Selected problems of the Aarhus Convention application

based on experience and court practice of NGOs in 7 EU countries

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Prepared by:

Environmental Law Service, Czech Republic
ÖKOBÜRO, Austria
Estonian Environmental Law Center, Estonia
Environmental Management and Law Association, Hungary
Environmental Law Center, Poland
VIA IURIS, Slovak Republic
Legal Informational Centre for NGOs, Slovenia

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Content

Practical application of Article 9 of the Aarhus Convention in some EU countries – comparative remarks

Pavel Černý, Environmental Law Service

Introduction

Practical application of the Aarhus Convention[1] has been reflected by several representative (at least with regard to the EC member states) studies.[2] These studies are, to a great degree or completely, based on the experience of the entities that most often attempt to make use of the Aarhus Convention in specific cases – i.e. particularly environmental non-governmental organisations (NGOs). In spite of their partial differences these studies come to similar conclusions, with regard to the chief insufficiencies in fulfillment of the Convention's requirements, including (namely) its provisions regarding access to justice (Article 9).

The following text, based namely on the outcomes of subsequent national "ministudies", discusses several specific topics from this field, which can be considered as crucial in relation to the practice of legal protection of the environment. This concerns:
- definition of terms for access to justice by individual members of public (standing conditions)
- scope of the court review of act and omissions, related to the environment
- effectiveness of a court review, particularly the requirement of its timeliness

In relation to this several more general subjects are touched, specifically:
- the difference between the requirements of individual paragraphs of Article 9 of the Convention (particularly between its 2nd and 3rd paragraphs)
- the position of the Convention in legal system of its parties (namely the matter of its direct application by courts)
- the (non)unity of application of the Convention in individual states (parties) and the consequences therein.

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

Specification who (which entities), and under what terms, shall have right to ask for the court review acts or omissions concerning the environment, is evidently the key matter related to application of the "3rd pillar" of the Aarhus Convention. With that regard, the differences between the formulation of paragraphs 1, 2 and 3 of Article 9 of the Convention and the consequences issuing therein (which the legal order and judicial practice of the parties do not take into account very frequently) must be emphasised.

a) distinction between requirements of paragraphs 9(2) and 9(3)

[1] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted in Aarhus in 1998.

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

Basically, paragraphs 1 and 2 of Article 9 shall ensure the possibility of judicial protection in cases that are related to application of additional rights anchored in the Convention - i.e. rights to access to information according to Article 4 and rights to participation during decisions regarding specific projects according to Article 6. In the first case, definition of the subject authorised to demand judicial protection is clear (the entity that is not satisfied with settlement of its request for information).

In the second area the situation is more complicated. Entities to whom the definition of "public concerned" according to Article 2 paragraph 5 applies are to be entitled to the right to ask for review of decisions and omissions, which are related to permission of the project subject to Article 6 of the Convention. The states may determine additional limiting terms, issuing from the requirement of "sufficient reason" or evidence of "violation of rights" by the plaintiff. However, they must respect the general requirements of "providing the affected public with extensive access to judicial protection".[3]

Paragraph 3 of Article 9 then requires that "members of the public" (i.e. not necessarily the "public concerned") have (also) access to a review of additional proceedings, actions or omissions, than those to which Article 6 of the Convention applies (including proceedings and omissions by private individuals). In these cases the parties evidently have greater freedom when defining the scope of authorised subjects. However, even here the general principles, expressed in the Preamble of the Convention and in its Articles 1 and 3, must be respected (i.e. the requirement for assurance of available and effective judicial protection mechanisms and enforcement of the law). The criteria specified by national legal norms therefore cannot be therefore set so strictly that they would actually prevent access to justice to all or nearly all affected subjects (including non-government organisations). [4]

Neither the parties' legislation nor judicial practice has been too concerned with the differences between the requirements of paragraph 2 and paragraph 3 of Article 9 of the Convention to date. Attempts to justify the accord between the existing state (legal order and practice of the courts) with the requirements of the Convention (if these are taken into account at all) are more typical. This chiefly concerns the concepts establishing the right to access to justice (both to administrative and civil courts) upon the petitioner's "subjective rights", or "sufficient interest".

b) infringement of rights

In some states this general requirement is interpreted very restrictively. For instance in **Austria** it is the general rule that the law for specific types of acts or other encroachment defines specific rights, the violation of which (exclusively) may be raised by a specific subject (for instance the owner of the neighbouring land) which can then demand judicial protection in this scope. Restriction of the potential "infringement of rights" on the possibility of encroachment upon ownership or other similar rights to real property is frequent. This approach does not take into account the possibility that the condition of "infringement of rights" can also be fulfilled for instance in relation to rights to protection of privacy, health or a favourable environment (this general approach evidently corresponds much more to the requirements of the Aarhus Convention).

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[3] See also Article 3(1) of the Convention.

[4] See also the Aarhus Convention Compliance Committee case 2005/11 – Belgium (http://www.unece.org/env/pp/compliance/C2005-11/).

c) standing of NGOs

With regard to NGOs, it is characteristic for systems based on the "doctrine of infringement of subjective rights", that the NGOs' access to justice in environmental matters is based on their previous participation in administrative proceedings (if the special laws allows this) and on the related protection of their procedural rights. This is then expressed not only in the actual matter of these subjects' terms of standing, but also in the scope of their "permissible complaint arguments" (see below).

Another alternative is anchoring of detailed and difficult to fulfill terms, under which the NGOs can acquire a specific status, enabling them (in a specific scope) access to justice, such as for instance in Germany or Slovenia.

With regard to the NGOs' access to justice, the current situation in Slovakia can be considered an extreme example of breaching obligations issuing from the Aarhus Convention. Following ratification of the Convention, a fairly progressive legislation was approved here, which issued from the legal fiction that NGOs may be affected, with regard to the right to a favourable environment, by important decisions concerning the environment. However this legislation was abolished after several years. The current wording of Slovak environmental laws enables NGOs a sort of limited or "inferior" participation in permit proceedings without the possibility of access to justice.

d) examples of broad interpretation of standing rights

However in some states, as a result of ratification of the Aarhus Convention, the possibilities of access to judicial protection were expanded, while preserving the general principles of complaint legitimacy based on "infringement of rights". For instance the Estonian Supreme Administrative Court (on the basis of direct application of the Convention) inferred, that in cases concerning environmental protection, the criterion of "infringement upon rights" must be interpreted less restrictively in comparison to other areas, more in the sense of "affecting" a person by a specific act in accordance with Article 2 paragraph 5 of the Convention. (It is interesting that the Czech Supreme Court came to similar conclusions in other than "environmental cases" – on the basis of application of constitutional principles, not international obligations – without this significantly affecting decisions by Czech courts in matters concerning the environment). Similarly the Supreme Court in Hungary stated that the government's duty to harmonise legal order with international obligations results in the necessity of a more general interpretation of terms for access to judicial protection, whereas in some cases concerning the environment, infringement of personal does not have to be proven at all.

On the basis of direct application of Article 9 paragraph 2 of the Convention Estonian courts also inferred that non-government organisations have the right to access to judicial protection without the need to prove violation of their rights and also without the need for special national legislation. They even acknowledged this right to groups (associations) without legal identity under the condition that they "represent the interests of a significant part of the local population".

If the legal order expressly anchors "actio popularis" for the field of environmental protection

this can undoubtedly be considered to fully satisfy the requirements of the Convention to access to judicial protection. This is the case in Portugal for instance or (for the field of planning) in Spain, or if the judicial interpretation of the term "affected interests" actually leads to the same results (which is the case in Great Britain, Ireland or Latvia). In Hungary, the Netherlands and some other states the legal order establishes the right to access to justice for non-government organisations without the need to prove infringement of rights.

Overall, it can be said that the situation in the parties to the Convention in relation to the key matter of the group of subjects authorised to access to justice in environmental matters are
- noticeably different and not issuing from the minimum common basis
- generally not taking into account the specific character of Article 9 paragraph 3 of the Convention
- in some cases clearly conflicting with the Convention.

2. Scope of the review

Delimitation of subjects authorised to access to justice in environmental matters is closely related to the scope of the judicial review of actions, proceedings and other legally important circumstances This scope can be examined from 2 basic viewpoints:
- which actions and other circumstances are subject to judicial reviews, or which are not
- to what degree do the courts address the applied arguments

a) objective approach – what is subject to review

With regard to the first question it is clear that, in practice, only those decisions or other circumstances, in relation to which it is possible for some subject to fulfill the conditions of complaint legitimacy, may undergo a judicial review. Therefore if the legal order and/or practice of the courts of some states issues from the (strictly perceived) doctrine of encroachment upon rights, the group of reviewable acts is thereby actually limited. Therefore, according to existing judicial interpretation for instance in the Czech Republic, the affected entities cannot demand that a decision to permit exceptions from noise limits or approvals with putting nuclear facilities into operation be reviewed.[5] In the Netherlands, some decisions are expressly excluded from review with reference to the so-called "general rules for enterprises", replacing individual permits.

EIA statements

Reviews of outputs of processes of environmental impact assessments (EIA) represent a specific problem. Where the final output of this process does not have the character of a final decision (for instance an "EIA statement" in the Czech Republic or in Slovakia) the concept based on the requirement of proving infringement upon petitioner's rights leads to the conclusion that (separate) judicial review of this act is not possible. In general whether decisions on whether a specific project will or will not be evaluated from the aspect of its environmental impact (so-called screening decision) should be subject to a judicial review is a contentious matter. In a number of countries the courts refuse to review these decisions. On the contrary in Estonia the Supreme Court stated, that "*even though procedural decisions are*

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

generally not subject to judicial review, it is necessary to proceed differently in cases concerning encroachment upon the environment, because in these cases procedural aspects have a fundamental impact on the final result of decision making".

Land use plans

Another specific area is reviews of land use plans. The contentious matter here is, whether, or under what circumstances, the plan can be considered a decision regarding permission of a specific activity in accordance with Article 6 of the Convention and whether the provisions on access to judicial protection according to Article 9 paragraph 2 of the Convention apply to it. In the opinion of the Compliance Committee for the Aarhus Convention in case no. 2005/11 (Belgium)[6] the ground plan may be considered such a decision under specific circumstances, if it is sufficiently specific. In other cases it is a matter of whether this concerns an action in accordance with Article 9 paragraph 3 of the Convention (according to the quoted statement by the Compliance Committee this should be so).

