

HANA MÜLLEROVÁ et al.

**PUBLIC PARTICIPATION  
IN ENVIRONMENTAL  
DECISION-MAKING:  
IMPLEMENTATION  
OF THE AARHUS  
CONVENTION**

*Ústav státu  
a práva*

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## DEDICATION PREFACE

We would like to dedicate this e-book to Milan Damohorský. Three of the contributors to this book are his former students and several others are his colleagues and friends. All of us have made environmental law not only our profession but also our personal interest. One can hardly become an environmental lawyer without being personally touched. Milan Damohorský also found his way to environmental law through nature protection – in late 1970s he was one of the founding members of the Czech Association of Nature Protectionists (ČSOP) that bases its undertakings not on activism, but on expert knowledge of nature conservation and understanding natural ecosystems. Now, as a leading personality of the second generation of the Czech environmental lawyers, he inspires with his boundless enthusiasm new people to develop the branch of his heart. After all – I am one of the first, and many others follow.

Milan Damohorský contributed immensely to the development of the theory and teaching of Czech environmental law. He stood at the beginning of environmental law in the Czech legal education in the early 1990s. In 1989, he joined the former Department of Agricultural and Land Law of the Faculty of Law, Charles University in Prague as a junior lecturer, and since then his professional career has been tied with this faculty. I firstly met him during my graduate studies at the faculty in late 1990s. As a teacher, he has always been highly appreciated by students. He is an excellent speaker and his lectures and seminars on environmental law have always been well attended. I recall his typical seminar from the time of my studies: pacing the lecture room regularly toward the front and rear, he explained the theory by giving many practical examples, telling stories, and showed his great sense of humour by including such highlights as imitating birds' singing and twittering with his voice.

Prof. Damohorský helped to build environmental law as an independent branch of law and a separate subject within the structure of the faculty to its today's full-bodied form of Environmental Law Department. He overtook the leadership of this department 10 years ago. Under his management, the department has consolidated and extended the scale of environmental law

related courses. Nowadays the department provides students with an obligatory two-semester course of environmental law as well as with numerous elective courses such as: International Environmental Law; EU Environmental Law; Agricultural law; Land Law; Mining, Energy and Nuclear Law; Law of the Sea; and Environmental Politics.

Thanks to his contacts with several foreign environmental law education centres and his regular cooperation with them (Institute for Environmental Law Linz, Faculty of Law of University Zürich, Faculty of Law of the University of Vienna, Faculty of Law of the University of Hamburg and others) he helped to take the Czech environmental law to the top level, organizing conferences and workshops, supporting and editing joint publications, inviting guest-professors and encouraging Czech students to study environmental law abroad.

It is not surprising that it was Milan Damohorský who stood behind the idea of establishing the Czech Society for Environmental Law [Česká společnost pro právo životního prostředí, ČSPŽP] in 2000 and he has been the Society's president ever since. Similarly to environmental law societies abroad, the Czech Society for Environmental Law is an expert association of environmental lawyers, supporting the development of the branch on both national and international level. It publishes a biannual "České právo životního prostředí" [Czech environmental law] in Czech and a yearbook "Czech and European Environmental Law" in English. The Society holds conferences and hosted lectures, provides expert analyses of legislation and interpretation as well as comparative studies on environmental law in other countries. Besides that, Milan Damohorský started a good tradition of organizing regular conferences of environmental lawyers from the Czech Republic, Poland and Slovakia that are typically taking place each year in September. In 2013, their tradition celebrates its 14<sup>th</sup> anniversary.

Prof. Damohorský also influenced the shape of the Czech environmental legislation: working for the Czech Ministry of the Environment in 1990s, he co-authored the Nature and Landscape Protection Act of 1992. This act is the only act from the first environmental legislation wave after 1989 that has remained in force until today.

## DEDICATION PREFACE

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I know Milan Damohorský as an incredibly hard-working organiser, author, Head of the Department as well as a supervisor. He is an author of almost 30 books or book chapters, including textbooks, and of more than 70 articles and conference papers. He led numerous grant and other projects and organized several international conferences. As a determined leader, he also demands a lot from his junior colleagues: he assigns tasks at any time and in any way; he is known for his long assigning lists he prepares for regular Environmental Law Department meetings. He calls the most unpopular assignments as “battle tasks”. When I hear on the other side of the phone “I have a special battle task for you”, I guess I may not like it. Nevertheless, it usually shows up as a part of a very well-thought-out plan. As a thorough supervisor, he pushes his students to develop their ideas deeper and further. I learnt it, too, when Milan reviewed the pre-final version of my Ph.D. thesis. I was especially proud of my conclusions to one of the most significant parts of the thesis. When he returned the manuscript to me, the page with those conclusions had a comment written in his broad and angular handwriting: “OK. – And what’s next?” How disappointing, how terse! But it was clear to me: I have to think more, delve deeper into the core of the matter. Yes – a thorough and in-depth approach – that is what Milan Damohorský applies to all his work and by that he enriches Czech environmental law.

Milan, at the occasion of your 50<sup>th</sup> birthday, we thank you for all you have been doing for the environment and for the law, for students and for environmental lawyers, and we wish you all the best to your future work!

Hana Müllerová

Prof. JUDr. Milan DAMOHORSKÝ, DrSc.

Vice-dean for Foreign Affairs and Head of the Environmental Law Department of the Faculty of Law, Charles University in Prague

President of the Czech Society for Environmental Law

## FOREWORD

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), probably the most ambitious and progressive instrument of the international environmental law, celebrates its 15<sup>th</sup> anniversary in 2013. A 15-years period should have been sufficient for member states to change their legislation and put new policies into practice. Is this the case of the Aarhus Convention? Our e-book collects the implementation experience of representatives of six Parties to the Aarhus Convention. It seems that there still exist areas in which the implementation is puzzling and that these problems are common for all the countries participating at the research presented in this book. It is certainly beneficial to gather this experience in order to identify implementation barriers and to look for common paths of - let's say - 'good' interpretation and application of the Convention that leads to its correct implementation.

The book is divided into three parts. Beginning with the Introduction to the Aarhus Convention Implementation, Part I at first briefly outlines the content of the Aarhus Convention and its distinct features; in the introductory chapter, **Hana Müllerová** also identifies the main weak points of the Aarhus Convention implementation in national legal systems.

In Chapter 2, **Balázs Majtényi** uncovers the special character of the Aarhus Convention at the boundary between the International Environmental Law and the International Human Rights Law. He argues that on one hand the Aarhus Convention contains provisions protecting procedural rights of the right to a healthy environment and that the term of an individual right is not unknown in the rights-based language of the Convention, but on the other hand, it also displays the following characteristics of international environmental conventions: it is a non self-executing document, which becomes judicially enforceable only through the implementation of legislation and specifies mainly obligations of a state. He supports an idea that in order to achieve effective protection of the environment, the international legislator should follow the way of national legislators in nominating

individual rights and state obligations in binding international human rights conventions, especially in those that deal with the first generations of human rights, and ensure effective individual complaint mechanism. He shows that the Aarhus Convention could be a signpost on this road.

**Balázs Horváthy** focuses on new tendencies in reflecting modern technologies in international law while using the example of amendments to the Aarhus Convention. He explains how the growing public awareness regarding the trade in GMOs is being answered in legal provisions aiming to improve the transparency and to give the opportunity to the public to get involved in all relevant stages of the decision-making procedures on GMOs. The Almaty Amendment that has still been under ratification will result in essential changes of the Aarhus Convention, which did not contain special rules regarding the GMOs in its original version. The author asks whether the framework of the Aarhus Convention is eligible to give a tool in the mentioned regard and analyses the general and specific provisions of the Convention that are to be applied in this field.

Part II presents a set of “implementation portraits” of five European countries – Parties to the Aarhus Convention. In Chapter 4, **Hana Müllerová** explains that the Czech legislation in combination with the way of its persisting interpretation has been criticized over the years for its dubious compliance with the Aarhus Convention in several aspects of the matter, especially with regard to the second and third pillar. The asserted non-compliance has been recently confirmed by the Aarhus Convention Compliance Committee. The chapter uncovers the following particular points of the non-compliance that have arisen from a common background: from the conditions of participation in administrative proceedings; from the interpretation that environmental NGOs may not claim substantive environmental rights (especially the right to a favourable environment); from the legal requirement to ground one’s claim in a review procedure exclusively with alleged violations of his or her own individual rights; and from the absence of the public interest claim in the Czech law. In Chapter 5, **Petra Humlíčková** then presents the details of the first and very complex case, which was brought against the Czech Republic to the Aarhus

Convention Compliance Committee, and which resulted in the Findings of this Committee in 2012, confirming the non-compliance in several Articles of the Convention by the Czech Republic.

The current Polish implementation status of the Aarhus Convention is introduced by **Wojciech Radecki** in Chapter 6. He puts a special emphasis on the development of the public participation legislation, particularly as regards the civil associations (NGOs). He describes the two so called “apogees” of that participation in the Polish law and practice and its nowadays features.

In her analysis of the Slovak implementation of the Aarhus Convention, **Barbora Králičková** focuses in Chapter 7 on both legislation and case law. She demonstrates how the most significant cases concerning the Aarhus Convention implementation, the “VLK” case and the “Mochovce Nuclear Power Plant” case, contributed to positive changes in legislation. She also points out weak points of the interpretation and practical application of the Convention’s requirements that still occur in the Slovak Republic despite the fact that the relevant laws have been put in compliance with the Convention.

In Chapter 8, **Miroslav Stehlík** presents a deep analysis of the German implementation of Article 9 (2) of the Aarhus Convention. He summarizes the development of the German concept of legal standing to take legal actions in administrative procedure, which resulted in establishing an environmental association lawsuit in the Federal Nature Protection Act in 2002. The Chapter weights positive and negative aspects of this legal instrument, which may be seen as a modified version of the public interest litigation in environmental law. Moreover, the author describes the recent findings of the ECJ, according to which the German legislation regulating the environmental association lawsuit was not in conformity with Art. 9 (2) of the Aarhus Convention and with the relevant EU law. The author completes the explication with describing the reaction of the German legislator to the mentioned findings.

**Ivana Jelić** contributes with the Montenegrin experience in implementing the Aarhus Convention. Montenegro, as a candidate country to the EU, displays a contradictory image: while the respective legislation is almost

fully harmonized with the Convention, the practice shows that there is a lot of space for further developments. Chapter 9 thus covers a presentation of a legislative and institutional framework of the Aarhus Convention implementation in Montenegro as well as an overview of respective practical implications.

Part III of our book deals with specific problems connected with the Aarhus Convention implementation. It starts with the topic of nature protection in Chapter 10. **Adam Habuda** describes in this chapter the stages of public participation in relation to the Natura 2000 areas. He explains that in the process of designation (creation) of new Natura 2000 areas, the public participation is insufficiently guaranteed. On the other hand, the public participation is present in the application of two key instruments for the management and protection of existing Natura 2000 areas: habitat assessment and protection plans. The Chapter also shows a brief assessment of legal model of Natura 2000 adopted in Poland.

Following two chapters display common problems of public participation guarantees in the area of planning a development and use of land. Pressures and counter-pressures of both legislative and practical ensuring of public participation are presented in a vivid picture on an example of the Czech Republic, where the procedures in question are treated in the Building Act. Special focus is put on the role of environmental NGOs in the matter. In Chapter 11, **Martina Franková** summarizes the most important changes in the Czech Spatial Planning Legislation brought into the Czech Building Act by an amendment in 2012. She uncovers how these changes influenced the implementation of obligations arising from Articles 6 and 7 of the Aarhus Convention in the area of spatial planning and subsequent procedures (creation of spatial planning policies and planning permission proceedings). Chapter 12 by **Jana Dudová** and **Helena Doležalová** then aims to reflect changes brought by the mentioned amendment to the Czech Building Act in the sphere of participation of the public concerned in building permission proceedings and related procedures, with a special regard to the interlinkages to legislation regulating renewable sources of energy.

