



**Implementation of the Aarhus Convention
in EU Member States**
Legal Analysis Collection
2006



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Introduction

Justice & Environment (J&E) is a network of public interest environmental law organisations based in the EU member states. J&E aims to use law to protect people, the environment and nature. Our primary goal is to ensure the implementation and enforcement of the EU legislation through the use of European law and exchange of information.

In 2006, transposition and implementation of the AC on access to information, public participation in decision-making, and access to justice in environmental matters (hereinafter the 'AC') was chosen by J&E as one of our three topics of concern. Based on previous assessments, we decided to focus on the AC's third pillar – access to justice, particularly transposition and implementation of Article 9.2.

This collection of analyses consists of an overview of the common problems in the six countries where J&E has its members, as well as separate national analyses. Lawyers from Austria, Czech Republic, Estonia, Hungary, Poland and Slovakia describe the transposition and implementation of access to justice and touch on issues concerning access to environmental information and public participation.

The general overview highlights the most pressing issues and shortcomings we have found, which are astonishingly similar in most of our countries (few exceptions noted below):

- Insufficient clarity on the position of the AC in the national legal systems, particularly as to its direct applicability and precedence over national law in practice.
- Legal standing both in administrative and judicial proceedings – the position of organisations and individuals, where for the most part only the standing of environmental organisations in proceedings under Article 9.2 is unproblematic.
- Efficiency of the review of the timeliness of proceedings is an issue, and injunctive relief or other forms of postponing challenged decisions are scarce.
- Review of decisions within the EIA process, particularly screening decisions, since many assessments end at this stage and national systems make it often impossible to challenge these decisions.

General Information

1. Use of the AC, its direct applicability and precedence over national law

The Countries where J&E member organisations are active have all ratified the AC and made it part of their legal systems, but differences exist in the position this international treaty has in the various legal systems and how its applicability is perceived. Direct applicability is influenced by whether the provisions of an international treaty are sufficiently specific and whether they grant rights to private persons.

The existing conditions of direct applicability are interpreted differently by different states. There is an example of the Supreme Administrative Court decision in the Czech republic stating that Convention, as an international treaty, has a precedence over national legislation, which means that it is possible to directly invoke the rights that the AC guarantees before the authorities and courts. In Hungary, courts regularly refer to the Convention in their rulings. In Poland, direct applicability and precedence over national laws stems from provisions of the Constitution.

In Austria and Slovakia this issue is not so clear – the courts and other authorities are reluctant to quote and refer to the Convention and little is done to promote the rights which civil society can derive from its provisions.

2. Legal standing in environmental matters

In all the countries we have assessed, it is fair to say that legal standing has been broadened as a result of the AC (either after ratification or before it was actually ratified, in preparation for its implementation). On the other hand, in none of the countries is legal standing sufficient to implement the provisions and philosophy of the Convention.

Environmental organisations

Environmental organisations have recognised a positive shift in this area. Since they are, in compliance with Article 2.5, evidently part of the ‘public concerned’, such organisations have become acknowledged parties to administrative and judicial proceedings falling under Articles 6.1 letter a) and 9.2 of the Convention.

In the countries under review, establishing and registering environmental organisations does not present a significant obstacle (even though conditions in some countries, such as Austria, are more elaborate than in others).

The standing of environmental organisations is regulated differently in each country. For the most part such subjects can challenge both the procedural as well as the substantive shortcomings of environmental decisions. However, the concept applied in the Czech Republic does not view environmental organisations as bearers of other than procedural rights. On the other hand, in Slovakia several laws (IPPC and EIA particularly) contain a legal fiction according to which environmental organisations meeting specified conditions are to be viewed as having had their right to a healthy environment violated.

Legal standing in environmental matters other than EIA and IPPC proceedings differs significantly. It is fair to say, however, that the implementation of Article 9.3 has not been completed in any of the countries under review.

Other entities and individuals – impairment of rights

The broadening of legal standing for other members of the ‘public concerned’ beyond environmental NGOs is either non-existent, very rare, inconsistent, or ad hoc in the countries under review. In the majority of the specific cases observed, public participation and access to justice for such subjects is permissible only if ‘direct impairment of their rights’ is proven. This concept is constructed to fit mostly the material rights, namely property rights, of the claimants, and authorities do not consider it applicable to the right to a healthy environment, right to privacy, or right to health. In several of the countries under review, these rights are guaranteed by the Constitution and the right to privacy, interpreted as to embrace the right to a healthy environment, is stipulated by the European Covenant on Human Rights, to which all of the countries under review adhere. However, it is difficult to attach any content recognised by public authorities to these rights.

As a result of this interpretation and application, real standing is granted only to environmental organisations in many cases and countries. Other subjects, such as other organisations and concerned individuals, can gain standing only if they have special rights, mostly property-related rights, which are impaired. Claiming the right to a healthy environment as an enforceable, subjective right is rare, and even NGOs often argue procedural infringements only.

3. Injunctive relief – postponing challenged decisions

Aarhus provisions make a difference only if the challenged decisions with negative environmental impacts are reviewed in time before they are implemented, or if their enforceability can be delayed until their legality is reviewed by an independent tribunal. In the countries under review we often see that such decisions are implemented and a subsequent tribunal’s verdict has no power to reverse the factual situation – development projects are thus built regardless of the adjudicated violations of public participation and other provisions.

The Convention contains measurements against such situations, providing for timeliness of court review and regulating administrative or judicial injunctive relief. However, in most of the countries under review, such measurements are inefficient. Court review often takes too long (see the Czech Republic, Slovakia, and others) and a motion for injunctive relief – whether administrative or judicial - is seldom granted. In the Czech Republic, for example, a motion for postponing the enforceability of a decision must be supported by proofs of irreversible loss. However, NGOs are considered to have only had their procedural rights violated (never their substantive rights); thus it is impossible to prove damages on the basis of procedural rights and to have the enforceability of the challenged decision postponed.

On the other hand, inspiring examples can be found in Estonia, where court practice concerning injunctive relief has been positive, since possible environmental harms themselves are regarded as irreversible. As for the timeliness of court proceedings, we can turn to Hungary, for example, where legislation concerning court proceedings stipulates time lines for starting proceedings, including the first hearing of a case.

4. Challenging decisions within EIA proceedings

The main related problem in most of the countries observed is a lack of review of screening decisions, particularly if the EIA process ends at this stage of assessment (which in some countries is the majority of cases; in Austria, for example, 80% of cases end at the screening stage). Projects and activities with potentially considerable environmental impacts are assessed

as not requiring EIA, and the public concerned cannot bring any counter-arguments to effectively challenge such decisions.

In Estonia, for example, it is possible to challenge screening decisions for significant procedural flaws; however, since the decision not to initiate an EIA is only published along with the final administrative act (the environmental permit), this possibility is a highly theoretical one. If an EIA process ends at the screening procedure phase, it is unlikely in Slovakia for NGOs to qualify as parties to subsequent construction permitting procedures. In Austria EIA related issues, including whether the activity should have been assessed or not, can not be addressed in subsequent permitting proceedings. In such cases, the public concerned has very limited possibility to ask for review of decisions with potentially severe environmental impacts. In Poland, only the developer proposing a project or activity and its neighbours have the right to challenge screening decisions. An inspiring example is Hungary, where screening decisions are 'resolutions' – substantive decisions – and both administrative appeals and judicial review are possible.

The Czech and Slovak legal systems consider the entire EIA process as a 'consultative' one, which makes even the final 'opinion' in the EIA process not a binding decision. As a consequence, such an opinion merely forms the basis for the related construction permitting process. The EIA process and decision can be reviewed only via subsequent land use and construction proceedings, which is neither timely nor effective.

5. Conclusions

The AC is a part of the legal system in Austria, Czech Republic, Estonia, Hungary, Poland, and Slovakia. In some of these countries it has been so for several years already (in Hungary since 2001), while in some countries there is still very limited experience with it (in Slovakia since 2005). It is acknowledged and applied as a part of the legal system, in some countries with more results, including positive results (such as Hungary), and in other countries it has yet to claim its recognition.

We are convinced that the broader engagement of the public into environmental decision-making is vital for improving the quality of the places we inhabit and the life we live. For this purpose, the AC will be a suitable tool if the deficiencies mentioned above and in the specific country analyses which follow can be eliminated.

Even though in some cases legislative changes are inevitable, many of the shortcomings in the national legal systems can be resolved if existing provisions are interpreted and applied in compatibility with the letter - and mainly with the spirit - of the Convention.

To advance such an application, it is useful that members of the public concerned (namely environmental organisations and active inhabitants) use the AC in proceedings and base their claims and arguments on its provisions. Capacity building of members of the public claiming their rights, as well as of public officials and judges granting these rights and formulating decisions, appears to be important in this context.

AUSTRIA



1. General information on AC ratification and transposition

- a) AC was ratified in June 2005
(Ratification act published in official journal on 10. June 2005 ,BGBl III 2005/88)
- b) The legal position of the Aarhus Convention in Austria is a **legally binding international agreement**.
- c) The day after publishing the parliament's ratification act in the official journal (BGBl)¹ an international convention becomes part of Austrian federal legislation (Art 49/2 B-VG²) and has the status of a federal act (Bundesgesetz).
- d) Ratified conventions are "**self-executing**" (general transformation of international law to Austrian law) and directly applicable by authorities
 - if they **are sufficiently** concrete with regard to the rule of law principle of the Austrian federal constitution (Art 18/1 and 18/2 B-VG) and
 - if no provision for "special transformation" became part of the respective ratification act (Art 50/2 B-VG).³
- e) The Aarhus Convention was ratified **without a special transformation** provision. Thus it has the status of a federal act.
- f) Authorities have to decide case by case whether the Aarhus Convention is sufficiently concrete for direct application⁴
- g) The official parliamentary material to Aarhus ratification argues that the Convention is not directly applicable but that the parliament prescinds from providing the special transformation provision of Art 50/2 B-VG because parts of the Conventions are subject to implementation of EC-law.⁵
 - Nevertheless this statement has no legal but factual consequences as can be use by authorities for the interpretation whether the Convention is directly applicable or not.
- h) So far courts and authorities **rejected** any attempt for **direct application** of the Aarhus Convention, recently in a permit procedure of a skiing site in western Austria (Naturschutzbund Vorarlberg/ Skiing site extension Damüls)⁶.
- i) The Austrian legislation and application of Article 9/3 Aarhus Convention could be subject of an **infringement of the EC treaty** The ECJ ruled in the De Berre case⁷ that Member States have, based on European Law, an obligation to **fulfill provisions of international agreements** the Community ratified.

Transposition timeframe

- a) In Austria transposition of the Aarhus Convention has only been established with regard to EC Directives on

¹ BGBl: Bundesgesetzblatt, (official journal)

² B-VG: Bundes-Verfassungsgesetz (federal constitution act)

³ See Öhlinger, Verfassungsrecht⁶ (2005), page 78 et seqq, figure 119 et seqq

⁴ Öhlinger, Verfassungsrecht⁵ (2005), page 79 et seqq, figure 120

⁵ 654 der Beilagen XXII.GP

⁶ Case details are available at OEKOBUERO.

⁷ ECJ C-213/03 (15 July 2004), Syndicat professionnel coordination des pêcheurs de l'étang de Berre and de la région v Électricité de France (EDF); ECJ C-239/03 (7 October 2004), Commission vs France

- public participation (Directive 2003/35/EC on the amendment of EIA and IPPC-Directives)⁸ and
 - Environmental Information (Directive 2003/4/EC)⁹
- b) EIA Directive provisions were transposed on time (June 2005) in the Federal EIA-act for both the federal and regional level.
- c) On federal level the majority of IPPC Directive provisions were transposed with a few months delay. Some regions have transposed IPPC-Directive provisions only recently.
- d) **Environmental Information** Directive was transposed on time (February 2005) on federal level
- Transposition on regional level (Bundesländer) has partly been released and respectively not released (Burgenland)
 - In July 2006 the European Commission launched an infringement procedure against Austria because of the regions failure to transpose the Directive.

The national acts transposing AC are mainly:

a) First Pillar (Environmental Information)

- UIG (Umweltinformationsgesetz, BGBl I 2003/76; Federal Act on Environmental Information)
- Environmental information acts of the Federal Regions (Bundesländer)
 - a. Burgenland (not transposed)¹⁰
 - b. Carinthia¹¹
 - c. Lower Austria¹²
 - d. Salzburg¹³
 - e. Styria¹⁴
 - f. Tirol¹⁵
 - g. Upper Austria¹⁶
 - h. Vorarlberg¹⁷
 - i. Wien¹⁸

b) Second Pillar (Public participation)

⁸Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

⁹ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

¹⁰ Gesetz vom 12. Juli 2001 über den Zugang zu Informationen über die Umwelt (Burgenländisches Umweltinformationsgesetz 2001 - Bgld. UIG -2001), LGBl. Nr. 30/2001

¹¹ Gesetz vom 7. Juli 2005 über Auskunftspflicht, Datenschutz und Statistik des Landes (Kärntner Informations- und Statistikgesetz - K-ISG), LGBl Nr 70/2005, LGBl Nr 59/2006

¹² NÖ Auskunftsgesetz, Stammgesetz 76/88 1988-08-04, Novelle 94a/06 2006-11-22

¹³ Gesetz über Auskunftspflicht, Datenschutz und Landesstatistik, LGBl. Nr. 73/1988, LGBl. Nr. 98/2004

¹⁴ Gesetz vom 19. April 2005, mit dem der Zugang zu Informationen über die Umwelt in der Steiermark geregelt wird (Steiermärkisches Umweltinformationsgesetz - StUIG), LGBl. Nr. 65/2005

¹⁵ Gesetz vom 12. Oktober 2005 über den Zugang zu Informationen über die Umwelt (Tiroler Umweltinformationsgesetz 2005 – TUIG 2005) LGBl. Nr. 89/2005

¹⁶ Landesgesetz vom 4. Juli 1996 über Maßnahmen zum Schutz der Umwelt und den Zugang zu Informationen über die Umwelt (Oö. Umweltschutzgesetz 1996), LGBl.Nr. 84/1996, LGBl.Nr. 44/2006

¹⁷ Gesetz über den Zugang zu Informationen über die Umwelt, LGBl.Nr. 56/2005

¹⁸ Gesetz über den Zugang zu Informationen über die Umwelt (Wiener Umweltinformationsgesetz - Wr. UIG) LGBl. Nr. 15/2001, LGBl. Nr. 48/2006

- a. **EIA Directive¹⁹ - Federal Act on Environment Impact Assessment (EIA Act 2000; UVP-G** (Umweltverträglichkeitsprüfungsgesetz, BGBl I 2000/89 idF I 2006/149)
- b. **IPPC-Directive**
- c. **AWG** (Abfallwirtschaftsgesetz, BGBl 2002/102; Federak Waste Management act, including IPPC permitting for waste treatment plants)
- d. **GewO** (Gewerbeordnung, BGBl 1994/194; federal act that regulates among others environmental permitting of industrial installations, including IPPC)
- e. **MinroG²⁰** (Mineralrohstoffgesetz; „Federal Mineral Raw Material Act“)
- f. **IPPC acts of the federal regions** (Bundesländer). Not all Bundesländer have transposed PP-Directive until now
 1. Burgenland²¹ (not transposed)
 2. Carinthia²²
 3. Lower Austria²³
 4. Salzburg²⁴
 5. Styria (not transposed)²⁵
 6. Tirol (not transposed))
 7. Upper Austria²⁶
 8. Vorarlberg²⁷
 9. Wien²⁸

3. Third Pillar (Access to Justice)

- Third pillar has only been transposed with regard to
 - a. Access to Justice of the public's rights of the **first**
 - b. and **second** pillar
 - c. (Article 9/1 and 9/2 Aarhus Convention.
- Art 9/3 **has not been transposed.**

Critical remarks on transposition

- a) In the official parliamentary materials to the ratification act is stated that there is no (coercive) need for additional transposition acts next to implementation of respective EC-Directives, in particular no need for legislation as to Art 9/3 of Aarhus.²⁹
 - The argument is that the Austrian legal system provides for sufficient access to justice provisions, without substantive arguments for that opinion (ombudsman (read below) are mentioned as justification).

¹⁹ EIA-Directive: Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC) (OJ L 175, 5.7.1985, p. 40)

²⁰ Bundesgesetz über mineralische Rohstoffe, über die Änderung des ArbeitnehmerInnenschutzgesetzes und des Arbeitsinspektionsgesetzes 1993 (Mineralrohstoffgesetz - MinroG), BGBl. I Nr. 38/1999, BGBl. I Nr. 113/2006

²¹ Gesetz vom 19. Mai 2005 über integrierte Vermeidung und Verminderung der Umweltverschmutzung (Burgenländisches IPPC-Anlagengesetz - Bgld. IAG), LGBl. Nr. 65/2005

²² Gesetz vom 23. Mai 2002 über die integrierte Vermeidung und Verminderung der Umweltverschmutzung (Kärntner IPPC-Anlagengesetz - K-IPPC-AG), LGBl. Nr. 52/2002, LGBl. Nr. 13/2006

²³ NÖ IPPC-Anlagen und BetriebeGesetz (IBG), Stammgesetz 07/04 2004-01-26 Blatt 1-7, 1. Novelle 13/06 2006-02-16 Blatt 2-8

²⁴ Gesetz vom 25. Mai 2005 über die integrierte Vermeidung und Verringerung der Umweltverschmutzung durch bestimmte Betriebsanlagen (IPPC-Anlagengesetz), LGBl. Nr. 59/2005

²⁵ Gesetz über die integrierte Vermeidung und Verminderung der Umweltverschmutzung und die Beherrschung der Gefahren bei schweren Unfällen mit gefährlichen Stoffen bei bestimmten Anlagen und Betrieben (Steiermärkisches IPPC-Anlagen- und Seveso II-Betriebe-Gesetz), LGBl. Nr. 85/2003

²⁶ Landesgesetz vom 4. Juli 1996 über Maßnahmen zum Schutz der Umwelt und den Zugang zu Informationen über die Umwelt (Oö. Umweltschutzgesetz 1996), LGBl. Nr. 84/1996, LGBl. Nr. 44/2006

²⁷ Gesetz über die integrierte Vermeidung und Verminderung der Umweltverschmutzung sowie die Beherrschung der Gefahren bei schweren Unfällen, LGBl. Nr. 20/2001, 5/2004, 26/2006

²⁸ Gesetz über die integrierte Vermeidung und Verminderung der Umweltverschmutzung (Wiener IPPC-Anlagengesetz - WIAG), LGBl. Nr. 31/2003, LGBl. Nr. 45/2005

²⁹ 654 der Beilagen XXII.GP page 7

- OEKOBUERO made an official negative comment to this statement in the materials.³⁰
- b) Access to Justice and public participation problems can be observed with regard to transposition provisions of
 - EIA-screening procedures and in
 - in federal transport EIA proceedings in general

2. Atmosphere related to the Aarhus Convention

General atmosphere relevant for the AC and adressed issues

- a) Transposition of the first two pillars has had **very positive effects**
- b) **Environmental information** issues appear to be **widely accepted**
 - In the 1990's, before the first Federal EIA-Act was adopted, there was heavy resistance from both public administration as well as economic lobby groups against Environmental Information.
 - The amendment of the Federal Act on Environmental Information (UIG)³¹ as to the transposition of Directive 2003/4/EC passed parliament unanimously.
- c) **NGO standing** and Access to Justice in EIA and IPPC proceeding are a serious improvement in Austria.
 - NGOs had no public participation and Access to Justice rights before.
 - Until now only in very few cases **NGO** actually participated EIA proceedings.
 - The reason for that is allegedly that NGOs **do not have sufficient** financial (law firms, technical experts) and human **resources** to effectively participate in EIA-proceedings.
- d) As mentioned above **Austria refuses to enact any legislation** with regard to **Art 9/3** of the Aarhus Convention.
- e) In addition Austria has a very **skeptical** position³² with regard to **Access to Justice Directive** proposal³³ of the European Commission.

3. Brief summarization of the first and second pillars of the Aarhus Convention

- a) **Administrative standing in environmental matters**
 - In Austria **standing** right is a **precondition** for **Access to Justice** and respective **permitting procedures**.
 - In Environmental Information matters standing is not a precondition for Access to Justice

³⁰ http://doku.cac.at/aarhus_ratifizierung_oekobuero.pdf

³¹ UIG (Umweltinformationsgesetz, BGBl I 2003/76; Federal Act on Environmental Information)

³² Please read the letter of Austria to the EC presidency in Spring 2005 (Annex I of this case study)

³³ COM(2003) 624 final (24. October 2003), proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on access to justice in environmental matters

- The provision of Art 6/1/b³⁴ Aarhus Convention on “activities **not listed in annex I** which may have a significant effect on the environment“ have **not** transposed in Austria.³⁵

b) Access to environmental information

- The **Federal Act** on Environmental Information (UIG³⁶) is **well elaborated** and closely linked to the Directive's³⁷ wording.
 - a. Most Bundesländer followed the wording of UIG for respective regional transposition acts.
 - b. Negative is the reluctance of Bundesländer with regard to transposition and application (read above).
- **Access to Justice** provisions with regard to information are proper and detailed.
 - a. Problems occur if an authority does not respond at all to an information request.
 - b. In this case the applicant may only get legal redress after **six months**.
 - c. This is not effective legal redress with regard to the Directive and the Aarhus Convention.
- **Application** experience has been **positive** until now
 - a. Some authorities appear to **ignore applications** and try to delay responses as much as possible.
 - b. **Bundesländer** refuse to provide information more often than federal authorities.

c) Other relevant peculiar issues of Aarhus Convention in Austria

A) The system of Environmental Ombudsman

Environmental Ombudsman (Umweltanwaltschaft, <http://www.umweltanwaltschaft.gv.at/>) is a body that is established in the (nine) regional governments (and administration) for the purpose of protecting the environment on regional level

The system and approach **differs from region** to region (Bundesländer). Some offices have up to 15 persons staff, others only 2 to 3. Ombudsman employees get their monthly salary from the **regional governments**. Ombudsman employees are usually persons that used to work in the regions administration before. They usually have the status of **civil servants**.