Acts and omissions of private persons

Application of the principle of "infringement of rights" restricts access to review of actions and omissions by private individuals if these actions do not have direct and immediate consequences on the personal rights of individuals, but rather on the environment as a public property (interest). Apart from this, even where it is possible that the legal sphere of a private individual was infringed (pollution or threat to its environment) the courts frequently refuse use of traditional private legal instruments. An example of accommodating legislation in relation to the option of judicial review of actions by private subjects is the Polish Environmental Protection Act, according to which NGOs may file an action in cases of threat to or damage to the environment as the "common good".

Overall it is possible to say that also in relation to the possibility of reviewing individual acts or other outcomes, the legal orders of the parties make insufficient provisions for meeting the specific requirements of Article 9 paragraph 2 and particularly paragraph 3.

b) permissible complaint arguments – what can be objected

With regard to the issue of "permissible complaint arguments" or the scope in which the courts deal with individual acts, the situation is again problematic in countries where the strictly perceived doctrine of infringement of rights is applied. For instance according to Austrian legislation, the affected individuals (landowners) may only ask for a review of infringement upon their ownership rights and rights to protection of health. They cannot object to violation of other provisions of environmental laws. This significantly restricts the scope of judicial review of official decisions.

Concerning actions by non-government organisations, the Czech courts have declared that permissible complaint objections are only those that concern infringement of the procedural rights of these petitioners during proceedings before administrative offices. However the actual method of application of this principle differs greatly in individual cases (in some it is

[6] See footnote 4.

very strict,[7] in others the courts address substantive objections either "by means" of the review of the right to due settlement of objections, or without any theoretical justification. In practice the formal insistence of courts on this concept leads to a differing and unbalanced scope of review in similar cases.

The whole concept is based on confusion of the terms of standing (where it can be in compliance with the Aarhus Convention to limit the scope of persons with access to courts by the requirement of infringement of rights) and the scope of review of the challenged decision, in the event that the matter of the right to sue has been settled. In relation to the lastly mentioned aspect, Article 9 paragraph 2 of the Convention clearly indicates the requirement of a review from the aspect of both procedural and substantive legality of the decision.

In contrast to this approach we can point out the already mentioned Slovak legislation (currently abolished), according to which the fiction of infringement upon the right to a favourable environment is assumed for environmental NGOS. In a number of other states the issue of the scope of the review (if this concerns a review of the legality of the decision) is not a contentious matter at all and is accepted as a matter of course that the petitioner may apply any arguments in this direction. The Hungarian courts for example often not only review the substantive legality of an administrative decision (e.g. whether the limit values for pollutions are applied correctly), also but the scientific correctness of the supporting technical documentation, most prominently the environmental impact statement.

3. Effectiveness of judicial protection

Anchoring the right to access to justice according to Article 9 of the Aarhus Convention has the real sense only if there is a literal possibility of its utilisation to prevent encroachment upon the environment. Paragraph 4 of this Article therefore expressly specifies the duty to the parties to secure the opportunity of achieving preliminary measures, including injunctive relief, so that the judicial procedures according to the preceding paragraphs provide adequate, fair, timely and effective remedies. Therefore, the combination of significant length of court proceedings with the restricted or wholly excluded option of achieving an injunctive relief, which leads in practice of "academic victories" (canceling the permits for already executed projects) is in conflict with the requirements of the Convention

For instance Czech legislation and until recently also (in the full scope) court practice, represents such a combination. However, in several of its recent judgments, the Supreme Administrative Court expressed the legal opinion that in spite of the strict terms for acknowledgement of the suspensive effect of the action (i.e. requirement of the petitioner being at risk of "irrecoverable harm") the courts shall acknowledge a suspensive effect to complaints by members of the public concerned in cases that are subject to the Aarhus Convention.

This interpretation approaches the legal order and practice of other countries which are much more accommodating in relation to preliminary protection against irrecoverable encroachment upon the environment. For instance the Estonian law requires an evaluation of whether there is a risk of "serious damage to the environment" for evaluation of the suspensive effect of a complaint. Apart from this, the courts may also issue various types of preliminary measures –

[7] In one of the cases the court dismissed to consider arguments that the project was not assessed in the EIA procedure, although it should have been, and that the impact of the project on the Natura 2000 area was evaluated wrongly, as these objections are not related to the plaintiff's procedural rights.

for instance forbid offices to issue subsequent decisions or suspend running activities. Criteria for acknowledgment of the delaying effect are similarly specified in Hungary, Slovenia and Belgium (here also expressly in relation to non-government organisations). Filling an action automatically has a suspensive effect in a minority of states.

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

Conclusions

The mentioned list of problematic matters concerning application of Article 9 of the Aarhus Convention in individual states is naturally not exhaustive. For instance it was not mentioned that the high costs of court proceedings and risk of compensations to the counterparty if loosing a case is a fundamental problem in some states. Also the matter of whether and under what circumstances the requirements of Article 9 paragraph 3 of the Convention can or should apply to criminal proceedings related to harmful encroachment upon the environment, has been neglected.

In spite of this, it is possible to make several potentially valid general conclusions on the basis of the presented subjects.

This chiefly concerns the afore-mentioned insufficient reflection of the differing formulation and evidently also differing intended purpose of the provisions of paragraph 2 and paragraph 3 of Article 9 of the Convention. A number of decisions, actions or proceedings with serious consequences on the environment are not “covered“ by the wording of Article 6 of the Convention and therefore nether Article 9 paragraph 2 of the Convention applies to these. In spite of this it is evident that, in accordance with the general goals of the Convention and also with the purpose of its Article 9 paragraph 3, in cases such as industrial accidents, operation of unauthorised waste dumps or exceeding emission of harmful substances or noise limits, the public should be granted access to judicial protection. Therefore it is not in accordance with the Convention if states specify so strict criteria for access to justice in such cases that cannot be satisfied by most members of the public (concerned). Otherwise said, the legislative and particularly judicial bodies of the parties to the Convention should seriously address the requirements of paragraph 3 Article 9 of the Convention.

The second general matter is the overall position of the Convention in the legal system of the parties. Form the above-mentioned examples it is evident that in some countries the courts have acceded to direct application of the Convention, which has mostly led to an increase in standards of legal protection of environment and affected individuals. In other states the courts have refused the option of direct application. Without launching into more details, it is possible to note that this approach should not be sufficiently justified by the fact that some of the provisions of the Convention are formulated in the way that “each Party shall ensure...”, i.e. that the parties are required to accept measures for achieving specific goals. Most important, however, is to emphasise that, regardless of the issue of whether the Convention is “capable of direct application” from the aspect of national laws, the courts should always interpret the relevant national provisions in accordance with the requirements of the

Convention. In most cases this should be sufficient to fulfill its goals. This is confirmed namely by the great variability of interpretation of terms for access to judicial protection in various countries, which issue from the common general doctrine of "infringement of rights".

This is directly related to the afore-mentioned disunity in fulfillment of the requirements of the Convention by individual parties, clearly indicated by the presented examples (whether this concerns the scope of individuals who have access to judicial protection, the scope of acts subject to judicial review, the availability of preliminary measures or other individual aspects). Not only that this disunity itself clearly does not correspond to the declared goals of the Convention, but it is also not desirable from the aspect of the Convention's position as part of EC law, which should also indicate the requirement for a basic common standard of its application in all EU member states. It is therefore necessary to strive to achieve approval of directives specifying minimum common rules for transposition of the requirements of namely Article 9 paragraph 3 and 4 of the Convention by member states – i.e. for the directive on access to justice in environmental matters.

The Aarhus Convention is a unique international legal instrument, which combines the subject of environmental protection with human rights and simultaneously with the responsibilities of public institutions and also individuals and their associations. Thanks to its uniqueness the Convention has induced and still induces many expectations. However these expectations are frequently disappointed by the formal approach by courts and other public institutions. It would be shame if these vain expectations would lead to fall of people's interest and willingness to become actively involved in the environmental protection.

Selected problems of the Aarhus Convention application in AUSTRIA

Thomas Alge**,** ÖKOBÜRO

The Aarhus Convention was ratified by Austria in June 2005. Courts do not apply the Convention directly. Similar to Germany, major Austrian legal experts, politicians, administrative decision makers appear not in favor of the Convention or interpret it very restrictively. The Aarhus Convention contradicts the general administrative principles with regard to standing and access to justice in the Austrian legal system. Many lawyers are not ready to do this step in Austria. After an international study of the European Commission on Article 9/3 implementation in Austria published 2007 that resulted in the conclusion Art 9/3 is basically not implemented, there is new room for discussions and political pressure in Austria.

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

Introduction

Access to Justice in environmental matters in Austria is closely related to standing (locus standi) requirements. The general rule is that only "parties" to an administrative proceeding have standing that includes access to review procedures in specific issues.[8] A "party" to the proceeding is defined as a legal subject taking part in the proceedings on the basis of a legal interest or a legal title.

In order to obtain standing a "subjective right" needs to be violated or at risk. "Subjective rights" or "individual rights" need to be determined by legislation for the party concerned. In practice national legislation either expressly define rights that could be violated with respect to certain parties (e.g neighbours concerning noise, smell, property..)[9] or standing rights are derived from subject matter of a case and respective sectoral legislation (e.g waste, forestry, soil) by interpretion as to general administrative rules and principles.[10]

Article 9/3: Standing in general environmental matters

In general[11], the public (consisting of individual citizens, local groups and NGOs) does not have legal standing in administrative procedures regarding public environmental interests. This is particularly caused by the following reasons: The existing laws only provide for locus standi regarding individual rights that are basically not related to the public interests, though sometimes the individual and public interest might overlap (e.g aspects of nuisance from noise, air quality). In principle[12] only the individuals directly affected by an activity or emission would be granted standing rights (and access to a following review procedure)

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[8] See *Thienel*, Österreichisches Verwaltungsverfahrensrecht (2006) page 86 et seqq. for further details and references

[9] e.g Art 42 AWG (Federal Waste Management Act): This provision clearly defines who has standing in waste permit proceedings (the applicant, neighbours, the industrial site owner etc. Its however not clear what is the „subjetive" right conderned defining the scope of their standing rights.

[10] *Thienel*, Österreichisches Verwaltungsverfahrensrecht (2006) page 88

[11] Please read for details the European Commission mandated study: Country Report Austria in "Measures on access to justice in environmental matters (Art 9(3))" *Milieu* L*td.* 2008, p. 9.

[12] See *Berger* in *Ennöckl/N.Raschauer*, UVP-Verfahren vor dem Umweltsenat (2008), page 85 for further details

according to Art 9.3 AC. In practice this is from the term „members of the public“ of Art 9/3 Aarhus Convention (apart from the applicant, municipalities and other state bodies) basically only „neighbours“ in tue Austrian legal sense. However, neighbors may only take part in some permit proceedings; but they have, despite few exemptions, no right to innitiate those proceedings or demand the review of decisions (e.g in cases where a permit was issued many years ago and in the meanwhile the factual situation or technical developments have changed).