The third Part of the Book is concluded with an analysis of how the institution of a Public Defender of Rights (Ombudsman) may be helpful to an effective implementation of the Aarhus Convention. In Chapter 13, **Jitka Bělohradová** shows that despite the Ombudsman's powers were not established in any direct connection with the requirements of the Aarhus Convention, they may be well used by the public to support a more effective implementation of the Convention. While analysing the example of the Czech Ombudsman, the author identifies possible ways in which the Public Defender of Rights may help to enforce the procedural environmental rights enshrined in the Convention.

It seems that implementation of a convention with such modern and progressive elements is more a long-distance run that goes far beyond the borders of environmental law. It certainly influences the environment, democracy and civil society, as well as human rights. Nevertheless, we have to identify our "Aarhus" objectives ahead. These objectives aim for strengthening the role of the public in any planning and decision-making that may affect the environment, because this is the core of the so called environmental democracy. We have to go this way not only to get the compliance with the Aarhus Convention, which is, as any other convention, "only" an instrument for improvement, but we have to do this also for the sake of our environment. This e-book is a small contribution to the academic input in the subject matter. Thanks to financial support of the International Visegrad Fund within the project of Small Grant No. 11240153, themes of the book were also discussed in an International workshop with the title "Public Participation in Environmental Decision-Making: Implementation of the Aarhus Convention" that took place at the Institute of State and Law – Academy of Sciences of the Czech Republic on 16 and 17 May 2013. The book was created under subsidies for long term conceptual development of the Institute of State and Law of the Academy of Sciences of the Czech Republic, v.v.i. (RVO: 68378122). The law and case-law covered in this book is stated as at 15 July 2013.



## **PART I. AARHUS CONVENTION: 1998 – 2013 AND BEYOND**

### **1. Introduction to the Aarhus Convention Implementation**

#### **1. 1 Aarhus Convention in a Nutshell**

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter referred to as the “Aarhus Convention” or “Convention”)<sup>1</sup> was adopted on 25 June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference of the United Nations Economic Commission for Europe (UNECE) and entered into force in October 2001.<sup>2</sup> As of 2 April 2013, there were 46 Parties (i.e. member states) to the Convention, majority of which were European states together with several post-soviet republics. Russia is not a signatory of the Convention. The same applies for states of all other continents except for a few British and French overseas departments, although the Convention is open to accession by any non-ECE countries, subject to approval of the Meeting of the Parties.<sup>3</sup>

The Aarhus Convention aims to enhance the environmental protection by granting the public specific procedural environmental rights: access to information, public participation and access to justice. These three elements are called three ‘pillars’ of the Convention. Simultaneously, it imposes corresponding obligations on Parties and public authorities to ensure that the rights are really granted to the public. It is important to notice that public participation cannot be effective without access to information, as provided under the first pillar, nor without the possibility of enforcement enabled through access to justice under the third pillar. In this way all the

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<sup>1</sup> See the full text of the Aarhus Convention in its authentic version and official and other translations at:

<<http://www.unece.org/env/pp/treatytext.html>> (cited 12 July 2013).

<sup>2</sup> See official site of the Convention at:

<<http://www.unece.org/env/pp/introduction.html>> (cited 12 July 2013).

<sup>3</sup> <<http://www.unece.org/env/pp/ratification.html>> (cited 12 July 2013).

three pillars are closely interconnected and only together they can fulfil the complete set of targets of the Convention that we may describe in such points as increasing engagement of civil society in the environmental policymaking, increasing its democratic nature and legitimacy, increasing the transparency and democratic legitimacy of government policies on environmental protection, and developing a sense of responsibility among citizens by giving them the means to take legal action to protect their environment.<sup>4</sup>

### 1.1.2 Contents of the Three Pillars

#### 1.1.2.1 Access to Information

The ‘information pillar’ comprises firstly the obligation of public authorities to respond to public requests for information (so called ‘passive access to information’) and secondly the duty to provide environmental information actively, i.e. to collect, update and disseminate such information from the own initiative of a respective authority.

The public’s right to obtain information on request from public authorities covered by Art. 4 of the Convention requires the Parties to ensure that *any* person, without duty to prove or state an interest or a reason for requesting, has the right to request *any* environmental information and get it as soon as possible, at the latest within one month, unless the requested information can be shown to fall within a finite list of exempt categories. For these cases, the Convention sets out very clear procedure rules for refusals of providing information.<sup>5</sup>

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<sup>4</sup> See e.g. PALLEMAERTS, M. The Aarhus Convention: Engaging the disenfranchised through the institutionalisation of procedural rights? In CHAMBERS, B. W. and GREEN, J. F. (Eds.). *The Politics of Participation in Sustainable Development Governance*. Tokyo: United Nations University Press, 2006, p. 182-183.

<sup>5</sup> Public authorities may refuse to provide information where disclosure would adversely affect national defence, international relations, public security, the course of justice, commercial confidentiality, intellectual property rights, personal privacy, the confidentiality of the proceedings of public authorities, or where the information requested has been supplied voluntarily or consists of internal communications or

The definition of 'environmental information' as set in Art. 2 (3) encompasses a non-exhaustive list of elements of the environment (whose definition is not established by the Convention), such as air, water, soil etc.; factors, activities or measures affecting those elements; and human health and safety, conditions of life, cultural sites and built structures, to the extent that these are or may be affected by the aforementioned elements, factors, activities or measures. The Implementation Guide to the Aarhus Convention concludes that the intention of the drafters was to craft a definition that would be as broad in its scope as possible, so as to strengthen the procedural rights of members of public within its application.<sup>6</sup> Moreover, the Convention enables the Parties to establish even a broader scope of 'environmental information' in their national legislation.<sup>7</sup>

The definition of a 'public authority', given in Art. 2 (2) is also very rich in content and covers government institutions of all levels, all persons performing

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material in the course of completion. However, there are several restrictions on these exemptions aiming to prevent their abuse by over-secretive public authorities. Moreover, the Convention stipulates that the exemptions must be interpreted in a restrictive way. If the request was made in writing, the refusal is to be issued in writing as well, and always has to be justified by providing rationale and contain information about the review procedure (i.e. the questioner has to have a possibility to appeal and to be informed about it). For detailed interpretation of individual refusal reasons, see the collected case law to Art. 4 (3) and 4 (4) in ANDRUSEVYCH, A., ALGE, T. and KONRAD, C. *Case Law of the Aarhus Convention Compliance Committee (2004-2011)*, 2nd Ed. Lviv: Resource and Analysis Center "Society and Environment" 2011, [online]. Available at:

<[http://www.unece.org/fileadmin/DAM/env/pp/Media/Publications/ACCC\\_Jurisprudence\\_Ecoforum\\_2011.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Media/Publications/ACCC_Jurisprudence_Ecoforum_2011.pdf)>. p. 24-27.

<sup>6</sup> EBBESSON, J., GAUGITSCH, H., JENDROŠKA, J., STEC, P. and MARSHALL, F. *The Aarhus Convention: An Implementation Guide (Second Edition)*. United Nations Economic Commission for Europe, 2013, p. 40.

<sup>7</sup> This rule applies as a general rule to all the requirements of the Convention: The Convention establishes minimum standards to be achieved but does not prevent any Party from adopting measures which go further in the direction of providing access to information, public participation or access to justice (so called 'floor', not a 'ceiling' principle).

public administrative functions, and persons having public responsibilities or functions, or providing public services in relation to the environment. As regards the first group – the government institutions, it is irrelevant whether their responsibilities have links to the environment. All governmental authorities of any function are covered under ‘public authorities’.

Public authorities may impose a charge for supplying information provided that the charge does not exceed a ‘reasonable’ amount.<sup>8</sup>

The active information duties that the Convention imposes on the Parties in Art. 5 include general obligations of public authorities to be in possession of up to date environmental information which is relevant to their functions, and to make information ‘effectively accessible’ to the public by providing information on the type and scope of information held and the process by which it can be obtained. It means that Art. 5 primarily sets out the duties of the Government to collect and disseminate on its own initiative the pieces of information which are relevant to their functions. Art. 5 does not relate to all environmental information under Art. 4 but only to specific categories of information. This includes, inter alia, information relevant to public authorities’ functions, information about proposed and existing activities that may significantly affect the environment, information in times of emergencies, information on the state of the environment, product information, pollutant release and transfer information, information about laws, programs, policies, agreements and other documents relating to the environment and information about how to get information. For example, a water authority would be expected to possess and update information concerning water resources and not necessarily air pollution emissions data.<sup>9</sup>

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<sup>8</sup> Both the Aarhus Convention Compliance Committee and the Court of Justice of the European Communities have already ruled on the interpretation of the reasonable charge. See EBBESSON, J., GAUGITSCH, H., JENDROŠKA, J., STEC, P. and MARSHALL, F. *The Aarhus Convention: An Implementation Guide* (Second Edition). United Nations Economic Commission for Europe, 2013, p. 89-90.

<sup>9</sup> *Ibid*, p. 92.

### 1.1.2.2 Public Participation

In Art. 6 – 8 the Convention sets out minimum requirements for public participation in various categories of environmental decision-making. The term ‘public participation’ is not expressly defined in the Convention. The preamble and the relevant Articles however indicate what values the public participation shall fulfil and which forms it can have. The general goal of this pillar is to ensure providing the public with a mechanism for asserting the right to live in an environment adequate to health and well-being, together with fulfilling everybody’s duty to protect the environment.<sup>10</sup> The public participation shall also contribute to transparency in decision-making and strengthen public support of decisions about the environment. In any type of environmental decision-making, the public participation builds on a cooperative action of public authorities and members of public involved, which should ideally result in some kind of a partnership in policymaking.<sup>11</sup> The essential steps in any public participation must include:

- effective notification of the planned procedure to the public with an adequate information on the possibility to participate;
- adequate information to the public on the content of the problem to be decided; this includes also a right for those who are expected to be most affected by the decision (so called the public concerned<sup>12</sup>) to inspect information which is relevant to the decision-making free of charge;

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<sup>10</sup> See the preamble, para. 7.

<sup>11</sup> EBBESSON, J., GAUGITSCH, H., JENDROŠKA, J., STEC, P. and MARSHALL, F. *The Aarhus Convention: An Implementation Guide (Second Edition)*. United Nations Economic Commission for Europe, 2013, p. 115-116.

<sup>12</sup> The public concerned explicitly includes NGOs promoting environmental protection and meeting requirements set in national law; see Art. 2 (5) of the Convention. That leads to a special position of the environmental NGOs within the system of the Aarhus-guaranteed environmental rights, which is commented as unprecedented in international environmental law. See PALLEMAERTS, M. *The Aarhus Convention: Engaging the disenfranchised through the institutionalisation of procedural rights?* In CHAMBERS, B. W. and GREEN, J. F. (Eds.). *The Politics of Participation in Sustainable Development Governance*. Tokyo: United Nations University Press, 2006, p. 189.

- proper procedures for the public participation, which means an adequate timing (preferentially at a stage early enough to be able to really influence the final decision) and defined forms of public commenting (e.g. public hearings or a possibility of sending written comments);
- appropriate consideration of the outcome of the public participation; this step describes how the public authorities should treat the comments of the members of the public; this is crucial, because if the public input is not capable of having a tangible influence on the actual content of the decision, then the public participation is not effective and is rather formal;
- prompt public notification of the decision taken, with the text of the decision and the reasons and considerations on which it is based being made publicly accessible.

The public participation provisions of the Convention are divided into three parts, according to the kinds of governmental processes covered. Article 6 faces public participation in decisions on licensing or permitting specific activities with a potential significant effect on the environment, counting all activities or facilities for which national law requires an environmental impact assessment procedure (EIA) including public participation. Article 7 covers public participation in the development of plans, programs and policies relating to the environment, which include territorial plans, environmental action plans, and environmental policies at all levels. Article 8 covers public participation in the legislative (or more generally normative) process; it means the possibility to comment the drafts of laws and regulations prepared by public authorities that may have a significant effect on the environment.