Most of them are, at least, “formally” independent. In some regions there is heavy political pressure on Ombudsman and they must not act against the political will of a regional government. But majority of them are very active and progressive. They have a lot of obligations, but far too little financial and human resources.

Ombudsmen have **standing and Access to Justice in EIA proceedings**, also in the screening proceeding. This is a very important role. In **regions with political pressure** they usually do not go too much into cases. In other regions they try to be as active as possible in respective proceedings with their limited resources and reach good results.

³⁴ Art 6/1/b read as follows: „Each Party... “(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions;”

³⁵ But EIA Directive might be directly applied. See *Raschauer/Ennoeckl*, § 3 Rz 2.

³⁶ Umweltinformationsgesetz, BGBl I 2003/76

³⁷ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

The institution of Environmental Ombudsman is frequently used by the Austrian government and politicians to argue that **Access to Justice for the public concerned** (Article 9/3 Aarhus Convention) is **not necessary** in Austria because as we have Ombudsman.

From our understanding Ombudsman is a great institution in Austria.

- But Ombudsman have nothing to do with Austria's obligations under the Aarhus Convention. Ombudsman can be seen as a privileged environmental administration body, but they are not representative of the public concerned.
- They are established to improve environmental conditions, but not to represent public concerned or members of the public.
- The approach of the Aarhus Convention is to give environmental rights to the public concerned and NGOs, but not to governmental bodies.
- This is the core difference between the Aarhus Convention and the approach the Austrian legal system is based on.

B) Umweltsenat (Environmental Senate) as exemplary appeal body

Umweltsenat (<http://www.umweltsenat.at/>) is the appeal body for EIA proceedings for all EIA-proceedings that are not federal transport³⁸ projects (§ 5 USG).³⁹ The appeal body Umweltsenat comprises of ten judges and additional 32 legal experts (§ 1 USG). Umweltsenat has been established only for the purpose of EIA appeals to tackle the **technical and legal complexity of integrated EIA permit proceedings**⁴⁰. Its members are selected and designated for six years by the federal government and regional governments (§ 2 USG).

Umweltsenat is known and acknowledged for **concise and well elaborated decisions** with accurate legal and technical expertise. The court frequently overrules and amends respective EIA-permits and stipulates additional permitting requirements. Consequently respective EIA permits prove to have particular **high legal standards** as the decision could otherwise be overruled by Umweltsenat.⁴¹ Therefore it can be concluded that Umweltsenat is one of Austria's core instruments for proper implementation and enforcement of EC and Austrian environmental law.

In all EIA proceedings that are not federal transport projects NGOs (and, under certain circumstances citizens group and neighbours) may appeal EIA decision at Umweltsenat. The court **guarantees effective procedural as well as substantive legal redress**.

C) Flaws in federal transport EIA legislation: Limited Access to Justice

As indicated above the legal position is slightly different for EIA-proceeding on federal motorways and high speed railroads. Such projects are regulated in the **third section** of UVP-G⁴², whereas all other projects fall into the **second section**. It's obvious that the third section is characterized by many shortcomings as compared to the second section of UVP-G.

³⁸ With transport projects we mean federal motorways and highspeed railtracks. Please read OEKOBUERO legal analysis on EIA-infrastructure of J&E Workplan 2006 for details.

³⁹ Competences of Umweltsenat are ruled in Umweltsenatsgesetz (USG; Environmental Senate Act)

⁴⁰ Any acts that are a condition for a project's permit have to be applied and decided in the respective EIA-proceeding (**consolidated development consent procedure, Article 3/3 UVP-G**). Please read OEKOBUERO legal analysis on EIA-infrastructure of J&E Workplan 2006 for details.

⁴¹ In the case a party appeals. Neighbors have standing when they are affected. Their rights are limited to protect themselves but not to protect environment. NGOs have full standing since June 2005. Citizen's groups have full standing only in certain EIA procedures. Please read OEKOBUERO Aarhus case study for J&E Workplan 2006 as for details.

⁴² Bundesgesetz über die Prüfung der Umweltverträglichkeit (Umweltverträglichkeitsprüfungsgesetz 2000), published in BGBl 1996/773, BGBl I 2000/89.

Access to Justice and participation rights are **limited** as compared to UVP-G's second section, basically because **Umweltsenat** is not competent appeal body and Ministry of Transport might be biased as it is planning and by the same time EIA permitting authority.

The only redress bodies for federal transport EIA-permits are the

- **highest Constitutional⁴³ (VfGH⁴⁴) and**
- **Administrative⁴⁵ Courts (VwGH⁴⁶).**

Administrative Court is established to assess legality of administrative decisions. As this court is the highest Austrian administrative court it basically focus⁷

- **on “significant” procedural and material problems, but**
- **can not go into substantive details by its nature.**

The same counts for the **Constitutional Court**. The role of the court to address (significant) **constitutional faults** of administrative decisions as well as legality of general regulations and parliamentary acts.

In **contrast to Umweltsenat** highest Constitutional and Administrative Courts may

- only cancel an EIA decision (**courts of cassation**), but **must not overrule** or amend a decision.
- In contrast to Umweltsenat, that amends decisions frequently, it has been an **exemption** if Constitutional Court cancel's an EIA decision.
- This happens only if there are **serious** and **“significant” shortcomings** in EIA-permitting procedure.
- Until now Umweltsenat only rejected three EIA-decisions, but amended 100s of decisions. The latter is not possible for the highest courts.

Though both court's case law is profound and brilliant it has to be stressed that they **have not been established to focus on substantive details** of complex proceedings like federal transport EIAs.

In addition we have to state that the average⁴⁷ appeal proceeding duration is

- **22 months** at the Administrative Court
- **8,5 months** at Constitutional Court

Highest court appeals do usually not allow **interim relief** (suspensive effect). In theory it would be possible, but its an extraordinary exemption interim relief is granted. As result motorways might be constructed or even opened for traffic before highest courts decide. This legal position is in **contrast to Art 9/4** of the Aarhus Convention.

This legal position is worsened by the fact that **Ministry of transport** (BMVIT, www.bmvit.gv.at) is

- politically **responsible for federal motorway and railroad** constructions (planning, construction, control) and
- by the same time the only (EIA) **permitting authority** for the same projects.
- With other words: BMVIT permits projects it plans before.

⁴³ For motorway EIA that started before June 2005. Please read OEKOBUERO legal analysis on EIA-infrastructure of J&E Workplan 2006 for details

⁴⁴ Verfassungsgerichtshof (Constitutional Court) www.vfgh.gv.at

⁴⁵ For highspeed rail tracks; for motorway EIA that started before June 2005. Please read OEKOBUERO legal analysis on EIA-infrastructure of J&E Workplan 2006 for details.

⁴⁶ Verwaltungsgerichtshof (Administrative Court) www.vwgh.gv.at

⁴⁷ Official report to parliament on VfGH and VwGH: BKA, III-163 der Beilagen, 22GP

Hence Access to Justice provisions for **federal transport projects** are **ineffective substantive and procedural legal redress** with regard to Article 9/2 of the Aarhus Convention as well as PP-Directive⁴⁸.

4. Article 2.5 of the Aarhus convention

Definition of “public concerned”

The public concerned provisions are ruled in Article 19 clause 6 to 9 of UVP-G (EIA-act⁴⁹).

Provisions on NGO-standing and Access to Justice are not only relevant for EIA but also for federal IPPC proceedings. The latter refer to Article 19 clause 6 to 9 of UVP-G with regard to NGO registration. Thus UVP-G provisions can be seen as applicable in all respective Austrian Federal IPPC acts and are also applicable in some regional IPPC-acts.

Please not that In the Austrian legal system **standing** in permit proceedings is a **precondition**

- for **Access to Justice** and
- effective **public participation**.

The most important articles on standing related to **PP-Directive** (Directive 2003/35/EC) and the Aarhus Convention ruled in UVP-G read as follows:

“Locus standi, right of participation and right of appeal

Article 19. (1) *The following parties shall have locus standi:*

1. **neighbours:** *neighbours shall be persons who might be threatened or disturbed or whose rights in rem might be harmed at home or abroad by the construction, operation or existence of the project as well as the owners of facilities in which persons stay temporarily on a regular basis with regard to the protection of such persons; neighbours shall not be persons who stay temporarily in the vicinity of the project and do not have rights in rem; with regard to neighbours abroad, the principle of reciprocity shall apply to states not parties to the Agreement on the European Economic Area;*

2. *the parties stipulated by the applicable administrative provisions unless they already have locus standi according to number 1;*

3. *the ombudsman for the environment according to paragraph 3;*

4. *the water management planning body to protect the interests of water management according to Article 55 (4) of the WRG 1959;*

5. *municipalities according to paragraph 3;*

6. *citizens' groups according to paragraph 4, except in the simplified procedure (paragraph 2); and*

7. *environmental organisations recognised under paragraph 7.”*

With regard to **citizens groups** the act provides

⁴⁸ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

⁴⁹ UVP-G: Bundesgesetz über die Prüfung der Umweltverträglichkeit (Umweltverträglichkeitsprüfungsgesetz 2000), published in BGBl I 1996/773, BGBl I 2000/89. UVP-G amendment 2004, amendment of UVP-G as to implementation of Directive 2003/35/EC, BGBl I 2004/153, BGBl. I 2006/149 (Federal Ct on Environment Impact Assessment, EIA Act 2000)

“Article 19 (4) (Constitutional provision) **Comments** according to Article 9 (5) may be **supported** by entering one’s name, address, date of birth and signature on a **list of signatures**. The list of signatures shall be submitted at the same time as the comment. If a comment is supported by **200 persons** or more who have the right to vote in municipal elections in the host municipality or in a directly adjoining municipality at the time of expressing their support, this group of persons (**citizens’ group**) shall have locus standi in the development consent procedure for the project and in the procedure according to Article 20 or shall be considered to be a party involved (paragraph 2). Citizens’ groups having locus standi shall be entitled to claim the observance of environmental provisions as a subjective right in the procedure and to complain to the Administrative Court or the Constitutional Court.”

A) NGOs

Only “registered”-NGOs (may) have standing in federal EIA and IPPC proceedings

NGOs have to register⁵⁰.at MoE.

An NGO has to “prove” that

- their primary objective is the protection of the environment
- that is non-profit oriented, and that has been in
- existence and has pursued the objective identified (1.) for at least **three years**

It takes some time until NGOs have collected respective documents.

Once NGOs are registered they may get standing in EIA and IPPC proceedings, but only if they

- have filed written complaints during
- the period set in a permitting proceeding.

⁵⁰ “§ 19 (6) An environmental organisation is an association or a foundation:

1. whose primary objective is the protection of the environment according to the association’s statutes or the foundation’s charter,
2. that is non-profit oriented under the terms of Articles 35 and 36 Bundesabgabenordnung—BAO (Federal Fiscal Code), BGBl. No. 194/1961, and
3. that has been in existence and has pursued the objective identified in number 1 for at least three years before submitting the application pursuant to paragraph 7.

(7) (Constitutional provision) In agreement with the Federal Minister for Economic Affairs and Labour, the Federal Minister of Agriculture and Forestry, Environment and Water Management shall decide upon request by administrative order whether an environmental organisation meets the criteria of paragraph 6 and in which Laender the environmental organisation is entitled to exercise the rights related to locus standi. Complaints against the decision may also be filed with the Constitutional Court.

(8) The request pursuant to paragraph 7 shall be supported by suitable documents that prove that the criteria of paragraph 6 are met and that indicate the Land/Laender covered by the activities of the environmental organisation. The rights related to locus standi can be exercised in procedures on projects to be implemented in this Land/in these Laender or in directly neighbouring Laender. The Federal Minister of Agriculture and Forestry, Environment and Water Management shall publish a list of the environmental organisations recognised by administrative order pursuant to paragraph 7 on the Internet site of the Federal Ministry of Agriculture and Forestry, Environment and Water Management. This list shall specify the Laender in which the environmental organisations are entitled to exercise rights related to locus standi.

(9) An environmental organisation recognised pursuant to paragraph 7 shall forthwith inform the Federal Minister of Agriculture and Forestry, Environment and Water Management if any of the criteria defined in paragraph 6 is no longer met. Upon request of the Federal Minister of Agriculture and Forestry, Environment and Water Management, the environmental organisation shall submit suitable documents proving that the criteria defined in paragraph 6 continue to be met. If the Federal Minister of Agriculture and Forestry, Environment and Water Management learns that a recognised environmental organisation no longer meets one of the criteria of 12 paragraph 6, this fact shall be declared by way of administrative order in agreement with the Federal Minister for Economic Affairs and Labour. The list pursuant to paragraph 8 shall be amended accordingly.

(10) An environmental organisation recognised pursuant to paragraph 7 shall have locus standi and be entitled to claim the observance of environmental provisions in the procedure insofar as it has filed written complaints during the period for public inspection according to Article 9 (1). It shall also be entitled to complain to the Administrative Court.

(11) An environmental organisation from a foreign state may exercise the rights under paragraph 10 if this state has been notified pursuant to Article 10 (1) no. 1, if the effects impact that part of the environment in the foreign state whose protection is pursued by the environmental organisation and if the environmental organisation could participate in an environmental impact assessment procedure if the project was implemented in this foreign state.”

NGO standing in regional IPPC-proceedings

Standing provisions in regional IPPC acts (Bundesländer) differ partly from the EIA-act approach. Some acts refer to the above mentioned EIA-act provisions,⁵¹ others stipulate similar conditions like (objective environment, three years, non profit) but only with an ad-hoc approval in respective IPPC-permitting proceedings⁵².

NGO's access to Justice is limited as compared to other parties

- NGOs do not have the right to bring up the case after the decision of Umweltsenat to the
- Federal Constitutional (VfGH) and
- Administrative Courts (VwGH),
- whereas other parties can do so⁵³

Thus NGOs standing is limited as compared to other parties. EIA project initiators may appeal any decision of Umweltsenat to the highest federal courts. NGOs would not be represented in the federal courts proceedings.

B) Limited standing for Citizen's groups

Citizen's groups may get standing only in Annex I EIA proceedings if they make a joint submission with signatures and comments to the Environmental impact statement within **six weeks**.

- Citizens' groups provisions has **existed already before Aarhus implementation** since the EIA-act was enacted 12 years ago. It has **proved to be a very successful** for PP.
- The negative aspect is that **Citizen's groups** rights are limited to (UVP-G) EIA Annex I activities, what is the minority of the actual EIA-cases in Austria.
- Citizen's groups have neither standing nor Access to Justice in IPPC proceedings.

C) Limited standing for neighbours

Neighbours have standing in all EIA and IPPC proceedings since PP-Directive has been implemented.⁵⁴

- Neighbours standing provisions are limited.
- Neighbours may **not offend infringement of environmental** legislation in general, but only provisions that are supposed to protect them **in particular** (like noise, smell).
- This means aspects like **air quality, nature protection** and application of environmental law are **not** subject to the standing rights of neighbours.
- Standing provisions for neighbours are not based on the Aarhus Convention but on Austrian **administrative law principles only**.
- This is no effective legal redress as to the Aarhus Convention and respective EC Directives.

⁵¹ For example Upper Austria: Landesgesetz vom 4. Juli 1996 über Maßnahmen zum Schutz der Umwelt und den Zugang zu Informationen über die Umwelt (Oö. Umweltschutzgesetz 1996), LGBl.Nr. 84/1996, LGBl.Nr. 44/2006

⁵² For example Vorarlberg: Gesetz über die integrierte Vermeidung und Verminderung der Umweltverschmutzung sowie die Beherrschung der Gefahren bei schweren Unfällen, LGBl.Nr. 20/2001, 5/2004, 26/2006, Wien: Gesetz über die integrierte Vermeidung und Verminderung der Umweltverschmutzung (Wiener IPPC-Anlagengesetz - WIAG), LGBl. Nr. 31/2003, LGBl. Nr. 45/2005

⁵³ Please note the differentiation as to transport proceedings where the highest courts are the only redress body mentioned in the first chapter what is no effective legal redress for other reasons.

⁵⁴ Before PP-Directive was implemented neighbours had no standing in federal motorway EIA-proceedings projects. Only few cases have occurred with the amended legal position for neighbours (basically proceedings that started after June 2005)

D) IPPC: public participation and Access to Justice only for NGOs

- **Only NGOs** have Aarhus related standing (and Access to Justice) in IPPC development consent procedures.
- There are no standing and Access to Justice provisions for citizen's groups.
- For **neighbour's** rights in IPPC-proceedings are as limited as in EIA proceedings.

E) Limited rights in federal transport cases

Access to Justice and participation rights are **limited** in Federal transport EIA-proceedings, as mentioned in Chapter I:

- The only redress bodies are the highest Constitutional and Administrative Courts.
- Highest courts basically focus on significant legal problems by its nature.
- Highest Courts may only cancel an EIA decision (court of cassation), but not amend it.
- Highest Courts do not grant interim relief
- Appeal proceedings last up to 22 months in average.

F) Ombudsman standing

Ombudsman have standing and Access to Justice (please read Chapter I as for the role of Ombudsman)

G) Conclusions

- It can be concluded that **only NGOs have standing and Access to Justice** with regard to the Aarhus Convention and PP-Directive. But NGOs standing (and Access to Justice) provisions
 - are limited as compared to other parties in proceedings
 - are limited in federal transport projects.
- **Ombudsmen** have an important role in EIA-proceeding. But Ombudsman can not be seen as representatives of the public concerned as they are administrative bodies.
- **Citizen's groups** may only get standing (and Access to Justice) EIA Annex I proceedings.
- **Neighbours'** rights are limited to provisions that aim to protect them but not to environmental law as such
- The fact that only NGOs have standing and Access to Justice in all respective EIA and IPPC projects is a **too narrow interpretation of the Convention** which provides that
 - the public concerned AND
 - NGOshave public participation and Access to Justice rights, and not "only NGOs".

Criteria for non-governmental organizations promoting environmental protection

- NGO registration proceeding is ruled in § 19 clause 6 to 11 UVP-G (EIA-act)⁵⁵
- The registration process is somehow formalistic.
 - It takes some time to collect the data needed for the registration
 - So far **only about 20 NGOs have** registered in Austria.
 - The registration procedure has been fair and accomplished quickly until now.

⁵⁵ Please read above.

- A basic deficiency of this approach is that there is **no ad hoc registration for NGOs** on the federal level.
 - Many NGOs only realize their right to participate when a proceeding starts.
 - But then it is too late to register and they must not participate in a permit
- The above mentioned approach of IPPC proceedings in some regions (Bundesländer) with ad hoc NGOs approval in respective proceedings appears to be preferable.

5. Article 9.2 of the Aarhus convention, specifically:

Standing based on “sufficient interest” and/or “impairment of right”

- **NGOs and citizens groups do not have to show a “sufficient interest”** or an “impairment of their right”;
 - **NGOs** have to be **registered** or ad hoc approved as NGOs (some regional IPPC acts)
 - **Citizens groups** have to make **joint comments** and live in the (neighbouring) municipality of the project’s location.
 - **Neighbours** do have to show **sufficient interest** (see definition in § 19 (1). Though neighbours have standing in all EIA proceedings since PP-Directive implementation we want to add that respective standing provisions are very limited.

“Substantive rights impaired” of NGOs; right to a healthy environment or privacy

- UVP-G (EIA-Act) provides that NGOs and citizen’s groups (EIA-act Annex I only)
 - *shall be entitled to claim*
 - **the observance of environmental provisions**
 - **as a subjective right in the procedure”.**
- NGOs (and citizens groups in Annex I – EIA proceedings) have standing and Access to Justice with regard to
- legality of any substantive environmental law provisions in EIA and IPPC projects
- as well as respective procedural rights.
- Access to Justice is factually limited in federal transport as the only redress body are Constitutional and/or Administrative court (please read above Chapter II).
- There is no right for NGOs to claim a healthy environment outside to EIA and IPPC permitting proceedings.
- There are no privacy and health rights for NGOs.

There are no other public participation and Access to Justice provisions next to EIA and IPPC Directive transposition acts like nature protection and GMO.

Review of EIA screening decision

Austrian case by case screening provisions as the main flaw of EIA and PP-Directive transposition

The provisions on EIA- case by case screening procedure (Article 3/7 UVP-G; Article 24/5 UVP-G for federal transport projects)⁵⁶ can be seen as the core problem of Austrian EIA-Directive and Aarhus Convention implementation from our understanding.

The reason for this assumption is that there are **no public participation** and/or **Access to Justice** provisions with regard to the screening decision. Public concerned

- **must not legally challenge screening** decision and
- **must not refer to EIA-Directive**
- in any following permitting procedure and
- even though they had no
- possibility to participate screening and neither had any respective Access to Justice before.

Austrian EIA-case by case screening procedure is obligatory to assess whether an EIA proceeding is necessary in particular

- for **activities** with lower threshold values (compared to Annex I) (and) in **sensitive areas** (Article 4.3 and **Annex III** EIA Directive),
- for **extensions and amendments** of existing of existing activities
- because **cumulative effects** of different projects,
- because of **salami-slicing of one project**.⁵⁷

The main problem with regard to the Austrian EIA-case by case screening procedure is that (estimated) 80 % of screening proceedings end with the result that no EIA is necessary.⁵⁸ **The public may**

- **neither participate (or even have standing) in this screening** proceeding
- **nor appeal against** the screening decision.
- From a legal point of view the main problem is that the question that an **EIA** would be necessary for a project **must not be brought up in any stage of any** following project development consent proceedings. The **screening decision is binding** for all following proceedings.

