, including participation of the public or civil society organizations in any phase of the process.

## **2. Scope of judicial review of environmental acts and omissions**

### **2.1. Nature of acts/omissions subject to judicial review**

The issue of which acts and/or omissions are subject to judicial review is strongly connected to the question of legal standing in Hungary. This stems from the regulatory method applied by the Environmental Protection Act 1995 that allows legal standing for environmental NGOs in “environmental administrative procedures”. Certainly, once a case is not qualified as environmental, no extensive public participation can prevail therein. Hence a project developer that is successful in calling a procedure “not environmental” realizes comparative advantage, in relation to those project developers whose procedures are clearly environmental.

An apparently unrelated information is that before 2005-2006, the environmental, the nature conservation and the water management authorities were separate state bodies with separate powers and competences. Within the Hungarian administrative reform these bodies were gradually merged into integrated environmental, nature conservation and water management inspectorates organized on a regional basis (presently ten such inspectorates exist in Hungary).

Having known that legal standing of NGOs prevails in cases that are environmental, and also having known that a case becomes environmental once the environmental inspectorate is involved in the decision-making, the merger of state bodies has clear relevance in this matter. One could think that with this merger, the number of cases called “environmental” has grown significantly. Or to put it this way: are all cases environmental where the integrated inspectorate is involved or only those cases where the environmental department of the integrated inspectorate (formerly a separate state body) takes part in making the decision?

Unfortunately, some state bodies, such as the (also) integrated Bureau of Agricultural Administration seems to take a negative approach in this issue.

#### **Case study No. 2**

Is nature conservation part of environmental protection?

A nature conservation association received information that the setting-up of a boar (wild pig) breeding zone and the building of a surrounding metal fence were permitted in a protected forest by the forestry agency. The nature conservation authority has been involved in the

process as an expert agency with no right to co-decision. The NGO claimed legal standing in the permitting process which was refused by the forestry agency. According to the argument of NGO in the given case, once a department of the integrated environmental, nature conservation and water management inspectorate is involved in a case (in this very case it was the nature conservation department), the case is environmental. This argument was also supported by an authoritative statement issued by the County Public Prosecutor Office, Department for Administrative Matters. Nevertheless, the Bureau of Agricultural Administration as an umbrella authority of agriculture-related matter has upheld its restrictive interpretation and denied legal standing to the NGO, calling the case of the boar breeding zone either a forestry case or a hunting case (since the boars were bred for future hunting purposes). The NGO has filed a lawsuit against the forestry agency at the County Court. The court, however, has interpreted the law differently from the NGO and stated in its order No. 14.Kpk.21.022/2008/2. dated 23 May 2008 that if not the environmental department of the integrated inspectorate was involved in the case but another department in charge of nature conservation (as was the case in the given procedure), the case cannot be considered an environmental one, consequently, there is no legal standing for environmental NGOs. Since the court has decided in a non-trial process, there was no remedy against this decision.

Luckily, this case was decided in a non-trial process, thus it did not create a legal precedent (this is not a reported case). Therefore this case and the interpretation of the single judge do not reflect a wide-spread consensus among the judiciary. What could create real clarity is another Legal Unity Resolution of the Supreme Court made in this specific matter, however, it is still to be made.

As for the administrative omissions, the legislation does not include a possibility to initiate judicial review procedure in situation when the authority fails to start the procedure itself (*ex officio*), when a law asks it to do so. In such event, the affected person can ask the superior administrative authority to take a remedy. However, if it fails to do so, the courts cannot order the passive authority to act (to take a decision).

## **2.2. Breadth of judicial review of acts/omissions**

Another crucial question is to what extent the court reviews the legality of an administrative decision in environmental matters. There are a number of possible interpretations, ranging from the most restrictive to the most liberal. One might call the standpoint the most restrictive when courts only review the procedural legality of an administrative decision, e.g. whether the administrative body making the decision had legitimate powers to decide in the case, whether it had territorial competence, whether the decision was made in writing and contains the necessary elements, whether there was no conflict of interests, etc. The other extreme of the scale is when courts do not only review the substantive legality of an administrative decision, e.g. whether the limit values for pollutions are applied correctly, but also reviews the scientific correctness of the supporting technical documentation, most prominently the environmental impact statement.

There are certainly a number of variations between these two approaches, however, the Hungarian courts seem to adopt the latter attitude and “lift the administrative veil” in reviewing legality of EIA decisions, also scrutinizing the technical merits of an EIS. On the contrary, environmental NGOs can only challenge the environmental opinion of the administrative resolution taken to court and can refer to the illegality of a resolution and claim its annulment only in relation to its environmental aspects.



### **Case study No. 3**

#### Court experts v. contracted experts

Recently, in two high profile cases, the court has commissioned independent judicial experts to review the technical correctness of EISs in Hungary. One of the cases affected the construction of a five-star hotel partly near, partly on a protected wetland, while the other case is about the establishment of a large cement factory near the Hungarian-Slovakian border. In both cases, the independent experts' job is to review and evaluate the merit of the technical findings made by the experts who were contracted by the project developers. This clearly signifies that the court brought not only the administrative decision but also its supporting materials under its jurisdiction in environmental cases.

### **3. Injunctive relief**

The injunctive relief or injunction is an important tool in environmental cases, because it may serve the interest of environmental protection once applied wisely. It can ensure the stability and unchanged feature of a situation in a case where a new development project would be potentially harmful for the current environment, whereas it can trigger immediate action if a damage to the environment already occurred and any delay in action would only aggravate the situation. There are two kinds of injunctive relief in Hungary, according to the basic division of branches of law:

- administrative judicial injunction
- civil judicial injunction

The administrative judicial injunction is applicable in an administrative judicial proceeding where the legality of an administrative decision is the matter. It is basically trying to reach the suspension of the enforceability of an administrative resolution.

According to Art. 109 of the Administrative Procedure Act 2004, all second level administrative resolutions are enforceable upon communication. However, the plaintiff may ask the court to suspend this enforceability by its order any time during the judicial procedure. Once requested, the court must make a decision upon the suspension within eight days. Aspects to be taken into account when deciding over the suspension by the court are a) irreversibility of the change stemming from the administrative resolution and b) comparison of harms caused by the enforcement of the administrative resolution or by the suspension thereof. The court may only decide whether to suspend enforceability, and cannot order the defendant to perform any other activities or duties. The court order (either refusing or accepting the claim for suspension) can be appealed to the superior court.

The civil judicial injunction is applicable in a general civil judicial procedure, e.g. in a case where a private individual's conduct is disputed to be harmful for the environment by an environmental NGO at court. According to Art. 156 of the Civil Procedure Act 1952, the court may in any procedure make an order to have a request fulfilled, in case it is needed for preventing a jeopardizing damage, for the conservation of a situation giving rise to the legal dispute or for the legal protection of the claimant deserving special equity, and if the

disadvantage caused thereby does not exceed the advantage. The court has to make a decision as soon as possible upon the request. The court may hear the parties before making a decision, or can issue an order dependent upon the payment of a deposit or bond by the claimant. Such order of the court – if positive – may instruct the defendant to act in a certain way or perform certain activities or duties. The court order (either refusing or accepting the claim for injunction) can be appealed to the superior court.

#### **Case study No. 4**

##### **Injunctive reliefs in Hungary – two examples**

Administrative judicial procedures are more open to injunctive reliefs than civil judicial procedures. For instance, the Constitutional Court of Budapest has suspended the enforceability of a permit issued by the head of the Cultural Heritage Agency. The permit allowed the construction of a hotel on top of a protected cave in the Buda hills, replacing an old Turkish bath-style public steam bath built in the nineteenth century. On the other hand, the same Constitutional Court of Budapest refused to suspend the enforceability of a construction permit of a large residential building located in a green area of Budapest. The difference between the two situations was obviously the presence of a specially protected natural value in the first case and the lack thereof in the latter.

Thus, injunctive reliefs are more frequently used in administrative judicial procedures in the protection of the environment than in civil procedures where their usage is significantly scarcer. In case an administrative resolution is challenged at court, the quality of reasoning against the administrative decision and the matter disputed (e.g. the potential harm to environment of a planned activity, etc.) basically define whether the enforceability of the administrative decision will be suspended or not. However, when requested in a civil procedure, monetary equivalents of a certain claim (e.g. to halt the construction of large infrastructure projects) influence court decision to such an extent that they either refuse such claims or make them dependent on payment of a deposit or bond, which makes their use practically unfeasible.

#### **Conclusion**

Implementation of the AC in Hungary is quite developed and – compared with other countries in Europe – is relatively lenient towards participation. This was reaffirmed by the Government's latest Implementation Report submitted to the AC MOP held in Riga in 2008. However, there are also signs that would support a contrary evaluation, as was highlighted by the Hungarian environmental NGOs' shadow report also prepared for the AC MOP 2008 – and as is demonstrated sometimes by the above paragraphs. Drawing conclusions is therefore not easy, however, when making a final balance, one has to take into account diverse aspects but has to weigh their importance as well. Consequently, we can repeat that in our understanding, the implementation of the AC in Hungary is relatively fair.

## **Access to environmental justice in POLAND**

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### **Introduction**

The study presents selected problems with the implementation of Article 9 paragraphs 2 and 3 of the Aarhus Convention in Poland in the light of the respective provisions of the Community law. The presentation does not pretend to cover all the issues involved.

### **I. Legal status of the Convention in Poland**

#### **Ratification**

Voting the Act of 21<sup>st</sup> June, 2001 on ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (OJ No 89, item 970), the Polish Parliament gave its consent to the ratification of the Aarhus Convention.

The ratification document was signed by the President of the Republic of Poland on 31<sup>st</sup> December, 2001. It was deposited on the 15<sup>th</sup> February 2002 at Depositary of the Convention (United Nations Secretary-General, New York).

Text of the Convention has been published in the Official Journal of 9 May 2003 (OJ No 78, item 706).

#### **Direct effect**

Art. 91 of the Constitution reads:

##### ***Article 91***

- 1. After promulgation thereof in the Journal of Laws of the Republic of Poland (Dziennik Ustaw), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.*
- 2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.*

Interpretation of the Aarhus Convention as such by Polish courts and authorities is not too developed. The Constitutional Court has never addressed the issue. However, in numerous cases (more than 100 cases) in front of administrative courts claimants raised - besides arguments based on Polish and EU law - also arguments referring to the Convention. In majority of verdicts courts stated that the Aarhus provisions were not contravened - yet by saying that they gave an impression to examine these provisions in relation to a given case, acknowledging by that the Convention is directly applicable.

However, in a couple of cases the courts seem to have been excluding the provisions of the Convention to have direct effect in Poland. In most cases such an opinion was not

substantiated by any analysis. Only in one case the court bothered to give some reasoning, albeit neither extensive nor very convincing one.

The case concerned standing of an ecological NGO: the NGO wanted to challenge a building permit which was not allowed under Polish law according to which no members of the public concerned and no NGOs may participate in the building permit proceedings. The NGO claimed standing to have been granted directly by the Convention and the court ruled that the Aarhus Convention may not be directly applicable.

The reasoning behind that verdict seems however to be rather unconvincing. The court interpreted Art.3.1 of the Convention (which requires Parties *to take the necessary legislative.. measures... to implement the provisions of Convention*) in the light of Art. 91.1 of the Constitution (which says that an international agreement shall be applied directly, *unless its application depends on the enactment of a statute* ) and determined that under Article 3.1 of the Convention its application „*depends on the enactment of a statute*“. Therefore, according to the court - the Convention cannot be directly applicable in Poland.

### **Legal context for application of Article 9.2 and 9.3 in Poland**

The legal scheme meant to implement the requirements stemming from Article 9.2 is purely administrative one and includes both administrative appeal and access to administrative court. The scheme is based on some general rules for participation in administrative proceedings and access to administrative review procedures combined with some specific provisions in environmental legislation modifying these general rules.

The legal scheme meant to implement the requirements stemming from Article 9.3 is a combination of administrative and civil law instruments. The administrative ones rely solely on the above mentioned general rules for participation in administrative proceedings and access to administrative review procedures while the civil ones are based on general rules of the civil law combined with some specific provisions in environmental legislation modifying these general rules.

As indicated above, the general rules for participation in administrative proceedings and access to administrative review procedures play a significant role in application of both Article 9.2 and Article 9.3 and have to be presented first.

## **II. General rules for participation in administrative proceedings and access to administrative review procedures**

Under the Administrative Procedure Code (APC) a right to participate in the proceedings and challenging the decision is granted to:

- parties to the proceedings
- participants with the party's rights;

Both parties to the proceedings and persons (organisations) participating in given proceedings with the party's rights can participate actively in the administrative proceedings (i.e they have access to all relevant files, they can submit motions etc) and they can also file an administrative appeal and finally challenge the decision at administrative court.