### *1.1.2.3 Access to Justice*

The third pillar of the Convention regulated in Art. 9 requires the Parties to ensure the public the 'access to justice', meaning a legal possibility to enter a review procedure before a court that shall be 'fair, equitable, timely and not prohibitively expensive' in three contexts:

- in cases of information requests under Art. 4, that the questioner finds unlawfully refused or not appropriately handled;
- in cases of specific decisions under Art. 6 which are subject to public participation requirements, being opposed as illegal, either substantively or procedurally, by a person of the public having a sufficient interest or suffering a persistent impairment of his or her right;<sup>13</sup>
- in cases of challenging breaches of environmental law in general.

The first two points refer directly to the preceding Convention pillars and enable their enforcement. On the other hand, the third point under Art. 9 (3) – the requirement to set up a review procedure to challenge acts and omissions by public authorities and private persons who breach laws relating to the environment in general, creates a new level of the access to justice, going far beyond the other Convention requirements. This provision is really very wide and enables to take legal action not only against violations of law or failures to take action required by law of public authorities, but also against private persons outside the government (for example, enterprises and others who are subject to it), for members of the public 'where they meet the criteria, if any, laid down in national law'.<sup>14</sup> At the same time, the wording of Art. 9 (3) is unfortunately rather indefinite and not clear enough and since the entering of the Convention in force, its correct interpretation has had to be searched and developed. The problem is that the right mentioned is unprecedented in law in general: national laws usually do not equip the members of the public with the right to open proceedings (e.g. criminal proceedings) directly against private violators of environmental norms; the public may, as a rule, only notify the competent authorities (e.g. police).<sup>15</sup>

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<sup>13</sup> That means that the scope of persons entitled to pursue such an appeal is slightly narrower than the 'public concerned'.

<sup>14</sup> It means that the issue of legal standing is primarily to be determined in national law.

<sup>15</sup> That is the case also in the Czech Republic. The legal instrument enabling anybody to take direct legal steps against private violators of public law obligations

That is also the main reason why Art. 9 (3) is considered as an especially tough proposition to be put in national practice, although the (not clear enough) provision is interpreted as allowing Parties, thanks to its wide scope, *more flexibility* in its implementation.<sup>16</sup>

### 1.1.3 Progressive Elements

The Aarhus Convention is assessed as one of the most significant international environmental agreements. Among other international instruments aimed at the environmental protection it stands out as very progressive. This Convention can be even counted among some let's say new generation of international environmental agreements, because of a number of reasons:

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including the environment, so called *actio popularis* or public interest appeal, is very rare within European countries, known e.g. to Portugal law. However; the Aarhus Convention is constantly interpreted as not requiring the *actio popularis*. See e.g. BONINE, J. E. The public's right to enforce environmental law. In STEC, P. *Handbook on Access to Justice under the Aarhus Convention*. Szentendre, Hungary: The Regional Environmental Center for Central and Eastern Europe, 2003, p. 32. The Compliance Committee of the Aarhus Convention commented on the "*actio popularis*" issue several times, too. For instance in the decision Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, par 35 it stated that "*On the one hand, the Parties are not obliged to establish system of popular action ("actio popularis") in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause "where they meet the criteria, if any, laid down in its national law" as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act or omissions that contravene national law relating to the environment.*" Cited in ANDRUSEVYCH, A., ALGE, T. and KONRAD, C. *Case Law of the Aarhus Convention Compliance Committee (2004-2011)*, 2nd Ed. Lviv: Resource and Analysis Center "Society and Environment" 2011, p. 74. [online]. Available at: <[http://www.unece.org/fileadmin/DAM/env/pp/Media/Publications/ACCC Jurisprudence Ecoforum 2011.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Media/Publications/ACCC_Jurisprudence_Ecoforum_2011.pdf)> (cited 9 July 2013).

<sup>16</sup> EBBESSON, J., GAUGITSCH, H., JENDROŠKA, J., STEC, P. and MARSHALL, F. *The Aarhus Convention: An Implementation Guide (Second Edition)*. United Nations Economic Commission for Europe, 2013, p. 206.



Primarily, the Aarhus Convention interconnects the environmental protection with human rights. This represents a reflection of a new approach to the legal protection of the environment. This approach called the 'rights-based' approach is to be seen also in the area of substantive rights.<sup>17</sup> An even stronger reason why the Aarhus Convention belongs to progressive instruments concerns the role of the public in it. The Convention covers not only the obligations of the Parties, as it is usual in traditional environmental agreements, but it also directly impacts the public in two ways:

- firstly, the Convention requires the Parties to guarantee to persons from 'the public' procedural rights of 'access' as were described above; and
- secondly, and that is highly important and not ordinary at all in traditional instruments, the Convention opens and the implementing Decision I/7 of the Meeting of the Parties gives a direct opportunity to members of 'the public' to join the control mechanisms of the Convention by submitting communications to the Aarhus Convention Compliance Committee (ACCC), the body established in the Convention in order to ensure its enforcement.<sup>18</sup>

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<sup>17</sup> There are strong efforts to consolidate the 'human right to environment' as a substantive basic right within the collection of internationally guaranteed human rights; however, these efforts to establish such a substantive human right have not yet been successful in international law. See e.g. SHELTON, D. *Human rights and the environment: substantive rights*. In FITZMAURICE, M., ONG, D. M. and MERKOURIS, P. (Eds.). *Research Handbook on International Environmental Law*. Cheltenham: Edward Elgar Publishing Ltd, 2010; KRAVCHENKO, P. and BONINE, J. E. *Human Rights and the Environment: Cases, Law, and Policy*. Carolina Academic Press, 2008; ANTON, D. K. and SHELTON, D. L. *Environmental Protection and Human Rights*. New York: Cambridge University Press, 2011; BOYD, D. R. *The Environmental Rights Revolution: and Global Study of Constitutions, Human Rights, and the Environment*. University of British Columbia Press, 2012; BOYLE, A. *Human Rights and the Environment: Where Next?* *European Journal of International Law*. 2012, Issue 3.

<sup>18</sup> To see the compliance mechanism of the Convention in detail, consult the document *Guidance Document on the Aarhus Convention Compliance Mechanism* [online]. United Nations Economic Commission for Europe. Available at:

This way, the public is given really a strong position, not existing in any elder instruments.

If we look at this second point, the possibility of members of the public to enter the control mechanism, in a greater detail, we can find out that this way of initiating the compliance procedure is much more common than the classical one (the communication of a Party regarding non-compliance of another Party, or a communication of a Party on its own non-compliance): there have been several dozens of communications given by members of the public (across the whole Europe) compared to only one communication of a Party.<sup>19</sup> This comparison may be interpreted as a sign of an intense interest of the public in the member states of the Convention in strengthening the environmental rights and, thus, in improving the environmental protection in Europe.<sup>20</sup>

Therefore, the Aarhus Convention posits the public in the role of a “partner” to public authorities, which displays a very strong element of environmental democracy. The ‘engaged, critically aware public’ is seen as both an essential player and a partner in the formulation and implementation of environmental public policies.<sup>21</sup>

<[http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC\\_GuidanceDocument.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf)> (cited 10 July 2013).

<sup>19</sup> It was a communication of Romania about compliance by Ukraine. See LANCEIRO, R. The Review of Compliance with the Aarhus Convention of the European Union. In CHITI, E. and MATTARELLA, B. G. (Eds.). *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*. Heidelberg: Springer, 2011, p. 362. See also <<http://www.unece.org/env/pp/submissionp.html>> (cited 14 July 2013).

<sup>20</sup> LANCEIRO, R. The Review of Compliance with the Aarhus Convention of the European Union. In CHITI, E. and MATTARELLA, B. G. (Eds.). *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*. Heidelberg: Springer, 2011, p. 363.

<sup>21</sup> PALLEMAERTS, M. The Aarhus Convention: Engaging the disenfranchised through the institutionalisation of procedural rights? In CHAMBERS, B. W. and GREEN, J. F. (Eds.). *The Politics of Participation in Sustainable Development Governance*. Tokyo: United Nations University Press, 2006, p. 183.

#### 1.1.4 The EU Context

Many of the Parties to the Aarhus Convention are at the same time the member states of the European Union and the EU as a whole is a signatory of the Aarhus Convention. The former European Communities adopted the Aarhus Convention on 17 February 2005 and have been a Party to the Convention since May 2005. These facts make the Aarhus Convention as if 'double-source-obligatory' for this group of states: it obliges them in the international law sphere and as an EU law commitment, too. There are plural-aspect legal interlinkages between the Aarhus Convention and the EU law.<sup>22</sup>

The European Communities (resp. later European Union) adopted the following set of legislative acts in order to implement the Aarhus Convention:

- Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC;
- Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC;
- Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p.13)

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<sup>22</sup> For a detailed analysis, see JENDROŠKA, J. Public Participation in Environmental Decision-Making. Interactions between the Convention and the EU Law and Other Key Legal Issues in its Implementation in the Light of the Opinions of the Aarhus Convention Compliance Committee. In PALLEMAERTS, M. (Ed.) *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law*. Groningen, Amsterdam: Europa Law Publishing, 2011, p. 91-147. ISBN 978-90-8952-048-7.

entered into force on 28 September 2006 and became of application on 17 July 2007; this regulation covers not only the institutions, but also bodies, offices or agencies established by, or on the basis of the EC Treaty, which shall adapt their internal procedures and practice to the provisions of the Regulation;

- Amendments of individual provisions in several environmental directives, e.g. Directive 2001/42/EC of 27 June 2001 on the assessment of certain plans and programs on the environment and Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy.<sup>23</sup>

The above mentioned pieces of legislation implement the first and second pillar of the Convention. It is worth mentioning that as early as in 2003 the Commission of the EU presented a Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, which was intended so as to implement the third pillar of the Convention (Art. 9).<sup>24</sup> However, this proposal has not yet been adopted and seems to be postponed indefinitely.<sup>25</sup> There are also voices

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<sup>23</sup> More on the Aarhus Convention implementation by the European Union see the official site of the European Commission on <http://ec.europa.eu/environment/aarhus/index.htm> (cited 19 July 2013).

<sup>24</sup> COM(2003) 624, see [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=fr&DosId=186297](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=fr&DosId=186297) (cited 19 July 2013).

<sup>25</sup> See esp. *Proposal for a Directive on access to justice in environmental matters*, 2003. Available at: [http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003\\_0624en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0624en01.pdf). *Opinion of the European Parliament on the Proposal of the Directive on access to justice in environmental matters*, 2004. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P5-TA-2004-0239+0+DOC+PDF+VO//EN>. *Opinion of the European Economic and Social Committee on the 'Proposal for and Directive of the European Parliament and of the Council on access to justice in environmental matters'*, 2004. However; there have been some signs recently bringing to mind this "EU environmental legislation debt" again; see for instance POTOČNIK, J. *Speech on the EU directive proposal on access*

declaring that the directive in the proposed wording could not achieve the objective to implement effectively the third pillar of the Convention.<sup>26</sup> The main criticism made on the contents of the draft directive was that its scope exceeded that of the Aarhus Convention (which was admitted by the Commission itself) and, with specific regard to the procedural arrangements, that it did not take sufficient account of the principle of subsidiarity. The draft directive was said to not restrict itself to a framework, not leaving room for the Member States to establish the details. As an example, the draft directive regulated the aspects of legal standing relating directly to the problematic Art. 9 (3) of the Convention; despite the fact that the directive did not require an *actio popularis*, it planned to grant 'qualified entities' a general legal standing, which would not subject to the requirement of sufficient interest or an infringement of the law. This extension of standing, not required by the Aarhus Convention, was said to go beyond the obligations laid down in the Aarhus Convention.<sup>27</sup>

## 1.2 Main Implementation Shortages

Negotiating the Aarhus Convention has been assessed from the very beginning as highly ambitious. The Convention has really 'top-level'

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*to justice in environmental matters on the Seminar on Access to Justice and Organisation of Jurisdictions in Environment Litigation by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACAEurope) / Brussels, 2012 [online]. Available at:*

*<[http://www.mzp.cz/C1257458002F0DC7/cz/dokumenty\\_aarhuska\\_umluva/\\$FILE/OMOMS-Projev\\_Potocznik-20122911.pdf](http://www.mzp.cz/C1257458002F0DC7/cz/dokumenty_aarhuska_umluva/$FILE/OMOMS-Projev_Potocznik-20122911.pdf)> (cit. 19 July 2013).*

<sup>26</sup> E.g. OBRADOVIC, D. EU Rules on Public Participation in Environmental Decision-Making Operating at the European and National Levels. In PALLEMAERTS, M. (Ed.) *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law*. Groningen, Amsterdam: Europa Law Publishing, 2011, p. 184-185. ISBN 978-90-8952-048-7.