This legal position limits standing rights to a group of persons (neighbours) that‘s standing rights hardly relate to public environmental interests as stated in the Aarhus Convention. This is the case because “neighbour protection rights” are directed at the protection of property and health of the persons concerned. Environmental concerns can only be addressed regarding a concrete issue, take the threat to health due to noise emissions as an example. Noise quality standards and laws tue serve for general environmental protection would are not subject to neighbour’s standing rights.[13] Another example is water quality. A neighbor to a polluting facility may address water quality issues concerning the polluting of his private well (in particular owner of private water use rights such as small fountains), but may not refer to general water quality considerations (e.g. those based on the Water Framework Directive) in the context of the proceedings. The same is true for EIA proceedings, where neighbors standing rights are limited to their individual concern, but are not open for public interests such as nature protection, water and air quality standards.

NGOs and other groups do not have legal standing in any of the above mentioned cases relating to the environment because they have no “individual (or “subjective”) rights” (that could be violated or at risk) according to the Austrian administrative and constitutional laws, jurisprudence and legal literature, unless such rights are expressly designated by law.[14] However, the latter is not the case in Austria, even though this would be legally possible according to the prevailing case law of the highest administrative and constitutional courts.[15] Thus NGOs have no standing rights in any environment related administrative proceedings apart from EIA and IPPC permit proceedings, where EU-Directives Directive 2003/35/EC provide for such rights.

Case example – ski resort in Alps

This legal position can be illustrated by the following **case (*Skiing region Mellau/Damüls*)**. Two ski resorts in the western province of Austria (province *Vorarlberg*) should be united by major investments (such as new pistes and ski-lifts). The project is located in the alpine regions and covers a construction site of almost 20 hectare. An EIA-screening procedure (case

[13] The same is true for air quality issues. A citizen of the city Graz filed a lawsuit against the Province of Styria and the Republic of Austria. In this case it was a civil lawsuit, an administrative one was not possible, aimed at the determination that the Province and the Republic were to be held responsible for damages to health resulting from not undertaking measures against exceedances of PM10 limit values. After years of proceedings the result was that a rejecting judgment by a court at lower instance was confirmed by the highest court of justice (Ref. No.: 1Ob151/06x). The rejection was based on the view that the plaintiff had to exactly specify the measures the Province of Styria should have, but has not taken. The second lawsuit against the Republic of Austria was also rejected at first instance.

This case clearly shows the difficulties citizens are confronted with when they try to take legal steps to push for compliance with rules of general environmental law. The administrative legal process is not open to them. It is possible to file a civil lawsuit but in this case have to proove that specific omissions by the authoritites have led to a concrete personal damage. This is very hard to proove.

[14] *Thienel*, Österreichisches Verwaltungsverfahrensrecht (2006) page 87 with further references.

[15] *Thienel*, Österreichisches Verwaltungsverfahrensrecht (2006) page 91 with further references

by case examination) ended with the decision (Decision IVe-415.13 from 17.08.2004) that no EIA is necessary since the project has not sufficient environmental impact (!!!). The screening decision can not be legally reviewed by NGOs are other members of the public according to the prevailing Austrian case law.[16] An NGO, *Naturschutzbund Vorarlberg,* claimed legal standing in the following nature conservation procedures by directly reffering to Art 9 par 3 of the Aarhus Convention. The provincial adminstrative court dismissed (Decision UVS-327-006/E10-2006, 30.08.2006) the claim by arguing firstly that the Aarhus Convention is not direclty applicable for constitutional reasons, that Art 9/3 is worded not sufficently clear in order to be directly applicable and its the national legislator that should decide whether standing is granted or not.

In the lately adopted **Environmental Liability Act** (not published in OJ yet) neighbours and a groups of NGOs have standing in remediation procedures. Standing is expressly designated to the groups. They can also request the authority to take measures and thus initiate a remmediation procedure. Standing rights are however expressly limited to health and property and other expressly listed subjective rights (such as peronal water rights) of parties depriving from other laws. NGOs can hardly be affected in health and properity. And, in contrast to EIA and IPPC procedures (read below), there are no specific rights to invoke designated to NGOs. This means, according to the prevailing case law of the highest courts and the prevailing opinion among Austrian adminstrative law lawyers and scientiests, that NGOs have no actual rights they could invoke[17] next to their specific procedural rights, whereas neighbours can invoke their individual procedural, health and property rights, but not public interest environment law (as above).

It can be concluded that, apart from EIA and IPPC proceedings, only neighbours have locus standi in (some) environment related permit proceedings, but only to protect their individual rights (in particular property and health). Please note that the right to initiate review procedures of existing permits is granted only in exceptional cases. Furthermore, there is no right for any member of the public to initiate proceedings regarding ommissons of private persons or authorities.

Article 9/2: NGO standing and access to justice rights in EIA and IPPC procedures

In Austria the EIA procedure is by the same time the permit procedure for a proposed activity. This means firstly that EIA takes place at the very latest stage of project development process. Secondly in the EIA any project activity is assessed to be in concordance with environmental law. EIA and IPPC procedures are set as „consolidated permit procedures“[18]. This means in these procedures any relevant environmental law such as water or waste management, air, noise, nature protection has to be applied (and permitted as to the activity). Whereas in other projects a developer needs to apply for different development consent procedures for one single project (e.g. waste permit, water permit, forestry permit, nature protection permit),the EIA and IPPC decisions are by the same time the environmental permit decision and consent the proposed activity.

[16] Please read below chapter 2b on the screening procedures

[17] Parties to a proceeding whose standing rights are based on explicit determination in a act („NGOs have standing in this procedure“) without depriving this rights from the subject matter of a procedure are so called „formal“-parties. The latter's standing rights need to be expressly defined by legislation since they do not deprive their standing from other laws.

[18] See legal analysis on „EIA in infrastructure projects“ in Austria, *Justice and Environment* (2006)

The legal position for NGOs in EIA and IPPC proceedings is different compared to general legal position we referred to above since NGOs are expressly granted standing rights with the right to invoke compliance with any environmental law provisions. They therefore may address the issues of general environmental concern from which individuals are excluded. **This means to invoke compliance with environmental law standards is their standing right espressly determined by law.** This has the side effect that due to the „consolidated permit procedure" NGOs have indirectly standing in any other sectoral permit proceeding (such as waste, water..) because this is all decided in the EIA permit.

A prerequisite for being granted these rights is the prior registration of an NGO at the Ministry of the Environment which is linked to a variety of particular requirements (e.g. the organisation has to exist for 3 years already pursuing the aim of environmental protection, working pro bono and on non profit base). The registration process takes a couple of weeks at least and has to be finished before the EIA/IPPC -procedure starts. An ad hoc registration for NGOs is not possible. Until now 29 organisations have are enabled to participate in EIA and IPPC-procedures in Austria.[19]

Once registered the organisations have the right to obtain standing (with subsequent access to justice) in EIA and IPPC permit proceedings and the right to enforce any environmental related law that is or shall be subject to the procedure. To maintain their standing rights NGOs have to submit argued comments on the environmental impact statement within the six weeks public inspection period.

For local groups („citizen's group") legal standing is only possible in a limited number of EIA proceedings. A „citizen's group" is defined by the Austrian EIA-act as at least 200 individuals living in the (surrounding) municipalities of the location signing a „joint statement" referring to the project within in the six weeks public inspection period. If they do so they have the same standing rights as NGOs, namely the possibility to invoke any environmental law as their individual interest. Please note that this counts only for a very limited number of EIA-procedures (but not all in IPPC procedures), whereas in the majority of EIA procedures such groups have no standing rights.[20] Furthermore strict formal criteria for the founding of such a local group have been introduced by jurisprudence of the Austrian Constitutional Court[21]. These requirements make it very hard for citizens to use the instrument of the local group to achieve legal standing in the EIA proceedings and lead to the situation that until now approximately 85 % of the citizens groups were rejected by courts and could not maintain their standing rights.[22]

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[19] The list is published on the Website of the Austrian MoE: http://www.lebensministerium.at/article/articleview/27824/1/7237/

[20] The Austrian EIA act, generally speaking, provides for two different kinds of EIA proceedings. In the more common one ("simplified proceedings") the local groups have no standing at all, they only have the right to demand for access to relevant documents, but lack any other kind of power usually related to procedural standing.

[21] See VfGH 14.12.2006, V 14/06 (A 5 NORD Autobahn; Abschnitt Eibesbrunn – Schrick); VfGH 02.03.2007, V66/06 (S 2 Wiener Nordrand Schnellstraße, Abschnitt Umfahrung Süßenbrunn, im Bereich der Gemeinden Wien und Aderklaa); VfGH 01.10.2007, V14/07 (S 33 Kremser Schnellstraße und S 5 Stockerauer Schnellstraße); VfGH 13.03.2008, B743/07(380 kV-Steiermarkleitung) and others.

[22] This excessively formalistic interpretations by courts can not be considered as in accordance with Article 9/2 of the Convention providing for "*the objective of giving the public concerned wide access to justice within the scope of the Convention*" since this can not be interpreted as wide access to justice.

Article 9/1: Environmental information
Access to justice with regard to environmental information requests is less problematic. Any (natural or legal) person has, according to the Austrian environmental information acts, access to justice if an information request was refused. However, in practice the access to justice procedures appear inefficient, but not timely and effective. This is further elaborated below in the last chapter.

2. Scope of judicial review

a) which acts and omissions are subject to the review

In general, different parts of the public have different possibilities for demanding judicial review of decisions taken by public authorities. The standing position pre-determinates what rights in what laws can be invoked. Only their substantive and procedural standing rights can be legally reviewed. As mentioned above only neighbours have standing in some environmental permit proceedings, but not NGOs (apart from EIA and IPPC procedures).

Neighbours can review some aspects of permit decisions if they had invoked and maintained their standing rights in the permitting procedures for industrial installations according to the Trade Commerce and **Industry** Regulation Act (GewO; this includes protectionn from nuisance caused by smell, other (industrial) emissions and noise), the Federal **Waste** Management Act, certain aspect in the Federal **Forestry** Act (ForstG), **local building and construction permit** procedures (regulated by provinces)**,** Federal **Water** Management Act (AWG). Nevertheless, the rights of neighbors are primarily directed at the protection of their **health and property**. They have no possibility to invoke general environmental law aimed at the protection of the environment (see above) since their standing rights derive from their individual interest. This very much limits the scope of possible revision of authoritive decisions.