An appeal is to be filed to the administrative authority of the second instance (APC or special provisions indicate competence of these authorities) but through the authority whose action is in question. In case where the appeal had been filed by all the parties concerned, the authority of the first instance may modify its decision without passing on the case to superior authority.

If the appeal is not respected by the administrative authority, a party concerned (or participants who anticipating in given administrative proceedings with the rights of a party) may challenge the decision at administrative court. Since the 1st of January 2004 Poland has the two-tier administrative courts system instead of the previous one-tier one. It consists of 14 voievodship administrative courts (WSA) as a first instance and the Main Administrative Court in Warsaw as a second instance. The main competence of the latter is to hear appeals from voievodship administrative courts (serve as a cassation court). The compliant to the administrative court of the first instance shall be filed through the authority whose action is in question and not directly to the court. This allows the authority to verify its action and - in case the authority considers the compliant justified - make or modify its decision without initiating the proceedings before a court.

### **The concept of “party”**

According to Article 28 of APC, a party to the administrative proceedings is a “*person whose legal interest or duty is affected by the proceedings or who demands activities of authority because of this legal interest or duty*”.

A party to the proceedings regarding individual cases is always a person who files an application for an administrative decision (e.g. a permit for emissions, an EIA decision, a construction permit etc.) or a person to whom - in case of decisions issued *ex officio* - a decision is addressed (for example a polluter to whom an enforcement notice is served or an administrative fine is imposed upon ).

Apart from the applicant, other persons whose legal interest is also affected are regarded as parties to the proceedings. The authorities competent to issue a decision in question on a case-by-case basis decide who should be treated as “a party”. The situation in this respect differ and very much depend on the way particular substantive laws are drafted. They enjoy significant discretion in this respect but this discretion is subject to judicial control and the administrative courts have the final say on whom to treat as “a party”.

Most substantive laws are designed in such a way that administrative courts used to consider also third persons likely to be affected to have individual legal interests at stake and therefore to be parties to the proceedings. In development control and environmental permitting procedures usually immediate neighbours (owners, holders or administrators of neighbouring properties) of the existing or planned activity or project (for which an environmental authorisation is issued) were traditionally regarded as parties to the proceedings.

Recently, however, there is a trend in substantive laws relating to environmental matters to introduce provisions limiting the scope of persons to be treated as “parties”:

- The Building Law Act of 1994 (hereinafter referred to as BLA) since 2003 includes provisions (Article 28.2 and Article 3 item 20 of the BLA) requiring to treat as “parties” the applicant for a construction permit and owners or administrators of only those properties which are situated in the area affected by the building structure, while “the affected area” is defined as area indicated by special provisions

providing for limitations in the use of the area. Such provisions limit significantly the circle of parties, as “*special provisions providing for limitations in the use of the area*” are rather rare.

- Environmental Protection Law Act (EPLA) since 2005 requires to treat as “parties” to the proceedings regarding permits for emissions (other than IPPC permits) only the applicant for a permit.

### **The concept of “participants with the party’s rights”**

A possibility to participate in administrative proceedings as **participants with the party’s rights** is granted to:

- social organisations (NGOs)
- the public prosecutor
- the ombudsman
- other institutions/authorities (if such a possibility is specifically envisaged by respective substantive statutes).

All of the above subjects are granted the above rights in order to allow them to represent and protect the (various) public interests involved in given decision-making procedure. They do not represent their own legal (or factual interests) but only public interests. In case of social organizations (NGOs) the legal requirements for making use of this opportunity are the most elaborated. According to Article 31 of APC:

*§ 1. Social organisation, in cases concerning other persons, may demand: (1) initiation of proceedings; (2) admission of these organisations to the proceedings, where this is justified by statutory objectives of the organisation and where the interest of the society so requires.*

*§ 2. State administration authorities, having found the demand of the social organisation justified, shall initiate the proceedings ex officio or shall admit the organisation thereto. The organisation may appeal against a refusal to initiate the proceedings or to admit it to the proceedings.*

*§ 3. Social organisation may participate in the proceedings with the rights of a party.*

The above provisions grants standing to social organisations in cases where these organisations represent a common interest. The organisation may participate in the proceedings with the rights of a party which means that it enjoys the same rights as a party to the proceedings, including a right to appeal. In order to be admitted to participate, an organisation must file a relevant motion. The public authority then assesses the motion and decides whether it considers it justified. The assessment is not limited to verification of formal requirements, but concerns also merit justification (need) for the participation of the organisation in a given case (in other words: the authority decides whether it considers it useful to allow the organisation to participate). A refusal may be challenged by the organisation.

### **III. Art. 9.2 of the Aarhus Convention**

#### **Standing conditions**

Polish legislation does not provide for definition of “public” or “public concerned”.

The scope of the right to participate in “public participation procedure” is broader than the one provided under article 6 of the Aarhus Convention. It is granted to “everyone” (i.e. the “public” pursuant to article 2, para 4, of the Convention), and not only to the “public concerned”.

The right of access to justice (as provided for in Art. 9.2 of the Convention) is however granted in Polish legislation only to persons having sufficient interest, i.e. parties to the proceedings or with the rights of a party (see above).

#### **Scope of judicial review of environmental acts and omissions**

##### ***a) Which acts/omissions are subject to the review***

The acts (decisions) requiring public participation (EIA decisions, IPPC etc.)

##### ***b) To what extent do courts review the acts***

Administrative courts decide the case primarily on the basis of documents and evidences gathered during previous stages of proceedings and on the basis of explanations by parties (Articles 106.1 and 2, 133 and 193 of Procedure of Administrative Courts Law Act (PACLA)).

The court may allow - *ex officio* or upon the motion of parties - additional **evidences** in the form of documents if it is necessary to clarify the essential doubts and will not prolong too much the proceedings (Articles 106.3 and 193 of PACLA). This means a party is allowed to submit an expert’s study as evidence (and in practice parties often do so) but this study will be treated by the court as an additional material and so-called private document and not as an expertise of a qualified expert witness (such a document is allowed in the administrative proceedings and not in the judicial-administrative proceedings).

#### **Injunctive relief**

Exercising of rights granted by an administrative decision subject to an appeal filed to the authority of the second instance is suspended until the appeal is investigated.

Decision of the 2. instance authority is considered final and in principle may be executed even if challenged to the administrative court. The court may however, on the motion of the claimant, suspend exercising of rights granted by this decision.

### **IV. Art. 9.3 of the Aarhus Convention**

Art. 9.3 of the Aarhus Convention is implemented in Poland by Art. 31 of APC providing for administrative way (see above).

Challenging of private persons' acts and omissions may be sought however first of all through civil proceedings.

### **Standing of NGOs in civil proceedings**

Under Article 323 of EPLA, environmental organizations (fulfilling the conditions described above) are entitled to file a lawsuit in the public interest of environmental protection. Apart from them, also the State Treasury and self-governmental authority may do so.

Article 323 of EPLA provides for a right to file a civil suit by:

- persons affected by an environmental damage or threat of such damage (Art. 323.1) - this provision is based on general rules of civil law,
- environmental NGOs and self-governmental authorities in case where the threat or violation affects the environment as a common good (Art. 323.2) - this can be considered as an unique right granted to environmental NGOs. As to a definition of environmental organisation - see remarks on Article 2.5 of the Convention above

Art. 323.1 of EPLA says:

*“Every person who is directly threatened by damage or has suffered damage as a result of illegal impact on the environment may demand that the entity responsible for this threat or violation should restore the state complying with law and take preventive measures, in particular by putting in place an installation or equipment to protect against the threat or violation; where this is impossible or too difficult, the person may demand that the activity causing the threat or disturbance should be stopped”.*

### **Scope of judicial review of environmental acts and omissions**

#### ***a) Which acts/omissions are subject to the review***

##### Administrative proceedings

According to APC a party to the proceedings (or an organisation participating “with the party’s rights” - see above) has a right to challenge any **administrative decision** to the administrative authority of the second instance (APC or special provisions indicate competence of these authorities). If the appeal is not respected by the administrative authority, a party concerned may file a complaint to an administrative court of first instance, and then consequently - to the court of second instance.

Therefore each decision authorising any activity or project may be challenged (development consents, environmental permits etc.) - the scope of this possibility depends however on the circle of persons recognized as parties to the proceedings or persons participating with the rights of party (see section II above).

Omissions of public authorities may be challenged by anyone whose legal interest is affected. A relevant procedure consists of two stages:

1. A summons to take action filed to the authority failing to act; and - if the summons was not respected



2. A compliant to the administrative court.

### Civil proceedings

Art. 323.2 of EPLA says:

*„Where the threat or violation affects the environment as a common good, the claim referred to in paragraph 1 may be advanced by the State Treasury, a unit of local/regional administration as well as an environmental organisation“.*

In case where a damage caused by impact on the environment is suffered, the liability of the perpetrator shall not be excluded by the circumstance that the activity responsible for the damage is conducted on the basis of a decision and within its limits (Article 325 of EPLA).

The civil path is however still not too popular in environmental cases and is rarely used.

### ***b) To what extent do courts review the acts***

Regarding administrative proceedings - see above remarks to Art. 9.2.

Civil courts decide the case on the basis of evidences presented by parties and are not allowed to act *ex officio*. In other words the courts are bound by the motions by parties to the proceedings.

### **Injunctive relief**

#### Administrative proceedings

See above remarks re Art. 9.2.

#### Civil proceedings

As mentioned above, Article 323 of EPLA provides also for liability for causing a threat of damage and enables the court to impose on a perpetrator taking preventive measures, in particular by putting in place an installation or equipment to protect against the threat or violation. Where taking such measures is impossible or too difficult, the court may impose ceasing the activity causing the threat.

## **Selected problems of the Aarhus Convention application in ROMANIA**

Catalina Radulescu, Centre for Legal Resources

### **1. Standing conditions for member's of public concerned access to review procedures**

Aarhus Convention was ratified by Romania in 2000. According to article 35 of the Constitution, a healthy environment is a fundamental right in Romania since 2003, when Constitution was modified.

According to Romanian Constitution, the international human rights treaties are directly applicable. If there are any contradictions between the international human rights treaties and other national legislation, then the international regulation have priority. However, if the national provisions of the law are more favorable, then the national regulation would apply (art. 20 paragraph 2).

Although environmental legislation was enforced since 1995, environmental law was still considered without any normative power. Environmental agreements were technically superficial, and they were not issued as a result of any public consultation. Adoption of Aarhus Convention did not bring any change in national legislation or administrative practice. A proper implementation of Aarhus Convention has never been passed. The changes of the national legislation came as a result of adoption of EU Directives. Starting 2002 Romania passed a number of administrative normative acts to regulate access to environmental information, public participation to decision making process, and also access to justice.

Regarding access to information, happily, Romania passed in 2001 a general Act on access to information, very favorable for citizens, and also applicable for environmental information.

Since 2005, when Romanian Government "implemented" Aarhus Directive of EU 2003/4/EC, and also Aarhus Convention, the authorities are trying to apply a more difficult and longer procedure for access to information then the one prescribed by FOIA. Due to previous mentioned constitutional regulation, we successfully obtained in court the recognition of FOIA regulation as applicable for access to environmental information.

#### **1.1 Standing conditions**

Administrative Procedure Act of 2004 is granting standing in all administrative procedures to all social organisms that are aiming to protect fundamental rights according to their statute.

A new Environmental Protection Act was passed in 2005, a Governmental Ordinance, no. 195/2005, which recognizes *actio popularis* in all environmental matters, to al persons, directly or through environmental NGOs, including the right to be consulted in decision making process, for the development of environmental policies and legislation, for emitting normative acts and also for plans and programs<sup>1</sup>.Secondary legislation has implemented specific procedure for access to justice in environmental problems.

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<sup>1</sup> Act 195/2005 (GEO) regarding the environmental protection stipulates in art 5 that:

In many cases the legal standing of CRJ as organization aiming to protect the fundamental rights was challenged, but all the time due to *actio popularis* in environmental cases, the courts recognized the capacity of NGOs to act against environmental prejudice.

The Administrative Court Act of 2004 also includes in the category of the prejudiced persons, the social bodies invoking prejudice by the challenged administrative document either of a public interest, or of the legitimate rights and interests of certain determined natural persons. The public interest refers to the rightful order and the constitutional democracy, the guarantee of the fundamental rights, freedoms and basic obligations of the citizens, satisfying the community needs, achieving the competence of the public authorities.

Since the environmental right represents a fundamental right according to art. 35 from the Constitution we consider that the administrative law grants a larger tolerance to the access to justice regarding environmental problems, not limiting the nongovernmental organizations that can challenge environmental regulation documents only to those that have as purpose the environmental protection.

This way, the mentioned normative documents expressly grant to the nongovernmental organizations the possibility to challenge in court by admitting the right to challenge for the problems regarding the environmental protection.