This legal position is **heavily criticized** by the vast majority of legal experts in Austria as an

- infringement of EIA-Directive,
- ECJ-case law,⁵⁹
- Austrian constitutional and administrative law⁶⁰ as well as the
- Aarhus Convention.

The Aarhus **Convention does not provide for such a limitation on Access to Justice.**

⁵⁶ Article 3/7 UVP-G read as follows:

“Article 3. (7) Upon request by the project applicant, by a co-operating authority or by the ombudsman for the environment, the authority shall state whether an environmental impact assessment for a project needs to be performed pursuant to this Federal Act and which criterion of Annex 1 or Article 3a (1) to (3) applies to the project. This statement may also be made ex officio. The decision shall be taken in the first and second instances by administrative order within six weeks each. The project applicant, the co-operating authorities, the ombudsman for the environment and the host municipality shall have locus standi. Before the decision is taken, the water management planning body shall be heard. The essential substance of the decisions, including the main reasons for them, shall be published or made accessible to the public in a suitable way by the authority. The host municipality may file a complaint against the decision taken with the Administrative Court. The ombudsman for the environment and the co-operating authorities are exempted from the obligation to reimburse cash expenses.”

⁵⁷ Please read EIA-case study for details.

⁵⁸ There is no official available statistic. The 80 % rate was researched by OEKOBUERO by individual interviews and calculations. The figure is mentioned by civil servants in official talks.

⁵⁹ ECJ 7.1.2004, C-210/02, *Delena Wells*; ECJ 16.9.1999, C-435/97, *World Wildlife Fund (WWF) u.a.*; ECJ 24.10.1996, C-72/95, *Kraaijeveld u.a.*; ECJ 7.9.2004, C-127/02, *Niederländisches Waddenmeer*, ECJ 19.9.2000, C-287/98, *Linster*, ECJ 16.9.2004, C-227/01, *Commission vs Spain*, ECJ 2.2.1998, C-321/95, *Greenpeace vs Commission*

⁶⁰ Read *Raschauer/Ennöckel* § 3 Rz 41 for details

This legal position is, from our understanding, in contrast to **Article 6 and 9/2** of the Aarhus Convention that provides for Public Participation and Access to Justice for activities listed in Annex I of the Aarhus Convention.

In addition this legal position is in contrast to **Article 9/3** of the Aarhus Convention that provides for Access to Justice to acts of public authorities in environmental matters.

Infringement of EC-Environmental Law

- The Austrian legal position on screening proceedings **precludes any reference on EIA-directive** in a project's permitting procedure. This is contrast to ECJ⁶¹ case law whereas **concerned subjects have the right to directly refer to EIA-directive** (if they did not have the chance to do in another stage of a proceeding).
- In a **recent judgement** (ECJ 4. May 2006, C-290/03 Diane Barker) the ECJ ruled that *"Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the **second stage**, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location."*
- and *"that the competent authority is, in some circumstances, obliged to carry out an environmental impact assessment in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved (see, in this regard, Commission v United Kingdom, paragraphs 103 to 106). This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment."*
- Austria would have to directly **apply⁶² EIA-Directive and Aarhus Convention** as the Austrian legislation is in contrast to EC Environmental law with regard to *de Berre judgement* (C-213/03, C-239/03)⁶³ and the above mentioned ECJ decisions.

In spring 2006 the **European Commission** stated in an official press release that the Commission – after having received many similar individual complaints from Austria - may have observed a **potential structural flaw** in Austrian EIA-legislation as to the combination of high threshold values and **weak case by case screening** proceedings.⁶⁴

6. Article 9.3 of the Aarhus convention:

Art 9/3 is not implemented in Austria. Please read arguments above.

A similar provision on "environmental law" (on Article 9/2 Aarhus Convention) can be found in UVP-G. This provision is interpreted in the way that these are all provisions that directly or indirectly serve for the purpose of protection individuals and the environment from environmental impacts, emissions, immissions etc.⁶⁵

⁶¹ ECJ 7.1.2004, C-210/02, *Delena Wells*; ECJ 16.9.1999, C-435/97, *World Wildlife Fund (WWF) u.a.*; ECJ 24.10.1996, C-72/95, *Kraaijeveld u.a.*; ECJ 7.9.2004, C-127/02, *Niederländisches Waddenmeer*, ECJ 19.9.2000, C-287/98, *Linster*, ECJ 16.9.2004, C-227/01, *Commission vs Spain*, ECJ 2.2.1998, C-321/95, *Greenpeace vs Commission*

⁶² C-213/03. "A provision in an agreement concluded by the Community with a non member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure."

C-239/03 paragraph 25: "In accordance with case-law, mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence (see, to that effect, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 9, and Case C-13/00 *Commission v Ireland* [2002] ECR I-2943, paragraph 14).

C-239/03 paragraph 26: From this the Court has inferred that, in ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (*Demirel*, cited above, paragraph 11, and *Commission v Ireland*, cited above, paragraph 15).

⁶³ ECJ C-213/03 (15 July 2004), *Syndicat professionnel coordination des pêcheurs de l'étang de Berre and de la région v Électricité de France (EDF)*; ECJ C-239/03 (7 October 2004), *Commission vs France*

⁶⁴ *Inringment procedure Tauernbahn, siehe newflash juli 2006 für nachweis*

⁶⁵ *Raschauer/Ennöckel*, § 19 Rz 14

7. Article 9.4 of the Aarhus Convention, specifically:

Injunctive relief

- Injunctive relief is granted in EIA permitting procedures that are not federal transport projects as well as in IPPC proceedings.
- Highest courts usually do not allow interim relief in environmental law cases.
- The general rules of administrative law are applied and be seen as in line with the Convention (see 654 der Beilagen XXII.GP page 7)

Other qualities of procedures

- **“Timely” procedures**
 - In EIA, PPC and information acts there are respective deadlines set, in general.
 - In Environmental Information acts there lack provisions on Access to Justice if an authority fails to answer a request at all.
 - The time frame appeals is **six months** in that case.
 - In **federal transport** EIA cases time frames are **inappropriate**. The only redress body for proceedings started since June 2006 the only redress body is the highest Administrative Court.
 - The average appeal duration is 22 months.
 - Interim relief is usually not granted in environmental matters.
- **“Not prohibitively expensive” procedures**
 - The general rules of administrative law are applied and be seen as in line with the Convention (see 654 der Beilagen XXII.GP page 7)
 - Information requests have been free of charge until now. This is very positive.
 - In particular EIA proceedings are far too expensive for effective public participation and Access to Justice.
 - This counts in particular for federal transport cases
 - Effective participation affords expensive legal and technical expertise.
 - Courts only accept arguments that are based on the same technical level as EIA-data.
 - Expertise cost up to 10.000 Euro

8. Article 9.5 of the Aarhus Convention – inspiring mechanisms

- Information on public rights on MoE Website (<http://recht.lebensministerium.at/>)
- Funding OEKOBUERO and J&E Environmental Law Service
- System of Ombudsman (Umweltanwaltschaft) in Bundesländer.
- Umweltsenat as an exemplary EIA appeal body.
- EIA-act without federal transport provisions.
- Standing and Access to Justice provisions for citizen’s groups in EIA-act Annex I cases.

9. Summary and conclusions

Austria has ratified the Aarhus Convention in June 2005. The Convention is **directly applicable** in Austria with regard to Austria's obligations to implement and apply international agreements ratified by the European Communities (ECJ de Berre case).

Austria has **transposed** the Aarhus Convention basically by implementing PP Directive (EIA and IPPC Directive amendment) and the Environmental Information Directive.

EIA Directive and Environmental Information Directive were transposed on time on federal and regional level (EIA-only). Bundesländer (regions) were reluctant with regard to information Directive implementation, but (almost all) have transposed the Directive in the meanwhile.

IPPC-Directive provisions were transposed with a few months up to 1,5 years delay.

Austria is **reluctant** to implement and transpose **Art 9/3** of the Convention.

Environmental information Directive has been transposed in a very positive way. Access to Justice on information requests is free of charge as well as requests itself. The main flaw is that Access to Justice is only possible after six months in cases where an authority does not react to a request at all.

The Austrian **EIA-act** (UVP-G) guarantees **fair and timely** EIA and appeals proceedings as well as interim relief in general. Very positive are standing and Access to Justice provisions for **citizen's groups** for Annex I projects, standing Access to Justice provisions for **Ombudsman** as well as **Umweltsenat** as appeal body. **NGOs** Access to Justice provisions are **limited** as they must not appeal to the highest courts.

The legal position is different for **federal transport EIA**. Access to Justice is **ineffective** and in contradiction to Aarhus Convention and PP-Directive for several reasons.

The same counts for the legal position and application for **EIA-case-by case screening** proceedings for both federal transport and not federal transport projects. Public is excluded from case by case screening. The public has **no Access to Justice** on the screening decision. The screening decision is final and any EIA issue must not be claimed in any subsequent permitting proceeding. Estimated 80 % of screening decisions do not see an EIA as necessary. This legal position **contradicts** respective Aarhus Convention provisions (ECJ **de Berre**)⁶⁶ as well as the **EC Treaty**, in particular ECJ case law (ECJ, recently **Diane Barker**, C-290/03, 4 May 2006).

The interpretation of "**public concerned**" is interpreted **too narrow** in Austria. Only NGOs have standing and Access to Justice in all PP-Directive proceedings. PP-Directive and the Aarhus Convention provide for such rights for the public concerned, and **not only NGOs**. Only in EIA-act Annex I cases citizens groups have Access to Justice and standing in line with the Aarhus Convention and PP directive.

Neighbours standing and Access to Justice provisions are **limited** and based on Austrian public law principles but not on environmental law. Thus neighbours may protect themselves from immissions and emissions, but not the environment as such (climate change, nature protection, air-, water-, soil quality standards.)

Aarhus Convention third pillar on Access to Justice has only been implemented with regard to first and second pillars. **Art 9/3 is neither implemented**, applied or transposed at all. This

⁶⁶

legal position and application as an **infringement** of the Aarhus Convention and the EC Treaty as already mentioned above.

Abbreviations

BGBI	Bundesgesetzblatt, (official federal journal), http://ris1.bka.gv.at/authentic/index.aspx
BMVIT	Bundesministerium für Verkehr, Innovation und Technologie (Federal Ministry of Transport, Innovation and Technology) www.bmvit.gv.at
B-VG	Bundes-Verfassungsgesetz (federal constitution act)
UVP-G	Federal EIA-Act
UIG	Federal Environmental Information Act
EIA	Environmental Impact Assessment
ECJ	European Court of Justice
PP Directive	Directive 2003/35 EC (read below for details)
SP-V,	Federal Act on Strategic Assessment of Transport, (read below for details)
USG	Bundesgesetz über den Umweltsenat (Umweltsenatsgesetz: Environmental Senate Act, BGBl I 114/2000)
UVP	Umweltverträglichkeitsprüfung (EIA)
UVP-G	Federal Act on Environment Impact Assessment (EIA Act 2000, read below for details)
Umweltsenat	Environmental Senate (EIA appeal body)
VfGH	Verfassungsgerichtshof (Constitutional Court) www.vfgh.gv.at
VwGH	Verwaltungsgerichtshof (Administrative Court) www.vwgh.gv.at

Legislation and decisions

Austrian Aarhus ratification act, BGBl III 2005/88, 10 June 2005

AWG: Abfallwirtschaftsgesetz, BGBl 2002/102)

Bgld. UIG 2001: Gesetz vom 12. Juli 2001 über den Zugang zu Informationen über die
Umwelt (Burgenländisches Umweltinformationsgesetz 2001), LGBl. Nr. 30/2001

European Commission; COM(2003) 624 final (24. October 2003), proposal for a DIRECTIVE
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on access to justice in environmental
matters

EIA-Directive: Council Directive of 27 June 1985 on the assessment of the effects of certain
public and private projects on the environment (85/337/EEC) (OJ L 175, 5.7.1985, p. 40)

Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003
providing for public participation in respect of the drawing up of certain plans and
programmes relating to the environment and amending with regard to public participation and
access to justice Council Directives 85/337/EEC and 96/61/EC

Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on
public access to environmental information and repealing Council Directive 90/313/EEC

ECJ C-72/95 (24 October 1996), Kraaijeveld u.a.

ECJ C-127/02 (7 September 2004) Niederländisches Waddenmeer

ECJ C-210/02 (7 January 2004), Delena Wells

ECJ C-213/03 (15 July 2004), Syndicat professionnel coordination des pêcheurs de l'étang de Berre and de la région v Électricité de France (EDF);

ECJ C-227/01 (16 September 2004), Commission vs Spain

ECJ C-239/03 (7 October 2004), Commission vs France

ECJ C-287/98 (19 September 2000), Linster

ECJ C-321/95 (2. February 1998), Greenpeace vs Commission

ECJ C-435/97 (16 September 1999) World Wildlife Fund (WWF) u.a.

GewO: Gewerbeordnung, BGBl 1994/194, idF BGBl. I 2006/84 (federal act that regulates among others environmental permitting of industrial installations, including IPPC)

K-IPPC-AG: Gesetz vom 23. Mai 2002 über die integrierte Vermeidung und Verminderung der Umweltverschmutzung (Kärntner IPPC-Anlagengesetz), LGBl Nr 52/2002, LGBl Nr 13/2006

K-ISG: Gesetz vom 7. Juli 2005 über Auskunftspflicht, Datenschutz und Statistik des Landes (Kärntner Informations- und Statistikgesetz), LGBl Nr 70/2005, LGBl Nr 59/2006

MinroG: Bundesgesetz über mineralische Rohstoffe, über die Änderung des ArbeitnehmerInnenschutzgesetzes und des Arbeitsinspektionsgesetzes 1993 (Mineralrohstoffgesetz), BGBl. I 1999/38, idF BGBl. I 2006/113

NÖ IPPC-Anlagen und BetriebeGesetz (IBG), Stammgesetz 07/04 2004-01-26 Blatt 1-7, 1. Novelle 13/06 2006-02-16 Blatt 2-8

NÖ Auskunftsgesetz, Stammgesetz 76/88 1988-08-04, Novelle 94a/06 2006-11-22

Oö. Umweltschutzgesetz 1996: Landesgesetz vom 4. Juli 1996 über Maßnahmen zum Schutz der Umwelt und den Zugang zu Informationen über die Umwelt, LGBl.Nr. 84/1996, LGBl.Nr. 44/2006

Salzburger Gesetz vom 25. Mai 2005 über die integrierte Vermeidung und Verringerung der Umweltverschmutzung durch bestimmte Betriebsanlagen (IPPC-Anlagengesetz), LGBl Nr 59/2005

Salzburger Gesetz über Auskunftspflicht, Datenschutz und Landesstatistik, LGBl. Nr. 73/1988, LGBl. Nr. 98/2004

Strategische Prüfung Verkehr (Federal Act on Strategic Assessment of Transport), BGBl I 2005/96

StUIG: Gesetz vom 19. April 2005, mit dem der Zugang zu Informationen über die Umwelt in der Steiermark geregelt wird (Steiermärkisches Umweltinformationsgesetz), LGBl. Nr. 65/2005

Steiermärkisches IPPC-Anlagen- und Seveso II-Betriebe-Gesetz: Gesetz über die integrierte Vermeidung und Verminderung der Umweltverschmutzung und die Beherrschung der Gefahren bei schweren Unfällen mit gefährlichen Stoffen bei bestimmten Anlagen und Betrieben, LGBl. Nr. 85/2003

TUIG 2005: Gesetz vom 12. Oktober 2005 über den Zugang zu Informationen über die Umwelt (Tiroler Umweltinformationsgesetz 2005) LGBl. Nr. 89/2005

UIG: Umweltinformationsgesetz, BGBl I 2003/76

UVP-G: Bundesgesetz über die Prüfung der Umweltverträglichkeit (Umweltverträglichkeitsprüfungsgesetz 2000), published in BGBl 1996/773, BGBl I 2000/89. UVP-G amendment 2004, amendment of UVP-G as to implementation of Directive 2003/35/EC, BGBl I 2004/153 ,BGBl. I 2006/149 (Federal Ct on Environment Impact Assessment, EIA Act 2000)

Vorarlberger Gesetz über die integrierte Vermeidung und Verminderung der Umweltverschmutzung sowie die Beherrschung der Gefahren bei schweren Unfällen, LGBl.Nr. 20/2001, 5/2004, 26/2006

Vorarlberger Gesetz über den Zugang zu Informationen über die Umwelt, LGBl.Nr. 56/2005

WIAG: Gesetz über die integrierte Vermeidung und Verminderung der Umweltverschmutzung (Wiener IPPC-Anlagengesetz), LGBl. Nr. 31/2003, LGBl. Nr. 45/2005

Wr. UIG: Gesetz über den Zugang zu Informationen über die Umwelt (Wiener Umweltinformationsgesetz) LGBl. Nr. 15/2001, LGBl. Nr. 48/2006

Literature

Altenburger/Wojnar, Umweltverträglichkeitsprüfungsgesetz, UVP-G 200 idF BGBl I 2005/14, Praxiskommentar, Wien, 2005

Eberhartinger-Tafill/Merl, UVP-G 2000, Umweltverträglichkeitsprüfungsgesetz, Kommentar, Stand 1. Juni 2005, Wien, 2005

Ennöckl/Raschauer, Eckpunkte der GewerberechtsNov 2005, in: *Ecolex* 2005, S. 870

Hecht, Partizipation und Access to Justice im Umweltbereich, Umsetzung der Aarhus-Konvention in Österreich, Wien, 2001 (= Informationen zur Umweltpolitik 145, edited by Bundeskammer für Arbeiter und Angestellte)

Öhlinger, Verfassungsrecht, Wien (20056)

Parliamentary material to Aarhus ratification: 654 der Beilagen XXII.GP AB 662 S. 82
http://www.parlinkom.gv.at/portal/page?_pageid=908,727619&_dad=portal&_schema=PORTAL

Annex I

22 March 2005

Access to Justice in Environmental Matters

Austrian response to Presidency questions

Austria would like to thank the Presidency for inviting Member States to comment on the proposed Directive in order to find a common Council strategy.

Austria's general position is that the proposed Directive on access to justice is not essential to contribute to the implementation of the Aarhus Convention. Furthermore, the Directive goes beyond what is required under the Aarhus Convention concerning the alignment of administrative procedures.

It should also be taken into account that the proposed Directive is the only outstanding dossier of the "Aarhus package". After having agreed upon the regulation as well as the decision for ratification, the EC will be a Party to the Convention at MOP 2, which was an important objective from Austria's point of view.

As the Commission has primarily proposed the Directive in order to ratify the Aarhus Convention, the impact of the Directive needs to be reassessed. We suggest a re-evaluation by the Commission of the need for a legislative act on access to justice in environmental matters. On the basis of existing numerous studies the Commission should define possible gaps where Member States' legislation is not sufficient to comply with Article 9(3) of the Aarhus Convention. In any case it should be possible for Member States to maintain their national systems and - if necessary - complete them to meet the requirements set out in Art. 9(3).

Austria is not convinced of the merit in taking up the negotiations on the proposed Directive in view of Member States' critical positions. It would be very difficult to find a compromise, which satisfies all main concerns.

In view of those considerations, Austria at this stage would not like to enter into a detailed discussion by indicating the substantial changes that should be made to the Directive to be more acceptable, and therefore we will only give a very general indication that the major difficulties relate to the definition of the scope of application, the compulsory nature of internal reviews and the provisions on qualified entities.

CZECH REPUBLIC



1. General information on the ratification and transposition of the AC

The AC (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).

Position in national legal system

Article 1.2 of the Czech Constitution determines that the 'Czech Republic adheres to the obligations that issue to it from international law'. 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 our opinion, most of the AC articles should be interpreted as fulfilling these requirements. This interpretation was approved by the judgment of the Supreme Administrative Court of July 2006 (Prague Airport case). The court stated that Czech law must be interpreted in compliance with the requirements of the AC (in particular, it referred to articles 2.5, 6, 7, and 9 in this case – for more details, see the EPS AC case study). As a matter of fact, with regard to the above-mentioned interpretation, the court confirmed that the AC is a 'directly applicable' international treaty, which means that it is possible to directly invoke the rights that the AC guarantees before the Czech authorities and courts.

Formal transposition

There were no 'direct' transposition norms concerning the AC and only a few references to it in the rationale for individual norms adopted after its ratification (e.g., the new Building Act). The Czech Ministry of the Environment (MoE) asserted during the ratification procedure in Parliament that 'the legislation of the Czech Republic is fully compatible with the requirements of the Convention' and this is what the MoE states on all occasions.⁶⁷ This might be more or less correct if some of the ambiguous provisions of Czech laws were interpreted in favour of the rights of the public (and the AC's 'spirit'). However, for the most part this has not been the case (see below for specific examples). Art. 8 of the AC (participation in preparation of binding rules) is definitely not transposed into the Czech legal system.

National act(s) through which the AC was transposed

As mentioned in the previous point, no act has been adopted directly to transpose the AC. Important acts concerning the rights of the public guaranteed by the AC (according to its 'pillars') are:

Access to information (A2I) - 123/1998 Coll. Act 'On the Right to Information on the Environment' (the 'general' 106/1999 Coll. Act 'On Free Access to Information' is also relevant).