<sup>27</sup> LANCEIRO, R. The Review of Compliance with the Aarhus Convention of the European Union. In CHITI, E. and MATTARELLA, B. G. (Eds.). *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*. Heidelberg: Springer, 2011, p. 367.

objectives, but on the other hand, in many provisions it is formulated without enough clarity, definiteness and precision. This character of the text of the Convention has led to numerous interpretative problems that make the correct national implementation of the Convention more difficult. Now, almost exactly 15 years after the Convention signature in Aarhus, we can still say that there remain many questions of the Convention interpretation and application that have not yet been fully solved at the international, European and national level.

The other source of the Aarhus implementation difficulties in national law systems seems to be rooted in deep differences in procedural legal regimes of individual member states. Especially the approaches of the Parties to implementing procedural rules of access to justice differ a lot. Positions of the environmental NGOs are very diverse within the national law systems, varying from almost an *actio popularis* to very restrictive forms of it, and also deep differences in standing for citizens and NGOs.<sup>28</sup> An example of a restrictive model is the Czech Republic, whose conditions for legal standing of citizens and NGOs in environmental litigation are described in Chapter 4.

The great variety of different procedural legal regimes of individual member states is - let's say - an 'intrinsic' problem for a convention that focuses primarily on procedural rights. The diversity of procedural regulations arises from different legal history of the states. The Aarhus Convention does not aspire to unify these procedural regimes, but it aims to establish certain minimum standards.

The diversity of national procedural laws has one more consequence: it places high demands on the Compliance Committee of the Aarhus

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<sup>28</sup> POTOČNIK, J. *Speech on the EU directive proposal on access to justice in environmental matters on the Seminar on Access to Justice and Organisation of Jurisdictions in Environment Litigation by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACAEurope) / Brussels, 2012* [online]. Available at: <[http://www.mzp.cz/C1257458002F0DC7/cz/dokumenty\\_aarhuska\\_umluva/\\$FILE/OMOMS-Projev\\_Potocznik-20122911.pdf](http://www.mzp.cz/C1257458002F0DC7/cz/dokumenty_aarhuska_umluva/$FILE/OMOMS-Projev_Potocznik-20122911.pdf)> (cited 6 July 2013), p. 3-4.

Convention. The role of the Committee is very exigent because this body has to interpret individual provisions of the Convention in a manner that enables to establish a homogenous standard for all the differing national law systems.

Despite all these difficulties, the Aarhus Convention, with its stress on procedural elements of the human right to environment, makes a contribution of a capital importance towards the new rights-based approach to environmental protection. As B. Majtényi notices, *“without procedural rights, any human rights protection system could become inoperable, and the rights contained therein, too, could become victims of state despotism.”*<sup>29</sup>

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<sup>29</sup> MAJTÉNYI, B. A right without a subject? The right to a healthy environment in the Hungarian constitution and the practice of the Hungarian constitutional court. *Fundamentum*, 2008, Issue 5. p. 27. ISSN: 1417-2844.

## 2. Signpost on the Road? The Aarhus Convention as a Link Between International Environmental Law and International Human Rights Law

### 2.1 Introduction

Multilateral international environmental conventions do not adopt the language of effective human rights documents that address right holders in terms of individual rights, but mostly declare only state obligations, and enforcement of documents, that are binding, is often uncontrollable.<sup>30</sup> State obligation reaches its targets via domestic legal regulation. Efficient tools of international human rights instruments are linked to the first generation of human rights (civil and political rights). While the first generation of human rights is justiciable, the second and third generation rights are not.<sup>31</sup>

Without directly applicable *individual rights*, any system of human rights protection is apt to become inoperable, and the rights contained therein may become victims of a state will. By the individual rights I mean real rights, which are not construed only as state obligations, but also wholly as individual rights with subjects, in other words as rights that can be enforced. The institutionalization of internationally protected human rights is therefore completed only when possibilities of the justiciability become reality. Let me give an illustrative example. How could individual interests be asserted before the European Court of Human Rights if for instance the European Convention on Human Rights were to mention a fundamental right merely as a state obligation, without designating its individual rights aspect? A state obligation is weak without individual rights and complaint mechanism.<sup>32</sup>

<sup>30</sup> BODANSKY, D. *The Art and Craft of International Environmental Law*, Cambridge, Mass.: Harvard University Press, 2010. p. 225. ISBN 9780674061798.

<sup>31</sup> ALLAIN, J. International Human Rights Law in Theory and Practice. In FEYTER, K. D. & PAVLAKOS, G. (Eds.). *The Tension between Human Rights and Group Rights: A Multidisciplinary Approach*. Oxford: Hart Publishing, 2008, p. 284-285. ISBN 978-1-84113-829-9.

<sup>32</sup> See in detail MAJTÉNYI, B. A right without a subject? The right to a healthy environment in the Hungarian constitution and the practice of the Hungarian constitutional court. *Fundamentum*, 2008, Issue 5. p. 22-35. ISSN: 1417-2844.



Theoretically, the best solution would be if international environmental conventions referred to the connection between human rights and the state of environment and tried to apply the individual rights-based approach of efficient international human rights instruments and established individual complaint mechanism. As H. Müllerová mentions, the link between the international environmental law and international human rights law has „served as a basis for establishment of the so-called rights-based approach“ to international environmental protection.”<sup>33</sup> It would be the missing link between international environmental law and the international protection of the first generation of human rights, which would make environmental law more effective.

The often-cited UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters – the so called Aarhus Convention – takes steps forward in this regard. This Convention makes provisions to protect the procedural rights of the right to a healthy environment, and the term of individual right is not unknown in the rights-based language of the Convention. However, the fundamental problem has not been solved - the document displays also the characteristics of international environmental conventions: it is a non self-executing document which becomes judicially enforceable only through the implementation of legislation and specifies mainly state obligations.

## 2.2 International and Transnational Legislation

International human rights documents often formulate the environmental claims as the right to a healthy environment or as associated with sustainable development<sup>34</sup> and hence part of the right to

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<sup>33</sup> MÜLLEROVÁ, H. Human Rights Approaches to Environmental Protection at the International Level and their Application in the Czech Republic. *Common Law Review*, Issue 11, Autumn 2009, p. 27. Available online at: <<http://www.commonlawreview.cz/human-rights-approaches-to-environmental-protection-at-the-international-level-and-their-application-in-the-czech-r>>.

<sup>34</sup> The concept of sustainable development has played a decisive role in the evolution of international law and environmental policy since the 1990s; after Rio it also

development.<sup>35</sup> (Sustainable development is also specifically designated as a right, since its achievement requires the joint realization of first and second generation of human rights.) Yet, there is an obvious difference between the two modes of regulation. The right to a healthy environment may appear in national documents as well, in no small part because some of its elements denote real individual rights as well as specific obligations of the state. The normative substance of the right to development, in contrast, would be more difficult to define unequivocally. The following are mentioned among the subjects of the latter right: all humans, all nations, and occasionally the mankind (present and future generations altogether). They are all entitled to delineate the direction of economic, social, cultural and political development. (In international law today, mankind, that is the community of people currently alive and those to be born in the future, can already be a legal subject. Even though treating mankind as a legal subject internationally can potentially be justified already today, in domestic law it can nevertheless certainly not be regarded as a legal subject.)<sup>36</sup>

An examination of relevant international human rights regulations shows that the claim to a healthy environment appears partly as an individual

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began to appear in national legal systems. As far as the concept's international law presence is concerned, it no longer appears only in conventions, but also for instance in the International Court of Justice's decision in the *Gabčíkovo-Nagymaros* case. It is nevertheless doubtful whether it can be regarded as a legal principle, and the possibility of applying it normatively is even more doubtful. The most common criticism of the right to development is that since in reality it is not a right, it can neither contribute sufficiently to development nor to the promotion of human rights protection. For more details on sustainable development see: BOYLE, A. and FREESTONE, D. *International Law and Sustainable Development* New York: Oxford University Press, 1999. ISBN-10: 0198298072.

<sup>35</sup> SENGUPTA, A. On the theory and practice of the right to development, *Human Rights Quarterly*, 2002 24, 4 p. 837–889. ISSN: 0275-0392.

<sup>36</sup> On this issue see for example NAGY, B. 'Az emberiség közös öröksége: A rejtőzködő jogositott' [Mankind's Common Legacy: The Hidden Subject] In HERCZEGH G, BOKORNÉ Szegő H, MAVI V, NAGY B. (Eds.), *Az államok nemzetközi közösségének változása és a nemzetközi jog* [International Law and Changes in the International Community of States] Budapest: Akadémiai, 1993. p. 113–143. ISBN 963056596X.

right – in the context of human rights protection – in non-binding documents of international human rights law and in the Aarhus Convention. The soft law documents often enlist environmental claims in the third generation of human rights (solidarity rights). In these documents we also observe examples of the rights to environment and development both being represented.

The Rio Declaration on Environment and Development (1992), which in its Principle 3 establishes sustainable development as a right and specifies the procedural rights of the right to a healthy environment in Principle 10, is a case in point. Principle 10 therefore contains the following: the participation of affected citizens in environmental decision-making, the access to environmental information, as well as the possibility to seek effective judicial and administrative proceedings, including the right to legal redress and remedy. The three pillars of the Aarhus Convention are based on these procedural rights of Principle 10: access to environmental information, public participation, and access to environmental justice.

If the EU legislation is examined, we will find the following: According to Article 37 of the European Union's Charter of Fundamental Rights, "*a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*". This ensures the joint responsibility of those organs in the Union vested with legislative, judicial and executive powers. The notion of sustainable development is recurrent also in the Treaty on European Union and in the Treaty on the Functioning of the European Union. For instance, Article 11 declares that the European Union's "*[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.*"<sup>37</sup> The European Union primary law documents have a preference for the term of sustainable development.

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<sup>37</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.

### 2.2.1 The Case of the Aarhus Convention

Several authors claim that the Aarhus Convention (the EU is also Party of the Convention) is a step forward in the field of international environmental protection because the rights-based approach appears in the text of the Convention,<sup>38</sup> and the official website of the Document mentions that it “*links environmental rights and human rights*”.<sup>39</sup> The Aarhus Convention is indeed similar to the human rights conventions in many respects. For instance, it nominates the prohibition of discrimination: “*the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.*”<sup>40</sup> As J. Ebbesson observes, “*although the term ‘right’ is generally avoided, the objective, structure and context of the Aarhus Convention are rights-oriented.*”<sup>41</sup> The individual rights-based approach sometimes directly appears, for example, in Article 9 (1), which nominates access to justice: „*Each Party shall, within the framework of its national legislation, ensure that any person [...] has access to a review procedure before a court of law or another independent and impartial body established by law.*”

The Document also uses the term 'public' and 'public concerned'.<sup>42</sup> The public, in the text of the Convention, refers to “one or more natural or legal

<sup>38</sup> See for example EBBESSON, J. *Information, Participation and Access to Justice: the Model of the Aarhus Convention*. Available online at:

<[www2.ohchr.org/english/issues/environment/environ/bp5.htm](http://www2.ohchr.org/english/issues/environment/environ/bp5.htm)>. FITZMAURICE, M. Note on the Participation of Civil Society in Environmental Matters: Case Study. *Human Rights & International Legal Discourse*, 2010, Issue 1, p. 47–65. ISSN 1783-7014.