Neither NGOs nor neighbours have (outside EIA and IPPC) access to justice in the following permitting procedures: **railways**, **roads**, **shipping, nature conservation** or most aspects of the **water** protection.[23]

NGOs do not have access to justice in any of the abovementioned procedures. The same counts for SEA-procedures, **spatial planning**, or **local construction proceedings**. There is no right to address non compliance with **water**, **air**-quality[24], ambient **noise** or other **environmental quality standards** at courts. A particular problem are **EIA-case by case examination** procedures (screening procedures). 80 % of the procedures end with the decision that no EIA is necessary and the public is excluded from this procedure. The issue that an EIA would be necessary must not be invoked by any party to a following proceeding

[23] *Berger* in *Ennöckl/N.Raschauer*, UVP-Verfahren vor dem Umweltsenat (2008), page 104

[24] However, regarding health and air quality the ECJ recently issued a judgement (C-237/07, Dieter Janecek vs. Freistaat Bayern))on the right of EU citizens with regard to public's enforcement rights of limit values for particulate matter after a reference for preliminary ruling by the German Federal Administrative Court. The underlying legal act is the Ambient Air Quality Directive (96/62/EC). Where there is a risk for the exceedance of limit values or alert thresholds, citizens directly concerned by this exceedance must be in a position to legally require the competent national authorities to draw up an action plan. They should therefore be granted the right to enforce air quality plans as their individual interest. Its unclear if Austrian court would follow this judgement. Even in this case the legal base would not be the Aarhus Convention and its objectives, but human health protection for individuals, without direct relationship to pubilc interested oriented environmental law.

due to the prevailing case law of the highest courts. The latter is critized by major legal experts.[25]

With regard to **environmental liability** it was addressed above that the new act designates standing and access to justice rights to NGOs and neighbours, however only procedural law, health and property can be invoked. It is unclear what rights NGOs have since their personal health and property can hardly be affected by its nature.

There is practically no legal possibility for the public to demand from the authority to take action in case of grievances or omissions unless a personal interest (health, property) would be seriously at risk. With regard to **road and rail tracks** there it is **expressly prohibited by law to claim individual rights**[26], in particular nuisance from **air** pollution and **noise**. No review can be demanded in case the authority fails to act or acts in an inappropriate way. Furthermore there is no possibility to demand the authority's activity as regards acts and omissions from private persons.

With regard to EIA and IPPC-permit procedures the legal position is different. NGOs can review the EIA and IPPC decisions, including any law applied within these consolidated permit procedures. However, in Austria there are only 20 to 25 EIA procedures a year, whereas there thousands of other environmental procedures.

b) To what extent do courts review the acts?

Due to the Austrian peculiarity that access to justice is very closely related to the question of standing rights in the proceedings this question has to be seen in context with question number one and 2a (see above). What kind of review takes place, what are its contents and its extent is determined by the standing position.

As mentioned above there are different types of standing, depending on the position and the kind of the legal person involved. This in turn leads to different extents of judicial review.

Legal persons deriving their standing in a proceeding from the fact that they are directly affected and can therefore be considered as neighbors may only demand judicial review as regards their personal rights (which is in most cases be protecting their health and property) but not as regards the compliance with general environmental law. An example is Art 102 of the Austrian Water Management Act. This provision determines the parties and therefore the standing rights in proceedings according to this act. Depending on the concrete procedure standing is provided for different legal entities (such as authorities, communities). Neighbors are only involved as parties, if their rights are being touched in any way (e.g private fountains).

With regard to EIA and IPPC procedures NGOs, if they had met the formal criteria refferred to above, have the right to fully legally review the EIA and IPPC permit decisions, covering any relevant Austrian environmental law, including the public participation provisions. Only in this procedures NGOs have full access to justice with regard to any public interest related environmental law, including air and noise, water, waste etc.

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[25] *Berger* in *Ennöckl/N.Raschauer*, UVP-Verfahren vor dem Umweltsenat (2008), page 97

[26] The justification is that roads and railroads server for public interest that is more important than individual interests in any case.

3. Injunctive relief, costs and efficiency of review procedures

As general rule, injunctive relief is granted in Austrian environmental permit proceedings. The problem there is, if any, only a limited no of subjects that can appeal decisions in the sense of the Aarhus Convention.

In regular cases the independent provincial administrative tribunals of the federal provinces ("Unabhängiger Verwaltungssenat") are the competent redress bodies. With regard to EIA procedures (but not federal motorway and rail projects) the redress body is the Federal Independent Environmental Senate (Unabhängiger Umweltsenat). Injunctive relief is granted by law for respective appeal proceedings. Furthermore both courts decide in the subject matter and not only on procedural law.

The next level of legal redress are the Federal Highest Administrative Court (Verwaltungsgerichtshof) and the Constitutional Court (Verfassungsgerichtshof). Both courts may grant injunctive relief, but in practice they do not in environmental cases. This is particular problematic with regard to federal motorway and railway projects that are permitted according to the Austrian EIA-act. In such cases the permitting authority is the Federal Minister of Transport (BMVIT). The Environmental Senate is not competent as appeal body. The only redress bodies are the Highest Administrative or Constitutional Courts. Appeal procedures at these courts take in average between 12 and 24 months. At the time of the decision respective projects are already in the implementing status with irreversible environmental and financial effects. This problematic issue can be illustrated by the following case:

Case example - S1 West motorway:
The EIA permit was issued in May 2006. Citizen's group (they had standing in the procedure) appealed to the Highest Constitutional Court after the decision was issued. In January 2007 constructions started (actual it should have started in summer 2007, but there were problems and disputes of the project tendering process). In July 2007 the Court abolished the EIA-permit decisions due to serious procedural problems in the case. However, since the project was already under heave constructions, the Court set a timeframe until 31. Dec 2007 to issue a new EIA permit. In the meanwhile constructions could proceed.[27] The minister of transport (BMVIT) pursued the new EIA permit procedure within three months. The public hearing was held just before Christmas and the decision was issued few days after Christmas 2008. The local group appealed to the highest Administrative Court in February 2008. The decision of the Court is expected either in the last months of 2009 or early 2010. The motorway construction will be finished at that time.

This case shows that access to justice is neither effective nor timely in such projects. Furthermore costs of up to 50.000 EUR arose for the local group for technical and legal expertise needed to maintain their standing rights and the appeal proceedings. Such procedures are furthermore prohibitively expensive.

Not all parties of a proceeding have the same access to justice possibilites. The scope and level of access to justices it determinated by the standing rights of each parties. Whereas applicants and neighours deprive their rights from the subject matter of different laws (see

[27] For further details on references to the case and its legal base ready Alge/Altenburger, elni review 2/2007, page 9 et seqq

above), NGOs need specific rights that are expressly designated to them. NGOs are “formal parties” to the procedures. The legislator has to expressly enable “formal parties” to appeal to the highest courts. This is not the case for NGOs (apart from a limited No of EIA-procedures) in the limited procedures (EIA and IPPC) they have standing rights at all. This means e.g that NGOs could succeed an appeal procedure at the independent administrative or environmental senates, but the developer can appeal to the highest courts and abolish the decision of the senate. This is unequal treatment and limits the efficacy of the NGOs access to justice rights to large extent. Its questionable whether this can be interpreted as appropriate, fair and equitable access to justice in the sense of Article 9/4 of the Convention.

With regard to Article 9/1 the review procedure is not timely and efficient. If an authority does not respond to a request after two months the applicant has to ask the authority to issue an administrative decision on the refusal. This takes some months as practice shows. In case the authority does not issue the decision with six months, the applicant can go to court. This means in worst case, and there is experience with such cases, it can take up to one year until an information applicant has the right to request an administrative review procedures and the decision might take another six months. 1,5 five years later the requested information is normally not relevant any more.

Summary

The Aarhus Convention is basically only applied in EIA and IPPC procedures where European rules set up standing and access to justice standards.

Only neighbours have standing and access to justice in most environmental permitting procedures. Their standing and access to justice rights are however limited to individual interests such as health and property, but not general environmental law in public interest (like air, noise, water quality). However they and the NGOs have no standing and access to justice rights in permitting procedures of roads, railways, shipping, or nature conservation

NGOs have standing and access to justice in EIA and IPPC procedures that are by the same time permitting procedures for the project and cover any environmental permit needed for an EIA or IPPC project. NGOs can invoke any enviromental law in the permit and appeal procedure.

Apart from that NGOs have no access to justice rights at all. Courts refuse to apply the Convention directly.

Injunctive relief is granted in environmental permitting procedures by law. Problematic are federal motorway and rail projects, where injunctive relief is not granted in practice for different reasons. At the time of the court’s decision projects can factually not be stopped any more since environmental damages and the amount of invested resources are irreversible. Furthermore costs for standing and access to justice are prohibitively expensive in such procedures.

Other problems occur with regard to access to justice in environmental information appeal procedures (too timely) and unfair treatment of NGOs access to justice rights compared to other parties to the proceeding.

Selected problems of the Aarhus Convention application in the CZECH REPUBLIC

Pavel Černý, Environmental Law Service

The Aarhus Convention (AC) was ratified by the Czech Republic in July 2004 and has been in force from October 2004. It's interpretation by Czech courts is, generally speaking, not very developed, inconsistent and rather limitative. In a few decisions, the courts presented relatively positive opinions about the AC influence on the rights of public concerned – mostly when this argumentation was not decisive for the case (as "obiter dicta").[28] On the contrary, in a number of cases the courts refused to overcame their previous restrictive case law (mostly with regard to standing requirements and scope of review in environmental cases), with main argument that the AC is not a "directly applicable" international treaty in Czech legal system.

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

Czech legislation does not contain any definition of the "public concerned". There is also no provision directly transposing the "standing requirements" of art. 9 of the AC (or the relevant provisions of EC law).

The Code of Administrative Judiciary (CAJ) grants standing to start a review procedure of an act of administrative authority to

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

Wording of this "general standing provision" of administrative justice, as well as it's common interpretation by the Czech courts, leads to the conclusion that access to review procedures is (also in environmental cases) granted only to persons "maintaining impairment of a right." It also in practice mostly pre-determinates possibility of starting the review procedure by participation in the administrative procedure.

Similar general concept applies also for review of the omissions of administrative authorities and for the civil court procedures.