⁶⁷ See e.g. the 2005 Czech Republic Implementation Report, p. 2
(<http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.18.add.6.e.pdf>)

Public participation (PP) - (individual provisions of mainly) 100/2001 Coll. EIA Act, 50/1976 Coll. Land Use Planning and Building Act (a new Building Act, 183/2006 Coll., will enter into force in 2007), 114/1992 Coll. Act 'On the Protection of Nature and Landscapes,' 254/2001 Coll. Water Protection Act, 76/2002 Coll. IPPC Act, 74/2004 Coll. GMO Act and some others. The general Administrative Code 500/2004 Coll. is also very important for public participation options.

Access to justice (A2J) - 150/2002 Coll. Code of Administrative Justice in connection with the above mentioned acts granting PP. There are no special acts or provisions concerning A2J in environmental matters (see below in part III).

Other information on transposition

It should be emphasized that the MoE very strongly defends the position that the AC is perfectly transposed, although this is highly questionable even in theory (especially concerning A2J and PP on the preparation of generally applicable, legally binding rules that may have a significant effect on the environment.)

2. Atmosphere related to the AC

During the ratification procedure in Parliament, many arguments were raised against the AC by those who oppose public participation and describe environmental NGOs as 'eco-terrorists' (the AC was ratified on the 2nd attempt). The former deputy minister of industry (now head of the Supreme Control Office) labelled the principles the AC is based on as 'perverse'.

Generally, despite a campaign by NGOs and (in some periods) attempts by the MoE to show that the AC is a priority topic for them, both the majority of decision-making authorities and the 'general public' have barely registered that the AC exists (and even if some officials did, they try to ignore it). The situation 'pre-' and 'post-' Aarhus (both concerning legislation and decision-making procedures) did not change considerably. On the other hand, the existence of the AC repeatedly helped NGOs to avoid repeated attempts to diminish the possibilities of PP and A2J, which periodically recur.

NGOs who regularly try to make use of the rights granted by the AC are mostly aware of its content. An umbrella organisation, Green Circle, has had a project on informing the public about the AC, the result of which is an 'Aarhus web' (www.ucastverejnosti.cz). EPS has organized a number of seminars concerning the AC. However, as far as we know, 'non-lawyer' NGOs do not use the AC very often in their practical work. EPS is probably the only one trying to refer to it systematically, at least in court proceedings, with the aim of gaining favourable precedents. The prevailing attitude on the part of NGOs might change quickly if national legislation and its interpretation introduce more barriers to PP (as is expected).

Until recently the courts have referred to the AC only in a few cases, mostly when it was not important (decisive), or when reasoning that the AC does not insist that some acts (EIA statements - see below) are subject to judicial review. The important and favourable judgment of the Supreme Administrative Court of July 2006 (see above) could change the situation if the court confirms the approach presented in it.

3. Brief summarization of the first and second pillars of the AC

A2I situation

The Act On the Right to Information on the Environment, originally inspired by the EC guidelines of 1998, was extensively amended in 2005 with the aim of transposing directive no. 4/2003/EC. As this directive was primarily inspired by the wording of the AC, it also led to the transposition of most of the provisions of the AC, relating to A2I, into Czech law. In practice, the Act is respected by most authorities. Despite this, the following problems tend to arise relatively often:

The provisions of the Administrative Code and Building Act, according to which only parties to the administrative proceedings and persons who have demonstrated 'legal interest' have access to information and documents from official acts (files), are often abused in practice.

The interpretation of what is and what is not 'environmental information' is another issue, causing problems in some cases, namely because there are two different acts on the right of A2I ('environmental' and 'general'), with substantial procedural differences.

The time limits (30 days according to the 'environmental' information act as compared with 15 according to the 'general' one) are often not met.

Judicial reviews of refusals to provide environmental information or ignoring requests are slow and ineffective. A court decision that refusal of information was unlawful does not guarantee that the applicant will get the information. This reduces the importance of A2I as a tool of public control over how state power is exercised. A (partial) solution would be that courts are entitled to order the officials to provide the information, unless there is a reason not to do so, as is possible according to the 'general' access to information act.

PP situation (administrative standing in environmental matters)

There are two main types of PP in decision-making procedures in the Czech legal system: 'consultative' and 'full' participation.

The most typical examples of consultative participation are preparations of land-use plans, EIA and SEA procedures (also permitting GMO management or approval of safety programs for dangerous industrial enterprises). This kind of PP involves (theoretically) any natural or legal person without any restrictions, and enables the general public to get information and to submit their comments. However, the laws do not adequately stipulate the way in which public comments should be dealt with. This could make, and often does make, public participation a mere formality.

Only 'full' participation encompasses the public with all the rights granted by Art. 6 of the AC, namely paragraph 8 therein ('in the decision due account is taken of the outcome of the public participation'). It is usually also only this form of PP which enables the public concerned to contest the decision before the courts (with a possible preliminary review procedure before a superior administrative authority). This kind of participation is limited only to some procedures (their scope is, however, broader than AC Annex I requires, so it can be said that Art. 6.1 letter b) of the AC is applied in some cases). It is also not accessible to all persons meeting the definition of the 'public concerned' according to Art. 2.5 of the AC (which also limits their rights for ATJ - details below in part III). For the most part, only persons whose 'substantive

(ownership) rights' are 'directly affected' and (under some conditions) NGOs can participate in administrative procedures in which 'development consents' are issued.

For NGOs, the most frequently used provision which enables them to become parties to administrative procedures is Art. 70 of the Protection of Nature and Landscapes Act. The formal requirements are rather easy to meet - an NGO must have legal status⁶⁸ 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 (8 days after they receive information about the procedure). The main problem is that this provision is applicable only if the 'interests of nature conservation and landscape protection' (not 'environmental protection', which is definitely a broader term) are affected by the project. This condition is interpreted by individual authorities in different ways, in many cases as restrictively as possible.

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 makes possible only consultative participation - see above) and consecutively, according to Art. 23. 9 of EIA Act, to acquire the right to participate in subsequent development consent procedures.⁶⁹ The main obstacle here is that the conditions are formulated in such a way that it is impossible to make use of the latter provision, if EIA finishes at the screening stage (see also the analysis of the relationship between regulation of EIA procedure and ATJ in part III below).

In some administrative procedures which have a significant impact on the environment, the legal regulations expressly exclude PP, as the only participant is the person applying for a particular permit. An example is the consent procedure for a permit from the Office of Nuclear Safety to locate a nuclear power station or radioactive waste dump and other procedures in line with the 'Atomic Act' No. 18/1997, Coll.

A special case where public participation is excluded by the law (despite the procedure evidently concerning 'the interests of nature protection') is the granting of exceptions to bans in areas under special nature protection. The government has been issuing these exceptions on the basis of parliamentary amendments since 2004. Although the law states that this should be done through administrative procedures, the government makes its decisions by passing a resolution without debate on the basis of information submitted by the minister of the environment.⁷⁰ This situation not only contravenes the requirements of the AC, but is clearly unconstitutional from the viewpoint of the general entitlement to due process. However, no-one has yet managed to have it abolished.

In practice, PP rights are often breached. The most frequent problems are failure to inform the public concerned that the procedure is to start, refusal to provide copies of documents, setting excessively short deadlines for them to express their opinions, no settlement of objections and appeals, or settlement that is formal only.

⁶⁸ 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 and will not struggle for political power.

⁶⁹ The EIA procedure is in the Czech legal system relatively separate and not finished by a binding decision (development consent), but by a non-binding 'final opinion' underlying the subsequent administrative procedure(s). See the EPS EIA legal analysis for more details.

⁷⁰ Every week the government of the CR decides on some 5-15 applications for exception, generally on the nature 'permission to drive our car to our cottage' or 'permission to stray from marked footpaths for the purpose of scientific observation'.

Other peculiar issues

As mentioned above, Art. 8 of the AC is not transposed into Czech law. The Legislative Rules of the Government,⁷¹ which regulate the procedure of the adoption of new laws and other generally applicable legally binding rules, do not guarantee any rights for the public to have the opportunity to comment on legislation prepared. The publication of draft legislation is left completely up to the 'good will' of the ministries.

Concerning Art. 7 (participation in the preparation of plans and programs, namely the SEA procedure), the situation is similar to that concerning 'consultative participation' (see above).

Access to Justice

Despite all the above-mentioned problems, A2J is still the most problematic issue - in general mainly due to the restrictive interpretation of standing, near-impossibility of obtaining injunctive relief, and slow decision-making by the courts - causing a low degree of enforceability of environmental law. At the same time, without this 'third pillar', the functionality of both the others is questionable. Experience has shown that the administrative authorities mostly prefer economic and related political interests to environmental ones. Without independent and effective control, this makes rights on A2I and PP forceless, if not mere formalities.

4. Article 2.5 of the AC, specifically:

Definition of 'public concerned'

First of all, Czech legislation does not contain any direct definition of the ('general') public (Art. 2.4 of the AC) nor the 'public concerned.' It allows everyone to participate in the EIA and some other procedures ('consultative participation' – see above), which can be seen as fulfilling the rights of the 'general public' granted by the AC. However, the transposition of the term 'public concerned' seems to be necessary for the decision-making procedures because Czech legislation opens these procedures only to a defined group of participants.

The MoE asserts that Art. 2.5 of the AC is transposed through the above-mentioned provisions of particular environmental acts (enabling NGOs to participate in decision-making procedures). However, these provisions, together with the general definition of a 'party' in the Administrative Code⁷², open these procedures (and A2J subsequently - see below) only to a part of the 'public concerned' (i.e., they do not always cover the scope of 'public concerned' pursuant to the AC). For example, in the land use permit procedure, which can be considered the crucial development permit in most cases, the scope of participants is restricted only to the landowners and to certain NGOs. Other people likely to be affected by or having an interest in the decision-making (for example flat-dwellers) cannot become participants. The situation is even worse in some procedures according to the Nuclear Act or Mining Act, in which only the investor qualifies as a party (see above).

On the other hand, in the above mentioned judgment in the Prague Airport case, the Supreme Administrative Court 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

⁷¹ Not a binding act, only a government decree.

⁷² Here we should note that the administrative rules of procedure effective to the end of 2005 (no. 71/1967 Coll.) contained a general definition of the party, the breadth of which was similar to the definition of the public concerned in the AC (the party was, amongst others, the person 'whose lawfully protected interests could be affected by the decision'). This definition of the party, however, firstly was not applied where the special laws, such as the Building Act, contained a special (generally more restrictive) definition, and secondly was repeatedly repressed for 'excessive openness of access to procedure'. The new administrative rules of procedure, in force as of 1.1. 2006 (no. 500/2004 Coll.) only considers the party to be those whose 'rights or obligations' could be 'directly affected'.

be considered to be the 'public concerned.' 'The future will show if the courts (and subsequently the administrative authorities) will use this 'broader' approach.

Criteria for non-governmental organisations promoting environment

The conditions an NGO must meet for participating as a party in the decision-making process are described in the previous part: legal status, the main objective according to its by-laws (protection of nature and landscape, or the environment in general) and declaring their willingness to participate within a specific time limit (the last condition does not apply for NGO participation according to the EIA Act where, on the other hand, the NGO must express their opinion in the 'assessment stage' of the procedure to become party to the subsequent decision-making and, at the same time, the authority must declare that the decision will concern the NGO's statutory goals).

For A2J, there are no further special criteria or authorisation. Previous participation in the administrative decision-making procedure is the basic (and from the formal point of view the only) requirement for an NGO to be in a position to sue. In reality, however, their chance of challenging the decisions is limited by the judicial interpretation of the scope of admissible objections (see next point).

5. Article 9.2 of the AC, specifically:

Standing based on 'sufficient interest' and/or 'impairment of right'; right to a healthy environment

Interpretation of the word 'alternatively'

Similarly to Art. 2.5, there are no transposition provisions concerning A2J in environmental matters. This area is therefore only regulated by the general provisions of Act No. 150/2002 Coll., Code of Administrative Justice (further 'CAJ'). According to § 65 CAJ, standing to sue the decision of an administrative authority is granted to a person whose rights or obligations were created, changed, nullified, or bindingly determined by the decision and, furthermore, other parties to proceedings before the administrative authority who claim that their rights have been prejudiced by the administrative authority's acts in a manner that could have resulted in an illegal decision.

The wording of this CAJ general standing provision, as well as its interpretation by the courts, leads to the conclusion that access to review procedures before the court is granted only to persons 'maintaining impairment of a right.' It results also from court practice (stable interpretation), under which the courts have not considered 'legally affected interest' to be sufficient grounds for standing against the decision of an administrative body, even when it was a sufficient condition (under the 'old' Administrative Code) to acquire the status of a party in an administrative procedure (see above).⁷³

This formulation also means that for members of the public concerned, bringing a case before the court is conditioned upon previous participation in an administrative procedure (i.e., through the possibilities granted by the provisions concerning PP rights). In our opinion, this in and of itself does not contravene Art. 9.2 of the AC, as this provision sets out to provide the right to a court review in relation to 'decisions, acts, and inaction on the part of administrative bodies', to which article 6 of the AC relates. Of course, a conflict arises if the national legislature limits the

⁷³ For example, according to the decision of the Supreme Court in Prague dated 17.11. 1995, ref. no. 6 A 243/93, a municipality as a 'mere interested party' could not succeed in a suit against the placement of a spent nuclear fuel dump (!) on its land.

actual scope of the possible participation of the public concerned against the requirements of Art. 6 of the AC (see above).

Concerning omissions by the authorities, § 79 of the CAJ states that a person who has ineffectively exhausted the administrative measures 'for protection against the inaction of an administrative authority' may request that the court oblige the administrative authority to issue a decision on the merits of the matter. It is not quite clear (and not often used in court practice) how 'broad' the scope of possible plaintiffs is. It seems, however, that 'impairment of a right' by the inaction of the authority is also necessary in this case.

CAJ also contains a provision stating that a person 'explicitly authorised under a special regulation or international agreement that is part of the law' can file a lawsuit with the aim of protecting the public interest. There is no act of national legislation explicitly authorising anyone to such a 'public interest lawsuit'. However, the AC could be interpreted as falling into the scope of this provision. No court has yet accepted such authorisation, i.e., no NGO or other person from the 'public concerned' has successfully used this CAJ provision to bring a case to court. However, after the Supreme Administrative Court decision in the Prague Airport case, according to which the AC is directly applicable, it could be at least possible to try it this way.

Interpretation of 'maintaining impairment of a right'

As regards meeting the requirements of the AC, we do not believe that it is a theoretical concept upon which court practice is based (i.e., the doctrine of 'affected interests' or 'interference with rights') that is decisive here; rather, it is an effective circle of subjects which the courts recognise as actively legitimized, and the range of grounds for action they are willing to deal with.

a) Physical entities

People who fall under the definition of 'concerned public' (if they have qualified as parties to an administrative procedure, which in most cases is the main obstacle - see above) generally do not have a problem having a decision subjected to a full review, i.e., from both the substantive and procedural aspects. This means they can successfully object to any breach of their (substantive) rights (not only ownership, but also, for example, their right to a favourable environment, assured by the Czech Constitution through Art. 35 of the Charter of Fundamental Rights and Freedoms, hereafter 'the Charter'). The existence of this right as an enforceable public subjective right has repeatedly been confirmed by the Constitutional Court.⁷⁴ In some judgments the administrative courts have ruled, in relation to a more detailed look into the special regulations⁷⁵, that this constitutional right has been infringed as a result of permitting a variety of encroachments upon the environment. Overall, however, it can be said that at present relatively few people (natural persons) have taken advantage of the possibilities arising from either the national legislative ruling concerning the right to a beneficial environment, or from the AC.

b) NGOs

Significantly more access to the courts in environmental matters is enforced (or demanded) by NGOs. Greater theoretical attention is also paid to their position and options in this regard. One reason is the relatively rich - although considerably inequitable and somewhat logically inconsistent - administrative court practice relating to this problem.

⁷⁴ First in findings of reg. no. III.ÚS 70/97 dated 10.7. 1997.

⁷⁵ 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.

In accordance with this practice and the doctrines arising from it, NGOs can only successfully enforce court protection against intervention into their procedural rights in matters relating to environmental intervention.⁷⁶ To explain the origin of this approach and its current form, a brief diversion is necessary into the current development of NGO efforts towards environmental protection through the courts.

After becoming eligible to participate in administrative procedures,⁷⁷ NGOs in some cases have begun to file suits against official decisions (development consents). Their objections were logically aimed mostly against conflicts of the decisions with the legal protection of individual aspects of the environment (nature and landscape, quality of air and soil, etc.) and human health. It is the effort to ensure that regulations are being followed in these areas that has been and still is the basic motive behind NGO participation in administrative procedures and in any possible lawsuits being filed.

However, just as logical - or rather, 'unavoidable' - has been the conflict between the NGOs' efforts towards environmental protection through the courts and the concept of standing based on the necessity of furnishing proof of breach of the plaintiff's subjective rights (see above). In the first few years after the renewal of administrative justice and after permitting citizens' associations to participate in administrative procedures, the administrative courts generally rejected their claims on the grounds that they were made by 'evidently unauthorised 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 and upon which an NGO participating in an administrative procedure on the basis of one of the provisions of the special regulations quoted above (basically by virtue of the protection of the public interest) could base its standing to sue.

Later the courts' wholly negative attitude towards suits filed by NGOs softened somewhat. The courts began to protect at least the procedural rights of NGOs, meaning principally the right to actual participation in administrative procedures relating to the environment, and also to a 'fair trial', which mostly comprised the chance for them to familiarise themselves with the details of the decision and express an opinion on it (within a sufficient period of time).⁷⁸ The furthest this has been taken is probably by the High Court of Prague, when in one of its verdicts it stated that infringement of subjective rights 'can become a key which opens the way for a lawsuit' through the use of which 'a private claimant may - if he or she so desires - become a tribune defending the public interest'. In this verdict the court also said 'there is no legal basis for rejecting an objection simply because the law which it claims has been broken is directed exclusively or predominantly not towards the protection of the infringed subjective law, but towards the protection of the public interest'.⁷⁹

This relatively obliging approach, however, did not predominate in the years that followed. In the majority of cases the courts handled (and still handle) only those objections filed by NGOs which are immediately related to their procedural rights. Often they do not even consider a demonstrable breach of procedural rights as sufficient reason for abolishing a contested decision (they state that the claimant's rights were indeed infringed, but that this fact does not affect the legality of such a decision).⁸⁰

⁷⁶ It is generally the experience that courts reviewing the decisions of official bodies of executive authority tend to deal with the formal and procedural aspects rather than the actual objections. One of the main reasons behind this is the generally broad powers of official discretionary authority, linked with an appraisal of the specialised aspects of the case. Courts do not generally feel competent to review the objective accuracy of their appraisals. Compare, e.g. Stec, S.: Handbook on Access to Justice, Scentendre, 2003, pg. 29

⁷⁷ On the basis of law no. 114/1992 Coll., On the Protection of Nature and Landscape, and other later laws - see above.

⁷⁸ Compare Stec, S.: Handbook on Access to Justice, Scentendre, 2003, pg. 27 - the author describes the most typical legal arguments linked with PP rights, used in 'environmental lawsuits', as (a) failure to disclose all information to the public relevant to its participation (b) improper procedures for PP, such as timely or adequate notice, opportunity to comment etc., (c) inadequate response to comments received (failure to take due account) or failure to reveal the reasons or considerations for the decision.

⁷⁹ Decision dated 25.8. 1997, ref.no. 6 A 40/96.

⁸⁰ See e.g. decision of the High Court of Prague dated 17.5.1999, ref. no. 6 A 95/94.

At the same time it has become a standard explanation in the practice of the Czech courts that NGOs, 'due to the nature of the case', cannot enforce the right to a favourable environment as contained in the Charter (see above). Paradoxically, the Constitutional Court has declared this right to be enforceable through the courts (and that it had been violated in the given case) in a decision relating to a constitutional complaint filed by an environmental NGO⁸¹. This implicitly acknowledged the right to a favourable environment for the NGO. However, in another decision made later, it stated that this right cannot pertain to an NGO as a legal entity, as it is only physical entities as biological organisms that are exposed to negative effects upon the environment.⁸² It is this subsequent decision that is repeatedly cited by the administrative courts. The fact that NGOs participate in administrative procedures not in order to enforce their procedural rights but to actually protect the environment is generally overlooked.

The new regulation of administrative justice contained in the CAJ has not done much to change the conditions for the NGO's standing from a formal point of view; rather it has basically confirmed the previous doctrine. Despite this, in many cases the courts have recently complied with the 'substantive' objections put forward by NGOs as part of their suit. The reason they give for this is either that 'substantive' mistakes of the authorities infringe the NGO's right to the due settlement of its' objections⁸³, or they give no reason at all. On a general (theoretical) level the courts continue to uphold the position that the NGOs 'can object to the unlawfulness of an administrative body's decision only if they confirm that their procedural rights have been violated in a way which could result in an unlawful decision.'⁸⁴

Under the pressure of all these circumstances, NGOs are mostly basing their suits on the assertion that their right to a fair trial has been infringed, although the real aim of the suits is the protection of the 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 obstructionist and formalist (instead of protecting the environment itself).

The situation as a whole doubtlessly contravenes the aims of the AC as well as the requirements of Art. 9 paragraph 2 therein. In our opinion, a change in the Czech legal regulations is not completely necessary to meet these requirements (although an explicit definition of the right of NGOs or the 'public concerned' to a review of an environment-related decision, both from the substantive and the procedural point of view, would certainly be advisable). However, it would be sufficient to see a change in the approach of the administrative courts, i.e., for them to abandon the above 'doctrines' which allow NGOs only to enforce the protection of their procedural rights. Since in the Prague Airport decision the Supreme Administrative Court clearly stated that the AC has priority over domestic law, this change is unavoidable if a consistent approach to the position of the AC in the Czech legal system is to be retained.