As a result entire jurisprudence in Romania agrees that any person and all NGOs, environmental or human rights, have standing in court in environmental matters.

In civil matters there is no prescription of the law referring to standing in environmental matters. As general rule, to have standing, the plaintiff must prove subjective violation of his rights. In environmental matters all cases can easily be judged according to administrative procedural law. However, given the general rule prescribed by environmental protection law, one can argue to have standing in civil procedure, whenever environmental rights are infringed upon.

Criminal law lacks regulation regarding environment. Although there are specific crimes prescribe by the environmental protection law, there is no positive jurisprudence and no criminal procedure that needs specific processes and expertise to give the prosecutor the tools to prove that one person is guilty of environmental crime.

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the “State acknowledges to any person its right to a healthy and ecologically balanced environment, granting for this matter:

- a) the access to environment information, in compliance with the confidentiality conditions stipulated by the effective legislation;
- b) the association in environmental protection organizations;
- c) consultancy within the decision making process regarding the development of the environmental policy and legislation, the issuance of regulation documents in the field, the elaboration of plans and programs;
- d) the right to appeal, directly or through the environmental protection organizations, to the administrative and/or court authorities, as the case may be, for environmental problems;
- e) the right to damages for the suffered prejudice.”

Art. 20 item 6 of GEO 195 stipulates that the “Nongovernmental Organizations that promote the environmental protection have the right to appeal to justice au for the environmental problems”.

## **2. Scope of judicial review of environmental acts and omissions**

### **2.1 Which acts/omissions are subject to the review <sup>2</sup>**

For this matter, Act 1213/2006 regarding establishing the standard procedure for assessing the environmental impact for certain public and private projects contains provisions referring to the right of the interested public to challenge from a procedural or substantial point of view, the acts, decisions or omissions of the environmental protection authorities, which represent the object of the public's participation<sup>3</sup>

The acts or the omissions of the competent public authorities, representing the object of the public's participation to the assessment procedure of the environmental impact, are challenged at the same time with the decision of the classification phase or with the decision of issuing/rejecting the environmental agreement, and the settlement of the request is made in compliance with the provisions of Act no. 554/2004.

Art. 24 of Act 1213/2006 stipulates that a precursory condition, the mandatory nature of the prior procedure by which the infringed person requests to the public authorities to revoke, in part or totally, the challenged act.

The regulation of the assessment procedure of the environmental impact assessment regarding the impact assessment of certain public and private projects over the environment, which became effective in September 2009, contains the same procedural provision regarding access to justice as well as the abrogated regulation, including the mandatory nature of the prior procedure but it also contains some new elements. The interested public may challenge both the acts, decisions and omissions of the public authorities as well as the development approval<sup>4</sup>.

The acts or the omissions of the public competent authorities subject to public participation are challenged at the same time with the development consent, with the environmental agreement or, as the case may be, with the decision to reject the request for the environmental agreement, respectively with the development approval or, as the case may be, with the decision to reject the request for the development approval.

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<sup>2</sup> See also the guide for public participation in environmental procedures of Center for Legal resources, Terra Mileniul III and Justice for Environment, [http://www.crj.ro/Uploads/CRJAdmin/Ghid\\_mediu\\_EN.pdf](http://www.crj.ro/Uploads/CRJAdmin/Ghid_mediu_EN.pdf)

#### 3 Art. 23

(1) Any person that is part of the interested public and which considers itself infringed in any right or in a legitimate interest can appeal to the competent administrative court for challenging, from a procedural or substantial point of view, the acts, decisions or omissions of the competent public authority for environmental protection, which represent the object of the public's participation to the assessment procedure of the environmental impact, stipulated by this resolution, in compliance with the provisions of Administrative Law no. 554/2004, with further modifications.

#### 4 Art. 24

(1) Any person that is part of the interested public and which considers itself infringed in any right or in a legitimate interest can appeal to the competent administrative court for challenging, from a procedural or substantial point of view, the acts, decisions or omissions of the competent public authority for environmental protection, which represent the object of the public's participation to the assessment procedure of the environmental impact, stipulated by this resolution, in compliance with the provisions of Administrative Law no. 554/2004, with further modifications.

Practically, the environmental agreements always have an intermediary position, due to the goal and to the applicable regime. This way, according to the provisions of art. 46 of Decree for the approval of the assessment procedure of the environmental impact and of the issuance of the environmental agreements, after publishing the final decision the public has 10 days for formulating observations which “fundament the issuance of the environmental agreement”. We notice that the environmental agreement, final act of this procedure, is part of the “acts, decisions or omissions of the public competent authorities for environmental protection, **subject to the public’s participation**”. Therefore, if the environmental agreement could not be challenged at court, the provisions regarding the public participation would be void, and would not assure that the public’s observations are considered in the final decision.

The development consent represents the decision of the competent authority or authorities, which entitles the owner of the project to do the project and it consists in the following:

- the building permits,
- the agreements regarding the usage of the land for intensive agriculture,
- the agreement of the specialty territorial suburbs leaders belonging to the central public authorities in charge with the silviculture for the projects regarding afforesting the lands where there were no trees before,
- decision of the chief inspector of the silviculture and hunting territorial inspectorate, decree of the leader of the central public authority for agriculture, forests and rural development regarding temporary occupancy or definitive removal of a land from the national forest register, as the case may be, for achieving the objectives involving deforesting for changing the destination of the land,
- water management authorization.

The Act regarding establishing the procedure for performing the environmental assessment for plans and programs does not contain strict provisions regarding the access to justice. They can be found in the Manual regarding the implementation of the environmental assessment achievement procedure for plans and programs.

In what concerns the challengeable documents, we have to mention as favorable the modification of the environmental permit definition which has given them the character of administrative document instead of the technical one, for the same reasons mentioned regarding the environmental agreement.

Competence of **civil courts** is restricted in environmental procedure due to the extensive competence given by administrative procedural law. Both annulment of acts, injunctive relief and penalties are judged in administrative courts. However, civil court could be competent for cases against the polluter alone for remedies, or in remedial action.

In **criminal procedure** any person must report a crime of any kind. Environmental crime can be reported by any person. However, nobody can control the investigation done by police or prosecutor, because entire criminal procedure is “secret”.

### **Case study 1**

The case named “Taul Stiol”, is representative for the failure of criminal prosecution to act when environmental crime is committed. A glacier lake named Stiol, part of the National Park Rodnei Mountains, was almost destroyed by illegal construction of a road by the mayor of a Borsa City. After deciding that no environmental crime has been committed, the tribunal

sends the case back to prosecution in order to investigate more the destruction of the lake, and to see if it is a crime or not. After an expert found that the lake actually still exists, also there was a certain impact of the illegal construction, without considering the quality of GLACIER lake, also protected by law for special characteristics that disappeared, the prosecution concluded again that the mayor should not be convicted because he had no intention to destroy the lake, he just wanted to build a road and to bring water to the city (also the city has water from other sources). The destruction occurred in 2002. Until now the mayor didn't pay the price for reconstruction of the area (he has never been charged him with any accusation, also he had no permit for the constructions) and the road is still there, so that a large number of tourists are driving there for the weekend. As a result, waste left by tourists completed the "work" of the mayor. The mayor has also built a dam, enlarging the surface of the lake 3 times. As a result the shore was flooded and a specific and protected vegetation for the glacier lake, disappeared. Also other destruction of protected species and modification of habitats happened as a result. No measure for bringing the lake to the initial status was taken by authorities, and today might be too late.

## 2.2 To what extent do courts review the acts?

All claims against an administrative authority's acts, omissions, administrative procedures, or administrative contracts are subject to administrative courts, and are prescribed by Law no 554/2004<sup>5</sup>.

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<sup>5</sup> According to art. 1 of Act no 554/2004, "(1) Any person that deems him/herself aggrieved in a legitimate right or interest by a public authority, through administrative action, or as a consequence of such authority's failure to resolve such person's petition within the timeframe provided by law may approach the jurisdictional Administrative Litigations Court with a request for the rescinding of the contested action, or the recognition of the claimed right or of the legitimate interest, and for the reparation of the damage sustained as a consequence thereof. The legitimate interest may be both private and public.

(2) This Act also recognizes the right to approach the jurisdictional Administrative Litigations Court of third parties aggrieved in their rights or legitimate interests through an administrative action of an individual nature and regarding another subject of law".

**Art. 8** provides that „(1) A person aggrieved with respect to a right or a legitimate interest acknowledged by law, by a unilateral administrative decision, who is dissatisfied with the response received to his/her preliminary complaint, or who has received no response within the legal timeframe referred to in Art. 2, h), may take legal action before the jurisdictional Administrative Litigations Court, requesting the rescinding of all or part of the administrative decision in contention, reparations for the loss sustained and retributory damages. Such legal action before an Administrative Litigations Court may be also taken by the party that feels aggrieved with respect to a legitimate right through the failure of the administration to provide resolution of his/her case within the legal deadline or through the unjustified refusal to have his/her petition resolved, as well as through the refusal to perform a certain administrative operation needed for the exercise or protection of a right or legitimate interest.

**Art. 9** - (1) A person whose right or legitimate interest has been harmed by a Government Order or parts thereof may take legal action before the Administrative Litigations Court, raising the exception of unconstitutionality, insofar as the main object of the action is not a finding on the unconstitutionality of the Order or a stipulation in the Order.

**Art. 18 provides the solutions available to the court:**

„(1) The court examining a petition falling under the provisions of Art. 8 (1) may void all or part of the administrative act, or obligate the public authority to issue a new administrative act, issue a new document or perform a certain administrative operation.

(2) In addition to the cases falling under Art. 1 (6), the court also has jurisdiction to rule on the lawfulness of the administrative operations based on which the challenged act was issued.

(3) When the plaintiff's petition is favorably resolved upon, the court shall also decide on the reparations and retributory damages due to the plaintiff, if the plaintiff has so requested.

(4) When the object of the litigation is an administrative contract, the court, depending on the facts of the case, may:

- a) rule rescinding of all or part of such document;

Civil court can be competent only in cases against the polluter or private company, in remedial action. However, I am still not aware of such case in Romania.

The Decision of the Court can be appealed once, and there is also possibility of extraordinary appeal, according to general civil provisions. The administrative law provides a special possibility of extraordinary appeal, if the constitutional principle regarding the priority of the EU law against the internal legislation, was breached.

If criminal case would be, the court could sanction civil persons with criminal penalties, prison, but also the companies with criminal penalties and a criminal record. However we are not aware of such cases in Romania yet.

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b) obligate the public authority to enter into the contract to which the plaintiff is entitled;

c) compel one of the parties to fulfill a certain obligation;

d) express consent on behalf of one of the parties, when public interest so requires;

e) rule payment of reparations and retributory damages.

(5) The solutions available as per paragraph (1) and paragraph (4) (b, c) may be applied under pain of penalties for each day overdue.

(6) In all situations the court can set, in its ruling, on request from the interested party, a deadline for execution as well as a fine as per Art. 24 (2).

### 3. Injunctive relief (efficiency of judicial review)

In administrative procedure provided by Act no. 554/2004<sup>6</sup> injunctive relief can be granted by court from the moment when the preliminary administrative procedure starts, until the final decision of the court regarding the main claims of the plaintiff (eg. Annulment of the environmental permit). The injunctive relief is actually suspending the effects of the administrative act, or stops an administrative procedure until the legality of the act or of the procedure is judged by court. It can be requested by separate petition to the court, immediately after the preliminary administrative procedure started (in Romania it is a formal complained send to the public authority responsible). It can also be claimed after the preliminary administrative procedure has ended, through the same petition send to the court against the public authority, requesting to cancel, modify etc. an administrative act, procedure, omission, etc. It also can be claimed after the preliminary administrative procedure has ended, by separate petition to the court.

However, due to the length of the judicial procedure, granting the injunctive relief is not effective.

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<sup>6</sup> **Art. 14** „(1) For well grounded reasons and for the purpose of avoiding impending loss, the aggrieved person may, on the date of notifying the superior authority to the issuing public authority, subject to Art. 7, request the jurisdictional court to grant the injunctive relief of the challenged unilateral administrative decision, pending a decision on the merits of the case is reached by the Court. In case the aggrieved person fails to file action for rescinding within 60 days the suspension shall end lawfully and without any formality.

(2) The court shall decide on the request for injunctive relief, by an emergency procedure and with precedence, with summons to the parties.

(3) When a major national interest is at stake in the case, which may seriously affect the normal operation of a public administrative service, the request for injunctive relief of the challenged regulatory administrative decision may also be filed by the Public Ministry, *ex officio* or upon notice, in which case the provisions of paragraph (2) shall apply accordingly.

(4) The ruling given in favor of the injunctive relief shall be enforceable by virtue of law. It may be appealed on law within five (5) days of issuance. The appeal on law does not suspend the enforcement.