<sup>39</sup> See <<http://www.unece.org/env/pp/introduction.html>>.

<sup>40</sup> Article 3 (9) of the Convention.

<sup>41</sup> EBBESSON, J. *Information, Participation and Access to Justice: the Model of the Aarhus Convention*. Available online at:

<[www2.ohchr.org/english/issues/environment/environ/bp5.htm](http://www2.ohchr.org/english/issues/environment/environ/bp5.htm)>.

<sup>42</sup> According to Article 2 (5) the public concerned means “*the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for*

persons, and, in accordance with national legislation or practice, their associations, organizations or groups” (Article 2 Paragraph 4). The Aarhus Convention grants the public rights regarding access to information and public participation and access to justice. This rights based view appears for instance in Articles 6 and 9 which stipulate that the public concerned “*shall have the right to information, public participation and access to justice ... in relation to specific projects.*”<sup>43</sup> Or according to Articles 7 and 8 the public is entitled to participate in plans, programmes and policies relating to the environment and in the preparation of executive regulations.<sup>44</sup> The use of the term ‘public’ as the subject of rights is compatible with our rights-based view in terms of procedural rights. To acknowledge this, it is enough to consider Article 34 of the European Convention on Human Rights, which mentions that the European Court of Human Rights may receive applications from any person, non-governmental organization or group of individuals.<sup>45</sup> In the environmental case *Guerra and others v Italy*<sup>46</sup> forty inhabitants of the Italian town Manfredonia (a group of individuals) brought an application „*complaining of the risks of pollution or a major accident at a chemical factory.*”<sup>47</sup>

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*the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”*

<sup>43</sup> FITZMAURICE, M. Note on the Participation of Civil Society in Environmental Matters: Case Study. *Human Rights & International Legal Discourse*, 2010, Issue 1, p. 50. ISSN 1783-7014.

<sup>44</sup> Ibid.

<sup>45</sup> See BREITENMOSER, S. The Protection of Groups and Group Rights in Europe. In: FEYTER, K. D. & PAVLAKOS, G. (Eds.). *The Tension between Human Rights and Group Rights: A Multidisciplinary Approach*. Oxford: Hart Publishing, 2008, p. 250. ISBN 978-1-84113-829-9.

<sup>46</sup> *Guerra and Others v Italy* 116/1996/735/932, judgment of 19 February 1998.

<sup>47</sup> BREITENMOSER, S. The Protection of Groups and Group Rights in Europe. In: FEYTER, K. D. & PAVLAKOS, G. (Eds.). *The Tension between Human Rights and Group Rights: A Multidisciplinary Approach*. Oxford: Hart Publishing, 2008, p. 250. ISBN 978-1-84113-829-9.

The question then arises what the main differences are between this provision of the Aarhus Convention and the provisions of the most effective human rights convention, the European Convention on Human Rights.

The first difference is – as I referred to it earlier – that the term ‘right’ is sparsely used in the language of the Aarhus Convention and the document is not a self-executing international treaty. When Article 9 mentions that “*Each Party shall, within the framework of its national legislation, ensure ...*” it means that the quoted paragraph of the Convention is not a directly applicable provision, but only obliges the states to adopt domestic legislation to implement the provision of the Convention. It follows that individuals cannot directly refer to the provision of the Convention before domestic or international courts.

The second difference is that the Aarhus Convention does not establish an individual judicial complaint mechanism. In Article 15 on review of compliance, the Convention requires the Meeting of the Parties to establish “*optional arrangements of a **non-confrontational, non-judicial and consultative nature** for reviewing compliance with the provisions of the Convention*” (bold added). It clearly does not give a mandate for the creation of a judicial process. However, in October 2002 the Meeting of the Parties established the Compliance Committee, which is a very important step regarding the effective protection of rights: a compliance mechanism may be triggered also by members of the public.

### 2.3 Domestic Legislation

Though it takes on different forms and its substance is varied, the desire for protecting the environment appears in constitutions of numerous European Union countries.<sup>48</sup> Various methods of regulation differ in terms of whether they formulate a right that all citizens can lay a claim to, as the Spanish, Portuguese and Belgian constitutions do or a requirement incumbent on the state instead. The latter approach was for example chosen

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<sup>48</sup> ORTH, E Umweltschutz in den Verfassungen der EU-Mitgliedstaaten. *Natur und Recht* 2007, Issue 4, p. 229. ISSN: 0172-1631.

by the Austrian Constitution and the German Basic Law.<sup>49</sup> There are also instances when it is both an individual right and a state obligation, which is the route taken by the Latvian Constitution.

The Hungarian Constitutional Court's decision No. 28/1994. (V. 20.) - in addition to associating environmental protection with third generation rights - interpreted the provision of the former Hungarian Constitution,<sup>50</sup> which contained a formulation (individual rights and state obligation) similar to the one found in the Latvian Constitution, as an 'independent institutional protection'. (According to the Constitutional Court, the latter denoted a state obligation without associated individual rights, whose realization is, thus, incumbent upon state institutions.) The Hungarian Parliament passed Hungary's new Constitution (named Fundamental Law) on 18 April 2011, which entered into force on 1 January 2012 and superseded the previous constitution (Constitution of 1989<sup>51</sup>). The new constitutional provision states with the same wording as the earlier: "*Hungary recognizes and enforces the right of everyone to a healthy environment.*"<sup>52</sup>

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<sup>49</sup> For more details on the provisions of the German Basic Law see: HÖRNIG, D., SEIFERT K. H. (Eds.), *Grundgesetz für die Bundesrepublik Deutschland*, Baden-Baden: Nomos, 2007. ISBN 9783832924423 3832924426; BRANDT, E. – SMEDDINCK U. (Eds.), *Grundgesetz und Umweltschutz*. Berlin: Berliner Wissenschafts-Verlag, 2004. ISBN 978-3-8305-0848-9; D JARASS, H. and PIEROTH, B. *Grundgesetz für die Bundesrepublik Deutschland* München: C. H. Beck, 2007. ISBN 978-3-406-60941-1.

<sup>50</sup> Article 18 of the Act XXXI of 1989 stated the following: "[t]he Republic of Hungary recognizes and enforces the right of everyone to a healthy environment". In Hungarian legal literature, László Fodor undertook a detailed analysis of article 18 as well as the Constitutional Court's decisions regarding the right to a healthy environment. See FODOR L. *Környezetvédelem az alkotmányban* [Environmental Protection in the Constitution]. Budapest - Debrecen: Gondolat-DE Állam- és Jogtudományi Kar 2006. ISBN 963-9610-30-5.

<sup>51</sup> Act XXXI of 1989, which was adopted at the time of regime transition, was formally only an amendment to the earlier constitution, Act XX of 1949, but in practice it meant the adoption of a new democratic constitution.

<sup>52</sup> Article XXI of the Fundamental Law: (1) Hungary recognizes and enforces the right of everyone to a healthy environment. (2) Anyone who causes damage to the

Occasionally the notion of sustainable development<sup>53</sup> also crops up in constitutions. For instance, pursuant to Article 2 (3) of the Swedish Constitution, public institutions must support sustainable development, which creates a “good” environment for present and future generations. Furthermore, this provision declares the realization of environmental protection objectives to be a state obligation. Article Q paragraph (1) of the Hungarian Fundamental Law also mentions this notion with the following wording: *“in order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world.”*

In any case, the inclusion of environmental protection in constitutions and international human rights documents implies a value judgment on the importance of this issue. It generally does not provide a new individual right, but it does enrich the substance of fundamental rights, including *individual rights*.

## 2.4 The Third Generation of Human Rights and/or Individual Rights

The concept behind solidarity rights is undoubtedly interesting, but the problem with this solution is that it is difficult to interpret the vision of the third generation of human rights with our rights-based view. The problem with this approach is that third generation rights cannot be

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environment shall be obliged to restore it or to bear the costs of restoration, as provided for by an Act. (3) It shall be prohibited to import pollutant waste to Hungary for the purpose of disposal. The official English translation of the Fundamental Law is available at:

<[http://www.parlament.hu/angol/the\\_fundamental\\_law\\_of\\_hungary\\_consolidated\\_interim.pdf](http://www.parlament.hu/angol/the_fundamental_law_of_hungary_consolidated_interim.pdf)>.

<sup>53</sup> The Brundtland Commission’s renowned 1987 report has defined the concept by saying that it satisfies the needs of the current generation without endangering the like needs of future generations. Hence the concept entails the desire for intergenerational equality. This “equality” is undoubtedly a creation of international law from whence it found its way into the national legal systems. See Brown Weiss, E. *Fairness to Future Generations* New York: Dobbs Ferry, 1989. ISBN 0-941320-54-5.



regarded as anything but an element of utopia grounded in common human values.<sup>54</sup> And through this way uncertain - though appealing - elements of utopia have seeped into domestic legal systems. Quite on the contrary, it would be more efficient, if international legislators dropped the concept of solidarity rights and followed national legislators in enlisting individual rights and specific state obligations in binding human rights instruments; especially in conventions that deal with the first generation of human rights.

Due to this incompatibility, solidarity rights appear mainly in soft law documents or in non-effective instruments of international law. What's more, third generation 'rights' cannot be construed as rights in domestic legal systems. They can neither be moulded into rights, nor into duties without losing their original concept.

It is for example difficult to determine what sustainable development precisely meant as a legal notion. It refers to a hitherto unknown development that reconciles environmental needs with economic and social development, but there is no unequivocal, exact legal definition. Moreover, there are widely diverging philosophical approaches underpinning it. (There are often even those ones that proclaim the possibility of leaving behind modern industrial society.) The term also alludes to intergenerational equality, but the notion of future generation is itself problematic in terms of legal regulation, since the interests of those not yet born or not conceived are difficult to discern, and hence within the framework of our current legal concepts they cannot be legal subjects in national legal systems. Indeed, it is even uncertain whether sustainable development can be achieved at all. Many believe that it is an oxymoron and cannot be implemented, as economic development as it is conceived today is based on growth, while the notion of sustainable development presumes that our

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<sup>54</sup> On occasion specific utopian ideas were formulated in the context of these rights. Such are for instance the concepts relating to "ecotopia", i.e. the most ideal societies living in harmony with the environment. For the emergence of the designation see: CALLENBACH, E, *Ecotopia*. Berlin: Rotbuch, 1984. ISBN 3-88022-200-2.

resources will remain fixed and finite. It is true that legal documents often employ terms whose content cannot be exactly defined. But an efficient legal regulation ought to scale back the use of such terms to the greatest possible extent.

Theoretically, in the case of international human rights regulation, the most fortunate approach would be if it were not only soft law declarations and the Aarhus Convention but also effective international human rights instruments on the subject of environmental protection, that would refer to the connection between human rights and the state of the environment, and moreover, if they specifically enumerated the individual rights derived therefrom, thus truly integrating environmental protection into the framework of international human rights protection.

The international legislator should promote the implementation of the environmental interests through individual rights and state obligations which promote its realization. The international legislator should apply the first generation of human rights in an environment-sensitive way, and in this process some individual rights have to be declared with a specific normative content.

This would imply the integration of several fields of international environmental law into international human rights protection and would mean a real link between international human rights protection and international environmental law. International legislators could follow the way of national legislators in nominating individual rights and state obligations in binding human rights conventions, especially in ones who are dealing with the first generations of human rights.

Let us recall that there are applications submitted to the most important institution serving the protection of first generation human rights, the European Court of Human Rights, which specifically address environmental protection problems. Although the Court handles environmental issues, protection is not efficient enough. (Moreover, we should note: the breach of Convention in cases pertaining to environmental issues was made out with reference to a violation of the

respect for private and family life.<sup>55</sup> This was true even in cases in which the establishment of a violation of the right to life would have been conceivable, such as the *Guerra and Others v Italy* case.<sup>56</sup> Maybe in such cases judges are prone to avoid making out a violation of the right to life to curb protest by the states in question.) The situation would be better if member states adopted a protocol on environmental protection. It could express the obligation of environment-sensitive application of the first generation of human rights. Not even the right to a healthy environment has to be explicitly mentioned: the environment-sensitive application of the first generation of human rights would be enough.