Preliminary review procedure before an administrative authority

The general condition for the admissibility of a lawsuit against a decision by an administrative body is that 'administrative appeal' has been exhausted. This administrative appeal is an appeal to the superior administrative body. The possibility to submit an administrative appeal

⁸¹ Quoted in the footnote n. 8

⁸² Resolution no. I. ÚS 282/97 dated 6.1. 1998. The issue of this decision breached the provisions of the Constitutional Court Act, which states that the in case of conflict with a previous opinion of Constitutional Court, the matter must be judged by the general assembly of the court.

⁸³ For example in accordance with the verdict of the Supreme Administrative Court dated 31. 8. 2004, ref. no. 6A 143/2001-151, the basic principals of administrative procedure oblige an administrative body to clearly rationalize its decisions to the extent to which it must be evident which facts they are based upon. Failure to do so was, according to the court, a violation of the procedural right of the claimant's – NGO.

⁸⁴ See, for example, the decision of the Municipal Court of Prague dated 17.3. 2004, ref. no. 28 Ca 441/2001

is applied in nearly all administrative procedures and it may be filed by any of the parties to the procedure – i.e., by NGOs as well as other members of the public concerned, provided they qualify as a party to the procedure.⁸⁵

The submission of an appeal begins the appeal process, which, in relation to the judicial review of a decision, is in the nature of a preliminary review procedure before an administrative authority. The submission of an appeal generally has a suspensive effect, although the new Administrative Code has greatly increased the possibility of eliminating this in an individual case.

An exception to the option to submit an appeal against a decision in environmental matters is the above-mentioned government decision-making concerning exceptions to bans in territories under special nature protection. As there is no real administrative procedure in practice (unlawfully), there is also no appeal body. The option to submit an appeal ‘in favour of environmental protection’ is also virtually excluded in procedures where the participant is merely the claimant (see above).

Review of EIA screening decision

The above-described approach adopted by the Czech courts to suits filed by the public concerned (mainly NGOs) in environmental matters also manifests itself in the question of the possibility of attaining a judicial review of acts issued by the appropriate offices as part of the EIA procedure, both as the conclusion to a screening decision and the final opinion.

The Czech adaptation of the EIA procedure involves a formally adjusted screening procedure in which the public (anyone) can take part. This screening procedure takes place with both obligatorily and facultatively reviewed schemes (‘scoping’ and ‘screening’ are combined in a single procedure). In all cases the screening procedure ends with a conclusion issued by the appropriate body. With facultatively reviewed schemes (Appendix II of the EIA Act) the main aim of the screening procedure is to state (de facto, to decide) whether the scheme will be reviewed any further (i.e., whether the full EIA procedure will go ahead). With the great majority of facultative schemes, the EIA procedure ends in practice with the screening procedure.

If the entire EIA procedure goes ahead, it ends with the appropriate office issuing a ‘final EIA opinion’. This is not a binding decision under Czech law and merely forms the basis for a related subsequent development consent. If the opinion is a consenting one, it always contains environmental protection conditions which must be either incorporated into the development consent decision or an explanation must be given as to why this did not happen.⁸⁶

In the view of the Czech courts, an EIA final opinion is not reviewable in court as it is not binding. The courts have rejected suits both by investors (against a negative opinion) and by the public concerned against consenting opinions (which form the overall majority). In some cases the courts have partially dealt with the content of an EIA final opinion while reviewing a subsequent development consent decision.

There has probably never been a case brought against the conclusion to a screening procedure. It is almost certain that if this were to happen, the suit would likewise be rejected for the same reasons as the EIA opinion.

⁸⁵ The original drafts of the new Administrative Code contained a provision stating that parties involved in a procedure in order to protect the public interest may only submit an appeal if one is also submitted by another party, and only ‘on the grounds of the curtailment due to which they are participating’. This and other efforts towards the basic inequality of participants from the concerned public are not contained in the approved version of the new Administrative Code (Act no. 500/2004 Coll.), partly due to intensive resistance from environmental NGOs when the law was being tabled.

⁸⁶ See § 10 para. 4 of Act no. 100/2001 Coll.

We see this approach by the courts as contravening both the requirements of Art. 9.2 of the AC, as well as particularly Art. 10a of Directive 85/337/EEC (EIA Directive) as amended by Directive No. 2003/35/EC ('Public Participation Directive').⁸⁷ The latter directive incorporated the requirements of Art. 9.2 of the AC into the EIA Act.⁸⁸ With regard to this fact, the 'direct effect' of this directive should be of use, i.e., the chance for those from the concerned public to invoke their rights arising from the directive in the national courts if the directive has not been properly transposed.⁸⁹

Even though according to Czech law an EIA final opinion is not a development consent decision, in any case it is both an 'act in accordance with Article 6 of the AC' and an 'act which is covered by the provisions of the EIA Act on public participation'. On the basis of the principle of priority of international contracts over national law, or the direct effect of the directive, the courts should therefore handle cases brought against EIA opinions. In our view, the argument that the EIA final opinions are reviewable as part of a suit against a related decision does not hold up. Above all, as already mentioned, the number of participants in administrative proceedings subsequent to the EIA procedure, and thus the number of claimants, is generally more limited than the definition of the concerned public as laid out in the AC and EIA Directive. In addition to this, considering the amount of time administrative procedures usually last, as well as the subsequent court proceedings, a review of an EIA opinion several years after it has been issued cannot be considered to meet the requirements for timely and effective judicial protection in accordance with Art. 9.4 of the AC (see below).

The same conclusion also applies to cases brought against conclusions to screening procedures, if this is where the EIA procedure ends. The obligation of EC member states to allow a review of a screening procedure for facultative schemes has been repeatedly confirmed by the European Court of Justice, even before the directive on public participation was approved.⁹⁰ We should add that, according to Czech law, if an EIA process ends with a screening procedure it does not, on the basis of the EIA Act, qualify NGOs as parties to subsequent (development consent) procedures. This fact also provides grounds for a request to allow a court review of the conclusion of a screening procedure.

The Supreme Administrative Court has not yet expressed an opinion on these questions. This can be expected in the near future as several complaints have been filed against administrative court decisions to reject cases brought against EIA opinions.

6. Article 9.3 of the AC, specifically:

'Provisions of national law relating to the environment'

Article 9.3 of the AC has not so far been transposed into Czech legislation in any way, nor does Czech law otherwise contain any specification or definition of the 'regulations relating to environmental protection'. In Act No. 17/1992 Coll., ('On Environment') the actual term 'environment' is defined as 'everything making up the natural conditions for the existence, including man, and required for their further development', and is comprised particularly of

⁸⁷ Full title 'Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC'.

⁸⁸ Obligations arising from Art. 9.2 of the AC have also acquired the nature of *aquis communautaire*, rendering it compulsory for member states to bring their national legal systems in line with this directive by no later than 25 June 2005. In addition to this, the Supreme Court in its Prague Airport decision stated that the AC as a whole had acquired the nature of a European law by the fact that the European Community ratified it in its decision 2005/370/EC.

⁸⁹ The Czech Republic has so far not adopted any legislative measures to commitments as defined by article 10a of the EIA Act. For this reason the Commission has begun an infringement procedure with the CR – for more details see <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/905&format=HTML&aged=0&language=EN&guiLanguage=en> ...

⁹⁰ See, for example, case C-435/97 Bozen (WWF and others).

'the air, water, minerals, soil, organisms, ecosystems, and energy'. From this definition we can infer which laws, or the provisions thereof, can be deemed to be 'relating to the environment'.

In practice the need for such delimitation has not yet arisen. Disputes over the interpretation of the term 'affecting the interests of nature and landscape protection' are much more frequent, as this is one of the conditions for NGO participation in administrative procedures as specified by Act No. 114/1992 Coll. (see above). Article 9.3 of the AC has not yet been applied in practice in the Czech courts. In a verdict relating to the Prague Airport case, the Supreme Administrative Court only made reference to this article when reciting the provisions of the AC which covered the case, but has gone no further into specifics.

Access to administrative or judicial procedures

According to Article 36 of the Charter, each person is entitled to enforce his rights by means of a set procedure before an independent and unbiased court and, in certain cases, before another body. Anyone claiming that his rights have been cut short in a decision made by a public administration body may ask a court to review the legality of such a decision, unless the law states otherwise. A review of decisions relating to basic rights and freedoms as defined by the Charter cannot, however, be excluded from the court's jurisdiction.

The term 'administrative procedures' is defined in § 9 of Act No. 500/2004 Coll., Administrative Code, as 'the procedure of an administrative body, the purpose of which is to issue a decision whereby in a certain case the rights or obligations of an explicitly specified person are grounded, changed, or annulled, or whereby in a certain case such a person is declared to have or not to have rights or obligations'. For the possibility of public participation in administrative procedures and administrative appeals, see above.

The basic requirement for a 'court procedure' stems from Art. 36 of the Charter as described above – the independence and objectiveness of the court administering the procedure. It must therefore be a body which is not involved in the relationships of superiority and subordination within public administration (compare Art. 6 of the European Council Convention on Human Rights). Court procedures in civil matters are regulated by Act No. 99/1963 Coll., Civil Procedure Code – hereafter CPC). Reviews of decisions taken by administrative bodies have been covered by a special law (CAJ – see above) since 2003.

As mentioned above, Article 9.3 of the AC has not yet been interpreted by the Czech courts, so the question remains as to what sort of procedure will be seen as meeting the requirements of this article. In our view it must be a procedure before an independent and objective body (see above). The term 'administrative or court procedure' must be interpreted with respect to the nature of the AC as an international treaty, taking into account the existence of different national models of reviews of decisions made by administrative bodies, e.g., the existence of administrative tribunals. This opinion is indicated also by the systematic incorporation of the article in question into the third pillar of the convention – A2J.

Thus we assume that Art. 9.3 of the AC needs to be interpreted as a 'general clause' of this third pillar, allowing access to judicial protection against contravention of environmental protection regulations, even in cases not covered by the previous paragraph of Art. 9 of the AC. In other words, even if the national regulations did not contain any special provisions concerning public access to court procedures in environmental matters, according to Art. 9.3. it should be possible to infer the right to this access. In addition to this, in the view of the Supreme Administrative Court (expressed in a verdict relating to the Prague Airport case) it could be argued that Article 9.3 of AC should also be classed as a part of 'EU law', on the basis of the

ratification of the AC by decision no. 2005/370/EC (thus regardless of the non-approval of the draft directive concerning A2J).⁹¹

Criteria set for members of the public to challenge acts and omissions contravening the provisions of national law relating to the environment

As regards the review of decisions of public authorities, the criteria previously defined in Art. 9.2 apply – the basic condition is participation in the administrative procedure preceding the decision. In our view this condition generally meets the conditions of the AC. There is nevertheless the question as to whether, with regard to the settlement of suits in the public interest (§ 66 CAJ), suits filed by people who have not participated in an administrative procedure should not also be deemed permissible on the basis of Art. 9.3 of the AC. In our view this should be the case, at least in situations where the law does not permit participation in administrative procedures either by an explicit regulation (for example procedures relating to the Atomic Act) or on the basis of the practical approach taken by offices (for example, since 2004 the government has issued exceptions to bans in areas under special nature protection by wholly bypassing the administrative process and with no chance whatsoever for the public to participate).

Accordingly an analysis of the requirements of Art 9.2 can also be called upon in cases of official inaction.

With regard to the possibility of demanding a 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 one to claim damage compensation and protection against the risk of injury. Some of these provisions could theoretically be construed as being in compliance with Art. 9.3 to allow a ‘private claimant’ to bring about judicial intervention into activities which damage the environment.⁹² This interpretation has not yet been adopted in judicial practice.

8. Article 9.4 of the AC, specifically:

Injunctive relief

a) Civil Court proceedings

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’ (§ 74 CPC). 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 50 000 CZK (approx. 1 800 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 are also not applied. If there are changes here in the future (e.g., in relation to the transposition of the directive on environmental liability), the deposit would be a major financial obstacle when applying injunctive relief as an effective remedy in accordance with Art. 9.4 of the AC.

⁹¹ Text of the proposal available at http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0624en01.pdf

⁹² For example § 5 of Act no. 40/1964 Coll., the Civil Code, which states that protection can be demanded of the appropriate state administrative body if there has been a clear breach of the ‘peaceful status’, or § 415 of the same act, which states that everyone is obliged to behave in such a way as not to cause damage to health, property, nature or the environment.

b) Administrative proceedings

In an administrative procedure the administrative body may impose injunctive relief upon anyone at the request of the party or through its own official authority, in accordance with § 61 of the Administrative Code, under the same conditions as in the Civil Court (see above). 'Administrative' injunctive relief may order a party or other person to perform some act, abstain from something, endure something or provide something. A decision must be made concerning a party's application for injunctive relief within 10 days. In certain cases, for example when a person's life or health is in immediate danger, the obligation may be imposed there and then, with immediate effect.

c) Administrative judiciary

For the purposes of a court review of acts by state administrative bodies, the CAJ covers both injunctive relief as well as the suspensive effect of a lawsuit. The relationship between these is far from clear cut and their interpretation by the courts, together with the usual length of time taken by suits against decisions by administrative bodies, fundamentally reduces (and often completely eliminates) the effectiveness of judicial protection in environmental matters.

Injunctive relief is covered in § 38 of the CAJ. This provision states that a court may use injunctive relief to 'charge parties to perform something, abstain from something or endure something', 'if a proposal to initiate proceedings has been submitted and there is the need to provisionally amend the standing of the parties for imminent serious detriment.' The law does not state that it must be the claimant himself who is at risk. Theoretically this could be interpreted as meaning that the courts could impose injunctive relief to protect the public interest, for example, the environment. This possibility, however, made difficult by the provisions of § 38 para. 3 of the CAJ, which states that a proposal for the issue of injunctive relief is not permissible 'if the suspensive effect can be applied to the application to initiate proceedings.' In our view this formulation is ambiguous and allows for two possible interpretations.

The first of these says that a court cannot impose injunctive relief if the conditions for the acknowledgement of the suspensive effect of a proposal to initiate a procedure are fulfilled in the individual case in question. The second interpretation implies that the imposition of injunctive relief is out of the question in all cases where the CAJ generally makes the suspensive effect of a specific type of administrative lawsuit possible (under certain conditions). It is this second interpretation that is thoroughly supported by the Czech courts for the time being. As for lawsuits against decisions made by administrative authorities, the suspensive effect can be acknowledged under certain conditions (see below for details). Therefore, the courts uphold the belief that injunctive relief is absolutely out of the question in these cases.

The submission of a lawsuit against a decision made by an administrative authority generally does not have a suspensive effect. The court may acknowledge it in accordance with § 72 para. 2 of the CAJ at the request of the claimant, although only under conditions that are exceedingly hard to meet: The claimant must succeed in proving that the enforcement or other legal consequence of the decision would entail 'irreplaceable loss' and that the acknowledgement of the suspensive effect 'in a disproportionate manner' would not affect the vested rights of third parties and is not in conflict with the public interest.⁹³

Individuals affected - for example, by building permits - sometimes succeed in proposing a postponement of the enforceability of a decision on the basis of an expert statement concerning the damages they face. If the claimant is an NGO, it is essentially impossible to

⁹³ These conditions are substantially stricter in two senses than with the injunctive relief, claim as inapplicable in these cases by the courts: Imminent loss must be 'irreplaceable' (not just 'serious') and, most importantly, must threaten the claimant directly.

fulfil these conditions (under the current interpretation by the Czech courts at least).⁹⁴ The courts generally reject proposals to postpone the enforceability of a decision with reference to the above concept, which states that such a decision may only affect the NGO's procedural rights. Therefore, in the view of the courts, it cannot claim irreplaceable loss 'due to the nature of the case'. Moreover, the courts do not have a fixed deadline for making decisions on proposals to acknowledge the suspensive effect.

This entire approach results in situations where the courts often abolish unlawful decisions based on suits filed by NGOs (or other claimants) many years after the building or other encroachments have been completed. In practice there is generally (with reference to the protection of the good faith of the investor) no subsequent order to have such interventions removed.

This situation of course cannot be considered as meeting the requirements of Art. 9.4 of the AC. A consistent solution would doubtlessly be an amendment to the legislation so as to set conditions that can realistically be fulfilled for the acknowledgement of the suspensive effect of a lawsuit (including imminent damage to the public interest or the environment) whilst also setting an early deadline for court decisions on these proposals. As regards matters of environmental protection, we believe it would be fitting to consider 'reversing the logic' of the current legislation – i.e., to have the courts issue the suspensive effect as a rule, rather than as the exception. Until this change happens, we assume it is necessary to change the present interpretation of the relationship between the suspension of enforceability and the possibility of imposing injunctive relief on the basis of the need to interpret the legal regulations in compliance with international commitments (see above), i.e., specifically with Art. 9.4 of the AC.

Other qualities of procedures

Requirement for 'fair and equitable' procedures

The general provisions of the Charter of Fundamental Rights and Freedoms, the CPC and the CAJ require the equality of the parties (participants) in court proceedings, just as they require independence and objectivity in decisions made by the judges and courts.

As regards the standing of parties to administrative procedures, the original versions of the draft of the new Administrative Code contained a number of provisions which would contravene the constitutional principle of equality for the parties in a procedure (including administrative procedures). The approved version of this law does not contain the most dangerous of these original ideas.⁹⁵ Nevertheless, some provisions of the act relating to the principles of equality and objectivity are ambiguous and allow for interpretations that can be abused, for example, to appoint a joint representative to a group of participants, possibly against their will, or the ease of ruling out the suspensive effect of an administrative appeal.

In practice (in procedures relating to individual provisions of the AC), the requirements for justice and equality are often infringed in a number of different ways. One example in our view is the enforcement of the doctrine of 'judicial protection of only the procedural rights' of NGOs (see above). There is almost no special legislation the purpose of which would be to balance the actual inequality (from the viewpoint of financial resources and related capacities) between investors and the public concerned. It is only in administrative procedures that NGOs are exempt from the fees for making copies of administrative records.

⁹⁴ Probably the only case so far where the court acknowledged a suspensory effect in a suit filed by an environmental NGO was a procedure against planning permission for one of the sections of the D8 motorway, where the main reason for the suit was the fact that the ministry of transport unlawfully failed to consider the claimant as a party to the proceedings. The court decided to suspend the enforceability of the decision, giving the reason that if the building work were to go ahead in compliance with the contested planning permission, the association's subsequent participation in the new procedure (if the decision were to be annulled by the court) would be pointless. In consequence the court actually acceded to the suit and annulled the decision.

⁹⁵ For example the proposed explicit restriction of the procedural rights of parties other than the claimant to 'rights which are essential for defending their interests' – thus the practical sanction of absolute license of administrative authorities in this regard.

Requirement for 'timely' procedures

For administrative procedures the administrative rules of procedure set specific deadlines (generally 30 days for the issue of a decision, with the option to extend). These deadlines also relate to the preliminary administrative review procedure. The Administrative Code also contains regulations for protection against the omissions of administrative authorities, which is linked (although not entirely consistently) with the option to file a suit in court against failure to act on the part of an administrative body.

Neither the CPC nor the CAJ contain any general deadlines for court procedures. Proceedings in the civil and administrative judiciary (in one degree) last from a few months to several years. In many cases 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.

In civil proceedings the courts should decide on applications for injunctive relief within 7 days (this deadline is frequently missed). In the administrative judiciary there is no deadline set for decisions on applications for injunctive relief or for the acknowledgement of the suspensive effect.

After ratification of the AC no new regulations have been approved as an explicit reaction to the request for timely procedures. However, an amendment to the CAJ did come into effect in May 2005 which relates to the possibility of a review of what are described as 'measures of a general nature' by the Supreme Administrative Court. The law has fixed a deadline of 30 days from the submission of the proposal for this type of procedure. Since the ruling of the Supreme Administrative Court in the Prague Airport case states that land use plans are measures of a general nature,⁹⁶ this is a very important regulation as regards decision-making in environmental matters, as well as for the AC. In this case the deadline also means that the requirements of Art. 9.4 of the AC are also met for the timeliness and effectiveness of the procedure.

Requirement for 'not prohibitively expensive' procedures

Participation in administrative procedures requires no immediate costs, provided that the public is able to do without paid legal aid. In cases involving extensive documentation the cost of making copies can be prohibitive; however, NGOs are exempted from them.

The fee for filing a lawsuit against a decision taken by an administrative authority, amounting to 2 000 CZK (approx. 70 Euro), can be seen as 'non-discouraging' for the majority of subjects (the court can be requested to grant an exemption from the fee, and some courts regularly excuse NGOs from the duty to pay). Courts in the administrative judicial system also generally do not acknowledge the payment of court costs to the state (administrative offices) if the suit fails. Despite this, there is the question as to whether the court fee does not discourage potential claimants in situations where the administrative judicial system does not provide effective protection with regard to the above-mentioned facts. From the complaint to the Supreme Administrative Court (against the first stage administrative court decision), the obligatory legal representation may be discouraging (not to mention the fee of 3 000 CZK - some 100 Euro).

⁹⁶ See Environmental Law Service AC case study for details.

In civil court proceedings the level of fees varies depending on the monetary value of the case. Greater use of civil means for matters of environmental protection may, amongst other factors, be hindered by fear of having to pay the costs of the adverse party if the suit fails (and particularly that party's legal representation).

8. Article 9.5 of the AC – inspiring mechanisms:

Other than the new regulations concerning judicial review of measures of a general nature and the availability of all the decisions taken by the Supreme Administrative Court on the internet (which, however, is not a legal obligation), none occur to us.