(5) In the hypothesis where a new administrative act is issued with the same contents as the one that was suspended by the Court, it shall be suspended by virtue of law. A preliminary complaint is not necessary in such case.

(6) Several successive motions for suspension cannot be filed on the same grounds.

(7) Enforced suspension of the administrative act results in the cessation of any form of enforcement until expiry of the duration of suspension.

#### **Art. 15 – Request for injunctive relief through principal action**

(1) An injunctive relief of the challenged unilateral administrative decision may be requested by plaintiff on the grounds stipulated at Art. 14, as part of his petition to the Court for the rescinding of all or parts of the administrative decision in contention. In this case, the court may rule suspension of the challenged administrative decision, pending the final and binding resolution of the case. The request for injunctive relief may be made in the petition to sue in the main action or through separate petition, pending the resolution of the merits of the case.

(2) The provisions of Art. 14, paragraphs (2) – (7), shall apply accordingly.

(3) The ruling given in response to the request for stay of execution is enforceable by virtue of law, and the appeal on law initiated according to Art. 14(4) does not suspend execution.

(4) In the situation where the action on the merits is admitted, the stay ordered in the conditions of Art. 14 shall be lawfully extended until the final binding ruling in the case, even if the plaintiff did not move for the stay of the administrative act on the basis of para. (1).



### **Case study 2**

In “Cheile Sugaului Case, request for ” injunctive relief against environmental permit was decided upon after 2 years since the procedure has started. The court rejected the request, considering that there is no danger to environment, even if the environmental permit was issued in a Natura 2000 site and the environmental impact assessment was completely denying the existence of the species protected as Nature 2000<sup>7</sup>.

In other cases, even if the injunctive relief is granted, it comes too late, or it is not respected by the parties.

### **Conclusions**

Although Romanian legislation seems very modern and effective, when it comes to implementation, we can find very negative examples that lead to massive negative impact upon environment.

We can give a few relevant examples:

### **Case study 3**

A private company requested an environmental permit for a medical waste incinerator. The Competent Agency for Environmental Protection (CAEP), after summoning of the technical committee and evaluation of the emplacement of the future incinerator, discovered that the building was already realized. The authority also discovered that the documentation submitted by the company was not complete. According to the Romanian Environmental Protection Law, an environmental permit can be issued only before the project is realized. Discovering that the building was already finished and the equipment bought, and that the documentation was insufficient, the authority rejected the request of the company to issue the permit. The company sued the CAEP and requested the court to find that all conditions and documentation of the project was submitted, that the project cannot be considered finished because the equipment was not turned on, and to force the CAEP to issue the permit. The court accepted the petition of the private company, and forced the CAEP to issue the permit immediately, without finalizing the EIA procedure.

In another case, CRJ asked the court to cancel a local urban plan regarding a huge bridge build in Bucharest, because the SEA procedure was never realized, and the environmental permit was never issued. The court rejected the case because considered that EIA procedure for the technical project was realized and the environmental permit issued in this procedure, so that there is no need of environmental evaluation for the urban plan.

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<sup>7</sup> See the Guide for public participation [http://www.crj.ro/Uploads/CRJAdmin/Ghid\\_mediu\\_EN.pdf](http://www.crj.ro/Uploads/CRJAdmin/Ghid_mediu_EN.pdf)

## **Selected problems of the Aarhus Convention application in the SLOVAK REPUBLIC**

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The Slovak Republic has accessed the Aarhus Convention on 31 October 2005. The Convention is in force since 5 March 2006. It is part of a Slovak legal system and as an international convention on human rights and fundamental freedoms the Convention has priority before laws.

### **1. Legal standing in administrative procedures and in court review procedures in general.**

Legal standing in administrative procedures in general is defined in Administrative Procedure Act nr. 71/1967 Coll. as general standing provision.

General definition of party of administrative proceeding is provided by Articles 14 and 15 of Administrative Procedure Act, based on which the party of proceeding is a person whose rights, interests protected by law or obligations will be subject of procedure or whose rights, interests protected by law or duties may be affected by a decision; a party of proceeding is also a person who claims that the decision may affect the person's rights, interests protected by law or duties until proved otherwise.

Party of proceeding is also a person who has such a position on the basis of a specific act.

Those general standing provisions are specified in special acts on special fields of human activities (for example Construction Act, Nature Protection Act, IPPC Act and so on), where are provisions for persons, whom belongs the right to be a party of proceeding, provided concretely for purpose of those acts. In general, the relationship between legal form in administrative act and legal form in special administrative acts are made on the basis *lex generalis* and *lex specialis*. For example according to the Construction Act (nr. 50/1976 Coll.) a subject can be a party of proceedings concerning land use permit only if his/her rights regarding „property or other rights regarding land or buildings, or neighboring lands and buildings“ can be „directly affected“. Other subjects, who can be party of these proceedings are applicant of land use permit, municipality and person who has such a position on the basis of a specific act.

Person, who is a party of the proceeding, is very important subject of every administrative procedure, because of his legal standing and rights, which belongs to him/her in the procedure. Party of the proceeding has in administrative following rights:

- a) the administrative authority shall explain, how it dealt with proposals and objections of a subject participating, these explanations shall be cited in the justification of the decision,
- b) access to the whole text of the decision, including its justification,
- c) delivery of the decision of a prosecutor (if it was issued),

- d) notification about correction of errors in writing, calculating and other obvious inaccuracies, in the decision,
- e) right to file an appeal concerning the first instance decision,
- f) access to court to review merital or procedural illegality of the decision or of inactivity of the administrative authority.

Under the Slovak legal order, only a person having the position of “party to the proceeding” in the previous administrative permit proceeding has the right to file a complaint in court in order to challenge an unlawful administrative decision (§ 250/2 of the Civil Procedure Code). Judicial proceedings involve participants of administrative procedures and those who should be treated as participants.

### **1.1 Application of Art 9.1 of Aarhus Convention.**

In this moment, it is possible to say, that first pillar of Aarhus convention and its application is not very problematic compare to the other pillars, because of the fact, that there is quite constant and in particular favorable interpretation of Art. 9.1 provided by Slovak courts.

A broader access to information has been legislatively arranged by an amendment to the Act 211/2000 on free access to information (Information Act) as amended. Measures concerning public access has been implemented to the Slovakia’s legal system by the Act 205/2004 on collecting, keeping and distributing information on the environment. Information Act guarantee free access to information for all kind of information (included environmental information) which obliged person dispose to (as obliged person is defined every public authority, which dispose to relevant information). Information is provided without necessity to provide legal or any other reason or interest concerning the request for information. Restrictions in rights to information could be made only from legally reasons defined in Information Act, so that the obliged person makes available required information including accompanying information after excluding information (where is the access restricted) defined by the Act. If there is an unlawful administrative decision related to access to information, aggrieved person has the right to file a complaint in court in order to challenge that kind of decision.

Main deficiency, which can be seen by application of art. 9.1 in Slovakia, is inefficiency of judicial review de facto. There is no problem with legal standing at all, but in a case, when there is a clear title on asked information from aggrieved person and courts affirm this and recall an unlawful administrative decision related to this, there is to long period of judicial review till the final verdict is made (averaged takes court review one year or more). After so long period is the asked information nearly always unprizable for the aggrieved person and it make no sense for him/her.

Next to this, another problem can be seen in merit of court decisions and what they are about. The usual praxis, which can be seen by court review is (in case, when there is clear title on asked information from aggrieved person and an unlawful administrative decision related to this), only to say that administrative decision was made by unlawful way, and why. But, courts in its verdict never says directly the main thing – that there is a clear and indubitable right on the side of aggrieved person on access to asked information a that there is a clear obligation for administrative authority to provide asked information, because of the fact, that there is no legally reason for disapproving the access to asked information. Courts, in their

decision-making process deal only with legality of the procedure of administrative body without going deeper into the problem.

## **1.2 Application of Art 9.2 of Aarhus Convention.**

In the present, it is possible to say, that the requirements of the Aarhus Convention concerning Art. 9.2 are included in the Act 24/2006 on environmental impact assessment as amended and also in the Act 245/2003 on integrated pollution prevention and control (IPPC Act).

**Processes of environmental impact assessments (EIA) according EIA Act** should be done always before by the permit procedure for a proposed activity and the final output of EIA process (“EIA statement”) does not have the character of a final decision, it is only a obligatory (but not “binding”) statement, which represents an obligatory basis for further decision-making. EIA process is not an administrative procedure pursuant to Administrative Procedure Act and “EIA statement” is not a decision with legal binding effect. Small exceptions from this rule are “EIA statements”, which are made for activities planned in Natura 2000 areas according article 6.4 of Habitats directive (Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora). In this case, if the “EIA statement” does not recommend the activity, because of negative influence of activity on Natura 2000 area, this statement is binding for permit decision-making process and the administrative authority can give a permit for activity only according legal provisions defined in EIA Act). EIA process must be executed for all activities and their changes, which are defined in Annex 8 of EIA Act (the same activities are in Annex 1 of Aarhus convention).

The EIA Act defines participating of the public in assessment process as follows: the public is one or more natural persons or legal entities, their associations, organizations or groups”. Pursuant to the provision of Article 24 of EIA Act the public concerned is defined as the public which is or may be interested in procedures of environmental decision-making. The public concerned according EIA Act involves:

- environmental NGOs which actively participate in the EIA procedure
- ad hoc public initiatives (2 or more people), under the same conditions
- individuals (natural persons) actively participate in the EIA procedure and prove interest on decision-making for the activity which is an object to EIA procedure.

If these subjects reach fulfill the above conditions, they have a right to become parties in the relevant decision making procedures and subsequently have access to court. In this context it is important to say, that environmental NGOs and ad hoc public initiatives are for the purpose of EIA Act specified as “*subject whose right for favorable environment may be affected by the decision*”. This is very important, because on this legal basis is possible to argue before the administrative authority or before the court with impairment of this right, which normally do not belong to legal persons. Impairment of rights can be proved when the administrative act is violating someone’s subjective rights.

As it was mentioned above, under the Slovak legal order, only a person having the position of “party to the proceeding” in the previous administrative permit proceeding has the right to file a complaint in court in order to challenge an unlawful administrative decision.

This is absolutely new legal situation (new legal definition of „public concerned“) came into force in May 2010 as a result of an infringement procedure started by the Commission. Until recently the situation was not so positive, because the amendment of the EIA Act from 2007

only granted the NGOs with limited participatory rights without the possibility of access to justice.

The right to become parties in the relevant decision making procedures and subsequently access to court were not guaranteed to the environmental NGOs in the period between December 2007 and July 2009. In this period, those rights were abolished by amendment of the EIA Act.

This amendment has changed legal position of the environmental NGOs within proceedings in environmental matters from „party of proceedings“ into „participating subject“. This change was significantly extensive and has affected not only proceedings according the Nature Protection Act, but also all proceedings in environmental matters concerning projects which are subject to previous environmental impact assessment (i.e. projects according to Annex I of the Convention).

The rights of „participating subject “ are narrower comparing to the rights of the „party of proceedings“. Rights of participating subjects are defined in the Administrative Act (in particular Article 15a paragraph 2, Article 23 paragraph 1, Article 33 paragraph 2). Pursuant to these provisions of the Administrative Act a „subject participating“ has right to be notified about commencing of the proceedings, right to be notified about filings of parties of proceedings, right to participate in the hearing and in local reconnaissance, right to propose evidence and right to inquiry the parties of the proceedings, right to search records and make abstracts and copies, right to give his/her opinion concerning all relevant documents of the proceedings, and finally – the right to propose update of the record.

In contrary to the party of the proceedings, a „participating subject “ **does not** have following rights:

- the administrative authority shall explain, how it dealt with proposals and objections of a subject participating, these explanations shall be cited in the justification of the decision,
- access to the whole text of the decision, including its justification,
- delivery of the decision of a prosecutor (if it was issued),
- notification about correction of errors in writing, calculating and other obvious inaccuracies, in the decision,
- right to file an appeal concerning the first instance decision,
- access to court to review merital or procedural illegality of the decision or of inactivity of the administrative authority.

In the period between July 2009 and May 2010, the legal situation was better, but not ideal. The public concerned involved

- a) environmental NGOs, which actively participate in the EIA
- b) civil association associating at least 250 natural persons over 18 years of age, of that number at least 150 persons with permanent residence in an affected municipality which actively participate in the EIA.

Both of those subjects had a right to become parties in the relevant decision making procedures and subsequently access to court.

There were some quite important deficiencies in this legal regulation, related to application of art. 9.2. In a case, if a municipality does not have more than 150 inhabitants with permanent residence in the municipality (in Slovakia is a lot of small villages, with less than 150 citizens with permanent residence), it was impossible to reach the legal condition defined in EIA Act. From this point of view, public participation in EIA process as a “public concerned”, which is carried out in a small village in Slovakia, was very restricted and nearly nobody had the right concerning art. 9.2.