The scope of natural persons having standing to sue the acts and omissions of administrative authorities is therefore in practice limited by (in some fields of law very restrictive) determination of parties to individual administrative proceedings. By reason of that, often only a part of the "public concerned" has access to court. For example, in the land use permits (generally most important decisions with regard to environmental protection), the scope of participants is restricted only to real property owners (leaving aside the NGOs – their position is described below). Other people likely to be affected by the decision (for example flat-

[28] For example, in the decision canceling part of land use plan of the city of Prague, relating to the development of the Ruzyně airport (decision dated 18.7.2006), the Supreme Administrative Court held, i.a., that art. 1.2 of the Czech Constitution requires that the national law is interpreted consistently with the international obligations arising out of the Convention. The same must be educed from the EC law, as EU as a whole is a party to the Aarhus Convention. In another interesting decision, the Court of the City of Prague held that the NGOs have equal rights in administrative procedures as other parties, which means that the court deciding on the lawsuit of an NGO must review also substantive legality of the decisions in question.

renters) are omitted. The situation is even worse in some procedures according to the Noise Protection Act, Nuclear Act or Mining Act, in which only the investor has a position of the party, and therefore also standing for a court action. This situation is currently subject to an infringement procedure against Czech Republic started by European Commission for insufficient transposition of art. 10a of the EIA directive.

On the other hand, in the judgment concerning the development of Ruzyně airport (see footnote 1), the Supreme Administrative Court (SAC) stated that in the land use planning procedure "all persons who are directly affected by the results of the proposed measures, for example noise or emissions, must be considered to be the "public concerned." This approach is, however, not applied generally. In other cases, lawsuits of people affected by land-use plans were dismissed with the argument they are not real property owners.

Also standing of the NGOs depends on their position as parties to the administrative proceedings. A number of environmental act grants them this possibility, if they meet some formal (rather easy to meet) conditions. The position of NGOs before courts is, however, strongly influenced and weakened by the above mentioned doctrine of "maintaining impairment of a right." In accordance with this doctrine, NGOs can only successfully enforce court protection against intervention into their procedural rights in the decision-making procedure. In some cases, mostly in the past, the courts interpreted this doctrine in a way that the NGOs can not meet the standing requirements at all.[29] Far more often, however, this doctrine is used by the courts to refuse individual arguments of the NGOs - and consequently often whole their lawsuits. This approach is further discussed in next part of this study (see also case 1 for more details).

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2. Scope of judicial review of environmental acts and omissions

a) which acts/omissions are subject to the review

In theory, most of environmental acts (and all having the character of "development consent") can be subject to judicial review. In practice, however, the scope "really reviewable" acts is influenced by the limited number of potential plaintiffs at some areas (see previous part). Decisions as "noise exemptions", approvals of nuclear operations or delimitations of protected areas for mining are de facto non- reviewable, according to current case-law. It shall be added, with that regard, that article 9.3 of the AC has not been transposed into Czech legislation in any way so far.[30]

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[29] Namely in first years after the NGOs have been granted the formal right to sue administrative decisions (permits) in environmental matters, the courts generally rejected their claims as "made by evidently unauthorized persons". The courts' arguments were based (explicitly or implicitly) on the assumption that there are no subjective rights that could be infringed by the decision and upon breach of which an NGO could base it's standing to sue. A typical court argumentation of that kind can be summarized as follows: It is not important, that the plaintiff was deprived of his right to participate in the administrative procedure. The critical point is that the decision did not grant him any right nor did it impose any duties to him.

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

As for the administrative omissions, there is a special legal gap consisting in impossibility to initiate any review procedure in situation when the authority fails to start the procedure itself, under occasions when a law asks it to do so.

The outcomes of the EIA procedure represent a special subject in Czech law. EIA is a separate procedure ended by non-binding "statement", which represent a obligatory basis for further decision-making. The statement is in no doubt an "act" in the sense of art. 9.2 of AC (and art. 10a of EIA Directive). Administrative courts have, however, so far dismissed all lawsuits recently lodged against EIA statements. According to the SAC, the requirements of AC and the EIA Directive are met if the statement is subject to judicial review together with consequent development consent decision. This approach can be seen as contravening both the requirements of effective and timely measures according to art. 9.4 of AC (see the case 2 for more details).

Another special case represent "measures of a general nature", including land use plans, which are subject to judicial review since 2005. There was a dispute if an act must be explicitly proclaimed by a law as this "measure", or if it's "legal nature" is decisive. Constitutional Court ruled that the second (material) approach must be applied.[31]

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

b) to what extent do courts review the acts

When a natural person has standing in a specific case, there are mostly no problems with regard to the requirement of challenging both substantive and procedural legality of the contested act.

The situation is fundamentally different concerning the NGO's lawsuits. Based on the "impairment of a rights doctrine", the courts developed case-law according to which the NGOs can only as successfully state infringement of their procedural rights in their lawsuits – as these are the only subjective rights they can have in the environmental procedures. The specific application of this approach is very different in individual cases. The courts have dealt with the "substantive" objections of the NGOs in many cases. On the other hand, there are even very recent decisions in which this approach has been applied in a very strict way. The courts refused to deal with the NGOs arguments concerning e.g. not meeting the

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

conditions for permitting lodging of the trees, alternatives of the investments or compensations for damaging the environment (see the case 1 for more details).
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Under the pressure of all these circumstances NGOs are often basing their suits on the assertion that their right to a fair trial has been infringed, although the real aim of the suit is the protection of environment. Both claimants and courts are therefore focusing on the procedural errors of administrative bodies more than on the essence of the dispute itself. One result of this is that NGOs are being accused of obstructions and formalism (instead of protecting the environment itself).

3. Injunctive relief (efficiency of judicial review)

The Czech legislation and court practice of issuing injunctive relieves in administrative judiciary is mostly not in compliance with the requirements of art. 9.4 of the AC, asking for equitable, not prohibitively expensive, **timely** and **efficient** remedies. CAJ sets very restrictive limits for this institute (literally inadmissible for the NGOs). This approach results in situations, where the courts often abolish unlawful decisions many years after the building or other encroachment have been completed.

There is, however, a few recent court decisions, which could signify changes of this situation. They were initiated by lawsuits filled by NGOs and other persons against "EIA statements". In all these cases, the courts have rejected the lawsuits, due to the "non-binding character" of the "EIA statements". (see previous part). The SAC has approved these decisions. At the same time, however, SAC repeatedly expressed an opinion that courts must grant injunctive relieves, if the members of public concerned ask for them in their lawsuit concerning environmental protection. Otherwise, art. 9.4 of the Aarhus Convention would be breached. (see the case 2 for more details). This interpretation overturns previous opinion that NGOs cannot meet the criteria for injunctive relieves.

In civil court procedures, the court may, at the request of a party, impose injunctive relief "if it is necessary to provisionally amend the conditions of the parties, or if there is a risk that the enforcement of the (subsequent) court decision could be threatened". The court may apply injunctive relief to forbid the handling of things, laws or particular transactions. Anyone requesting a court to impose injunctive relief is obliged to pay a deposit of 50 000 CZK (approx. 1800 Euro) to cover any compensation for damage or other loss which could be caused by the injunctive relief. As the civil judiciary has not been much used in environmental matters, the provisions concerning (civil) injunctive relief is also not applied. 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.

Case 1 - standing of NGOs and scope of review ("admissible NGO arguments")

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

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

NGO filed a complaint against this decision, arguing that trough participation of the NGOs in environmental development consent procedures, their members protect their (substantive) right for favorable environment (granted by the Czech Constitution). It also referred to the AC which grants right to challenge also substantive legality of the acts related to the environment for public concerned (including NGOs).

The SAC rejected the complaint and confirmed the position of the 1st stage court, that environmental NGOs "can only successfully claim for judicial protection against infringements of it's own, i.e. procedural rights. Therefore, according to SAC, it cannot claim infringement of the right for favorable environment (neither it's own nor for the members). With regard to the AC argument, the SAC only stated that the plaintiff did not raised at the 1st stage court, and for that reason it is not admissible in the complaint procedure.

Note: There is a number of very similar SAC decisions, including from recent time. On th other hand, there is also a number of SAC and other court decision which do not follow this approach, despite not stating that explicitly.

Case 2 – Review if EIA statements and injunctive relief

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

The plaintiffs lodged the complaint to SAC, arguing that the EIA statement shall be subject to judicial review, as it is with no doubt "act" in the sense of art. 9.2 of AC also of art. 10a of the "EIA directive",[32] transposing the AC requirements (partially) into the EC law. The also referred to the AC and EIA directive requirement of "timely and effective" a judicial review, which shall apply to the initial phases of the process of environmental decision-making.

SAC refused the complaint, confirming the conclusion that the EIA statement cannot be subject to (separate) judicial review. [33] According to the SAC, the requirements of the EIA

[32] Directive 85/337/EEC, as amended by Directive 97/11 EC and Directive 2003/35/EC.

[33] The SAC dismissed the motion for the submission of the issue, whether the EIA opinion must be "directly" reviewed by the court, to the European Court of Justice (this would concern proceedings on a preliminary question according to Art. 234 of the Treaty Establishing the European Community

Directive and the Aarhus Convention will be met if the EIA opinion is judicially reviewable together with consequent development consent decisions.

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

Note: This interpretation overturns previous opinion that NGOs virtually cannot meet the criteria for obtaining injunctive relieves. There have been a few decisions of administrative courts on NGO's proposals in compliance with this SAC opinion.

Selected issues of application of the Aarhus Convention in ESTONIA

Kärt Vaarmari, Estonian Environmental Law Center

The Aarhus Convention (AC) was ratified by Estonia on 06.06.2001.[34] The transposition of AC provisions into national law can be considered done via reflection of the principles of public participation and access to environmental information in specific laws (Administrative Proceedings Act, Environmental Impact Assessment and Environmental Management System Act, Planning Act, Public Information Act, Earth's Crust Act, Water Act, Waste Act, Ambient Air Protection Act, Integrated Pollution Prevention and Control Act, Radiation Act (etc)).

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

1. Standing conditions for members of public concerned

General standing conditions in administrative cases

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

According to Administrative Court Proceedings Act (ACPA), there are different kind of actions a person can file against administrative act or authority:

1) 'nullification actions' and 'obligation actions' that gives possibility to request nullification of the administrative act or oblige administrative authority to issue and administrative act or carry out an for (term for filing the action: 30 days);

2) 'establishment actions'

For the omissions, only 'establishment action' is possible.

In short, "impairment of rights" is necessary precondition to have a standing in administrative court in general or in case of 'nullification actions' and 'obligation actions', but "sufficient interest" is precondition in case of 'establishment actions'.