Generally, this may happen with regard to the following rights: the rights to legal remedy, information and a right to participate in decision-making processes. The access to environmental information, for example, may have some surplus content, namely that a state not only erects no barriers to stem the free flow of information, but that it is also obliged to supply its citizens with information concerning the state of the environment.

An efficient legal regulation should reduce the usage of legally not clearly definable terms, finding effective rights that could promote our ideas on environmental protection.

## 2.5 Conclusion

The development of international environmental law halted by the end of the 1990s. The last important stage of the codification process of

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<sup>55</sup> See for example the cases of *Hatton and Others v the United Kingdom* [GC], no. 36022/97, § 99, ECHR 2003-VIII and *López Ostra v Spain*, judgment of 9 December 1994, Series A no. 303-C. In the first case, eight citizens residing adjacent to Heathrow Airport in the United Kingdom requested indemnification on the grounds of sleep deprivation. POST, H. Hatton and Others: further clarification of the “indirect” individual right to a healthy environment *Non-State Actors and International Law* 2002. 2, 3, p. 259–278. ISSN: 1567-7125.

<sup>56</sup> *Guerra and Others v Italy* 116/1996/735/932, judgment of 19 February 1998.

international environmental law was the adoption of the Aarhus Convention in 1998. Almost nothing happened in the last decade. Even the environmental conferences (such as Earth Summit 2002, Johannesburg) ended without the adoption of binding international conventions. (Perhaps only the GMO regulation has evolved considerably after 1998.) Recently, the scenario that international environmental law and global environmental conventions can give a normative response to the challenges of global environmental problems, and thereby fulfil its original purpose, is less and less realistic.

Some progress of international environmental law is to be expected in the field of the procedural right to a healthy environment. The Aarhus Convention could be a signpost on this road. To achieve effective protection of the environment, international legislators could follow the way of national legislators in nominating individual rights and state obligations in binding international human rights conventions, especially in those that deal with the first generations of human rights, and they should ensure an effective individual complaint mechanism. On the universal and on the European level the simplest and most effective solution would be for member states to adopt a protocol on environmental protection to the UN Covenant on Civic and Political Rights and European Convention on Human Rights. These protocols could ensure the environment-sensitive interpretation of the first generation of human rights.

### 3. New Impulses: Aarhus Convention and Genetically Modified Organisms

#### 3.1 Introduction – Biotechnology and the Need for Transparency and Public Participation

Biotechnology, and in particular the regulation of genetically modified organisms (GMOs) is not surprisingly a very emotional topic debated worldwide. It is due to the fact that it affects the central areas of human life such as health or environment. Besides, biotechnology is a Janus-faced phenomenon of the modern era. On one hand, genetic engineering is a rapidly developing, cutting edge technology and, therefore, the main biotech industrial fields with ‘coloured names’ – like green, white or red biotechnology<sup>57</sup> – are increasingly major economic factors in particular regions of the world. The technology itself is relatively young: only 30 years ago, in 1983 the information was published on how to get foreign genes in plants and ten years later, the first products of the ‘green genetic engineering’ were put on the market.<sup>58</sup> On the other hand, biotechnology

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<sup>57</sup> The green biotechnology (or plant biotechnology) covers processes which are operated in the field of agriculture; the white biotechnology applies microorganisms in the industrial production; and the red biotechnology refers to the pharmaceutical and medical application of biotechnology. Today the literature establishes a more sophisticated structure of the biotech industry, e.g. DaSilva examines the ‘biotechnology rainbow’ and distinguishes 10 colours of biotechnology, see DA SILVA, E. J. *The Colours of Biotechnology: Science, Development and Humankind. Electronic Journal of Biotechnology*, vol. 7, 2004, issue 3. ISSN 0717-3458.

<sup>58</sup> A short overview of history of GMOs is given by Clancy, see CLANCY, N. *Genetically Modified Organisms and Democracy. Trinity College Law Review*, 2003, Issue 1, p. 127. ISSN: 1393-5941. The first frequent type of GM crops has been made resistant against herbicides, the second commonly used version has produced a biological insecticide, the ‘*Bacillus thuringiensis*’, a substance toxic to certain insects (the so called Bt-crops, which were the first commercially successful GMO seed varieties earlier). The first generation GMO crops are still present today and are limited to four plants (soya, corn, cotton, rape plant), as well as two modification processes. Nowadays there are genetically modified crops varieties with improved resistance to certain insects, diseases etc.; and also seeds with improved resistance to physical

gives rise to a strong feeling of insecurity, because at the current stage of scientific knowledge, risk of harmful effects to the mankind and to the nature arising from the GMOs cannot be definitely excluded. In other words, both the deliberate and an accidental release of GMOs into the nature pose major risks to human health and can have significant adverse effects on the environment.

If the portion of GMO products in the trade of seeds, food and feed are steadily growing and the health and ecological concerns are wakening, the public awareness, every so often boosted by civil society movements, can play even more important role in this field. The environmental law attempted to react to these challenges in the last two decades on both international and national levels and enormous efforts have been made in order to improve the transparency and to give opportunity to the public to get involved in all relevant stages of the decision-making procedures on GMOs. The general considerations behind these efforts are explained mostly with a substantive-right-like model,<sup>59</sup> which suggests that the public needs adequate information on products consisting of GMOs, which automatically enables to assert the right to live in a healthy environment. A number of scholarly explanations go further and try to embrace a wider picture giving the point of the transparency of 'environmental justice'<sup>60</sup>, or simply the

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stress (e.g. negative climatic effects) are also under development. For more information on the licensed GM species in a worldwide perspective, see CERA 2012 GM Crop Database. Center for Environmental Risk Assessment (CERA), ILSI Research Foundation, Washington D.C.

<[http://cera-gmc.org/index.php?action=gm\\_crop\\_database](http://cera-gmc.org/index.php?action=gm_crop_database)>.

<sup>59</sup> Binding international environmental conventions usually do not adopt the language of human rights, which address the rights holders in terms of individual (substantive) rights, but mostly declare only state obligations, or lay down provisions concerning procedural rights. See MAJTÉNYI, B. A right without a subject? The right to a healthy environment in the Hungarian constitution and the practice of the Hungarian constitutional court. *Fundamentum*, 2008, Issue 5. p. 22.

<sup>60</sup> See STEELE, J. Participation and Deliberation in Environmental Law: Exploring a Problem solving Approach. *Oxford Journal of Legal Studies*, 2001, Issue 3, p. 415-416. ISSN: 0143-6503.

need of public participation is built up on the basis of the 'environmental democracy'.<sup>61</sup> In this sense the process of participation may build a sense of citizenship or responsibility<sup>62</sup> and the opportunity of the public participation may also be a part of the 'localisation' of the environmental governance.<sup>63</sup> Other explanations lay the emphasis not on the individual, or to be precise, not on the 'human-centric' character of the public participation, but it is stressed out, that the access to more information and the improvement of public involvement help to make the environmental choices informed and well founded. This can lead to reinforced environmental protection, so the quality of the environment, the level of biodiversity etc. will be increased.

As a consequence, the necessity to information and participation rights of the public regarding the GMO matters can be established on human- and on environment-centric models as well. Both these aspects, *i.e.* the point of the public, and the point of the environment, can be put in context of a trade. In this context the public is the consumer itself, who has to make decisions regarding the products containing GMOs. From this perspective it is quite evident that the public participation can profoundly influence the choices and commercial habits of targeted consumers. Moreover, a big pressure is put on consumers in this regard, because on one hand, biotech companies are attempting to convince consumers that their GMO products are absolutely free of risks, using a large set of measures, including direct (e.g. aggressive marketing campaign) and indirect (e.g. one-sided or biased research communication) instruments. On the other hand, any consumer has to be responsible for their own decision, which in fact, can trigger irreversible consequences in the environment. Therefore, consumers are staying in the central point in this context. If one is thinking of a model

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<sup>61</sup> CLANCY, N. op. cit., 125–154.; and REID, E. and STEELE, J. Free Trade: What is it Good for? Globalization, Deregulation, and 'Public Opinion'. *Journal of Law and Society*, 2009, Issue 1, p. 13. ISSN: 0263-323X.

<sup>62</sup> REID, E. and STEELE, J. op. cit., p. 15.

<sup>63</sup> LEE, R. and STOKES, E. Environmental Governance: Reconnecting the Global and Local. *Journal of Law and Society*, 2009, Issue 1, p. 5. ISSN: 0263-323X.

of conscious consumers, it is inoperable without adequate information and the opportunity for public participation concerning the GMO matters.

Intensive involvement of the public can deliver obvious advantages as well. First, public participation can enhance the quality of decisions to be made, because public participation entails an active role for the public concerned. Accordingly, the public has the opportunity to specify its concerns and it is to be expected that the authority takes due account of these concerns when deciding, for instance, on placing a new GMO on the market. This process of participation, which can be regarded as a specific dialogue between the public and a responsible authority, can have more benefits, since the engagement of civil society in decision-making can be considered to have the capacity not only to 'improve' decisions, but also to enhance accountability and promote general acceptance of the regulatory framework, which resulted from the decision.<sup>64</sup> In other words, transparency and public participation is able to strengthen the public support for decisions on the environment, more concretely, to build the confidence of the consumers in decision-making on the use of GMOs.

The following paper attempts to analyse whether the framework of the Aarhus Convention is eligible to give a tool for increasing public awareness regarding the trade of GMOs, and to show how the general and specific provisions of the Convention can be applied in that field. It will concentrate on the provisions of the Aarhus Convention regarding the GMOs. Therefore, other international and national instances are not included into the scope of this chapter,<sup>65</sup> which reflects neither on the relevant EU legislation nor

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<sup>64</sup> CARDWELL, M. Public Participation in the Regulation of Genetically Modified Organisms: A Matter of Substance or Form? *Environmental Law Review*, 2010, Issue 1, p. 23. ISSN: 1461-4529. For the same explanation, but the emphasis put on strengthening the legitimacy of the governance, see EBBESSON, J. Public Participation. In: BODANSKY, D. and BRUNNÉE, J. and HEY, E. (Eds.) *Oxford Handbook of International Environmental Law*. Oxford, Oxford University Press, 2007. p. 687. ISBN 0199552150.

<sup>65</sup> See in this regard CARDWELL, M. op. cit., p. 12–25; CLANCY, N. op. cit., p. 125–154. For a detailed analysis, see: BERNASCONI-OSTERWALDER, N. The Cartagena



the case law.<sup>66</sup> The first part provides a short overview of the development the Aarhus Convention in this field (3.2.1), the subsequent main part focuses on the specific, GMO relevant provisions (3.2.2). It is followed by the examination regarding the rights ensured by the Aarhus Convention (3.3.). Finally, the paper is closed by concluding remarks (3.4.)

## **3.2 Aarhus Convention and the Almaty Amendment concerning the GMOs**

### 3.2.1 GMOs and the Development of the Convention

Even though the Aarhus Convention refers to the genetically modified organisms, the applicability of the Convention *vis-à-vis* these issues was originally questionable. In fact, to some extent, these topics were flagged as “*topics for further development by the Meeting of the Parties.*”<sup>67</sup> In April 1999, the Parties to the Convention in the course of a meeting held in Chisinau, Moldova, set up a Task Force on genetically modified organisms in order to observe the developments of these issues within other international fora and to make recommendations for the future treatment of GMOs under the Convention.<sup>68</sup> The Task Force conducted an analysis regarding the national implementation as well, which showed that the provisions of the Convention needed further clarifications.

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Protocol on Biosafety: A Multilateral Approach to Regulate GMOs. In: BROWN WEISS, E., JACKSON, J. H. and BERNASCONI-OSTERWALDER, N. *Reconciling Environment and Trade*, BRILL, 2008. p. 645–677. ISBN 97815711053701.