Also, the previous legal regulation in EIA Act did not afford opportunity to be a “public concerned” for natural persons as individuals. According EIA Act, individuals were not subject in a concept of “public concerned” This was not in conformity with Aarhus convention (according art. 2.4 *“The public means one or more natural or legal persons ... “* in combination with art. 2.5 *“The public concerned means the public affected or likely be affected by, or having an interest in, the environmental decision-making ...”* and with combination with art. 9.2 *“Each party shall, within the framework on its national legislation, ensure that members of the public concerned ...”*).

This means that many persons whose rights may be affected were not considered to be “public concerned” by the Slovak legal order, and thus do not have rights under articles 6 and 9 of the Convention.

Moreover, the position of individuals in administrative proceedings affecting their privacy, health, and environment was very weak in practice. Public authorities often did not respect the right of an affected person to participate in the decision-making process and his/her right to be “party to the proceedings.” Public authorities often decided that a person is not affected by the activity which is subject to the permit proceeding.

From this point of view, the new legal situation, which is in force from May 2010, seems to be very progressive.

**Legal regulation pursuant the IPPC Act** defines the public concerned as follows: The public concerned is the public that is or may be affected by decision-making procedure on a new operation or by decision-making on a substantial change in operation or by the updating of conditions for permission based on IPPC Act or that is or may be interested in such a procedure. The public concerned is

- a person that claims that the decision may affect the person’s rights, interests protected by law or duties until proved otherwise,
- organization supporting environmental protection founded on the basis of specific legal instruments; such an organization is for the purpose of this Act considered to be a subject whose right for favorable environment may be affected by the decision,
- civil association associating at least 250 natural persons over 18 years of age, of that number at least 150 persons with permanent residence in a affected municipality; this association is for the purpose of this Act considered to be a subject whose right for favorable environment may be affected by the decision.

Because of the fact, that activities, which are subject to the administrative procedure according IPPC Act are nearly the same as activities which are subject to EIA procedure, “public concerned” has two possibilities how to participate as a party to the proceeding. This also means that in Slovak legal order are two legal definitions of “public concerned”.

### **1.3 Application of Art 9.3 of Aarhus Convention.**

According to Article 9, paragraph 3, the Slovak Republic must determine certain members of the public meeting the criteria laid down in national law (if any) that will have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. Such procedures must fulfill the requirements of Article 9, paragraph 4.

With two exceptions (see below), there is no subject determined by the Slovak legal order that has the right to challenge any (every) act or omission which contravenes provisions of its national law relating to the environment in the procedure that fulfils the requirements of Article 9, paragraph 4 – fairness (including independence and impartiality), timeliness, equity, adequate, and effective remedies, or the possibility of issuing injunctive relief.

According Act. 151/2000 on using genetic modified technologies and genetic modified organism (GMO Act), in permit administrative procedures for using GMO, is defined, that a party to the procedure is organization supporting environmental protection founded according to specific legal instruments operating for more than one year, which have notified their participation in the administrative procedure in written form in accordance with the Act, together with petition containing 100 signs of natural persons, supporting its position in the procedure.

In administrative procedures according Act 359/2007 on environmental liability is defined, that a party to the procedure is organization supporting environmental protection founded according to specific legal instruments operating for more than one year, which have notified their participation in the administrative procedure in written form.

Only NGOs, defined in those acts could be seen as „public concerned“, which fulfill the requirements defined in Art. 9.3 of Aarhus Convention.

According other Acts relating to environment protection (for example Nature protection Act, Forrest Act, Mining Act), persons have access to the courts in order to challenge acts and omissions made by competent authority only if their rights have been impaired. As was mentioned above, a person has a right to access the courts in order to challenge any unlawful act of the public authorities only if the person was recognized as a “party of administrative proceeding” in the previous administrative proceeding and if his/her rights were impaired by the administrative decision.

So, under the Slovak legal order, no members of the public has the right to challenge every act or omission that contravenes the provisions of national law relating to the environment before the court.

As it was mentioned above, before December of 2007, the NGO supporting environmental protection was, according to Nature Protection Act a party to the procedure in administrative procedures according this Act. In December of 2007, those rights were abolished by amendment of the Nature Protection Act (543/2002) This amendment has changed legal position of the environmental organizations within proceedings in environmental matters from „party of proceedings“ into „participating subject“. This change was significantly extensive and has affected proceedings according the Nature Protection Act.

### **Case example 1**

Environmental non-governmental organization called VLK was a party of proceeding, according its claim, that its rights for favorable environment and its interest protected by law could be affected by administration decision made in the permitting proceeding for chemical affusions (pesticides) executed in National Park (which is area under very high level of protection according Nature Conservation Act) against wood-borer (bark-beetle), by the regional environmental state authority. The regional environmental state authority disqualified VLK from the permitting procedure, because in its point of view, there is no right, or interest protected by law, which directly belongs to NGO in this type of administrative procedure and which could be affected by decision. Secondly, there is no special act (included Nature Conservation Act), under which conditions could VLK be a party of proceeding in this type of administrative procedure. VLK has filled a lawsuit against the regional environmental state authority and its decision, and its arguments were made mostly on the Aarhus Convention rights. The case was lost in first instance, in second instance the Supreme court started a preliminary ruling on European Court of Justice, with a very important preliminary questions relating on self-executing of Aarhus Convention and direct applicability of art. 9.3. Supreme court asked following preliminary question:

1. Is it possible to recognize Article 9 and in particular Article 9(3) of the Aarhus Convention, given that the principal objective pursued by that international treaty is to change the classic definition of *locus standi* by according the status of a party to proceedings to the public, or the public concerned, as having the direct effect of an international treaty ('self-executing effect') in a situation where the European Union acceded to that international treaty on 17 February 2005 but to date has not adopted Community legislation in order to transpose the treaty concerned into Community law?
2. Is it possible to recognize Article 9 and in particular Article 9(3) of the Aarhus Convention, which has become a part of Community law, as having the direct applicability or direct effect of Community law within the meaning of the settled case-law of the Court of Justice?
3. If the answer to the first of the second question is in the affirmative, is it then possible to interpret Article 9(3) of the Aarhus Convention, given the principal objective pursued by that international treaty, as meaning that it is necessary also to include within the concept 'act of a public authority' an act consisting in the delivery of decisions, that is to say, that the right of public access to judicial hearings intrinsically also includes the right to challenge the decision of an administrative body, the unlawfulness of which lies in its effect on the environment?

## **2. Scope of judicial review of environmental acts and omissions**

### **2.1 Which acts and omissions are subject to the court review.**

The condition to initiate the administrative judicial procedure is that the ordinary remedies (appeal) of the administration procedure have been exhausted and the decision is valid and enforceable. The administrative judicial procedure is regulated by the general clause of review of the decisions and proceedings of the administrative authorities (including all decisions made in administrative proceeding, concerning to environment) limited by the negative enumeration of the decisions and proceedings which are excluded. In principle, all decisions



and proceedings can be subject to judicial review. Pursuant to Article 46 section 2 of the Constitution of the Slovak Republic, no review shall be excluded when fundamental rights and freedoms are affected. So, most of environmental acts can be subject to judicial review. But in practice, the scope “really reviewable” acts are influenced by the limited number of potential plaintiffs at some areas (see previous part). If the legislation and/or practice of the courts of a country is based on the (strictly applied) doctrine of impairment of rights, the group of “reviewable” acts is limited thereby. If the members of public concerned do not have the right to be a party of the administrative procedure, those acts could be a subject to judicial review only in theoretical view. Moreover to this, there are some environmental administrative procedure, where is only one party of proceeding – the applicant. Such decisions are de facto never subject to judicial control; only in case (theoretical) the application for them would be rejected, the applicant (investor) would have standing to sue.

The court procedure is governed by the cassation principle and the limited appellation principle. In the omission procedure, Article 250t of Act 99/1963 on Civil Procedure before the court the plaintiff shall demonstrate that the omission of the public administration body is contrary to a concrete legal provision which contains an order to the public administration body to act or to proceed including deciding. The reference to this violated provision shall be done in the action. The plaintiff should also demonstrate that all the available remedies set up in a special law (usually in the law which has been violated) has been exhausted, including appeals, proposals (e.g. pursuant to the Act 153/2001 on Public Prosecution etc.), the arguments should be presented to the court in writing. Court protection ideally include both of possible situations, when an authority in a procedure, once initiated, does not issue decision in the prescribed time limit and also when the authority fails to start the procedure itself (*ex officio*), under occasions when a law asks it to do so.

For the question relating to judicial review of acts or omissions of private persons in environmental matters, there are no special provisions, in Slovak legal order, concerned to environment. It is therefore only possible to use the general provisions on compensations of damages and protection against the risk of injury.

Next to this, there is not very positive praxis with judicial review of acts, which are not a result of administrative procedure according Administrative Procedure Act, but they have a strong influence and relevance for final the administrative decisions. This concerns about acts like “EIA statement” (final output of EIA process does not have the character of a final decision and the concept based on the requirement of proving infringement upon petitioner’s rights leads to the conclusion that (separate) judicial review of this act is not possible) or land use plans (it has not a character of individual administrative decision). The courts do not accept actions against those types of acts, with argument that there is no impairment of rights for the applicant.

**Case example Nr. 2 - Court review of EIA statement concerning thermo-power plant within a town Trebišov.**

In the town Trebišov, EIA process for thermo-power plant was in progress. One inhabitant of the town filled a lawsuit against an “EIA statement” with many substantive and procedural arguments. The courts (in both instances – before regional court and also before supreme court in appeal procedure) dismissed the lawsuit, because according to Slovak law, “EIA statements” are not binding decisions - they form basis for later decisions (sitting permission). From this reason court says, that there is no competence for court to decide about such a statement, because it is not a decision made in administrative procedure. From

this reason EIA statement has no „binding“ status and it is not able to impair some subjective rights.

Next to this, the same inhabitant in the same time filled a complaint to the Constitutional court, where he claims impairment of his constitutional rights. Also constitutional court dismissed the complaint, but from very interesting reason. Constitutional court says, that there is no competence to decide in such a case, because not all other available legally means, which are reachable for protection of claimer rights, were previously have been exhausted (namely filling a lawsuit to the regional court).

So, there are two absolutely contradictory opinions, Supreme Court says, that there is no competence to decide about such a statement, but Constitutional Court has other point of view on that problem.

## **2.2 To what extent do courts review the acts**

The administrative judicial procedure is under cassation principle. It means that the court is not entitled to modify the decision, but to confirm it or to cancel the decision and return the case before the administrative authority. The administrative authority is bound by the legal opinion of the court in case that the court decides to cancel the decision of the administrative body and to return the case back before the administrative authority, unless the new evidence about the facts or legal matters arises. The limited appeal principle means that the only exemption from the above cassation principle is the right of the court to change the decision of the administrative authority with regard to the reimbursement of damage, financial fulfillment or financial sanction and such possibility may be done only after the previous probation (demonstration of proofs and evidence) before the court. Courts mostly accept that the petitioner, if having standing to sue, may apply any arguments (substantive and also procedural) in the lawsuit. Problem is that the courts often decide only in formal way without going deeper into the substantive problems.

## **3. Injunctive relief**

According to the Article 250c of the Civil Procedure Code, the legal action has no suspensory effect. The administrative authority's decision is enforceable, unless otherwise stated in a special law. The court may decide to suspend the enforceability of the decision, upon request of the claimant, if it threatens irreparable harm. The conditions with regards to issuing preliminary injunctive relief in a procedure of court review of administrative (permit) decisions are very vague (it is up to court, what can be seen under "threatens irreparable harm"). The court does not have any obligation to issue a reasoned decision on the question of whether to issue injunctive relief or not. The applicant for issuing injunctive relief does not have the right to appeal the decision of the court on rejection of injunctive relief.

**Case example Nr. 3 – two different using of injunctive relief in a permitting process for landfill. Good and bad example.**

The Pezinok landfill case made it into court after activists from Pezinok filed a lawsuit with the Bratislava Regional Court. In addition, the move was followed by the Environmental Inspection office issuing both construction and operating permits for the landfill in Pezinok. The Environmental Inspection office which issued the permits for this area was directly influenced by the Regional Construction Office in Bratislava. When the Regional Court turned down the complaint by the citizens and the town of Pezinok, they filed an appeal with the Supreme Court. As a result, of the appeal the Supreme Court issued a preliminary injunction, because of threatens irreparable harm and temporarily stopped the landfill's operation until it reached its decision on the matter. In this case, the specific issue was the legitimacy of the permit for the landfill. The Supreme Court cancelled the permit for the controversial landfill, and ordered the case to be processed again by the relevant authorities.