9. Conclusions:

In our view the Czech Republic meets the commitments stemming from the 1st pillar of the AC (A21) to a great extent.

As regards commitments relating to 2nd pillar (PP), there are more problems arising from the ambiguous regulations and heterogeneous (often restrictive) interpretation of 'full' participation (especially of NGOs) in administrative procedures.

By far the greatest number of deficiencies, however, relate to the 3rd pillar of the AC – A2J. The most fundamental of these are as follows:

- Limited possibility for the concerned public (particularly NGOs) to challenge both the substantive and procedural legality of any decision, act, or omission subject to the provisions of Article 6 as a result of the 'doctrine of encroachment upon subjective rights';
- The opinion of the administrative courts concerning the impossibility of a judicial review of EIA opinions and the conclusions of screening procedures;
- Inefficiency of judicial reviews, caused by the length of judicial procedures combined with the non-attainability (with regard to the opinion of the administrative courts) of injunctive relief or the suspensive effect of lawsuits;
- Failure to exploit civil means to challenge acts and omissions by private persons.

In our view the majority of these shortcomings could be rectified through the current legislation if the administrative courts were to interpret their individual provisions in conformity with the commitments arising from the AC (or from the EC directives which transposed it into EU law). The first step in this direction has already been taken by the Supreme Administrative Court when it acknowledged the priority of the AC over national law and its precedence in its verdict on the Prague Airport case. It is essential that this approach is confirmed in future decisions and applied in the problematic cases as described above. In addition to this it would clearly be appropriate to amend some of the national legislation, for example, to incorporate the reviewability of the conclusions of EIA screening procedures and final opinions (in compliance with Art. 9.2 of the AC) into the EIA Act.

Changes both in the court's attitude and in the legislation should arise from the fundamental concept on which the AC and particularly the 3rd pillar are based. This concept, in our opinion, is based on the fact that there are no precise and strict boundaries between the subjective rights of 'private individuals', who comprise the public (concerned) and the public interest, and that these boundaries frequently overlap (typically in matters relating to environmental protection). If the public has broad access to the courts in environmental matters (and other issues of public interest), the protection of both these areas is enhanced. At the same time this is

the only way to remedy a great many unlawful decisions and procedures taken by executive bodies.

Finally, this is linked with an understanding of the task of the courts when asserting the rule of law. Here we can quote the opinion of a judge of the British Supreme Court, who states that 'public law ...is (at base) about wrongs - that is to say, misuses of public power; and the courts have always been aware of the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well-placed to call the attention of the court to an apparent misuse of public power.'⁹⁷ As the courts generally cannot initiate proceedings in public law ex offio, with this opinion 'private claimants acting in the public interest' can be regarded as subjects who assist the courts in performing their specific tasks while checking that the bodies of public administration are operating in a lawful manner.

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⁹⁷ Quoted from Stec, S. (ed.), Handbook on Access to Justice under the AC pg. 35

ESTONIA



1. General information on ratification and transposition of AC

AC was ratified by Estonia on 06.06.2001.⁹⁸

According to § 123 of Estonian Constitution, the Republic of Estonia shall not enter into international treaties which are in conflict with the Constitution. 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. According to the Supreme Court interpretation of this provision⁹⁹, the direct application of a ratified international treaty presumes there is no relevant provision in Estonian legislation or that such a national provision contravenes the international treaty. Direct application of an international treaty also presumes that the provision of the treaty is aimed at regulating internal (national) relationships and does not need specification in Estonian law.

There has been no direct transposition of AC provisions. The principles of public participation and access to environmental information are, however, reflected 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.). Some of the specific principles of access to justice in environmental matters have not been transposed into Estonian legislation in any way and have been applied by the courts directly.

2. Atmosphere related to the AC

General atmosphere in short: Civil servants know about the Convention, but are not eager to implement it. The NGOs have used AC actively, especially in court cases, regarding the standing issue. The situation 'pre-' and 'post-' Aarhus is definitely different, but after the first few years of NGOs crowing over the convention, officials have developed a certain strategy which the NGOs call the 'Aarhus bluff' – a situation where the requirements are formally more or less fulfilled, but substantially are not (e.g., the announcement of some activity is published in such a way that nobody learns of it (compare the beginning of *Hitchhiker's Guide to the Galaxy* ,as was once quoted on EPS's webpage).

3. Brief summary of the first and second pillars of the AC

I pillar: Estonian legislation sets a five-day deadline within which to answer requests for information. In practice the deadline is, however, often not met. Concerning the 'active' disclosure of environmental information, IT solutions have made it possible to publish official information on the Internet and it is quite accessible to the public.

II pillar: The biggest problem of all the pillars regards informing the public about development activities in an efficient and timely way. As for administrative standing, in regular administrative proceedings the circle of participants is restricted by the terms 'likely to be affected' or 'having sufficient interest', but in environmental cases the circle of participants is often open to anybody interested.

4. Article 2.5 of the AC - 'public concerned' and criteria for non-governmental organisations promoting environment

⁹⁸ Official Journal II 29.06.2001, 18, 89

⁹⁹ Supreme Courts decision of 20th December 2002 in administrative case No 3-3-1-58-02 (Leo Martinson v Lihula municipality)

The definition of 'public concerned' is not incorporated into national legislation in any way.

There are no criteria set for non-governmental organisations promoting environmental protection.

There have been, however, attempts to define such criteria (especially in order to be able to fulfil the requirements of the future A2J directive) and the Ministry of Environment has carried out a project, 'Concept for implementing the 3rd pillar of AC in Estonia', in result of which the following suggestions were made by the project workgroup about the criteria:

- Non-commercial character;
- The main statutory goal of the organisation is protection of the environment or part of the environment, nature protection, promotion of sustainable development, or any other similar aim that marks the organisation's obvious attempt to contribute to environmental protection in the public interest;
- According to the organisation's statutes (or other similar document), anybody who is supporting the organisation's goals can join the organisation and every member has the opportunity to express his opinion and participate in the management of the organisation (NB! That would exclude foundations from standing, e.g., ELF);
- It is not obvious that the organisation's structure, membership, and resources will be insufficient to carry out the organisation's main statutory goal;
- The organisation is actively carrying out its main statutory goal.

Specific suggestions have been made for criteria for organisations that are not legal persons.

The workgroup also made the suggestion not to establish an specific 'acknowledgment procedure', but that standing would be acknowledged on an ad hoc basis.

5. Article 9.2 of the AC, specifically:

Standing based on 'sufficient interest' and/or 'impairment of right'

There is no interpretation of the word 'alternatively' as in Art. 9.2 in Estonian court practice and the provision has not been transposed into Estonian law. However, in general administrative court proceedings, the concepts of 'sufficient interests' and 'impairment of right' have a different legal substance.

According to § 7 (1) of the Administrative Court Proceedings Act, only a person who finds that his or her rights have been violated or his or her freedoms have been restricted by an administrative act or measure has the right to file an action with an administrative court. In such an action a person can apply for:

- 1) Annulment of an administrative act or a portion thereof;
- 2) Execution of a suspended administrative act, issuance of an administrative act, or for a suspended or untaken measure to be taken.

Such an action must be filed within 30 days.

An action for the establishment of the existence or absence of a public law relationship or the unlawfulness of an administrative act or measure may be filed by a person who has a legitimate interest in the matter. The satisfaction of an establishment action only establishes the

unlawfulness of an administrative act or measure; however, the administrative act or measure remains valid. The result of establishment of unlawfulness can, however, be used as objections in other proceedings, following the unlawful act or measure, or as grounds to file a compensation suit for damage. Therefore the outcome of such an action must be used in further proceedings if anything is to be achieved (in fact, the possibility of using the outcome in further proceedings has in many cases been seen by the courts as a precondition for having a legitimate interest for disputing other administrative acts or claims for compensation). Such an action must be filed within three years.

In short: 'Impairment of rights' is a necessary precondition for standing in an administrative court in general or in the case of 'nullification actions' and 'obligation actions', but 'sufficient interest' is the precondition in the case of 'establishment actions'.

Therefore, according to national law, it depends on the nature of the action which of the preconditions will be applied.

Standing based on the right to a healthy environment

According to § 53 of the Estonian Constitution, everyone has the duty to preserve the human and natural environment and to compensate for damage he or she causes to the environment. Theoretically, a basic right to a clean environment can be deduced from this provision. Leading environmental lawyers of Estonia have been supporting the so-called 'conservative' approach, according to which the person must have (direct) contact with the assumed violation. Physical persons usually have no direct contact with nature protection issues (e.g., protection of species). The same experts are, however, of the opinion that the environmental organisations (members of the public) always have standing because they are always in direct contact with environmental issues in discussions as their purpose is usually very broad (e.g., protection of the environment or promotion of sustainable development).

The rights of 'everybody' in the Estonian Constitution are applicable not only to physical persons, but also to legal persons should they be in accordance with the purposes of these legal persons and also with the nature of these rights. Therefore, it must be concluded that § 53 is applicable to those legal persons which are environmental NGOs. Whether an NGO or anybody else can require the government under § 53 of the Constitution to preserve the environment is still under discussion. It has been a theoretical assumption by environmental lawyers that such a claim for duty may rise from this article (especially in conjunction with the AC).

It has to be noted that in judicial practice, individuals have not been seen as members of the public – in fact, the law and judicial practice clearly state that an individual has no right to turn to court in the public interest (it can only defend its own subjective rights). In judicial practice, only environmental organisations have been seen as representatives of the public interest. According to the opinion of the Supreme Court¹⁰⁰, if the plaintiff is a non-governmental environmental organisation fulfilling the criteria of Art. 2.5, its standing is to be presumed (the opinion of the Supreme Court is based on the reservation made in the first sentence of Art. 9.2).

¹⁰⁰ Supreme Court's decision from 29th of January 2004 in administrative case No 3-3-1-81-03 (Estonian Green Movement – FoE Estonia v Ministry of Economic Affairs); see also the case study

Preliminary review procedure before an administrative authority

There are different kinds of possible proceedings corresponding to the criteria of 'preliminary review procedure'.¹⁰¹

Challenge Proceedings are regulated through the Administrative Procedure Act. This makes it possible to dispute an administrative act before a court proceedings. The challenge is presented through the administrative body which issued the administrative act to an administrative authority which exercises supervisory control over the first body. If there is no such authority exercising supervisory control, the challenge shall be adjudicated by the same administrative body which issued the administrative act. In environmental cases, usually the latter provision applies, which makes the Challenge Proceedings more or less useless. If a person is not satisfied with the decision on the challenge, he/she can turn to the court to dispute the decision or initial administrative act.

Challenge Proceedings are free of charge. Currently the Challenge Proceedings are not mandatory and the relevant person may turn directly to court. A challenge may be filed by a person who finds that his or her rights are violated or his or her freedoms are restricted by an administrative act or in the course of administrative proceedings (§ 71). However, a challenge cannot be filed against an act or measure of an administrative authority over which the Government of the Republic exercises supervisory control.

The following may be applied for by way of Challenge Proceedings:

1. Repeal of an administrative act or measure;
2. Repeal of a part of an administrative act, unless partial challenge of the administrative act is restricted by law;
3. Issue of a precept for the issue of an administrative act, new resolution of a matter, or taking of a measure.

Supervisory control is the internal control of administrative activities. A person cannot demand that supervisory control be exercised, but he or she can draw the attention of the administrative body exercising supervisory control to the circumstances that necessitate the exercise of supervisory control. Supervisory control is not exercised in matters related to (state) supervision measures and acts, e.g., supervisory control is not exercised over the precepts of the Minister of the Environment.

A person exercising supervisory control has the right to:

1. Issue a precept for the elimination of deficiencies in a legal instrument or act;
2. Suspend the performance of an act or the validity of a legal instrument;
3. Invalidate a legal instrument.

The supervisory control proceedings have a supportive role in implementing the requirements of the AC.

¹⁰¹ The precise overview is given in „Report on the implementation of the Convention on access to information, public participation in decision-making and access to justice in environmental matters on behalf of the Republic of Estonia' (presented by Ministry of Environment to Secretariat of AC on 16.03.2005)

Data Protection Inspectorate

The Public Information Act is the main national legal act implementing the requirements of Article 4 of the AC (access to environmental information). According to § 46 of that act a challenge may be filed with the Data Protection Inspectorate in case of a violation of the Public Information Act. The Data Protection Inspectorate (hereinafter the Inspectorate) is a government institution, the main function of which is the state supervision of the processing of personal data, maintaining databases, and access to public information.

The proceedings conducted by the Inspectorate are Challenge Proceedings of a certain specific nature. The Inspectorate has the right to issue precepts to the holders of information to fulfil the law. The holder of information shall take the necessary measures within five working days. In case the holder of information neglects to fulfil the precept issued by the Inspectorate and does not challenge it in the administrative court, the Inspectorate shall commence misdemeanour proceedings or turn to the superior institution or body of the holder of information to perform supervisory control.

Taking into consideration the independence of the Inspectorate and the out-of-court nature of the proceedings, the proceedings are fully appropriate for implementing the requirements of the AC. However, problems might arise in ensuring the fulfilment of the precepts issued by the Inspectorate.

Chancellor of Justice

The main duties of the Chancellor of Justice include reviewing the legislation of the general application of the legislative and executive powers and of local governments for conformity with the Constitution and the legal acts of the Republic of Estonia. In addition to this, § 19 of the Chancellor of Justice Act establishes that everyone has the right of recourse to the Chancellor of Justice in order to verify the activities of governmental authorities, including the guarantee of constitutional rights and freedoms. As the independence of the Chancellor of Justice is already stressed in Chapter XII of the Constitution, the Chancellor of Justice can doubtless be considered an independent body in the meaning of paragraph 1 of Article 9 of the AC. The proceedings carried out by the Chancellor of Justice are free of charge for the person who made the recourse. The Chancellor of Justice does not have sufficient means to ensure the efficient fulfilment of his or her functions. Neither have any definite proceeding deadlines been established. Therefore, the review and supervision carried out by the Chancellor of Justice is not appropriate for implementing the requirements of the AC, but such proceedings may play a supportive role.¹⁰²

Review of EIA screening decision

The legal nature of the screening decision within the EIA process is that of a 'procedural act'. According to judicial practice¹⁰³, procedural acts as such can not be challenged in principle. They can only be disputed together with the final administrative act. Challenges to procedural acts are exceptionally permitted should the violation of procedure be of such significance that the legality of the final administrative act is doubted prior to its enactment. The procedural act can also be disputed separately in cases of violation of (procedural) rights. Therefore, an EIA screening decision is disputable if it is clear that there has been some significant violation of procedures or rights.

¹⁰² H. Veinla, K. Relve 'Access to Justice in Environmental Matters';
http://www.envir.ee/aarhus/seminar2_diskussioonimaterjal.pdf

¹⁰³ e.g. Supreme Court's decision of 18th February 2002 in administrative case No 3-3-1-8-02

However, taking into account that the Environmental Impact Assessment and Environmental Management System Act establishes that the decision not to initiate an EIA is to be published with the final administrative act (the environmental permit), the possibility to dispute the screening decision separately is highly theoretical and questionable. (Here we are of the opinion that the Estonian EIA Act is not in accordance with AC Art. 6.2)

6. Article 9.3 of the AC, specifically:

'Provisions of national law relating to the environment'

There is no interpretation of this phrase in national legislation or jurisprudence.

Access to administrative or judicial procedures

The main relevant Estonian legal acts¹⁰⁴

1. The Constitution -1992
2. Code of Administrative Court Procedure – 25 Feb 1999
3. Administrative Procedure Act – 6 June 2001
4. Chancellor of Justice Act – 25 Feb 1999
5. Government of the Republic Act – 13 Dec 1995
6. Environmental Supervision Act – 6 June 2001
7. Penal Code – 6 June 2001
8. Police Act – 21 May 1992
9. Code of Criminal Procedure – 12 Feb 2003
10. Law of Property Act – 9 June 1993
11. Law of Obligations Act – 26 Sept 2001

The relevant proceedings are:

1. Challenge Proceedings – in accordance with the Administrative Procedure Act
2. Supervisory control – in accordance with the Government of the Republic Act
3. Review and supervision carried out by the Chancellor of Justice

The following are also indirectly relevant:

1. Environmental supervision
2. Criminal proceedings

In regards to Challenge Proceedings, supervisory control, and the review and supervision carried out by the Chancellor of Justice, please refer to the analysis provided in the previous paragraphs.

Environmental supervision

In accordance with § 22 of the Environmental Supervision Act, an activity damaging to the environment may be suspended if:

1. It is not in compliance with an environmental standard or with the volume determined by the environmental permit;
2. It is performed on the basis of an environmental permit but endangers the life, health, or property of persons and said danger cannot be immediately eliminated;

¹⁰⁴ H. Veinla, K. Relve 'Access to Justice in Environmental Matters'; http://www.envir.ee/aarhus/seminar2_diskussioonimaterjal.pdf

3. It is permitted only on the basis of an environmental permit and said permit does not exist, has not been submitted, or has been issued by a person who has no authority to do so, or has been issued without considering the environmental protection requirements established on the basis of law;
4. It is permitted only during a certain period of time or under certain conditions and does not comply with the time or conditions permitted for such activity.

An environmental supervision authority may also take other measures in order to bring an activity damaging to the environment into conformity with the requirements.

Criminal proceedings

§ 6 of the Code of Criminal Procedure establishes that Investigative Bodies and Prosecutors' Offices are required to conduct criminal proceedings upon the appearance of facts referring to a criminal offence unless the circumstances exist which preclude criminal procedure or there exist grounds to terminate the criminal proceedings for reasons of expediency.

Standards for the right to file an action

1. Challenge Proceedings – in accordance with § 71 of the Administrative Procedure Act, a person who finds that his or her rights are violated or his or her freedoms are restricted by an administrative act or in the course of administrative proceedings may file a challenge.

2. Review and supervision carried out by the Chancellor of Justice – in accordance with § 22 of the Chancellor of Justice Act, everyone has the right to submit an application to the Chancellor of Justice upon a violation of his or her constitutional rights and freedoms either personally or via a representative in regards to the activities of the institutions specified in § 20 of this Act.

In regards to measures under civil law, neighbourhood rights and compensation for damages are possible means of legal action. Neighbourhood rights, however, can be applied only to a very restricted range of persons – neighbours – and even that only should there be a severe violation of environmental requirements, in addition to damage to property as such.

Regarding the compensation for damages: There are some provisions about compensation for damages caused by activity dangerous for the environment, but there are no precise provisions (in fact there is no regulation about environmental liability thus far).

7. Article 9.4 of the AC, specifically:

Injunctive relief

The regulation of injunctive relief is quite good. According to the Administrative Proceedings Act, 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 execution of a court judgment is otherwise impracticable or impossible.

By a ruling on injunctive relief, an administrative court may:

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 the Code of Civil Procedure.

Any right, obligation, or 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 court practice regarding injunctive relief in environmental matters has been rather supportive of the plaintiffs, as possible environmental harms are regarded to be irreversible.

Other qualities of procedures

The *fairness, equity, and independence* of the Chancellor of Justice and the courts are principles established in the Constitution. The Supreme Court has also stressed the importance of those principles several times. The Administrative Court Proceedings Act allows a biased judge or other biased persons to be retracted. The principle of objectivity is established in administrative proceedings as well.

As far as *timeliness* is concerned, the administrative courts should review cases within two months, starting from receipt of the action (i.e., two months for each stage). However, in practice the courts are overloaded and some cases have been in courts for years (the average time for ELF's cases has been approximately 1.5 years).

In the Challenge Procedures the deadlines are set by law (10 days to review the challenge, which may be prolonged to one month, if necessary) and are strictly followed in practice.

Regarding expenses of procedures, the court fees are low, but the main problem is the cost of legal advice (and the 'loser pays' principle).

8. Article 9.5 of the AC - inspiring mechanisms

As for inspiring an auxiliary mechanism for Art. 9.4 ('the judgments have to be published'), the court decisions in force are available to the public on a web-based database (<http://kola.just.ee/>).

Regarding accessibility of the decisions, two kinds of periods can be distinguished:

Until 1 January 2006 – searching for judgments was easy, the search could be performed, for example, on:

- Date of the case
- Court stage
- Number of the case
- Name of the judge
- Name of the applicant
- Name of the defendant
- Random keyword in the text of the judgment (in practice this was usually the most successful search tool)

The negative side was that not all judgments were actually entered into the database.

Since 1 January 2006, the names of the parties are not being published (for personal data protection purposes) and the search is more difficult (especially in cases of searches not for a specific case, but for cases with certain qualities). The search parameters are:

- The name of the case
- The number of the case
- Nature of the case (criminal, civil, offence or administrative)
- Court house (in what regional court the judgment was made)
- Timeframe for the proceedings (it is possible to search within different periods)
- Judgment date (it is possible to search within different periods)

The Supreme Court's judgments, are, however, even more widely accessible via its website <http://www.riigikohus.ee>. There is even a database of the most important precedents under specific keywords (for example, one of the keywords is 'environmental law').

9. Conclusions

The AC has been not fully transposed into Estonian law (especially in regard to Art 9.2), but this has caused no violation of the rights of environmental NGOs. The courts have been rather favourable on standing for environmental NGOs, as well as in implementing injunctive relief. The problems are more connected to long duration of the court cases (the situation is improving rapidly) and high costs for attorneys (in this regard, the situation has turned worse with the latest amendments to the court proceedings legislation).

HUNGARY



1. General information on ratification and transposition of AC

The AC was ratified by Hungary on July 2, 2001.