<sup>66</sup> For an overview of EU implementation, see RODENHOFF, V. The Aarhus Convention and its Implications for the ‘Institutions’ of the European Community. *Review of European Community & International Environmental Law*, 2002, Issue 3, pp. 343–357. ISSN 0962-8797, LEE, M. *EU Regulation of GMOs: Law and Decision Making for a New Technology*. Elgar, Cheltenham, 2008. ISBN 978 1 84542 606 4.

<sup>67</sup> See STEC, S., CASEY-LEFKOWITZ, S. and JENDROŠKA, J. (Eds.) *The Aarhus Convention: An Implementation Guide* (First Edition). United Nations Publications, New York/Geneva, 2000. p. 7. ISBN 92-1-116745-0.

<sup>68</sup> STEC, S. and CASEY-LEFKOWITZ, S. and JENDROŠKA, J. *ibid.*

Especially the reference to the 'deliberate release' of genetically modified organisms<sup>69</sup> was not profoundly formulated and it was not quite clear, to which activities it should apply. In July 2000, at the session of the signatories held in Cavtat, Croatia, a Working Group on GMOs was established. The Working Group played a major role in preparation of sessions of the Meeting of the Parties and proposed a guideline on GMOs. Following that, the Parties adopted the Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms<sup>70</sup> at the session of the Meeting of the Parties held in Lucca in Tuscany (October 2002). The so called Lucca Guidelines provided only a non-legally binding framework. The document represented a framework for good practice mostly in the field of public participation and access to environmental information on GMOs, but it touched upon the access to justice in a short paragraph as well. The non-binding character of the Guidelines has shown that the Parties – or at least majority of them – hesitated to undertake any obligatory provisions regarding the applicability of the Aarhus Convention in this field and were not interested in clarification of its existing rules. The decision adopted by the Meeting of the Parties outlined further work on the issue and set up a new Working Group on GMOs.<sup>71</sup> The Working Group was mandated to work out options for

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<sup>69</sup> Article 6 paragraph 11, for the details see Chapter 3.2.1 below.

<sup>70</sup> Decision I/4: Genetically Modified Organisms. First meeting of the Parties, Lucca, Italy, 21–23 October 2002. (ECE/MP.PP/2/Add.5). The final text of the Guidelines is available in the following background document: *Guidelines to Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms*. (MP.PP/2003/3 KIEV.CONF/2003/INF/7; 5 May 2003).

<sup>71</sup> See paragraph 3 of the Decision I/4 (ECE/MP.PP/2/Add.5). The most important task of the Working Group was to explore what the options were for a legally binding approach to further developing the application of the Convention in the field of GMOs. Besides the Decision the Group was entrusted also with preparation of a possible decision for the next Meeting of the Parties. Moreover, main directions of this work were set out, namely the further development of the provisions regarding the public participation in decision-making on deliberate releases of GMOs, including placing on the market.

a legally binding approach to further development of the Convention in the field of GMOs.<sup>72</sup>

Based on the result of this work, the Meeting of the Parties adopted a new decision<sup>73</sup> on Genetically Modified Organisms as an amendment to the Convention, at its second session in Almaty, Kazakhstan in May 2005. This decision aims to strengthen the public participation in the decision-making process concerning GMOs. In doing so, the Almaty Amendment introduced a new Article 6 *bis* and Annex I *bis* on GMOs and attempted to make clear the obligations of the parties with respect to the public participation in decision-making on genetically modified organisms. Moreover, it specifies minimum requirements for public participation in decisions on releasing and marketing GMOs and attempts to make some clarifications to the question to which extent the provisions of the Convention should be applied to issues concerning genetically modified organisms.

The amendment shall enter into force after being ratified by at least three fourth of the Parties that were party to the Aarhus Convention at the time the amendment was adopted. Specified in numbers, the slightly complicated formulation means that the ratification of 27 out of 35 Parties that were party to the Convention at the time the amendment was adopted in 2005 is required. Actually, the number of the Parties having ratified the amendment is 27,<sup>74</sup> but only 22 of them were Party to the Convention at the time of the amendment. Therefore, five further ratifications are needed for the amendment to enter into force.<sup>75</sup> Anyway, at this point it can already be highlighted that upon its entry into force, the Almaty Amendment of

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<sup>72</sup> STEC, S. and CASEY-LEFKOWITZ, S. and JENDROŠKA, J. op. cit., p. 7–8.

<sup>73</sup> Decision II/1 on Genetically Modified Organisms. Second Meeting of the Parties, Almaty, Kazakhstan, 25–27 May 2005. (ECE/MP.PP/2005/2/Add.2).

<sup>74</sup> On 9 May 2013. For the current status of the ratification, see: UM Treaty Collections Chapter XXVII Environment 13.b. Available at: <<http://treaties.un.org/>> .

<sup>75</sup> The following countries were party to the Convention at the time the amendment was adopted, but are yet to ratify the amendment: Albania, Armenia, Azerbaijan, Belarus, France, Georgia, Kazakhstan, Kyrgyzstan, Malta, Tajikistan, The former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine.

the Convention will apply only to those Parties that have become a party to it. Therefore, a two level system of obligations regarding the GMO issues will arise after the Amendment takes effect.

### 3.2.2 Provisions of the Convention Regarding GMOs

As mentioned above, the contracting parties could not solve their divergent approaches and interests in dealing with the genetically modified organisms, nor could they reach agreement on the applicability of the Convention concerning the genetically modified organisms. Therefore, the final version of the treaty text offered a compromise which has left the door open for several questions. Anyway, the preamble of the Convention devoted special attention to the deliberate release of genetically modified organisms into the environment, and the need for increased transparency and greater public participation in decision-making.<sup>76</sup>

In general, all the three pillars of the Convention have relevance in the perspective of the genetically modified organisms. Firstly, the right to access to information (Article 4 of the Convention) can be applied with respect to the information on GMOs, therefore, these pieces of information should be regarded as environmental information in terms of the Convention. Secondly, as for the public participation in decision-making, Article 6 (11) explicitly refers to the genetically modified organisms but it restricts the obligations of the Parties only to “the extent feasible and appropriate”. Moreover, the ratification of the Almaty Amendment is on-going and for this reason also the amended Article 6 (11) and the new provisions (Article 6 *bis*, Annex I *bis*) should be profoundly analysed. Thirdly, the access to justice provisions should apply in GMO matters as well.

In addition to the previous pillars of the Convention, the relevant soft law arising from the Lucca Guidelines is also worth mentioning. The Guidelines can be characterised only as non-legally binding and voluntary framework regulating the roles of the public in the area of GMOs. The

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<sup>76</sup> See the twentieth paragraph of the preamble to the Convention, which recognized the “concern of the public” about these issues.

document mentioned a set of examples of good practice, which may be implemented by the Parties.

Therefore, the relevant legal framework consists of both hard law and soft law (good practice). With regard to the first category, in order to see a complex picture of it, it is important to look not only at the *lex lata* provisions, but also at the *lex ferenda* introduced by the Almaty Amendment. The following chart attempts to summarise the whole structure of provisions regarding GMOs, which will be followed by a short study of binding provisions.

Provisions of the Aarhus Convention regarding GMOs		Lucca Guidelines
Access to Information	<ul style="list-style-type: none"> <li>- Target group not restricted ('public')</li> <li>- <i>Article 4</i>: Access to environmental information ('passive' aspect)</li> <li>- <i>Article 5</i>: Collection and dissemination of environmental information ('active' aspect)</li> </ul>	<ul style="list-style-type: none"> <li>- General provisions: <i>Part III</i> of the Lucca Guidelines</li> <li>- it is provided for the 'public'</li> <li>- Specific Provisions: <i>Paras 6–12</i>: Public Notice and Access to Information to Public Participation</li> <li>- Thus linked to the public participation: it is an important prerequisite ("first step") of the successful Public Participation in terms of the Lucca Guidelines (<i>Para 6</i>)</li> </ul>
Public Participation	<p style="text-align: center;"><i>Non- Parties in the Almaty Amendment</i></p> <ul style="list-style-type: none"> <li>- restricted to 'public concerned'</li> <li>- GMOs not listed in <i>Annex I</i></li> <li>- <i>Article 6 para 11</i> (deliberate release of GMOs 'to the extent feasible and appropriate')</li> <li>- <i>Articles 6 and 8</i> (general subject, 'public')</li> </ul>	<p style="text-align: center;"><i>Parties in the Almaty Amendment</i></p> <ul style="list-style-type: none"> <li>- 'public' (no restriction)</li> <li>- new <i>Article 6 para 11</i> (exclusion of the general rules)</li> <li>- <i>Article 6 bis</i> and <i>Annex I bis</i> (deliberate release and placing on the market of GMOs)</li> </ul>
	<ul style="list-style-type: none"> <li>- <i>Chapter II</i> of the Lucca Guidelines</li> <li>- <i>Para 3</i>: should provide for all three areas of GMO applications, namely for deliberate release; placing on the market; and contained use.</li> <li>- providing public participation is recommended only for general cases listed in <i>Para 4</i> of the Lucca Guidelines (e.g. first-time deliberate release into the environment in any new places etc.)</li> <li>- States "may also consider applying" in other specific cases if, the Guidelines refer to some concerns in <i>Para 5</i> in this regard.</li> </ul>	
Access to Justice	<ul style="list-style-type: none"> <li>- for a refused request for information (<i>Article 9 para 1</i>) → 'any person'</li> <li>- for impairment of a right provided under the national law regarding public participation in decisions on deliberate release (but decisions regarding the GMO amendment are not covered!; <i>Article 9 para 2</i>) → Public concerned having a "sufficient interest," or "maintaining impairment of a right" where the administrative procedural law of a Party requires this as a precondition,</li> <li>- to challenge an act or omission by private persons; or public authorities which contravenes national environmental law (<i>Article 9 para 3</i>) → 'members of the public'</li> </ul>	<ul style="list-style-type: none"> <li>- <i>Part IV</i> of the Lucca Guidelines</li> <li>- If a Party decides to implement the Guidelines within a binding (national) framework, it is recommended to establish the guarantees according to Article 9 of the Convention</li> <li>- includes also activities which fall outside of the Convention, but are covered by the Guidelines</li> </ul>

### 3.3 The 'Three Pillars' of the Convention in the Light of GMOs

#### 3.3.1 Right to GMO Relevant Environmental Information

Articles 4 and 5 of the Convention lay down the framework of specific rights of citizens and obligations of the public authorities<sup>77</sup> regarding the access to information (First Pillar). Both the 'passive' and 'active' aspects of access are covered by the Convention. Article 4 realizes the first aspect thereof, based on that the public has the right to request for information, and the public authorities must respond to these applications. The latter, 'active' category is carried out within Article 5, which makes clear the obligations concerning the collection and public dissemination of the relevant information.

The access to information is established on a broad concept; however, the Convention also determines some limitations to this right, *e. g.* the Convention sets down, under which circumstances the public authorities may refuse the access.<sup>78</sup> However, the limitations, including the grounds for

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<sup>77</sup> See the wording of Article 2, paragraph 2 of the Convention. A "Public authority" means the (national, regional etc.) government itself; natural or legal persons performing public administrative functions under national law (e.g. specific activities in relation to the environment); or any other natural or legal persons having public responsibilities or functions, or providing public services in relation to the environment, which are functioning under the control of the government or other body of the state. In terms of the Convention, also the European Union should be regarded as a 'Public authority', but institutions acting in a judicial or legislative capacity are generally excluded from the scope of the term "Public authority".

<sup>78</sup> See Article 4 Paragraph 7. Access can be refused in the following cases: the public authority does not hold the requested information; the request is manifestly unreasonable or formulated in too general a manner; the request concerns material in the course of completion. The Convention also contains some general clauses, *i.e.* requests may also be refused on grounds of confidentiality of the proceedings of public authorities, national defence and public security, to further the course of justice or to respect the confidentiality of commercial and industrial information, intellectual property rights, the confidentiality of personal data and the interests

refusal, must be interpreted in a restrictive way. The obligations of public authorities also cover technical duties and tasks, for example, public authorities have to keep information up to date, and for this reason, they should establish publicly accessible lists, registers and files.