The case continued before the Constitutional Court - Owner of the landfill, fill a constitutional complaint against the procedure and the decision of the Supreme Court and Constitutional Court use the injunctive relief against the citizens. According to the complaint, the Supreme Court's steps had violated the rights of the plaintiff, when it cancelled the construction permit for the waste processing landfill. The Constitutional Court decided to postpone the enforcement of the Supreme Court's provisional remedy until the Constitutional Court decides on the complaints.

**Main deficiencies (summary)**

There is still not much experience with application of the Aarhus Convention provided by courts. In principle, there is no comprehensive and constant interpretation of the Aarhus Convention provided by the Slovak courts. But basically, we can see some important deficiencies, according present experiences.

1. **Formalism in decision-making.** The usual praxis is that courts (judges) do not understand to environmental issues and they keep out from the merit of the case and nearly never decided directly about impairment of rights relating to environment. Mostly, the reason for cancellation the administrative decision is based only from procedural point of view, and courts, in their decision-making process deal only with legality of the procedure of administrative body without going deeper into the problem. Judges are generally not educated with regards to environmental issues and issues related to the Aarhus Convention. There is no form of any training for judges concerning environmental issues and the application of the Aarhus Convention. Also, for this reason formalism regarding deciding environmental cases still pertains in the court practice.
2. **Timely resolutions.** Court proceedings can be very long (approximately one year; after submitting an appeal, even longer) and a complaint filed in the court against an unlawful decision does not suspend the effect of the decision to permit an activity (project). Therefore a permitted activity is often performed in spite of a possibly unlawful decision on the permit. The court proceeding is very long and a project is often completed by the time of the decision of the court (e. g. a factory or highway is already built).

3. **Injunctive relief.** The conditions with regards to issuing preliminary injunctive relief in a procedure of court review of administrative (permit) decisions are very vague. The court does not have any obligation to issue a reasoned decision on the question of whether to issue injunctive relief or not. The applicant for issuing injunctive relief does not have the right to appeal the decision of the court on rejection of injunctive relief.
4. **Very restricted standing according Article 9.3 of Aarhus Convention.** With two exceptions (see above), there is no subject determined by the Slovak legal order that has the right to challenge any (every) act or omission which contravenes provisions of its national law relating to the environment in the procedure that fulfils the requirements of Article 9, paragraph 4 – fairness (including independence and impartiality), timeliness, equity, adequate, and effective remedies, or the possibility of issuing injunctive relief.

## **Selected problems of the Aarhus Convention application in SLOVENIA**

Tina Divjak, Legal Informational Centre for NGOs

Slovenia ratified the Aarhus Convention (AC) in May 2004<sup>1</sup>. Most important national legal acts through which the AC is implemented are the *Act on Public Access to Information*, The *Environmental Protection Act (EPA)* and The *Nature Conservation Act (NCA)*. The case law regarding the AC is very limited or almost non-existent. The Administrative Court issued a decision regarding NGO standing conditions. The decision was procedural and did not go into the merits of the case, but nevertheless managed to end the several years-long administrative saga on NGO standing in administrative procedure. There are also two decisions of Slovenian Constitutional Court, both in favour of the AC and abolishing parts of legal acts on the basis of the breach of the AC, Article 8.

### **1. Standing conditions for member's of public concerned access to review procedures and scope of review**

#### **a) General standing conditions in administrative cases**

According to the Administrative Procedure Act, the parties to the procedure are those whose rights or direct legal interests may be affected by the administrative decision. Every person with a standing to initiate the procedure or to be a party in the administrative procedure can also appeal the decision.

After the administrative decision is final, the aggrieved party can file a lawsuit at the court of law against the authority that has issued the final administrative decision according to the provisions of the Administrative Disputes Act. The standing to file a lawsuit has a person whose rights or legal interests have been affected by the final administrative decision or because the administrative decision has not been issued in the prescribed time-frame. The standing for the judicial review is therefore limited to the same parties as in the administrative procedure.

In case of harmful activities of public authorities or private persons, anyone has a right to notify such a violation of environmental law to the environmental inspector (or other competent inspector, e.g. construction inspectorate is a responsible body for supervision of Construction Act). Inspectors issue their decisions in administrative procedure. The only party in the procedure is a natural or legal person against whom the proceeding has started (a person or entity that engage in harmful activity). A person or NGO that notified the violation to the inspector is not a party in the inspection procedure.

The fact that the person notifying the violation is not a party in the inspection procedure also means that such person can not "force" the inspector to start the procedure or to take meaningful steps to stop the violation. However, the State is responsible for the material damage suffered by the person that notified the violation or any other person if the inspector has acted illegally or has illegally omitted the action required to stop harmful activity.

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<sup>1</sup> Ratification act published in Official Journal on June 7<sup>th</sup>, 2004, Ur.l. RS št. 62/2004.

## **b) Civil procedure**

Civil procedure is regulated by the Civil Procedure Act. General public or NGOs are entitled to initiate or participate in a civil procedure under the same preconditions as all other persons: if their rights or interests are directly at stake (e.g. if the emissions devalue their property, endanger their health, if damages occur...). Apart from that, members of the public or NGO's cannot initiate judicial procedure or participate in it as parties. The only exception is provided for the NGOs that have s status under NCA (see below).

## **c) Criminal procedure**

New Criminal Code defines criminal offences against environment or natural goods and also includes criminal offences from the European Crime Directive. Anyone can notify a criminal act that has been committed with the violation of environmental law. However, such individual (or organisation) is not a party in the procedure (has no right to influence a procedure in any way), unless he or she has also been a victim of particular crime.

## **d) Standing conditions in environmental cases**

EPA concretises APA and ADA direct legal interests: Permanent residents of the area affected by the environmental impacts of a project have a legitimate interest in line with the regulations on administrative procedure if the impacts cause a disproportionate environmental burden or danger for human health OR if the person owns or possesses real estate, and thus is granted the status of accessory participant to the procedure. Members of the general public do not have a standing.

Legal standing (status of accessory participant) is granted by the responsible administrative body or court.

To have a standing NGOs must obtain a status under EPA or NCA. Conditions for NGOs to gain legal standing are quite strict, especially under EPA, which in Article 152<sup>2</sup> states that a status of "NGO acting in public interest" may be obtained by an association, foundation or private institute:

- Whose founder is not the state, municipality, other public law entity or political party,
- Has a sufficient number of members (in case of associations, at least 30 members), employees (in case of institutes, at least 1 expert employee with formal degree from the institute's field of activity), or endowment (in case of foundations, at least 1250 EUR),
- Has been established for the purpose of environmental protection,
- Is independent from public authorities and political parties,
- Has been active in the field of environment for at least five years,
- Keeps its own account records audited, and
- Is active on the whole territory of the Republic of Slovenia, or at least in five member states in case of foreign NGO that is registered outside Slovenia.

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<sup>2</sup> More detailed conditions are set in the Rules on detailed requirements and measures for authorisation of status of non-governmental organization which acts in the field of environmental protection in public interest, Ur.l. RS št. 112/2006.

The status of “NGO acting in public interest” is granted by the minister of environment upon the NGO’s application. A register of such NGOs is being kept by the MoE.

According to MoE’s web page<sup>3</sup> the status was granted to 5 organisations, one of which is active only regionally. On the basis of this we can assess that the last condition is not interpreted very strictly.

Nature Conservation Act in Article 137 prescribes the second possibility for an NGO to gain standing in administrative procedures related to the environment. This possibility concerns administrative and judicial procedures in the field of nature conservation. NCA states that the association (excluding other types of NGO legal entities) may acquire a status of “association acting in public interest” if it fulfils the following conditions:

- Is active in the field of nature conservation,
- Has already received recognition, reward or any other favourable evaluation by internationally recognised experts for their activities in nature conservation,
- Obtains its funds at least in part by membership fees,
- Spends most of its funds for nature conservation,
- Contributes significantly to nature conservation by promoting it or by education.

The MoE grants the aforementioned status. Such associations have the right to act in the interest of nature conservation in **all** administrative and judiciary proceedings.

These different criteria in EPA and NCA resulted in different interpretations on the use of both regulations<sup>4</sup>. Furthermore, until November 2006, the minister of environment did not adopt rules that were obligatory under EPA for the implementation of these provisions. In consequence, NGOs until recently did not even have the possibility to apply for the aforementioned status.

Under article 155 of EPA these NGOs have the right to participate in procedures in accordance with this law’s provisions (EPA explicitly states when NGOs can participate: art. 64 – procedure for the issuing of environmental consent for the planned activity and art. 73 – procedure for environmental permit for the operation of installation which may cause large-scale environmental pollution); they are represented in the Council of experts, the Consultative Council and other forms of cooperation established under EPA or other regulations, passed on the basis of this law. Although some interpretations of the Ministry of Environment were generous in giving NGOs with a gained status under EPA a possibility to act in all administrative and court decision (similar to NCA), interpretation of Administrative Court is clear, NGOs have a standing only in the two procedures especially mentioned in EPA. **Only additional exception is the case of exercising a right to a healthy environment** (see below).

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<sup>3</sup> [http://www.mop.gov.si/si/nevkladne\\_organizacije/dokumenti\\_in\\_projekti/](http://www.mop.gov.si/si/nevkladne_organizacije/dokumenti_in_projekti/)

<sup>4</sup> The administrative court ruled in the infamous case DOPPS (BirdLife Slovenia) vs. MoE (wind farm Volovja reber case) that associations can, without a doubt, gain an appropriate status not only on the basis of provisions set in NCA Article 137, but also on the basis of provisions set in EPA Article 153, because the status gained in accordance to one act does not exclude the status gained in accordance to the other act. The key question in this case is if the envisaged intervention, for which an environmental permit has to be issued, could or would have any impact on nature or its conservation. After that the status of the association should be tested – if the association was founded for acting in public interest for the protection of that part of nature for which the intervention is envisaged.

On the basis of NGOs' complaints and the administrative court's ruling the amendments to EPA were introduced, for example if the NGO is granted the status of the NGO in a public interest, the Ministry paid 50 percent of the actual costs of the financial audit, then the rights of NGOs, which gained their public benefit status under other laws (other than EPA) are the same as the rights of NGOs under EPA if they have a financial audit. The condition of financial audit was the most controversial one and strongly opposed by all NGOs. After many years of debates and pressures the last changes to the EPA, which are at the beginning of December 2009 in the Parliament's second reading, delete this condition and bring Slovenia closer to the compliance with the AC.

Even though the conditions are now less strict they are still set to high for Slovenian NGO standard. And what is more, the first application for the status under EPA was filed at MoE about a year ago and since then many have followed. But because the MoE cannot decide upon a jurisdiction (which department is responsible for decisions), still almost 5 years after the AC ratification and passing of EPA there were NGO with a legal standing under EPA in Slovenia at the beginning of 2009. BirdLife Slovenia complained to the Slovenian Ombudsman who brought the issue to attention of the new minister of environment. Finally, during the summer 2009 first five NGOs obtained this status.

Although in NGOs' opinion such strict conditions and big delays in granting the status were against the AC, the question was never discussed in the court procedure. In the case of Volovja reber, when the administrative court had the opportunity to bring the question of conditions before the Constitutional Court, it did not do so. A question of Slovenia's compliance was raised before the Constitutional Court twice, both times in relation to public participation rights.

In general, Slovenian environmental NGOs are not keen to use legal remedies, they rather use soft methods, such as campaigns, media, etc. Thus we do not have practical experience on arguments that are allowed to be used by NGOs during court proceedings.

## **2. Public participation during the preparation of executive regulations**

Although EPA says that "NGOs acting in the public interest" can also participate in the execution of other tasks of the ministry on the environmental protection field, especially by:

- Giving viewpoints about particular questions of environmental protection,
- Participation in the ministry's consultative bodies,
- Participation in delegations, established for international conferences, together with the representatives of the ministry or the Government;

Participation in the decision-making process is totally opened. In order to send comments to draft documents NGOs do not need to have a status in a public interest. However, we do not know what would happen if in case of the breach of the public participation procedure some NGO would want to challenge a passed act.

Slovenian Constitutional Court issued two decisions<sup>5</sup> directly or indirectly connected with the AC, both dealing with the lack of implementation of the Article 8. In the first case neighbours

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<sup>5</sup> U-I-406/06-21, March 29<sup>th</sup> 2007 (applicants: physical persons, neighbours of the are in question), U-I386/06, March 13<sup>th</sup> 2008 (applicant: Association for animal rights Ponikva).



of the Stud farm Lipica challenged two articles of the Act on Stud farm Lipica. The Stud farm has a status of a cultural monument. The amendments to the law set specific procedural rules for creating the national local plan (spatial plan) for this influence area. These rules were different from the procedure in the Spatial planning Act and denied the public all participation rights. The Constitutional Court ruled that the interest of the cultural monument and financing of it from the European Structural Funds cannot prevail on the interest of public participation. The procedure for public participation has to be clearly set and open for expert, interested and other public in order to reach sustainable decision. Article 5 of respective Act was thus abolished due to the lack of procedural rules.