The AC was proclaimed and thus made part of the domestic legal system by Act No. 81 of 2001. Based on this and Judgment No. 53 of 1993 of the Constitutional Court, the AC is directly applicable in the Hungarian legal system.

Having taken the original text of the AC as adopted in Aarhus in 1998, its transposition is formally finished in Hungary. As regards the amendments of the AC, there are two relevant documents, the so-called PRTR Protocol and the GMO Amendment. Hungary has signed the PRTR Protocol but has not made any efforts in order to ratify it. There has been no information available on the status of acceptance or ratification by Hungary of the GMO amendment.

The national act transposing the AC is Act No. 81 of 2001.

The text of the National Environmental Programme for the years 2003 – 2008 adopted by Parliamentary Resolution No. 132 of 2003 contains a reference to the AC, mentioning it as a source of obligations from which the requirements towards a meaningful public participation regime stem.

2. Atmosphere related to the AC

In general, the AC brought a new spirit into the Hungarian public participation regime; nevertheless, this was not immediately obvious for the stakeholders. Due to the fact that awareness of the AC was never raised by any meaningful government effort, broader public or even official knowledge of the AC was mostly non-existent. The first few years after the ratification of the AC did not produce any outstanding change in public or official awareness. The NGO community (notably, the one of environmental NGOs) was the first to realise the importance of the AC and started using its provisions as legal underpinnings of its arguments. As regards decision-makers, the case study for Hungary painfully illustrates an instance that is hopefully not representative of the overall situation prevailing five years after the transposition of the AC into the domestic legal system.

In this case (see the AC Case Study of Hungary), an NGO that was denied a locus standi in an administrative procedure based its legal standing on the AC against the construction authority of Budapest, the latter being supported in its arguments by the project developer as friend-of-the-defendant. The responses of the defendant were the following (not a literal quotation): The defendant – even though it does not know what the AC is about – is almost sure that it is not applicable to the given case; the friend-of-the-defendant does not know what the AC is about, because when the friend graduated at law school, which was 25 years ago, it was not part of the curriculum. Through publicising this landmark case, however, national media significantly contributed to general awareness of the AC.

In general, the AC became quite popular as a legal basis for court decisions regarding public participation. Both in particular (see the Environmental Impact Assessment Case Study of Hungary) and in general cases (see the Law Unification Decision No. 1 of 2004 of the Supreme Court on standing in environmental matters), courts tend to use this piece of legislation as a foundation of reasoning for their rulings.

3. Brief summary of the first and second pillars of the AC

a) In 1995, a new Environmental Protection Act was adopted that established standing for

environmental NGOs in environmental cases in Art. 98. In 2004, the Supreme Court declared in its Law Unification Decision No. 1 of 2004 that every case is environmental where the Regional Environmental Inspectorate is at least a consulted authority. Thus, Art. 6.1 letter b) of the AC is implemented in Hungary such that the required public participation opportunities prevail throughout the concept of standing in every such case where the competent environmental authority is at least consulted (and undoubtedly in every case where such authority makes the substantive decision).

b) Situation of A2I – what are the most significant limits of access to environmental information (e.g., vague provisions and lack of specific terms of performance for public authorities to make relevant information public)?

Access to information is refused in most cases on two grounds:

- the information is a material in the course of completion; or,
- access would affect the confidentiality of commercial information.

An amendment to the FOIA in 2005 introduced the following wording for the exception from disclosure: ‘data prepared or recorded in a procedure aiming at making a decision and serving as the basis of the decision.’ However, the construction of this expression is still not definite in Hungary. Before the proclamation of the AC and the introduction of ‘confidentiality of commercial and industrial information’ as a reason for non-disclosure, Hungarian law did not contain such a clause until the 2005 amendment of the FOIA. Consequently, the legal basis for refusing disclosure of business secrets in Hungary is now the AC, which paradoxically contributes to the narrowing of access to information.

4. Article 2.5 of the AC, specifically:

Definition of ‘public concerned’

Art. 97 of the Environmental Protection Act mentions ‘everybody’ as a synonym for ‘the public’. Individual members of the public can establish their standing in ‘environmental decision-making’ by showing their affectedness or likeliness to be affected, or by having an interest in the matter, which are preconditions of standing according to the Administrative Procedure Act as well. Art. 98 of the Environmental Protection Act defines those NGOs which are members of the public as ‘*associations and other membership NGOs, not being political parties or trade unions, created for the representation of environmental interests, working on the impact area.*’

Criteria for non-governmental organisations promoting environment

The criteria set by national law towards NGOs are twofold: First, they have to be properly established and registered according to the general non-profit law of the country; second, they have to be associations or other membership NGOs, cannot be political parties or trade unions, have to be created for the representation of environmental interests, and their territorial scope of activity must cover the impact area in question.

5. Article 9.2 of the AC, specifically:

Standing based on ‘sufficient interest’ and/or ‘impairment of right’; right to a healthy environment

In Hungarian law, a sufficient interest or an impairment of rights are not consecutive conditions for access to a judicial review procedure, therefore, they prevail as alternatives.

The judiciary tends to interpret the circle of rights narrowly. It is obvious that such rights do not embrace rights guaranteed by the Constitution such as the right to life or the right to a healthy environment, but mostly traditional rights stemming from the Civil Code, namely personal rights and material rights.

Review of EIA screening decisions

The possibility to review a screening decision is established within two steps. According to Government Decree No. 314 of 2005 on Environmental Impact Assessment, the competent regional environmental agency issues a resolution on the question of whether a project is subject to EIA. According to Art. 71 of the Administrative Procedure Act, there are two kinds of decisions an administrative agency can make: a) resolutions which are substantive; and, b) orders which are procedural. Since the Government Decree on EIA clearly defines decisions of screening as resolutions, it classifies them as substantive decisions. Because there is both an ordinary appeal and a judicial review available against substantive decisions (resolutions), screening falls under this category.

6. Article 9.3 of the AC, specifically:

'Provisions of national law relating to the environment'

The 'provisions of national law relating to the environment' are any of those legal enactments in the domestic legal system that contain relevant provisions for the protection of the environment.

Access to administrative or judicial procedures

An administrative proceeding is a two-instance procedure with a right to appeal; however, only substantive decisions (called 'resolutions' in the terminology of the Administrative Procedure Act) can be appealed, while procedural orders can generally only be appealed within the appeal against the substantive resolution. Judicial procedures against administrative decisions are single-instance processes, with a right to an extraordinary remedy against the first instance and final judgment to the Supreme Court. Judicial procedures initiated against polluters are general civil procedures with two instances and a right to appeal against the first instance judgment.

7. Article 9.4 of the AC, specifically:

Injunctive relief

There are two kinds of injunctive relief:

- a) In administrative judicial proceedings, suspensions of the enforceability of an administrative resolution;
- b) General injunction.

Administrative injunction

According to Art. 109 of the Administrative Procedure Act, second-level administrative resolutions are enforceable. However, the plaintiff may ask the court to suspend the enforceability through an order any time during the judicial procedure. Once requested, the court must make a decision upon the suspension within eight days. Aspects to take into account when deciding the suspension by the court are irreversibility of the change stemming from the

administrative resolution and comparison of harms caused by the enforcement of the administrative resolution or by the suspension thereof. The court order (either refusing or accepting the claim for suspension) can be appealed.

General injunction

According to Art. 156 of the Civil Procedure Act, the court may in any procedure make an order to have a claim fulfilled if it is needed to prevent a jeopardising damage, for the conservation of the 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 claim. The court may hear the parties before it decides, or it can issue an order dependent upon the payment of a deposit by the claimant. The court order (either refusing or accepting the claim for injunction) can be appealed.

Injunctive relief (see above) is frequently used in administrative judicial procedures in the protection of the environment; in civil procedures, its usage is significantly scarcer. If an administrative resolution is challenged at court, the quality of reasoning against the administrative decision defines whether the enforceability of the administrative decision will be suspended or not. However, when requested in civil procedures, monetary equivalents of certain claims (e.g., to halt the construction of large infrastructure projects) influence court decisions to such an extent that they either refuse such claims or make them dependent on payment of deposits, which make their use practically unfeasible.

Other qualities of procedures

Fair and Equitable

Equal rights are guaranteed by both the Constitution and the procedural acts, such as the Administrative Procedure Act and the Civil Procedure Act. According to Art. 57 par. 1 of the Constitution, everybody is equal before the court, and everybody has a right to an independent and impartial judiciary in a fair and open hearing. According to Art. 2 of the Civil Procedure Act, the task of the courts is to enforce everybody's rights to a fair procedure. In addition, Hungary has ratified the respective human rights conventions, e.g., the European Convention on Human Rights, and is a member of the Council of Europe, therefore, the Republic of Hungary can be challenged at the Court of Human Rights at Strasbourg as well.

Timely

Provisions of the Civil Procedure Act are supposed to ensure timely completion of judicial proceedings. These read as follows:

Art. 2 Par. 1: The task of the court amongst others is to implement the right of the parties to the termination of lawsuits within a reasonable time.

Art. 125 Par. 1: The court must make arrangements within 30 days at the latest from receiving the action by the court to set the date of the first hearing.

Art. 125 Par. 3: The first hearing must be set for a date within four months from receiving the action by the court but cannot be set later than within nine months.

The same applies in lawsuits where administrative decisions are reviewed, with the following differences:

Art. 332/B: The first hearing must be set for a date within 60 days from the court receiving the entire administrative documentation of the case from the defendant.

Moreover, Hungary has ratified the European Convention on Human Rights and is a member of the Council of Europe, thus the Republic of Hungary can be challenged at the Court of Human Rights at Strasbourg as well.

Not prohibitively expensive

Fees must be paid when initiating an administrative procedure as well as lodging an appeal. Private individuals are obliged to pay such fees, while NGOs are exempt if they were under no obligation to pay company tax on their income from economic activities during the preceding year. Administrative procedure fees must be paid by both individuals and NGOs, therefore not even NGOs are exempted from the payment of fees, but quite preferential amounts apply thereto. There are only fees to be paid for initiating judicial procedures or for an appeal, therefore the aforementioned total exemption for NGOs prevails therein. However, other costs of court procedures (expert fees, copying fees, attorney fees of the adversary party, etc.) are to be borne by parties notwithstanding their personal character. Both in the administrative procedure and in the judicial procedure, there is a possibility for submitting an individual claim for fee exemption. However, both the Administrative Procedure Act and the Civil Procedure Act refer to lower-level norms that regulate the details of such exemptions. Because these lower level norms only contain provisions for the exemption of natural persons (requiring data from applicants such as family name, mother's name, number of family members living in one household, etc.), legal persons including NGOs are practically deprived of being able to apply for fee exemption.

8. Article 9.5 of the AC – inspiring mechanisms:

The Legal Aid Act No. 80 of 2003 has set up a system of available free legal advice and representation within the regional Justice Offices of the Ministry of Justice; however, it is suffering from major shortcomings. First of all, only natural persons can claim free legal advice and representation. Second, even such applicants cannot receive advice on founding an NGO. Thirdly, no legal aid can be applied for in the regular judicial procedure, only in the administrative procedural phase and in the submission of an extraordinary remedy in the judicial procedural phase. All this results in a system of legal aid almost entirely unused or even useless for the public (especially the NGOs) in environmental matters.

9. Conclusions:

Overall, access to justice in environmental matters in Hungary can be characterised as of medium quality and fair, definitely neither strong nor easy. Although the AC was literally transposed into domestic law and therefore may serve as a basis for arguments in the defence of the environment by both private individuals and NGOs, certain lower-level norms still contain obstacles that make practical enforcement of rights burdensome. These are outdated conditions of standing for natural persons, diverse rules of standing of NGOs defined by line ministries, lagging court procedures in spite of clear requirements, financial barriers both to achieving the declaration of an injunctive relief and to having legal expertise on board, just to name a few.

Some of these questions seem to belong to the realm of capacity building rather than A2J; however, the lack of practical arrangements substantially hinders the meaningful implementation of this access right. This and the overall lack of resources in the Hungarian public and NGO sectors may be the underlying reasons why there are so few environmental cases with the participation of civil society before administrative authorities and courts.

To remedy this situation, the state must initiate and implement an overall program, the elements of which should range from basic awareness-raising for a better knowledge of rights, through

the amendment of procedural rules for easier representation of the public interest, to the broadening of financial leverages for stimulating public willingness to protect its own environmental rights before administrative and judicial fora. Just as in other aspects of the Aarhus regime, capacity building as a fourth pillar seems to be the key to the real practical enforcement of rights otherwise guaranteed by the other three pillars of the Convention.

POLAND



1. General information on ratification and transposition of AC

In passing the Act of 21st 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 AC.

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

The text of the Convention was published in the Official Journal on 9 May 2003 (OJ No 78, item 706). With this publication - according to Article 91 of the Constitution of the Republic of Poland - **the Convention became a part of the national legal system and is directly applicable. Moreover, it shall have precedence over national legal acts if its provisions cannot be reconciled with such acts.**

Poland has not ratified the GMO amendment to the AC (as introduced by Decision II/1 of the MOP) so far (neither has any other Party).

Although the Convention is directly applicable, there are also provisions of national law transposing its requirements (Poland aligned its legislation with the Convention prior to ratification). The main act providing for access to environmental information, public participation, and (partial) access to justice is the Environmental Protection Law Act of 27 April 2001 (OJ No 62, item 627 as amended - hereinafter referred to as EPLA). Moreover, general principles of administrative and judicial-administrative procedure apply. These principles are provided by the Administrative Procedure Code of 14 June 1960 (cons. text: OJ of 2000 No 98, item 1071 as amended - hereinafter referred to as APC) and by the Proceedings before Administrative Courts Law Act of 30 August 2002 (OJ No 153, item 1270). These are relevant primarily to access to justice.

2. Atmosphere related to the AC

Generally speaking, legal solutions promoting involvement of the public into environmental issues, in particular decision-making, existed in Poland already before Poland ratified the AC (although perhaps not conforming to all the Convention requirements very precisely or exactly). Therefore the Convention did not significantly change the situation in this respect.

On the other hand, an important factor in creating the atmosphere related to Aarhus issues was that the rights of environmental NGOs have been often abused by them (both under provisions existing before Aarhus and also under those adopted after Aarhus).

There were not only situations (widely publicised and commented on by the media) in which dishonest 'environmental' associations or groupings blocked investments (using legal means such as claims and appeals) in order to extract financial benefits from the investor in exchange for withdrawing the claims, but also cases where seemingly honest NGOs developed the habit of challenging all decisions regarding all major investments without checking their real impact on the environment or the correctness of the administrative procedure in a given case. This influenced the general reception of environmental NGOs in Poland and caused attempts to limit the legal possibilities of environmental NGOs' participation in decision-making (it seems, however, that so far these limitations have not caused non-conformity with the Conventions nor with the relevant Directives).

3. Brief summarization of the first and second pillars of the AC

Public Participation

Regarding 'activities not listed in annex I which may have a significant effect on the environment' (which in practice means mainly projects listed in Annex II to Directive 85/337) Polish law - following Directive 85/337 - provides for their obligatory selection. The selection decision may be challenged by parties to the proceedings (i.e., persons 'affected or likely to be affected or having an interest in decision-making' - see remarks on Art. 2.5 below), but not by environmental NGOs.

Access to Information

The legal framework concerning access to environmental information in Poland includes: Constitutional provisions, provisions on access to environmental information in the Environmental Protection Law Act of 2001, and provisions on access to public information in the Access to Public Information Act of 6 September 2001 (OJ No 112 item 1198, as amended).

At the same time, most environmental information is also public information and the relationship between these acts is not always very clear. This causes some practical problems for disclosure of information by public authorities (e.g., regarding exceptions, time limits, fees, etc.).

4. Article 2.5 of the AC

Definition of 'public concerned'

First of all it must be mentioned that Polish provisions transposing the AC use the concept of 'public concerned' only with regard to access to justice under Article 9.2 (and to some extent - under Article 9.3) of the Convention, giving the right of public participation to the general public and not only to the public concerned (the Convention demands enabling the participation of the public concerned).

With regard to access to justice, the definition of the public concerned is reflected in the provisions on the general rules of Polish administrative procedure. According to the Administrative Procedure Code, an administrative decision may be challenged by parties to the administrative proceedings, while a party - according to Article 28 APC - may be a person whose legal interest or duty is affected by the proceedings or who demands activities of an authority because of this legal interest or duty¹⁰⁵.

Environmental NGOs (see next paragraph on their definition) may participate 'with the rights of a party' in certain proceedings related to environmental cases - namely in those requiring public participation as provided by Article 6 of the AC. Participation 'with the rights of a party' means that NGOs are granted almost the same rights as a party (including the right to challenge the decision).

NGOs which participate in the proceeding 'with the rights of a party' enjoy in principle the same rights as a party and can raise the same arguments as parties to the proceedings (except, of course, property rights).

Moreover, in proceedings before the civil courts (the above-described issues relate to administrative procedure) NGOs may also claim that an operator has caused environmental damage (or threat of such damage) to the environment understood as a common good (see our previous analysis, remarks to Art. 9.3 of the Convention).

¹⁰⁵ On this issue, as well as generally on implementation of the AC third pillar, including on rights of NGOs - see J. Jendroska, M. Bar, Towards implementation of the AC's third pillar: Draft EU Access to Justice Directive compared with the situation in Poland, (in:) Environmental Liability Journal, Vol. 12, issue 2, April 2004, pp. 68-77

Criteria for non-governmental organisations promoting the environment

In order to fulfil the 'requirements under national law', an organisation has to be considered an 'environmental organisation', as defined in Article 3 point 16 of EPLA, which states: *"environmental organisation" shall mean social organisations, the statutory purpose whereof is to protect the environment*'.

According to this definition, an 'environmental organisation' is a kind of 'social organisation' as referred to in Article 5 para 5 of APC, i.e., *'professional, self-governing, co-operative, and other social organisations'*.

It stems from the essence of 'social organisations' that they act in the public interest and are non-profit-making. Moreover, social organisations have to be independent, i.e., not connected with political parties or public authorities. However, these elements of the definition of 'social organisation' are not provided explicitly by law, neither are they confirmed by jurisprudence. Rather, they come from a 'common-sense' interpretation and understanding of this definition.

Such organisations have to exist formally, i.e., to be listed in the relevant official register¹⁰⁶. They also have to have the statutory objective of protecting the environment (the definition does not require that this be its sole objective; it is open to discussion whether this means it must be the main objective).

5. Article 9.2 of the AC, specifically:

Standing based on 'sufficient interest' and/or 'impairment of right'; right to a healthy environment

See remarks on Article 2.5 - definition of 'public concerned' above. Under Polish law differentiation between both terms ('public concerned having a sufficient interest' and 'public concerned maintaining impairment of a right') is in practice irrelevant, as both of them come down to finding the existence of 'legal interest', as referred to in Article 28 APC.

A person *'whose legal interest or duty is affected by the proceedings or who demands activities of an authority because of this legal interest or duty'* has - under Article 28 of the Polish Administrative Procedure Code – the status of a 'party to the proceedings'.

Natural and legal persons enjoy such status mainly on the basis of their property rights (ownership or other property rights, such as perpetual usufruct). 'Right to privacy' or health protection issues rise in connection with property rights (i.e., the owner of real estate located in the neighbourhood of a planned industrial facility may claim that he would suffer harm).

The aforementioned Art. 28 of APC does not grant standing to NGOs. Instead, they are granted standing (as so-called entities 'with the rights of a party') under Art. 31 APC, and environmental NGOs are granted standing under Art. 33 of the Environmental Protection Law Act.

The members of the 'public concerned' who have standing may claim violation of their substantive and procedural rights.

¹⁰⁶ See verdict of 27 February 2001; II SA 968/00

Substantive rights may consist of:

- Either violation of property rights (see answer to question 1 above, also with regard to the 'right to a healthy environment or privacy'); or,
- Violation of substantive environmental and other provisions, such as non-compliance with environmental permits, with nature protection requirements (such as bans concerning protected species), or with the local land-use plan (which has the status of a binding local provision).

The question is how to interpret 'legal interest', as persons having such interest are considered as parties to the proceedings and have the right to challenge decisions (so-called factual interest is not sufficient).

For example, regarding EIA decisions or planning decisions, administrative courts consider immediate neighbours likely to be affected (owners or users of neighbouring real estate) to have individual legal interests at stake and therefore to be parties to the proceedings. Some verdicts grant the status of a party to the proceedings also to further (not only immediate) neighbours if the effects of the planned project may affect them.

Review of EIA screening decision

Parties to the EIA proceedings (in Poland the EIA procedure is to be concluded by a special EIA decision preceded by a separate administrative proceedings), i.e., the developer and immediate/further neighbours, have a right to challenge a screening decision.

NGOs, however, do not have such right.

6. Article 9.3 of the AC, specifically:

'Provisions of national law relating to the environment'

There is no legal definition of this notion (however, EPLA provides for a definition of 'environment' (Article 3 point 39)).

While the definitions of 'provisions of national law relating to the environment' may be (and are) the subject of academic disputes, it seems that in practice their interpretation does not cause any significant problems.

Access to administrative or judicial procedures

The Constitution of the Republic of Poland of 1997 provides a number of safeguards for access to justice. The most direct ones are granted in Articles 77 and 78 of the Constitution.

Article 77

1. *Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.*
2. *Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.*

Article 78

Each party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute.

Acts and omissions of public authorities

According to the Administrative Procedure Code, a party to the proceedings (or an organisation participating 'with the rights of a party' - see above) has the right to challenge a decision to the administrative authority of the second instance (the APC or special provisions indicate the competences of these authorities). If the appeal is not respected by the administrative authority, a party concerned may file a complaint with an administrative court of first instance, and subsequently to the court of second instance.