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

[34] Official Journal II 29.06.2001, 18, 89

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

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

Standing conditions in environmental cases

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

As for standing criteria: there are no requirements for standing of NGOs in Estonian laws, therefore the courts have interpreted the standing quite widely. Standing has been granted by courts in several cases to non-profit organizations and foundations whose statutory goals include environmental protection. The Supreme Court has stated that "*there is no need for special regulation about standing in national legislation. Standing for disputing the decisions, acts or omissions that have been made under provisions of the Convention is there, in case such decision, act or omission is disputable in court under national law*".[35]

Furthermore, standing has been granted to local activist groups that are not legal persons, but so-called "partnerships". "Partnership" is a term from Law of Obligations Act that is defined as situation where "*two or more persons (partners) undertake to act to achieve a mutual objective and to help to achieve the objective in the manner established by the contract, above all by making contributions*". For such situation, the Supreme Court has, however, determined certain standing criteria - an informal group can be considered as non-governmental environmental organization if it proves that it represents the position of significant part of local population.[36]

Secondly, even in the matter of standing for individuals, the Supreme Court has gone further than ACPA would foresee, stating that in environmental cases the standing may be based not only to impairment of rights, but also the fact that the person is concerned by the administrative act or deed.

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

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[35] Supreme Court's decision in case No 3-3-1-81-03 from 29 January 2004 (Estonian Green Movement vs Ministry of Economic Affairs)

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

2. Scope of judicial review of environmental acts and omissions

a) which acts and omissions are subject to the review

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

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

b) to what extent do courts review the acts

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

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

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

3. Injunctive relief

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

By a ruling on injunctive relief, an administrative court may:[37]

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

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

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

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

Case 1 – standing for informal groups and injunctive relief

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

In its decision from 2006, the Supreme Court did not satisfy their action, stating that since they disputed it several years later and before the group was actually formed, it did not have standing.

However, the Supreme Court analysed thoroughly whether such local group could have standing at all and came to conclusion that in this case, the local group might have had standing as such. The Supreme Court stated in its decision that "*informal group can be considered as member of public that owns standing only in case the position of the group and of the significant part of local habitats that could be considered as public coincide and the public in one or another form accepts such representative and its relevant activities.*"[38] The Supreme Court particularly stressed that giving standing to informal groups must not open way to misuse of standing, including unlimited and unreasoned claims in presumable public interests.

In this particular case, Supreme Court stated that the status of "representative of public" was proved by signatures that were collected from people for protection of this peat bog

[37] § 12[1] of the Administrative Court Proceedings Act
[38] Supreme Court's decision in case No 3-3-1-43-06 from 28 November 2006

(altogether 2483 signatures, of which 536 signatures from people from the municipality in question).

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

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

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

The municipality claimed to have standing as "member of public" according to art 9.2 of AC. The case ended up in Supreme Court, who did not agree with this approach, but stated that municipality did have standing on other basis – as being the "guardian" of rights of local people. However, in addition Supreme Court stated that "*in matters that deal with environmental decisions, it is not possible to attribute same contents to standing as in usual administrative cases – through impairment of subjective public rights. In environmental cases the impairment of subjective rights may, but does not have to occur. Therefore, in environmental matters the standing may be based not only to impairment of rights, but also the fact that the person is* ***concerned*** *by the administrative act or deed.*"[39] Such approach was surprising, taking into account the usual standing conditions in administrative cases (impairment of rights).

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

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

On basis of the interpretation of this Supreme Court's decision, the procedural acts in environmental decision-making are exemption from the general prohibition to dispute procedural acts separately from final administrative act. In this concrete case, the court stated that the municipality had indeed standing and right to dispute a procedural act (decision about

[39] Supreme Court's decision in case No 3-3-1-86-06 from 28 February 2007

initiation of EIA proceedings) – but the complaint was still left unsatisfied because at that time there were no legal norms that would have forbidden MoE to initiate permit proceedings.

Case 3 – judicial review of discretionary decisions

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

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

- if there have been no procedural mistakes in decision-making that could have influenced substantial decision;
- if the decision is in accordance to legal norms and general principles of law;
- if the decision is based on legal grounds;
- if the limits of discretion have not been overstepped;
- if no other mistake in discretion has been made.[40]

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

In this particular case, the Supreme Court found that although the local municipality claimed that the prison hospital will bring positive social and economic effects, it is not possible to find out what these effects really are (how many jobs). Since the environmental damage would be remarkable, it was not clear to Supreme Court why this municipality should get the benefits from damaging the environment, while the prison hospital could be built somewhere else without damaging the environment to such extent.

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

[40] The Supreme Court's decision in case No 3-3-1-54-03 from 14 October 2003

Selected Problems of the Implementation of the Aarhus Convention in HUNGARY

Csaba Kiss, Environmental Management and Law Association

Introduction

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

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

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

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

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

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

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

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

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

Judiciary tends to interpret the circle of such rights and interests narrowly. It is obvious that such rights do not embrace those guaranteed by the Constitution such as right to life or right to a healthy environment. However, those are mostly traditional individual rights stemming from the Civil Code, namely personal rights (e.g. good reputation) and material rights (e.g. property).

As the Administrative Procedure Act 2004 continues:

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

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

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

Case study No. 1.

Airports and noise protection zones

Airport construction is experiencing a boom in Hungary in the recent years with at least four new developments in the pipeline. In one such case a former Soviet military air base near Budapest (currently classified officially as a "non-public site for take-offs and landings") will be enhanced into a commercial airport. Part of the permitting process is the setting of the so-called "noise protection zone" around the airport, preceding the EIA process. In fact, this zone is delineated around the airport and it signifies that within this zone the ambient noise level will exceed the permissible limit values due to the air traffic. Hence, certain restrictions and adaptation measures have to be introduced within the zone. In the case, a neighboring town's municipality (Százhalombatta) has complained at the court that it has no standing whatsoever in the process where the National Air Traffic Authority eventually defines the zone and its details. This exclusion from standing was because the boundaries of the protection zone do not cut across the territory of the town (i.e. there is no overlap between the area of the town and of the protection zone of the airport), based on the initial calculations of the project developer. The final judgment made by the Budapest Capitol Court in June 2008 stated that legal standing should be granted to the municipality based on the notion of affectedness. In its reasoning, the Court held that the specific subordinate legislation prevailing in airport construction cases and limiting the persons to be notified of the decision on the noise protection zone to those only whose territory overlaps with the protection zone (i.e. where ambient noise limit values will be exceeded due to the air traffic) is unreasonably restrictive. It also held that the criteria to be met to have standing are set by an Act of Parliament, the Administrative Procedure Act 2004. This includes a test of affectedness which was clearly met by the plaintiff municipality for at least two reasons. On the one hand, the municipality is obliged by law to implement the protection of environment on its own territory. On the other hand, the affectedness was partly demonstrated by letters of complaints submitted to the

municipality by local environmental NGOs who have petitioned even against the current noise of a few take-offs and landings. The Court also held that the conditions required for standing in the Administrative Procedure Act 2004 ("significant adverse effect") are not identical with the case of exceeding of a limit value. Therefore those who are outside the noise protection zone of the airport, and will presumably not suffer a noise impact exceeding the limit values, can still suffer a significant adverse effect. Ultimately, the Court reaffirmed that a lower level norm on technical details of airport construction can not in any way overwrite a national Act of Parliament setting the boundaries of standing and ordered the National Air Traffic Authority to involve the municipality into the process as a party.

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

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

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

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

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

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

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

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

The initiator called the attention of the Supreme Court that according to information from NGOs their standing is not interpreted in a unified way in lawsuits relating to environmental procedures. In a number of administrative procedures law prescribes that the opinion of the environmental protection inspectorate as co-decision authority must be obtained for a decision. An example for such an obligation is the general construction permitting where in cases involving environmentally relevant issues the environmental protection inspectorate takes part in the procedure. In the aforementioned cases the potentially environmentally harmful characteristics of a future activity necessitate the participation of the environmental authority. The opinion of the latter neither can be appealed nor can be filed a lawsuit against separately, only within an appeal or a lawsuit against the basic decision to which the environmental opinion was issued. Court cases reveal the practice of judiciary that NGOs are not granted legal standing in construction, forestry and other administrative procedures, only in environmental impact assessment and IPPC cases.

The representative of the Attorney General Office was of an opinion that those procedures are considered „environmental" where the environmental protection inspectorate makes the basic decision relating to the environmental significance of an activity or establishment. Whereas those procedures where the environmental authority only contributes to the basic decision of another administrative agency with its environmental opinion do not fall under the category of environmental administrative procedures. Consequently, in such cases environmental NGOs do not have standing.

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

Public participation in environmental procedures is a specific occasion of the protection of fundamental rights. The Environmental Protection Act 1995 ensures legal standing to NGOs undertaking environmental tasks as a way of solution to this latter problem. It is the task of the authorities and courts to construe laws and to from legal practice in a way to comply with the requirements of international law and of the EU. Both the guiding environmental principles of the EU and the international regulation of environmental protection clearly require the participation of public in environmentally related administrative procedures.

In administrative lawsuits the legitimacy, i.e. the connection between the matter of the case and the plaintiff is crucial. Therefore environmental NGOs can only challenge the environmental opinion of the administrative resolution taken to court and can refer to the illegality of a resolution and claim its annulment only in relation to its environmental aspects.

2. Scope of judicial review of environmental acts and omissions

2.a. Nature of acts/omissions subject to judicial review

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

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

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

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

Case study No. 2

Is nature conservation part of environmental protection?

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

conservation (as was the case in the given procedure), the case cannot be considered an environmental one, consequently, there is no legal standing for environmental NGOs. Since the court has decided in a non-trial process, there was no remedy against this decision.

2.b. Breadth of judicial review of acts/omissions

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

Case study No. 3

Court experts v. contracted experts

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

3. Injunctive relief

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

- administrative judicial injunction
- civil judicial injunction

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

According to Art. 109 of the Administrative Procedure Act 2004, all second level administrative resolutions are enforceable upon communication. However, the plaintiff may ask the court to suspend this enforceability by its order any time during the judicial procedure. Once requested, the court must make a decision upon the suspension within eight days. Aspects to be taken into account when deciding over the suspension by the court are a) irreversibility of the change stemming from the administrative resolution and b) comparison of harms caused by the enforcement of the administrative resolution or by the suspension thereof. The court order (either refusing or accepting the claim for suspension) can be appealed to the superior court.

The civil judicial injunction is applicable in a general civil judicial procedure, e.g. in a case where a private individual's conduct is disputed to be harmful for the environment by an environmental NGO at court. According to Art. 156 of the Civil Procedure Act 1952, the court may in any procedure make an order to have a request fulfilled, in case it is needed for preventing a jeopardizing damage, for the conservation of a situation giving rise to the legal dispute or for the legal protection of the claimant deserving special equity, and if the disadvantage caused thereby does not exceed the advantage. The court has to make a decision as soon as possible upon the request. The court may hear the parties before making a decision, or can issue an order dependent upon the payment of a deposit or bond by the claimant. The court order (either refusing or accepting the claim for injunction) can be appealed to the superior court.