The Constitutional Court made a similar decision one year later: the nature Conservation Acts does not have clear procedural rules on effective public participation during the preparation of executive regulations and is thus in non-compliance with the AC and The Constitution of RS. The decision set a time limit of three months for the abolition of the breach.

Constitutional court did not directly issue a decision on direct applicability of the AC in Slovenian legal system. However, we can read from the merits of the decision that AC is not directly applicable: “Article 8 of the AC obliges a party to the convention to strive to promote effective public participation during the preparation of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. Article 8 obliges legislator when passing the laws. When passing the laws, which impose a duty on executive organs to pass a regulation, the legislator should in the same act regulate procedural rules on how general public should be included in the preparation of the regulation. To solve this tasks for all future acts a new Article on public participation was introduced into EPA. Public participation is now possible in preparation of all acts (national and local), which have important impact on the environment (protection of environment, nature conservation, management and use of parts of the environment, including GMOs etc.). The responsible body has to publish the proposal on the internet, including information where, when and how the public can comment the draft. Timeframe for public commenting shall be at least 30 days. The responsible body shall consider the comments, include them in the draft if they are acceptable and in any case prepare and publish a feedback report with reasons for inclusion or non-inclusion of specific comments in the draft. The article is now in force for 6 months and results are visible on the MoE’s web page<sup>6</sup>.

### **3. Right to a healthy Environment**

EPA contains a provision that allows the members of the public to initiate legal action even in those cases when they are not directly affected by the violation of the environmental law. EPA prescribes:

*“(1) In order to exercise a right to a healthy environment the citizens may, as individuals or through societies, associations and organisations, file a request at the court of law that a person for an activity affecting the environment:*

- *Shall cease this activity if it causes or would cause an excessive environmental burden or if it presents or would present a direct threat to human life or health,*
- *Or that this person be prohibited from starting to engage in this activity if there is a strong probability that the activity would present such a threat.*

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<sup>6</sup>

This provision goes further than Article 9.3 stipulates, but so far there is no case law regarding this. Since EPA sets standing conditions only for the two procedures described above and mentions here only societies, associations and organisations, we assess that the fulfilment of legal standing conditions is not needed in this case.

#### **4. Injunctive relief**

Injunctive relief is possible under Administrative Procedure Act Art. 221: Competent body can issue the injunctive relief if, according to all circumstances of the case, it is absolutely necessary to regulate the relations or questions. The decision is issued on the basis of data known at that time. In the decision it has to be clearly stated that the decision is temporary. The competent body may link the issuing of an interim injunction to the condition that the opposite party is insured against any damages that may be created as a result of the issuing of an interim injunction.

In the judicial procedure a plaintiff can at anytime before, during or **after** any judicial procedure demand from the court to issue a temporary injunctive relief to prevent imminent harm or damages until the lawsuit is finished and the court decision implemented. Injunctive relief can be granted if the plaintiff shows that an irreparable harm may otherwise occur or that the implementation of judicial decision will be otherwise prevented or hindered.

Unlike Civil Procedure Act and Execution of Judgments in Civil Matters and Insurance of Claims Act, Administrative procedure Act or Administrative Dispute Act do not set more precise conditions for issuing of the injunctive relief. Administrative court when deciding upon requests for issuing of injunctive relief mostly points out a principle of proportionality (imminent harm or irreparable damage of a plaintiff and harm of interests of the other party).

#### **5. Other AC institutes**

Timely procedures: administrative decisions must be issued within one or two months, administrative judicial procedures in average last around 1,5 years.

Not prohibitively expensive: In general, the costs to start an administrative procedure (around 3,55 EUR for the request and 14,18 EUR for the decision), to appeal or to file a lawsuit (63,44 EUR lawsuit in administrative dispute) against it are very low.

The client can also request free legal aid in judicial procedure, if his/her income does not exceed the financial census (minimum monthly salary per family member). If the request for free legal aid is granted, the client has a right to a free lawyer and the exemption from the payment of the costs of procedure (judicial fee, costs for witnesses, expert witnesses, translations, etc.), but not costs of adversary party.

#### **Conclusion**

Development of the case law in Slovenia is very slow. This is mostly due to the fact that NGOs and individuals lack knowledge on their legal rights under the AC and respective

national legislation. Furthermore, there is a lack of environmental lawyers, who would bring cases to the attention of the Courts.

Although MoE quickly reacted on the Constitutional Court's ruling on AC Article 8, the biggest problems still remains with the NGO legal standing. Until this problem is solved, Slovenia will not be in compliance with the AC.

### **Case1: Construction of the wind farm on Volovja reber**

Electric Company filed a letter of request for issuing an environmental permit for the construction of a wind farm and interconnectors on the area of Volovja reber above Ilirska Bistrica. Almost immediately after the request was made, DOPPS-BirdLife Slovenia wanted to gain the status of a party in the procedure in the process of issuing the environmental permit.

The application was denied on both instances of the administrative procedure because DOPPS had a status of NGO acting in a public interest under the Nature Conservation Act and not under the Environmental Protection Act.

In June 2006 the Administrative Court ruled in favour of DOPPS, and ordered Environmental Agency of Slovenia (administrative body on the first instance) to reconsider granting legal standing to DOPPS. However, granting the requested status was once again denied. The court did not refer to the AC, but only to the NCA, which states that NGO with a status on a nature conservation field can act in all administrative and judicial proceedings. Thus, the court only reviewed, whether the administrative procedure refers to nature conservation. The court also ruled that the regulation of EPA on which subjects are parties to the procedure is not exclusive – if NCA says that NGOS have a legal standing in all procedures, one just needs to find out if the particular procedure refers to or has elements of nature conservation.

In September 2007 following an appeal to MoE in a 2<sup>nd</sup> instance administrative procedure eventually granted DOPPS the status of the party in this procedure.

The conflict between the two laws was solved with the amendments to EPA.

## **Selected problems of the Aarhus Convention application in SPAIN**

Eduardo Salazar-Ortuno and Fe Sanchis-Moreno, Environmental Justice Association

The Aarhus Convention was ratified by Spain on 29 December 2004 and came into force on March 29, 2005. Although the Convention is directly applicable, Act 27/2006 of July 18 2006 regulating the rights of access to environmental information, public participation, and access to justice in environmental matters was passed to meet the obligations arising from the Aarhus Convention and of the implementation of Directive 2003/4/EC and Directive 2003/35/EC. This Act was in force since July 20 of 2006 but the access to justice provisions came into force only on October 19 2006. However, neither the Aarhus Convention, nor the Act 27/2006 are well known and fully applied. To comply with these provisions certainly involves a very important change of mind and attitude towards transparency and public participation. Thus, although Aarhus requirements fit perfectly within the Spanish legal and judicial system, deep changes, especially within current practice, may occur in order to fully comply with them. **Main obstacles found are referred to excessive length of judicial procedures, high costs of access to justice and lack of effective implementation of judicial decisions.**

### **1. Standing conditions for members of the public concerned, access to review procedures**

#### **a) Article 9/1: Environmental information**

Common administrative law is applicable whenever the right to access to environmental information is impeded by an act or an omission of a public authority. Under such situation any person who has submitted a request to access to environmental information has the right to appeal within the administrative procedure and, once the administrative procedure is exhausted, this person is granted with access to the correspondent administrative courts. At this regard, standing conditions do not create any problem. On the contrary, obstacles to overcome here deal with the excessive length of applicable procedures. A court can take from 5 to 8 years to issue an enforceable decision. In addition, costs involved are too high. The combination of these two factors: slowness and high costs cause that very few cases are brought before the courts despite the favourable and broad interpretation provided by Spanish courts on the right to access to environmental information.

A recent legal article published in the Public Administration Magazine studying jurisprudential decisions on access to environmental information<sup>1</sup> showed that access to justice under art. 9 (1) in Spain rarely meets the criteria lay down in article 9 (4) of the Convention because of the excessive length of judicial proceedings (five years or more are needed to obtain a final court decision on access to information) and prohibitively costs involved. Furthermore, all court decisions found were submitted by environmental NGOs and not by ordinary people, who seems to find pointless to seek judicial redress for their rejected or ignored environmental information requests.

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<sup>1</sup> Casado, L. 2009. [El derecho de acceso a la información ambiental a través de la jurisprudencia](#). In: [Revista de administracion publica](#), no. 178, pp: 281-322

## **b) Article 9/2: NGO standing and access to justice rights in EIA and IPPC procedures**

Common administrative law is applicable whenever the right to public participation is impeded by an act or an omission of a public authority. Members of the public regarded as having an interest would be allowed to take part in an environmental decision-making process and consequently they will have legal standing to appeal within the administrative procedure and once exhausted before the administrative courts.

Act 27/2006 specifically states that the following persons would always be considered as interested as regards public participation in environmental impact assessment and integrated pollution prevention and control procedures:

- Anyone who is deemed to have an interest under article 31 of Act 30/1992 on the legal framework of public administration and common administrative procedure. This article states that interested parties in administrative procedures include, in general, those promoting a procedure as holders of rights or legitimate individual or collective interests – NGOs included – and those who, without having initiated the procedure, may be affected by the decision adopted; and
- any non-profit organisation meeting the following requirements:
  - the aims provided in its bylaws expressly include the protection of the environment in general or of any particular element thereof
  - it was legally established at least two years before the action is brought and has been actively pursuing the aims provided in its bylaws
  - it performs its activity pursuant to its bylaws in a territory that is affected by the administrative act or, if applicable, omission

At this point it should stress that these specific requirements applicable to non-profit organisations, that is to say NGOs, did not previously exist in Spanish law. They were introduced by Act 27/2006, presumably, with the aim of limiting access. Moreover, some of these requirements are easily and objectively checkable, while others need further criteria for interpretation which has not been provided yet. Finally, these requirements go against lately legislative trend to provide for *actio popularis* under specific environmental legislation or regional laws on environmental issues.

## **c) Article 9/3: Standing in general environmental matters**

Article 24 of the Spanish Constitution establishes that all persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests. And article 125 states that citizens may engage in *actio popularis* in the manner determined by law. The Spanish legal system distinguishes standing conditions pending on the branch of law applied: administrative, criminal or civil. Criminal, administrative and civil law are applicable whenever a public authority or a natural or a legal person contravenes national environmental law.

**Access to criminal courts:** *actio popularis* is granted whenever a public authority or a natural or legal person commits a breach of criminal provisions regulated by the Criminal Code or any specific criminal law<sup>2</sup>. Thus, every citizen has the right to exercise *actio popularis* in respect of criminal offences. Environmental criminal offences are regulated by Title XVI and

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<sup>2</sup> Article 125 of the Spanish Constitution, article 19 of Organic Act 6/1985 of July 1 regulating the Judiciary and art. 101 of the Act on Criminal Prosecution.

chapters 1 and 2 of Title XVII of the Criminal Code<sup>3</sup>. By accessing criminal courts, individuals and NGOs can become party to criminal proceedings and therefore help protect the environment, i.e.: by being a party to a criminal suit and assisting the public prosecutor in the investigation of offences. It should be added that any declared criminal liability implies a civil liability.

Despite this broad standing, Spanish courts too often impede the exercise of the *actio popularis* by requesting from the plaintiff the deposit of an unaffordable bond. This is one of the reasons why, not surprisingly, Spanish citizens and environmental NGOs do not very often use this opportunity to bring environmental criminal cases.

#### **Case example no. 1 – Illegal authorisation of an urbanisation in a Special Protection Area (SPA) in Murcia**

In 2006 the Town Council of Aguilas (Murcia) intended to issue an authorisation for the urbanisation of a Special Protection Area - La Cerrichera - by means of amending the Local Town Plan. The regional environmental authority agreed on the amendment proposed without carrying out the due strategic environmental assessment. This was done despite the flora and fauna technical official reports opposing the amendment. The procedure to amend the Local Town Plan was accompanied with a request addressed to the EU for withdrawing the SPA protection of La Cerrichera.

The case was brought before the administrative court by two environmental NGOs. As a consequence the amendment of the Local Town Plan as well as building of the urbanisation was halted.

Furthermore, in 2007 those environmental NGOs addressed a criminal complaint to Murcia High Court Prosecutor against local and regional authorities, as well as technicians and other people involved in the case. The prosecutor decided to issue an accusation before the criminal court.

The two environmental NGOs who submitted the criminal complaint requested from the court to become a party to the criminal procedure by means of exercising their right to *actio popularis*. On April 11, 2007 the Court accepted they request whenever they deposit in advance a bond of EURO 3,000. Both organisations appealed the court decision.