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

1. A summons to take action filed with the authority failing to act; and, if the summons is not respected -
2. A complaint to the administrative court.

Acts and omissions by private persons

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

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

- Persons affected by environmental damage or threat of such damage (Art. 323.1) - this provision is based on general rules of civil law;
- Environmental NGOs and self-governing authorities in cases where the threat or violation affects the environment as a common good (Art. 323.2) - this can be considered a unique right granted to environmental NGOs. As to the definition of an environmental organisation, see the 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'.

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 cases where damage caused by impact on the environment has been suffered, the liability of the perpetrator shall not be excluded by the circumstance that the activity responsible for the damage was 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.

7. Article 9.4 of the AC, specifically:

Injunctive relief

Administrative proceedings

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

The decision of the second-instance authority is considered final and in principle may be executed even if challenged to the administrative court. However, at the motion of the claimant, the court may suspend exercising of the rights granted by this decision.

Civil proceedings

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

Other qualities of procedures

An example of provisions promoting *fair and equitable procedure* may be the rule concerning costs before administrative courts of first instance, where the claimant - even if losing the case - is not required to pay back costs incurred by the authority (see remarks on costs below). Such a solution contributes to strengthening the position of the claimant (as the 'weaker' party) vs. the authority.

Timeliness: An appeal filed with the administrative authority of the second instance shall be investigated and concluded within one month (in complicated cases within two months).

There are no time-limits provided for the courts (neither administrative nor civil ones).

Not prohibitively expensive:

Administrative proceedings

Administrative procedures (appeal to an authority of the second instance and complaint to an administrative court) are relatively cheap.

Administrative court proceedings

Filing an appeal is subject to a fee of 5 PLN (about 1.25 EUR) and a court fee for filing a complaint to an administrative court is 200 PLN (about 50 EUR).

Moreover, in the proceedings before an administrative court of the first instance, there are particular rules regarding costs: If the authorities lose the case they have to pay the winner his costs (both court and attorney fees), but if the authorities win they are not entitled to claim their costs.

However, a different rule applies at the administrative court of the second instance, where the claimant has to pay the costs back to the opposite party (a public authority) in cases where:

- The first instance court ruled to dismiss the complaint, the ruling was challenged, and the second instance upheld it;
- The first instance court ruled in favour of the claimant, this ruling was challenged, and the second instance dismissed it.

Civil proceedings

The general rule in civil procedure is that the winning party is paid its costs (court fees, attorney fees, etc.). Only in especially justified circumstances may the court release the losing party from this obligation.

Court fees are basically related to the values at stake (5%). In cases where no economic value is involved, the fees are fixed (the same fee irrespective of the value at stake). In cases related to environmental protection the fixed fee is rather modest - 100 PLN (about 25 EUR).

The losing party is to pay the costs incurred by the winning party, which includes both court and attorney fees.

Therefore, while the amount of court fees in civil proceedings does not constitute a burden in access to justice, the obligation of paying back the costs to the winning party might be a problem.

8. Conclusions

1. Provisions of the AC on access to justice seem to be well-implemented by Polish law. Although the recent tendency in Polish legislation is to limit standing of NGOs in administrative and judicial proceedings, the current provisions are still sufficient to fulfil the Convention's requirements.

2. Polish regulations implementing the Convention on public participation grant the right to participate to the general public and not only to the public concerned.

3. The right of access to justice is, however, limited to the 'public concerned', which is defined through the general concept of a party to administrative proceedings. Natural and legal persons enjoy the status of a party mainly on the basis of their property rights (immediate neighbours are usually regarded as parties to the proceedings).

4. Environmental NGOs may participate in certain proceedings related to environmental cases 'with the rights of a party', which means they are granted almost the same rights as a party (including the right to challenge the decision).

5. A separate measure provided for by Polish law is the possibility to challenge acts or omissions by private persons or public authorities before the civil court (Art. 323 of EPLA). Affected persons and - what is more interesting - environmental NGOs acting in the public interest of the protection of the environment may file a civil law suit against persons causing damage or a threat of damage to the environment.

6. Court and administrative fees related to participation in the proceedings are rather modest and cannot be regarded as a burden on access to justice.

SLOVAKIA



1. General information on ratification and transposition of AC

Slovakia was the last member of the EU to ratify the AC. The Slovak Parliament expressed its consent through an act on September 23, 2005, through presidential signature on October 31, 2005, and deposited the ratification with the General Secretary on December 5, 2005.

The Slovak Parliament decided that the AC is an international treaty concerning human rights and basic freedoms, which has priority before other laws (Art. 7, 5 of the Slovak Constitution).

However, direct applicability, which is still questionable, is a condition for this type of treaties to have real priority before other laws.

Without going into necessary details, transposition of access to information and public participation provisions concerning annex 1 activities in EIA and IPPC proceedings has been (formally) completed.

As far as activities not listed in annex 1 are concerned, insufficient clarity on definition of processes falling under the article 6.1,b) makes it complicated to assess transposition. In our view transposition is not sufficient.

There was no change of civil or administrative proceedings related to transposition of access to justice pillar. However, concerning environmental NGOs, shift from previously proposed “participating person” - with limited rights, no right to appeal or to request judicial review – to full standing was in fact to provide for access to justice

For all three pillars however bigger problem is application and implementation of existing provisions, which are mostly in compliance with the Aarhus Convention.

The following laws are the main pieces of legislation which regulate areas related to the AC:

Act No 205/2004 C.c. on Collecting, Preserving and Disseminating Environmental Information

Act No 211/2000 C.c. Freedom of Information Act

Act No 24/2006 C.c. Environmental Impact Assessment

Act No 245/2003 C.c. on Integrated Prevention and Protection against pollution of the environment

Act No 50/1976 C.c. Construction Code

Act No 543/2002 C.c. Nature Protection Act

Act No 151/2002 C.c. on Use of Genetically Modified Technologies and GMOs

Act No 71/1967 C.c. Administrative Proceedings Act

Act No 99/1963 C.c. Civil Proceedings Act

Generally, concerning the approach of the Ministry of Environment and other relevant authorities to the transposition and implementation of AC provisions, we would like to mention the following:

The official opinion is that public participation as well as Article 9.2 concerning access to justice are fully transposed. Representatives of Ministry of Environment acknowledge their obligation to transpose directives and incorporate the Convention, they also acknowledge lack of transposition of Article 9.3 of the Convention. Moreover they (sometimes) appreciate expertise of NGO representatives, mainly NGO lawyers. On the other hand they are inconsistent as to their approach to NGOs as well as in their position in specific legal issues – transposition of

specific legal provisions. They seem to be oscillating between the pressure to meet obligations and political pressure.

For example, the Ministry assigned preparation of an analysis on the issue of how Slovakia meets its Aarhus obligations to the Slovak Environmental Agency even though NGO lawyers have repeatedly expressed interest in participating. Moreover, the outcome of the analysis is not even available for our comments.

NGOs encounter other misleading and even antagonistic statements and positions of the MoE in different circumstances - for example when the new EIA law was been passed.

The official position of MoE remains unclear.

Among the approaches of the other ministries, the one which should be mentioned is the Ministry of Agriculture – the minister recently announced at a press conference that he plans to establish a commission for re-assessing the Nature Protection Act, particularly its public participation provisions.

There are similar attacks from the Parliamentary Committee for the Environment.

2. Atmosphere related to the AC

There is no noticeable difference between pre- and post- Aarhus. There is lack of awareness on how the AC can improve the work of active citizens in a practical way. Awareness has been insufficiently raised by government and by NGOs. Very few cases of direct use of Aarhus-related arguments exist in Slovakia and there is very little capacity building. The AC is not used as a supporting legal grounds in administrative and court claims, the same way as for example Constitution or European Covenant on Human Rights

Another reason why there is little difference is that several legislative changes tackling the same issues as AC occurred before Slovakia ratified the AC (in the year 2005). So, for example, public participation was broadened in the EIA Act enacted in the year 1994 (even though it is true that environmental organisations per se have been added only in 2006). The GMO Law and Nature Protection Law, both enacted in 2002, also opened up proceedings to the public participation of environmental organisations, regardless of the Convention.

On the other hand, contrary to the philosophy and provisions of the AC, the APA was amended to establish the concept of a 'participating person'. This special category, proposed by the government to 'implement AC', was meant for environmental NGOs, but it severely restricted procedural rights. For example, a participating person cannot challenge a decision and does not have the right to have its comments reflected in the decision. Luckily, this legal category has so far not been fully implemented.

On the other hand, access to justice did not improve as a consequence, and standing to sue in environmental matters remains troublesome for all members of the concerned public except environmental organisations.

3. Brief summarization of the first and second pillars of the AC

A2I: Even 'before Aarhus', the authorities had already been somewhat trained, thanks to the liberal FOIA enacted in the year 2000. Access to information is usually not denied with completely unfounded arguments. The most commonly used arguments for denial of information

are that information has been provided without obligation, or that information is protected by trade secret or by authorship rights.

On the negative side, tests of whether requested information is 'information concerning contamination of environment or significant impact on health of people, environment including biodiversity and ecological stability' and therefore cannot be considered a trade secret are rarely actually conducted by the information-holding authority. However, there is a rich case law with well-developed arguments favouring broad access to information.

One important contribution of AC was a recent FOIA amendment which obligates corporate entities established by a state or municipality to provide information concerning the environment upon request. Prior to this amendment they had to provide information only concerning management of the public finances which were vested to them.

At the moment, there are two important deficiencies concerning access to information:

First is length of court proceedings – according to our judicial system, the court cannot order the direct release of information, it can only adjudicate that a public authority to which a request was addressed has violated the law when denying access to information. After such a verdict, the case is returned to the public authority for further proceedings. This 'vicious circle' can be quite endless and information quite irrelevant when finally provided.

Second, a fee for suing the central governmental authorities has been introduced quite recently (almost EUR 280 for first instance court proceedings and EUR 280 for appellate proceedings). This fee may discourage individual claimants – environmental organisations are exempt.

The pro-active provision of environmental information to the public (Internet) is still being developed. The MoE database (www.enviportal.sk), which contains information obligatory per the EIA Act, is slow and insufficient. The web page of the Slovak Environmental Inspection is slightly better, which contains information based on the IPPC law. Information based on the GMO law and GMO Directive, for example, the locations of GM fields, which should be publicly accessible in a form of register, are subject to legal dispute.

4. Article 2.5 of the AC – definition of 'public concerned' and criteria for non-governmental organisations promoting environment

The 'public concerned' is reflected in the following provisions of Slovak legislation:

1. Administrative Proceeding Act (APA) in § 14, 1 according to which administrative standing is granted to a person whose rights, interests protected by law, or obligations can be directly affected by the decision; or a person who claims that s/he can be directly affected until the opposite is proven.

This is a general definition applicable in all administrative decision-making unless a specific law stipulates otherwise.

2. Environmental Impact Assessment Act (EIA) sets conditions for:

- civic associations: Ad hoc established legal person associating 250 members, of which 150 are from the affected location;
- organisation supporting protection of the environment.¹⁰⁷

¹⁰⁷ Organisation supporting environment (in registered bylaws one of the goals must be „support' or „protection of environment') is legally established in accordance with the Slovak legislation in existence at least 2 years.

If these two legal persons send comments within the time-limit for a particular stage of a particular EIA process, they have *ex lege locus standi* in further administrative proceedings concerning that particular project or activity.

3. Integrated Prevention and Protection Control Act (IPPC) stipulates standing in this administrative proceeding for 'public concerned', which for the purposes of this proceedings are:

- civic associations and environmental organisations – defined in a similar way to EIA (see above, point 2 - however with no time of existence requirement)
- persons whose rights are affected - defined in a similar way to APA (see above, point 1.).

This situation does not sufficiently reflecting AC in two ways:

First, in Slovakia it is the Construction Code and not EIA law which stipulates land use and licensing proceedings, including standing provisions. The Construction Code allows for the participation of civic associations and environmental NGOs as defined in EIA and for the participation of persons whose property rights are affected. No other persons falling under the definition of 'public concerned' in accordance with Art. 2.5 of the AC (first part of the sentence) can participate in decision-making concerning proceedings listed in Annex 1 of the AC.

This is a lack of transposition.

Second, in proceedings other than those listed in Annex 1 of the AC (proceedings where EIA is mandatory) the general definition of standing in APA usually applies. This definition is broad; however, we struggle with narrow application. Administrative authorities and courts use a test for 'rights, interests protected by law, and obligations', which basically does not allow for other than property rights to be the basis of *locus standi*. Thus claims based on APA standing (for example, in waste management proceedings, water management proceedings, etc.) claiming the right to privacy or a constitutional right to a healthy environment have so far been unsuccessful (see the case study from Slovakia).

5. Article 9.2 of the AC, specifically:

Standing based on 'sufficient interest' and/or 'impairment of right'; right to a healthy environment

The Slovak system of the judiciary is based on the protection of claimants' rights / entitlements. Administrative senates (part of the general judiciary, but distinct from civil, criminal, commercial, etc. senates) hear cases when physical or legal persons claim that their rights have been violated by the decision or action of an administrative authority. For standing to sue, it is generally not sufficient to claim violation of an 'interest protected by law' (equivalent of 'sufficient interest?').

On the other hand, if a person gains administrative standing based on 'directly aggrieved interest protected by law', which is one part of a definition of a party to administrative

proceedings, such person becomes party to administrative proceedings. Consequently, a party to administrative proceedings can bring the case to the court claiming impairment of her rights.

Thus *de lege*, members of the public concerned can gain standing and related procedural rights in administrative proceedings by claiming that their interest protected by law has been directly aggrieved. As a party to administrative proceedings, the public concerned can then challenge administrative decisions at court based on violation of procedural only. However this situation is not tested in our system.

However, in practice this has not been very successful for members of the public concerned about environment, health, or privacy. We have not been able to successfully claim administrative standing based on interests protected by law (for example, the interest to protect the environment or to live in a healthy environment) or other than property related rights (for example, the right to privacy or right to a healthy environment).

As mentioned above, a person can challenge an administrative decision or action (including inactivity) of an administrative authority claiming violation of her rights. Our courts hear administrative claims of physical persons based on both substantive rights (especially related to property) as well as procedural rights (for example, insufficient access to information or insufficiently reasoned decisions).

Since our jurisprudence is inspired by the decision-making of Czech tribunals, there was a risk that legal persons, such as environmental organisations, might not be able to claim the right to a healthy environment. The prevailing opinion was that the bearer of this constitutional right can be only a physical person. To avoid this interpretation, the EIA Act and IPPC Act contain a legal fiction establishing that an 'environmental organisation is deemed to be a subject whose right to a healthy environment can be impaired'.

Thus the main practical problem concerning the content of the right is that, with the exception of environmental NGOs, the only way for the public concerned to challenge an administrative decision at court is to:

First gain standing based on mostly property rights;
Consequently challenge the administrative decision claiming procedural rights or rights related to property, since the right to a healthy environment or privacy do not have real content yet.

The exception concerns an environmental NGO within EIA (and consequent licensing proceedings) and within IPPC and is based on the legal fiction mentioned above.

Preliminary review procedure before an administrative authority

Injunctive relief in administrative proceedings is stipulated by APA. In accordance with its provisions, an administrative authority may order parties to a proceedings to act, abstain, or bear action. Its provisions are also applicable for proceedings according to the Construction Code. Use of administrative injunction in proceedings when seeking either ordinary remedies (appeal) or extraordinary remedies has been insufficiently tested. Judicial injunction is used more often.

Review of EIA screening decision

It is impossible to challenge decisions made within the EIA proceedings, neither a screening decision, nor the final statement in EIA can be challenged. They are both considered not as

self-standing decisions, but only the groundwork for the subsequent licensing decision. Administrative authorities issuing licenses are not bound by EIA decisions, but are obligated to consider them and reason any deviation from their conclusions.

However, it is our opinion that Article 10a of the EIA Directive, 85/337/EEC on EIA as amended by 2003/35/EC, and provisions defining participation of the public concerned in the Slovak EIA Act (see above), provide for a possibility to gain standing in subsequent licensing proceedings even if the full EIA was not conducted. In another words, if, for example, an environmental organisation meets the criteria set by the EIA Act and files comments on a project proposed by an investor, it qualifies for standing in the further licensing proceedings. This environmental organisation – as a party to the proceedings - can then challenge the licensing decision arguing that the EIA process was not conducted, as well as any other flaws of the licensing proceedings and decisions. This possibility has not been tested yet, but it could provide for a certain form of review of screening decisions.

6. Article 9.3 of the AC, specifically:

'Provisions of national law relating to the environment'

Slovakia does not have any specific transposition of this article. Therefore there is no interpretation of the phrase 'provisions of national law relating to the environment' and there is no special approach to access to administrative or judicial remedies other than those mentioned above concerning Article 9.2.

Access to administrative or judicial procedures

As mentioned above, a person can bring the case to the court if her rights were violated by an administrative authority – either in administrative proceedings or because a person / claimant was excluded from proceedings. Thus, administrative standing is a precondition for standing to sue. The only administrative proceeding which guarantees participation of environmental organisations beyond Article 6.1, a) is regulated by the Nature Protection Law. Other proceedings, such as water management or forest management do not provide for special participation of the public concerned. In these proceedings, the general definition of a party to administrative proceedings as stipulated by APA applies. The wording of this definition is broad, but its application is very narrow, basically not allowing standing based on other than property related rights.

7. Article 9.4 of the AC, specifically:

Injunctive relief

Provisions of the Civil Proceedings Act stipulate that the court can, based on a motion from a party, delay enforceability of a challenged decision if immediate enforcement could cause severe harm. This provision, however, cannot, in our view, be considered an 'effective remedy' in accordance with Art. 9.4 of the AC, due to the following reasons:

CPA does not stipulate any time-limit in which the court must decide on the motion. Dismissal of a motion is delivered to the party only in the form of an 'announcement' with no possibility of appeal. Ambiguity of the language of this provision presents a problem, particularly the wording 'severe harm' and 'court may (delay enforceability).'

Therefore this provision in practice is virtually useless.

Other qualities of procedures

In relation to *timeliness and fairness of AC related proceedings*, constitutional provisions and related Constitutional Court and European Court of Human Rights jurisprudence concerning the right to a fair trial apply.

Slovakia is notorious for delays in court proceedings (the vast majority of ECHR claims relate to this issue) and the Slovak Republic annually pays compensation to victims for violation of their right to a fair trial for this reason.

Timeliness of court proceedings is also related to injunctive relief. As mentioned above, in Slovakia we lack precise regulation and efficient application of injunctive relief. The court issues a verdict concerning review of an administrative decision or non-action of an administrative authority often only when the factual impact is very low, since the challenged activity is already in operation. There is no time limit for the court to issue its decision in such cases. Therefore, timeliness of procedures remains a big barrier.

Regarding expenses of procedures, administrative proceedings are exempt from fees.

Until recently all court claims against the inactivity of public authorities and against illegal interventions by public authorities were exempt from the obligation to pay court fees. A recent amendment of the Law on Court Fees introduced court fees against illegal decisions of ministries and other central government authorities of 10 000 – 20 000 SKK (up to roughly EUR 500).

Foundations, charitable, humanitarian, and environmental organisations and consumers' rights associations are still exempt from paying all court fees. However the above-mentioned amendment can severely restrict access to justice for individuals and other than exempt legal entities.

8. Article 9.5 of the AC - inspiring mechanisms

Perhaps the 'legislative fiction' established in our EIA and IPPC laws according to which NGOs meeting conditions determined in those laws are considered to 'have their right to a healthy environment' impaired by a related decision can be considered 'inspiring'.

This provision is not sufficiently tested yet; however, its contribution can be seen in the following ways:

- It gives some content to what has been an empty shell provision – Article 44 of the Constitution which guarantees the right to a healthy environment.
- It provides some assurance that our courts will not deny the right to a healthy environment per se to legal persons, including NGOs, and that consequently such persons would only be able to claim violations of procedural rights – which is the situation in the Czech Republic.

9. Conclusions

The situation related to the Aarhus Convention in Slovakia, particularly as regards access to justice, can be summarized as follows:

- **Lack of awareness**, capacity building and consequently insufficient use of AC related arguments resulting in lack of case law applying AC and lack of direct experience
- **Public participation of environmental organizations** is regulated in a sufficient way. Public participation of this category of legal persons according to Article 6.1. a) and consequently their access to justice according to Article 9.2 is provided for within provisions of the EIA, IPPC and GMO legislation. Environmental organizations in other proceedings falling under the Article 6.1. b) and consequently Art. 9.3 of the AC have a special standing regulated by Nature Protection Law. Administrative standing in other proceedings (water, forests, mining) is regulated by general standing provisions of the Administrative Proceedings Act, which is defined broadly, but interpreted narrowly.
- **Threat to environmental organizations** presents so far an „empty shell provision“ of the APA – „participating person“. This category of administrative standing does not allow to challenge decision and does not grant other important procedural rights. It was specifically meant for environmental organizations and there is a political will to use it for limiting procedural rights since NGOs „use their procedural rights to delay proceedings“ (according to, for example, Minister of Agriculture and others).
- **Public participation and consequently access to justice of other members of concerned public** (besides environmental organizations) is regulated and interpreted insufficiently. For EIA related decision-making stipulated in Construction Code no other categories of public are allowed to participate, only persons with property rights impaired. For IPPC as well as proceedings falling under the Aarhus Convention Article 6.1.b. general definition of the APA applies. Narrow application of „rights, interests protected by law and obligations“ as stipulated by this Act did not allow for standing of concerned individuals or legal persons based on constitutional right to a healthy environment or privacy.

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