Case study No. 4

Injunctive reliefs if Hungary – two examples

Administrative judicial procedures are more open to injunctive relieves than civil judicial procedures. For instance, the Capitol Court of Budapest has suspended the enforceability of a permit issued by the head of the Cultural Heritage Agency. The permit allowed the construction of a hotel on top of a protected cave in the Buda hills, replacing an old Turkish bath-style public steam bath built in the nineteenth century. On the other hand, the same Capitol Court of Budapest refused to suspend the enforceability of a construction permit of a large residential building located in a green area of Budapest. The difference between the two

situations was obviously the presence of a specially protected natural value in the first case and the lack thereof in the latter.

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

Access to environmental justice in POLAND

Magdalena Bar and Jerzy Jendrośka, Environmental Law Center

Introduction

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

I. Legal status of the Convention in Poland

Ratification

Voting the Act of 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 Aarhus Convention.

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 at Depositary of the Convention (United Nations Secretary-General, New York).
Text of the Convention has been published in the Official Journal of 9 May 2003 (OJ No 78, item 706).

Direct effect

Art. 91 of the Constitution reads:

Article 91

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

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

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

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

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

The reasoning behind that verdict seems however to be rather unconvincing. The court interpreted Art.3.1 of the Convention (which requires Parties *to take the necessary legislative.. measures... to implement the provisions of Convention)* in the light of Art. 91.1 of the Constitution (which says that an international agreement shall be applied directly, *unless its application depends on the enactment of a statute*) and determined that under Article 3.1 of the Convention its application „*depends on the enactment of a statute*". Therefore, according to the court - the Convention canot be directly applicable in Poland.

Legal context for application of Article 9.2 and 9.3 in Poland

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

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

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

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

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

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

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

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

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

The concept of "party"

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

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

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

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

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

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

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

The concept of "participants with the party's rights"

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

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

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

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

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

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

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

III. Art. 9.2 of the Aarhus Convention

Standing conditions

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

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

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

Scope of judicial review of environmental acts and omissions

a) Which acts/omissions are subject to the review

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

b) To what extent do courts review the acts

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

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

Injunctive relief

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

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

IV. Art. 9.3 of the Aarhus Convention

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

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

Standing of NGOs in civil proceedings

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

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

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

Art. 323.1 of EPLA says:

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

Scope of judicial review of environmental acts and omissions

a) Which acts/omissions are subject to the review

Administrative proceedings

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

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

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

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

2. A compliant to the administrative court.

Civil proceedings

Art. 323.2 of EPLA says:

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

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

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

b) To what extent do courts review the acts

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

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

Injunctive relief

Administrative proceedings

See above remrks re Art. 9.2.

Civil proceedings

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

Selected problems of the Aarhus Convention application in the SLOVAK REPUBLIC

Eva Kovačechová, VIA IURIS

The Slovak Republic has accessed the Aarhus Convention on 31 October 2005. The Convention is in force since 5 March 2006. It is part of a Slovak legal system and as an international convention on human rights and fundamental freedoms the Convention has priority before laws. There is still not much experience with application of the Aarhus Convention. In principle, there is no comprehensive interpretation of the Convention provided by the Slovak courts.

1. The rights of environmental non-governmental organisations (i.e. public concerned) are in conflict with the requirements of Article 6 paragraph 8 and 9 and Article 9 paragraph 2, 3 and 4 of the Aarhus Convention

In decision-making in environmental matters Slovak environmental non-governmental organisations **do not have** all rights according to the Aarhus Convention, namely:

- right of the public that due account is taken of the outcome of the public participation,
- right of the public to be informed about the whole text of the decision, including justification,
- access to judicial review of the decision, including merital and/or procedural illegality of the decision or of the inactivity of the administrative authority.

Those rights were guaranteed to the environmental organisations, however, recently they were abolished by amendment of the Act on Environmental Impact Assessment (24/2006) and another amendment of the Nature Protection Act (543/2002). These amendments are in force since 1 July 2007, respectively 1 December 2007.

The amendment of the Act on some Measures to Accelerate Preparation of the Construction of Highways and Motorways (129/1996) and of the Act on Environmental Impact Assessment (24/2006) (hereinafter as „Act on EIA“) has transformed a legal position of the local environmental organisations and environmental non-governmental organisations within the decision-making procedures in environmental matters: from „parties of proceedings“ to „participating subjects“. The amendment was adopted despite of negative opinion of the Legislative Council of the Government of the Slovak Republic which observed that the amendment does not fulfil the obligations of Directive 85/337/EEC).

The Nature Protection Act and the EIA Act were amended by the Act 454/2007. This amendment has changed legal position of the environmental organisations within proceedings in environmental matters from „party of proceedings“ into „participating subject“. This change was significantly extensive and has affected not only proceedings according the Nature Protection Act, but also all proceedings in environmental matters concerning projects which are subject to previous environmental impact assessment (i.e. projects according to Annex I of the Convention). This law was returned by the President to the National Council of the Slovak Republic (Parliament) as a law in conflict with the Aarhus Convention. However, the National Council has discussed the law again and later on it was adopted.

The rights of „subject participating“ are narrower comparing to the rights of the „party of proceedings“. Rights of participating subjects are defined in the Administrative Act (in

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

Nonetheless, unlike party of the proceedings, a „subject participating" does not have following rights:

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

2. Defining of the subjects (namely natural persons) which are parties of the proceedings is more restrictive than the circuit of subject pursuant to Article 2 paragraph 5 of the Aarhus convention.

Pursuant to the Aarhus Convention a member of public concerned, which is likely to be affected or having an interest, has right to participate in the permit proceedings. Slovak legal system defines the circuit of the subjects participating in the rpoceedings more restrictively.

According to the Slovak Construction Act (50/1976) a subject can be a party of proceedings concerning siting permission only if his/her rights regarding „property or other rights regarding land or buildings, or neighbouring lands and buildings" can be „directly affected". This means that only if such person can prove that she/he has certain rights concerning some land and/or building in the area in dispute, such person can be a party of proceedings. This wording of legal provisions causes that a natural person is not considered a party of proceedings if she/he claims „only" that his/her rights to healthy environment, health or privacy can be affected.

3. Slovak legal system does not guarantee to the members of public access to injunctive relief pursuant to Article 9 paragraph 4 of the Aarhus Convention.

The Civil Procedure Code in its Article 250c paragraph 1 does not automatically guarantee postponement of the effects of the permit, if such permit is subject to judicial revies. A chairman of a judicial senate can postpone the effects of such permit upon request of a party of proceedings. However, such request does not have to be satisfied and there is no remedy to review judicial refusal of such postponement. It is solely upon discretion of a chairman of a senate whether request will be gratified or not. The only legally stipulated reason is that a chairman can guarantee a postponement of implementation of a permit in dispute if there is a threat of significant detriment.

In practice courts satisfy such requests only exceptionally. The reasons are not known because the court does not have to justify its refusal. The applicant should be only „notified“ of such refusal, however, courts usually do not deal with such request at all.

<u>Case study</u>: participant of sitting permission concerning thermo-power plant within a city (Trebišov, Eastern Slovakia)
participant of sitting permission concerning waste dump within a city (Pezinok, Western Slovakia)

There are two proceedings where natural persons (inhabitants of the city affected) seek their procedural positions within the proceedings. There is no judicial decision issued yet, the cases are pending.

Selected parts of justification of relevant decisions of administrative authorities:

- parties of proceedings are defined in Article 34 of the Construction Act (50/1976), it stipulates the natural and/or legal persons are parties of proceedings if „their proprietary rights or other rights regarding lands or buildings, as well as neighbouring lands and buildings, including flats, are directly affected“. Pursuant to Article 139 paragraph 1 of the Construction Act expression „other rights“ shall be applied to rights analogous to priprietary rights, such as rental relationships, right to use building, etc.
- an applicant is mistaken when he applies expression „other rights“ as right to healthy environment, privacy protection or other rights deriving from the Aarhus Convention,
- the environment affected is protected within siting procedure by binding opinion of a relevant administrative authority,
- The Aarhus Convention was transposed into the Slovak legal system – by Act on EIA (24/2006) and this transposition is reflected in cited Article 34 paragraph 1 of the Construction Act. Based on this provision citizens initiative, citizens association and environmental non-governmental organisation can claim that they are parties of proceedings because their right to healthy environment can be affectedy – as stated in the EIA Act. However, according to the relevant administrative authorities, this cannot be applied on the natural persons.
- It is impossible to directly apply the Aarhus Convention within the administrative proceedings.

Selected problems of the Aarhus Convention application in SLOVENIA

Tina Divjak, Legal Informational Centre for NGOs

Slovenia ratified the Aarhus Convention (AC) in May 2004[41]. Most important national legal acts through which the AC is implemented are the *Act on Public Access to Information*[42], The *Environmental Protection Act*[43] (EPA) and The *Nature Conservation Act*[44] *(NCA).* The case law regarding the AC is very limited or almost non-existent. The Administrative Court issued a decision regarding NGO standing conditions. The decision was procedural and did not go into the merits of the case, but nevertheless managed to end the several years-long administrative saga on NGO standing in administrative procedure. There are also two decisions of Slovenian Constitutional Court, both in favour of the AC and abolishing parts of legal acts on the basis of the breach of the AC, Article 8.

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

Every person with a standing to initiate the procedure or to be a party in the administrative procedure can also appeal the decision. EPA says: Permanent residents of the area affected by the environmental impacts of a project have a legitimate interest in line with the regulations on administrative procedure if the impacts cause a disproportionate environmental burden or danger for human health OR if the person owns or possesses real estate, and thus is granted the status of accessory participant to the procedure. Members of the general public do not have a standing. The same is true for NGOs – except with those with a status under EPA or NCA.

Persons whose rights or legal interests have been affected by a final administrative decision have legal standing in the judicial procedure. It can also be granted in case the administrative decision has not been issued in the prescribed time frame. The standing for the judicial review is therefore limited to the same parties as in the administrative procedure.

Conditions for NGOs to gain legal standing are quite strict, especially under EPA, which in Article 152[45] states that a status of "NGO acting in public interest" may be obtained by an association, foundation or private institute:

- Whose founder is not the state, municipality, other public law entity or political party,
- Has a sufficient number of members (in case of associations, at least 30 members), employees (in case of institutes, at least 1 expert employee with formal degree from the institute's field of activity), or endowment (in case of foundations, at least 1250 EUR),
- Has been established for the purpose of environmental protection,
- Is independent from public authorities and political parties,
- Has been active in the field of environment for at least five years,
- Keeps its own account records audited, and

[41] Ratification act published in Official Journal on June 7th, 2004, Ur.l. RS št. 62/2004.
[42] Ur.l. RS št. 24/2003, 61/2005.
[43] Ur.l. RS št. 39/2006, 70/08.
[44] Ur.l. RS št. 96/2004.
[45] More detailed conditions are set in the Rules on detailed requirements and measures for authorisation of status of non-governmental organization which acts in the field of environmental protection in public interest, Ur.l. RS št. 112/2006.