In October 2007 the County Court of Murcia issued the court order no. 275/2007 diminishing the bond requested from EURO 3.000 E to EURO 300 on the grounds of the Aarhus Convention and the administrative Spanish Act 26/2007.

This case shows direct enforcement of the Aarhus Convention by a criminal court to provide for access to justice under article 9(3) of the Aarhus Convention and applies some of the requirements established under article 9 (4) of the Convention, i.e.: non prohibitively expensive procedures. This court order set the general criteria in Murcia for setting bonds in a symbolic manner to those NGOs who decide to exercise *actio popularis* to protect the environment, so that the bonds set by the courts will not involve a burden to exercise *actio popularis* in environmental criminal cases.

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<sup>3</sup> Arts. 319-358 of Organic Act 10/1995 of November 23 on the Criminal Code.

**Access to civil courts** is granted when environmental damage affecting a private right is caused by any natural or legal person. This access is limited to affected parties or to a group of affected people: for instance, the majority of a group of affected people can act on behalf of the whole community affected<sup>4</sup>. Since 2000, some associations are allowed to defend so called collective interests. However, these are only those that protect consumers' rights<sup>5</sup>.

This jurisdiction plays a limited role in relation to the environment that it would correspond to matters concerning closure measures against installations because of an affected private right, and civil liability not arising from an offence, or arising from an offence about which the criminal process has expressly made reservations.

**General access to administrative courts** is ruled under Act 29/1998 of July 13 regulating Administrative Jurisdiction. This act requires exhausting the administrative review procedures established in Title VII - "Administrative review of administrative acts" - of Act 30/1992 on the legal framework of public administration and common administrative procedure before accessing to a judicial review.

When there is a breach of environmental legislation specifically articles 22 and 23 of Act 27/2006 expressly establishes that access to courts will be granted only to non-profit organisations that fulfil the requirements mentioned above.

A list of what is regarded as environmental legislation is included under article 18(1) "*all general provisions concerning the following matters: protection of water; protection against noise pollution; protection of soil; air pollution; rural and urban planning and land use; nature conservation and biodiversity; woodlands and forest management; waste management; chemical products, including biocides and pesticides; biotechnology; other emissions, discharges and releases of substances into the environment; environmental impact assessment; access to information, public participation in decision-making and access to justice in environmental matters; and any other matters provided for by regional legislation.*"

However, there is **specific legislation providing for *actio popularis*** under the administrative law that grants access to justice to any person who requests for its compliance. At central level this is the case for legislation related to town planning, costs protection, national parks, and cultural and heritage patrimony. Besides, at regional, there are several Autonomous Regions that had passed regional legislation providing for *actio popularis*. This is the case for Valencia, Cantabria, Balears, Castilla and Leon and Galicia regarding legislation on IPPC, nature conservation, EIA and SEA, environmental prevention and air pollution irrespectively.<sup>6</sup>

## 2. Scope of judicial review

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<sup>4</sup> Art. 6 (1)(7) of Act 1/2000 on Civil Procedure.

<sup>5</sup> Art. 11 of Act 1/2000 on Civil Procedure.

<sup>6</sup> Art. 94 of Valencia Region Act 2/2006 on IPPC. Art. 83 (2) of Cantabria Region Act 4/2006 on Nature Conservation. Art. 6 of Balears Region Act 11/2006 on EIA/SEA. Art. 88 of Castilla and Leon Region Act 11/2003 on Environmental Prevention. And art. 54 of Galician Region Act 8/2002 on Air Pollution.

As it was already explained above, under the Spanish legal system the review of acts and omissions made by the public authorities are reviewed by the administrative jurisdiction. Acts and omissions of private persons, civil servants and officials, may be reviewed by the criminal jurisdiction, when those acts or omissions may constitute a criminal offense and by the civil jurisdiction when they may have caused any private harm.

Therefore, it must be stressed that review of acts and omissions of public authorities, permitting and authorisations will be always subject to the administrative jurisdiction.

#### **a) Which acts and omissions are subject to the review?**

In general, under the administrative jurisdiction it is possible to review all general dispositions that are adopted by the executive, not by the legislator, and all final administrative decisions, as well as all administrative appeals lodged against any decision made by any public authority. However, in practice, difficulties were encountered to review administrative appeals against decisions on the EIA. These decisions were, so far, taken as mere procedural acts and it is necessary that the High Court will provide jurisprudence to clarify whether is possible to review an EIA decision independently from the substantive authorisation. At this regard, article 9 (2) of the Aarhus Convention may be of major importance.

In addition to express decisions, tacit decisions, that is to say those caused because of the *administrative silence*, are also subjected to review. For instance, those cases in which a request for information has been ignored are also subject to the administrative jurisdiction, even though the requester has not received any reply at all. In those cases *administrative silence* is positive, meaning that the access has been legally granted although the requester has not received the information in practice. Usually, on environmental authorisations the administrative silence operates as a negative response, although this is not always the case.

It is also possible to bring the authorities before the administrative courts because of their material omissions (not fulfilling their duties related directly to the environmental protection). For instance, when the applicable legislation obliges to the authority to make steps to avoid pollution and the authority insists in not meeting such an obligation, even after a citizen expressly request it to do so. Another clear example to illustrate this type of omissions is the obligation to make public certain environmental information through an emissions register or to alert to affected population when the ozone quality parameters have been exceeded. Thus we have an omission because the legal obligation exists, the same is applicable in relation with environmental inspection duties, the subsidiary execution of a judicial decision to do, the close of a facility, the opening of an enquiry, etc.

Finally, the administrative procedure law allows appealing before the administrative courts all material acts of the public authorities even when they are not regulated under any legislation. Those administrative acts that did not followed any specific procedure but that caused harm or put in risk the environment (e.g. a public work built without any project or environmental authorisation).

Under criminal law, environmental offenses may occur under the action or omission or any private person or civil servant or official. Under our criminal law is interesting the case of the breach of official environmental duty caused by omission of the public authority that hides the result of the environmental inspections, as well as the High Court jurisprudence in relation with the commission of a crime through an omission.



Under the civil law, private actions and omissions can be judged in order to stop or to activate some kind of environmental duties, and estimate eventual liability and damages and costs.

### **b) To what extent do courts review the acts?**

Remedies are different pending on the jurisdiction, i.e.: administrative, criminal or civil jurisdiction.

Under the **administrative jurisdiction** the Court responsible to judge on an appeal against an express or tacit administrative act would decide on its validity or nullity. Then, the court decision could be a declaratory judgement voiding the act, i.e.: establishing that the reviewed act is against environmental legislation and determining from what certain moment has no effect. Or, it can be a declaratory judgement finding the authority guilty that could involve a pronouncement on liquidated damages.

When the administrative jurisdiction reviews a case of an authority omitting or not acting the court decision may be a judgement finding the authority guilty. When the review involves any act of a public authority not regulated under any legislation, judgments will be declaratory, i.e.: acting against the Law, or a finding of guilty judgement, i.e.: halting authority's actuation and setting a time limit to issue a decision.

Many authors, i.e.: Alex Penalver, make a strong criticism on the limitation at regards to environmental remedies available at the administrative jurisdiction. One of these limits is the absence of a direct appeal against formal omission of the authority, i.e.: when the responsible authority does not make a decision or fails to pass a regulation to protect the environment. Another one is the individualistic approach of available appeals, in the sense that they are not thought to defend collective interests against an authority's inactivity. A major additional problem at this point is that courts can not act on behalf of the authorities when they do not meet their discretionary obligations and they can only declare that their inactivity is against the Law but are not able to issue a decision or act on their behalf. Under these circumstances the proposal would be to use USA legal figure of "citizen suits" on the grounds of article 9(3) of the Aarhus Convention.

Under the **civil jurisdiction** court decisions will be declarative judgements - declaring act or omissions against the Law or pronouncement about liability and liquidation of damages - or executive judgements - asking privates (companies or citizens) to act environmental duties or to stop activities which are damaging private rights related to the environment.

Under the **criminal jurisdiction**, judgements are of finding of guilty and may or may not include a civil pronouncement on liquidated damages for a third-party.

### **Case example no. 2 – non revisable EIA screening decision on the urbanisation of Murcia Traditional Orchard**

In 2004 a group of neighbours of Murcia Traditional Orchard decided to participate in the procedure to amend Murcia General Town Plan. The proposed amendment affected a protected area devoted to gardening since Roman times. The local authorities and a private company had signed an urban agreement to use that land for building an urbanisation with a

capacity of 1,600 people. The amendment proposed intends to allow such an urbanisation to take place.

Under Spanish legal system the best way to make sure that the new planning respect ecologic, cultural and landscape values was to conduct an EIA to identify possible impacts and to set mitigation measures.

In 2005 the regional urban authority issued a decision saying that it was not necessary to conduct an EIA on the grounds that the area was not economically profitable and that it had lost all its values. This decision was not bearing in mind that only 4 years in advance the EIA conducted for the adoption of the existing Murcia General Plan stated that the area should be protected because of its high ecological, cultural heritage and landscape values.

The neighbours wish was to take part in the decision-making process through the EIA procedure, regrettable they missed their opportunity because at the screening and scoping phases it was decided that no EIA was necessary. Then they decided to seek redress for this decision before the environmental authority. A legal report issued by the environmental authority on June 2005 stated that this decision, i.e.: screening decision avoiding the application of the EIA procedure, was not subject to any administrative appeal because it was considered as a mere procedural act and therefore not subject to any review.

Then, the Neighbours were forced to bring before the courts the decision to modify Murcia General Plan. Almost 4 years have passed since they did so, the urbanisation has been already built and occupied by all owners and residents and still the responsible court has not issue any decision on the merits of the case.

### **3. Injunctive relief**

The first problem is that the Spanish translation of the Aarhus Convention published in the official journey does not include the term “injunctive relief”. This term is wrongfully translated as “reparation of damages order”. Further more; Act 27/2006 does not introduce specific provisions on this matter.

In second place, it must be said that, in general terms, injunctive relieves are never issued against public administration in the administrative review process. Nevertheless, they are available under administrative, criminal and civil judicial law. Thus, in all of the three jurisdictions is possible to request the adoption of an injunctive relief<sup>7</sup>.

Under our legal system, an injunctive relieve is better known as a *precautionary measure*. It aims to impede the continuation of a situation liable to have harmful effects or to ensure the effectiveness of a future judicial resolution, anticipating its effects or adopting measures allowing a future judicial decision to be put into practice.

It can be ordered at the request of a party whenever the court considers them to be applicable, or adopted by the judge or the court of its own motion.

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<sup>7</sup> See for instance arts 129 to 136 of Act 29/1998 on the Administrative Jurisdiction.

If the *precautionary measure* is adopted at the request of one party, the judicial authority may set a bail which must be paid in advance by the requester. If the payment does not take place, the measure is not applied.

Usually courts establish bails that tend to be **prohibitively expensive** and non-profit entities – NGOs – usually cannot afford to pay them.

Thus, though it is legally possible to obtain an injunctive relief – *precautionary measure* - from a court, it is not usually done.

Real problem in practice to apply injunctive relief is the combination of the following three factors: settlement of unaffordable bails, judges and prosecutors lack of skills in assessing environmental damage and risk, and excessive length of Spanish judicial processes. As a consequence of not applying efficiently the injunctive relief mechanism, very often final court decisions protecting the environment are useless because the environment that they sought to protect is not there any more – is gone, and there is no way to repair it or to return to the previous situation.

Fortunately, from time to time is possible to find court decisions that make an appropriate balance of public interest against private interests at stake on the grounds of existing legislation and issued the injunctive relief – *precautionary measure* - requested with the aim to assure an effective access to justice. This is why the following case example was chosen among many other negative examples aiming to show that our current legal system provides adequate grounds for making court decisions that respect Aarhus Convention requirements.

**Case example no. 3 – court order halting public works in a protected pine wood in Villanueva de Gomez (Avila)**

Local authority of Villanueva de Gomez (Avila) authorised on February 1 2006 public works providing appropriate infrastructure for a mega-urbanisation project in a pine wood land protected under the Local General Town Plan.

Following the administrative procedure SEO/Birdlife lodged an appeal against the authorisation that was ignored. Once exhausted the administrative procedure, the case was brought before the administrative court accompanied with the request for the adoption of an injunctive relief to halt the public works.

On June 18 2009, the Administrative Court of Avila issued a court order adopting the requested injunctive relief ordering the halting of the public works without requesting the advance payment of any bail. As a result the public works were halted.

The court did not request any bail to the requester - the NGO - on the grounds of the aims that pursuit and the interests that protects. Besides it considers very difficult to fix a quantity of a bail due to the difficulties encountered to assess the environmental damage that it would be caused if the public works take place. Thus, to make sure that any court decision on the merits of the case is enforceable issues the injunctive relief.

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