- Is active on the whole territory of the Republic of Slovenia, or at least in five member states in case of foreign NGO that is registered outside Slovenia.

The status of "NGO acting in public interest" is granted by the minister of environment upon the NGO's application. A register of such NGOs is being kept by the MoE. Under article 155 of EPA these NGOs have the right to participate in procedures in accordance with this law's provisions; thus EPA explicitly states in which procedures NGOs can participate.

Nature Conservation Act in Article 137 prescribes the second possibility for an NGO to gain standing in administrative procedures related to the environment. This possibility concerns administrative and judicial procedures in the field of nature conservation. NCA states that the association (excluding other types of NGO legal entities) may acquire a status of "association acting in public interest" if it fulfils the following conditions:

- Is active in the field of nature conservation,
- Has already received recognition, reward or any other favourable evaluation by internationally recognised experts for their activities in nature conservation,
- Obtains its funds at least in part by membership fees,
- Spends most of its funds for nature conservation,
- Contributes significantly to nature conservation by promoting it or by education.

The MoE grants the aforementioned status. Such associations have the right to act in the interest of nature conservation in all administrative and judiciary proceedings.

These different criteria in EPA and NCA resulted in different interpretations on the use of both regulations[46]. Furthermore, until November 2006, the minister of environment did not adopt rules that were obligatory under EPA for the implementation of these provisions. In consequence, NGOs until recently did not even have the possibility to apply for the aforementioned status.

On the basis of NGOs' complaints and the administrative court's ruling the amendments to EPA were introduced, for example if the NGO is granted the status of the NGO in a public interest, now the Ministry pays 50 percent of the actual costs of the financial audit, then the rights of NGOs, which gained their public benefit status under other laws (other than EPA) are the same as the rights of NGOs under EPA if they have a financial audit.

Even though the conditions are now less strict they are still set to high for Slovenian NGO standard. And what is more, the first application for the status under EPA was filed at MoE about a year ago and since then many have followed. But because the MoE cannot decide upon a jurisdiction (which department is responsible for decisions), still almost 5 years after the AC ratification and passing of EPA there is no NGO with a legal standing under EPA in Slovenia. BirdLife Slovenia complained to the Slovenian Ombudsman who brought the issue to attention of the new minister of environment.

[46] The administrative court ruled (U 528/2006-15, June 29th 2006) in the infamous case DOPPS (BirdLife Slovenia) vs. MoE (wind farm Volovja reber case) that associations can, without a doubt, gain an appropriate status not only on the basis of provisions set in NCA Article 137, but also on the basis of provisions set in EPA Article 153, because the status gained in accordance to one act does not exclude the status gained in accordance to the other act. The key question in this case is if the envisaged intervention, for which an environmental permit has to be issued, could or would have any impact on nature or its conservation. After that the status of the association should be tested – if the association was founded for acting in public interest for the protection of that part of nature for which the intervention is envisaged.

2. Public participation during the preparation of executive regulations

Slovenian Constitutional Court issued two decisions[47] directly or indirectly connected with the AC, both dealing with the lack of implementation of the Article 8. In the first case neighbours of the Stud farm Lipica challenge two articles of the Act on Stud farm Lipica. The Stud farm has a status of a cultural monument. The amendments to the law set specific procedural rules for creating the national local plan (spatial plan) for this influence area. These rules were different from the procedure in the Spatial planning Act and denied the public all participation rights. The Constitutional Court riled that the interest of the cultural monument and financing of it from the European Structural Funds cannot prevail on the interest of public participation. The procedure for public participation has to be clearly set and open for expert, interested and other public in order to reach sustainable decision. Article 5 of respective Act was thus abolished due to the lack of procedural rules.

The Constitutional Court made a similar decision one year later: the nature Conservation Acts does not have clear procedural rules on effective public participation during the preparation of executive regulations and is thus in non-compliance with the AC and The Constitution of RS. The decision set a time limit of three months for the abolition of the breach. Consequently a new Article on public participation was introduced into EPA. Public participation is now possible in preparation of all acts (national and local), which have important impact on the environment (protection of environment, nature conservation, management and use of parts of the environment, including GMOs etc.). The responsible body has to published the proposal on the internet, including information where, when and how the public can comment the draft. Timeframe for public commenting shall be at least 30 days. The responsible body shall consider the comments, include them in the draft if they are acceptable and in any case prepare and publish a feedback report with reasons for inclusion or non-inclusion of specific comments in the draft. The article is now in force for 6 months and results are visible on the MoE's web page[48].

3. Implementation of Articles 9.3 and 9.4 (lack of case law)

EPA contains a provision that allows the members of the public to initiate legal action even in those cases when they are not directly affected by the violation of the environmental law. EPA prescribes:

"(1) In order to exercise a right to a healthy environment the citizens may, as individuals or through societies, associations and organisations, file a request at the court of law that a person for an activity affecting the environment:

- *Shall cease this activity if it causes or would cause an excessive environmental burden or if it presents or would present a direct threat to human life or health,*
- *Or that this person be prohibited from starting to engage in this activity if there is a strong probability that the activity would present such a threat.*

This provision goes further than Article 9.3 stipulates, but so far there is no case law regarding this.

Injunction relief is possible under Administrative Procedure Act Art. 221: Competent body can issue the injunctive relief if, according to all circumstances of the case, it is absolutely

[47] U-I-406/06-21, March 29th 2007 (applicants: physical persons, neighbours of the are in question), U-I386/06, March 13th 2008 (applicant: Association for animal rights Ponikva).

[48] http://www.mop.gov.si/si/zakonodaja_in_dokumenti/okolje/arhiv_zakljucenih_postopkov_sodelovanja_javnosti/.

necessary to regulate the relations or questions. The decision is issued on the basis of data known at that time. In the decision it has to be clearly stated that the decision is temporary. The competent body may link the issuing of an interim injunction to the condition that the opposite party is insured against any damages that may be created as a result of the issuing of an interim injunction.

In the judicial procedure a plaintiff can at anytime before, during or after any judicial procedure demand from the court to issue a temporary injunctive relief to prevent imminent harm or damages until the lawsuit is finished and the court decision implemented. Injunctive relief can be granted if the plaintiff shows that an irreparable harm may otherwise occur or that the implementation of judicial decision will be otherwise prevented or hindered.

Timely procedures: administrative decisions must be issued within one or two months, administrative judicial procedures in average last around 1,5 years.

Not prohibitively expensive: In general, the costs to start an administrative procedure (around 3,55 EUR for the request and 14,18 EUR for the decision), to appeal or to file a lawsuit (63,44 EUR lawsuit in administrative dispute) against it are very low.
The client can also request free legal aid in judicial procedure, if his/her income does not exceed the financial census (minimum monthly salary per family member). If the request for free legal aid is granted, the client has a right to a free lawyer and the exemption from the payment of the costs of procedure (judicial fee, costs for witnesses, expert witnesses, translations, etc.), but not costs of adversary party.

Conclusions

Development of the case law in Slovenia is very slow. This is mostly due to the fact that NGOs and individuals lack knowledge on their legal rights under the AC and respective national legislation. Furthermore, there is a lack of environmental lawyers, who would bring cases to the attention of the Courts.

Although MoE quickly reacted on the Constitutional Court's ruling on AC Article 8, the biggest problems still remains with the NGO legal standing. Until this problem is solved, Slovenia will not be in compliance with the AC.

Case1: Construction of the wind farm on Volovja reber

Electric Company filed a letter of request for issuing an environmental permit for the construction of a wind farm and interconnectors on the area of Volovja reber above Ilirska Bistrica. Almost immediately after the request was made, DOPPS-BirdLife Slovenia wanted to gain the status of a party in the procedure in the process of issuing the environmental permit.

The application was denied on both instances of the administrative procedure because DOPPS had a status of NGO acting in a public interest under the Nature Conservation Act and not under the Environmental Protection Act.

In June 2006 the Administrative Court ruled in favour of DOPPS, and ordered Environmental Agency of Slovenia (administrative body on the first instance) to reconsider granting legal standing to DOPPS. However, granting the requested status was once again denied.

In September 2007 following an appeal to MoE in a 2nd instance administrative procedure eventually granted DOPPS the status of the party in this procedure.

The conflict between the two laws was solved with the amendments to EPA.

Authors and contacts:

AUSTRIA
Thomas Alge
ÖKOBÜRO - Coordination office of
Austrian Environmental Organisations
Volksgartenstrasse 1
A-1010 Vienna
Tel: +43 1 524 9377/15
e-mail: thomas.alge@oekobuero.at
www.oekobuero.at

CZECH REPUBLIC
Pavel Černý
Environmental Law Service
(Ekologický právní servis)
Dvořákova 13
60200 Brno
Tel: +420 545 575 229
e-mail: pavel.cerny@eps.cz
www.eps.cz

ESTONIA
Kärt Vaarmari
Estonian Environmental Law Center
(Sihtasus Keskkonnaõiguse Keskus)
Magasini St 3
Tartu 51005
Tel: +372 742 8443
e-mail: kart@k6k.ee
http://www.elfond.ee/

HUNGARY
Csaba Kiss
Environmental Management and Law
Association
(Környezeti Management és Jog)
Egyesület)
Garay u. 29-31
1076 Budapest
Tel: + 36 1 3228462
e-mail: drkiss@emla.hu
www.emla.hu

POLAND
Magdalena Bar and Jerzy Jendroška
Environmental Law Center
(Centrum Prawa Ekologicznego)
Uniwersytecka 1
50-951 Wroclaw
Tel: +4871 34 366 95
e-mail: cpe@eko.wroc.pl
http://cpe.eko.org.pl

SLOVAK REPUBLIC
Eva Kovačechová
VIA IURIS – Center for Public Advocacy
(Centrum pre práva občana)
Komenského 21
97401 Banska Bistrica
Tel.: +421 48 4154102
Email: viaiuris@viaiuris.sk
www.viaiuris.sk

SLOVENIA
Tina Divjak
Legal Informational Centre for NGOs
Povsetova 37
1000 Ljubljana
Tel.: + 386 1 521 18 88
Email: tina.divjak@pic.si
http://www.pic.si/

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