An important point of this pillar is the specific character of the information. Basically, the environmental information can take any material form (written, visual, electronic, etc.). In line with the wording of the Convention, it is quite evident that the scope of the right to access to information is a broader category than, for instance, a notion applied by the European Union in the transparency regulation, i.e. the EU provisions provide access only to “documents”. The form of information seems to be also an open category, thus, any other not mentioned material forms existing now or developed in the future, also fall under this definition.<sup>79</sup>

While the form is not determined in the Convention, there is, however, a restriction regarding the content of the information, namely the requested information should have environmental character. Consistent with that, the ‘environmental information’ is an inherent category of both Articles 4 and 5; thus, the environmentally relevant information can be requested within the right to access to information and the obligations of public authorities are formulated with respect to this limited category.

The extent of the environmental information is defined in Article 2 paragraph 3, but only with an illustrative list of examples, and certainly not in an exhaustive manner.<sup>80</sup> Moreover, the definition of environmental

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of a third party who has volunteered the information. A decision to refuse access must state the reasons for the refusal and indicate what forms of appeal are open to the applicant.

<sup>79</sup> See STEC, S. and CASEY-LEFKOWITZ, S. and JENDROŠKA, J. op. cit., p. 86

<sup>80</sup> The list of ‘elements of the environment’ is non-exhaustive as the use of ‘such as’ in the text to introduce the list indicates that there may be others in addition to those specifically mentioned. For example, radiation, while being mentioned in subparagraph (b) as a ‘factor’, may also be considered as an element of the environment. See Article 2 Paragraph 3; and *Draft of Revised Implementation Guide*, Meeting of the Parties of the Convention, Fourth session, Chisinau, 29 June–1 July 2011; p. 42.



information represents only a minimum requirement; the Parties to the Convention may use a broader definition.<sup>81</sup> It is also possible for a national law of a Party not to differentiate between environmental information and other kinds of information held by public authorities, providing a right to general access.<sup>82</sup>

The Article on interpretation explicitly embraces also genetically modified organisms in the category of the environmental information as a component of the biological diversity, but neither the biological diversity itself nor genetically modified organisms are defined by the Convention. In this regard, one can refer to the Convention on Biological Diversity,<sup>83</sup> providing a possible concept of the biodiversity, which includes, not exclusively, the ecosystem diversity, species diversity and genetic diversity. The extent of the term 'genetically modified organisms' can put forward more questions, since the Convention on Biological Diversity and the Cartagena Protocol on Biosafety are applying 'living modified organism' (LMO) instead of the category of GMO. In terms of the Cartagena Protocol, an LMO is "any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology." The 'living organisms' are to mean in this respect any biological entity capable of transferring or replicating genetic material, including sterile organisms, viruses and viroids.<sup>84</sup>

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<sup>81</sup> STEC, S. and CASEY-LEFKOWITZ, S. and JENDROŠKA, J. op. cit., p. 91.

<sup>82</sup> Finland, the Netherlands and Sweden are among the countries with general access to information laws that make the question of whether information is 'environmental' or not, unnecessary. In contrast, Denmark has both a general information law and a specific law on environmental information. See STEC, S. and CASEY-LEFKOWITZ, S. and JENDROŠKA, J. *ibid.*

<sup>83</sup> See Article 2: "[T]he variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems."

<sup>84</sup> The use of the abbreviations GMOs as well as LMOs is somewhat confusing. Both seem to have approximately the same extent, e. g. for an ordinary consumer there are no palpable differences between the two terms. However, the LMO refers to a

As a short summary it can be highlighted that the notion of ‘environmental information’ covers also GMOs; therefore, the right to information and the obligations of public authorities should apply also to genetically modified organisms. In that regard, any person has to make requests concerning information in any form in context with GMOs without the explanation of any interest or concerns, which must be responded by the public authorities as soon as possible (or at latest within one month).<sup>85</sup> There are only limited grounds for refusal also in case of GMOs, which should be interpreted in a restrictive way and a refusal notice has to be sent in a written form.<sup>86</sup> Besides the ‘active’ aspect of access to information on GMOs, authorities have specific duties to collect information and make available automatically, without any request.

### 3.3.2 Public Participation in GMO Decisions

#### *3.3.2.1 Original Provisions of the Aarhus Convention*

The Convention’s second pillar concerns the public participation in decision-making. The main concept of the Convention is that people have a right to take part in basic decisions affecting their lives and the quality of these decisions can be improved through the active involvement of the public concerned.<sup>87</sup> As indicated above, Article 6 has been subjected to an amendment procedure which has led to the Almaty Amendment concerning the GMOs. Since the Amendment is not yet in force, the current provisions on public participation should be applied uniformly to all Parties to the

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genetically modified organism that is still alive, in other words, all GM entities which are capable of transferring, replicating genetic material (e.g. seeds, crops, or living fish); the term GMO includes both LMO and other ‘dead’ organisms which are not capable of replicating. See BERNASCONI-OSTERWALDER, N. op. cit., p. 645.

<sup>85</sup> See Article 4 Paragraph 2 of the Convention.

<sup>86</sup> Article 4 Paragraph 2 of the Convention.

<sup>87</sup> For distinguishing between ‘public’ and ‘public concerned’, see: FITZMAURICE, M. Note on the Participation of Civil Society in Environmental Matters: Case Study. *Human Rights & International Legal Discourse*, 2010, Issue 1, p. 47–65. ISSN 1783-7014.

Aarhus Convention irrespective of the fact whether they have ratified the Almaty Amendment or not. After the amendment shall enter into force, the actual provisions will determine henceforward the position of the Parties, which have not accepted the modification of the Convention. However, regarding the Countries which are not Parties to the Almaty Amendment, Article 6 will be replaced with a new provision examined in the next subsection.

As for the public participation in the current Convention, Article 6 lays down public participation requirements for authorisation of certain types of activities listed in Annex I to the Convention (e. g. proposed sitting, construction and operation of large facilities etc.). The final decision to license or to permit the activity must take due account to outcomes of the public participation. The wording of the Convention suggests that the requirements must be applied to decisions on proposed activities not listed in Annex I of the Convention, which may have a significant effect on the environment, but it seems to be only a soft obligation, because the Parties have to decide whether such a proposed activity is subject to these provisions or not. Therefore, regarding the activities not listed in the Annex the Parties have retained a large margin of discretion.

The Convention establishes strict requirements regarding the timing, notification, relevant information, commenting, response, and communication in order to provide the adequate and effective character of the public participation. Greater flexibility is offered to Parties in meeting the requirement of public participation concerning plans, programmes and policies relating to the environment,<sup>88</sup> and Article 8 regarding legislative drafting procedures.<sup>89</sup>

Public participation in GMO decisions is not actually added to Annex I, but Article 6 paragraph 11 recognises that the Parties must apply, within the framework of national law, the general provision regarding the public participation to decisions on whether to permit the deliberate

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<sup>88</sup> See Article 7 of the Convention.

<sup>89</sup> Article 8 of the Convention.

release<sup>90</sup> of genetically modified organisms into the environment “to the extent feasible and appropriate”. According to the formulation of the paragraph, it can be easily concluded, that the application of Article 6 regarding GMOs is subject to two major restrictions. Firstly, the obligation of the Parties is limited only to the ‘feasible and appropriate’ extent, which opens the door to wide interpretations. Secondly, Article 6 is subordinate to national law provisions, since the implementation of the relevant provisions is accomplished “within the framework of national law.” It is not an exaggeration to say that the requirement concerning the public participation in the field of the GMOs is only an option but not on any account an obligation. However, the paragraph establishes, similarly as the whole Convention, only a minimum level of requirements to be achieved (minimum requirement principle);<sup>91</sup> consequently it does not prevent any Party from introducing wider opportunities of public participation in GMO decision making procedures.<sup>92</sup>

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<sup>90</sup> There is no definition of a ‘deliberate release’ in the Convention, but the non-binding Lucca Guidelines made attempt to refine the borders of the term. ‘Deliberate release’ in this way is defined as any intentional introduction into the environment of a GMO or a combination of GMOs for which no specific containment measures are used to limit their contact with and to provide a high level of safety for the general population and the environment. See Annex I, Paragraph 2 (b) of Guidelines to Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms.

<sup>91</sup> See Article 3 (5) of the Convention: „The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.”

<sup>92</sup> But comparing the provisions of the Convention with other multilateral agreements, e.g. with Cartagena Protocol, it is obvious that the Conventions targeted the wider public and it is less restricted than other agreements, see KRAVCHENKO, S. The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements. *Colorado Journal of International Environmental Law and Policy*, 2007 Winter, p. 16. ISSN: 1050-0391.

### 3.3.2.2 *New Provisions of the Convention Regarding the GMOs*

After the Almaty Amendment shall take effect, the existing Article 6 (11) described above will be replaced with a new provision, which will exclude the application of the current Article 6,<sup>93</sup> and the new Article 6 *bis* with the Annex I *bis*<sup>94</sup> will be introduced in order to specify the requirements regarding the public participation in this field. The new provisions will apply to those countries which have ratified the Almaty Amendment and to all future Parties to the Aarhus Convention, because after the amendment shall enter into force, it will automatically be considered as an inherent element of the Convention.

The first novelty suggested by the title of the new Article 6 *bis* is that it covers not only the deliberate release of GMOs into the environment, but also placing GM products on the market. Consequently, the so called 'contained use' of GMOs remains henceforward out of scope of the Convention.

The new regulatory framework attempts to rely upon an active involvement of the public in decisions concerning GMOs. In doing so, the Parties should provide for early and effective information and public participation prior to making decisions on whether to permit a deliberate release into the environment and placing GMOs on the market.<sup>95</sup> The emphasis is put on the important principle of 'early and effective' information. In line with the first part of the principle, public authorities should inform the public at the earliest stage of a decision-making procedure on the deliberate release and placing on the market. In practice, that means as soon as an appropriate

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<sup>93</sup> New article 6, paragraph 11 of the Convention: „Without prejudice to article 3, paragraph 5, the provisions of this Article shall not apply to decisions on whether to permit the deliberate release into the environment and placing on the market of genetically modified organisms.”

<sup>94</sup> The use of the Annex to set out the prescribed modalities is interesting. While annexes are considered an integral part of the Convention (Article 13), the process of amending them is much less onerous than for amending a provision in the main body of the Convention (Article 14, paragraph 4, 5 and 6).

<sup>95</sup> Article 6 *bis* para 1.

notification has been submitted to the public authority, the public has to be informed, e.g. by public notice, about the proposed activities.<sup>96</sup> The Annex I *bis* on the modalities aims at determining the relevant requirements, and sets down that national provisions have to set a realistic time frame, which helps the public to express their concerns, an opinion about the proposed decisions. As for the second element, the information must be effective, which means that the relevant information should be provided in an easily accessible and comprehensible way.<sup>97</sup> It is also an important guarantee. The opportunity for the public to provide opinions would be meaningless, if the public could not have effective access to the information. They need to make their opinion well-founded.

The formulation of Article 6 *bis* points to the fact that the principle of early and effective information and the public participation have a mandatory character. For this reason it should be achieved within the framework of the national law governing the market of GMO products. Article 6 *bis* paragraph 2 expressly determines the position of national law relating to international law, declaring that “[t]he requirements made by Parties in accordance with the provisions of paragraph 1 of this Article should be complementary and mutually supportive to the provisions of their national biosafety framework, consistent with the objectives of the Cartagena Protocol on Biosafety.”<sup>98</sup> Although the formulation of the Article

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<sup>96</sup> See *Draft of Revised Implementation Guide*, op. cit., p. 166–167.

<sup>97</sup> Annex I *bis* paragraph 1. For the practice of the EU and its Member States, see *ibid.* In the European Union, the public has 30 days to comment on the opinion of the European Food Safety Authority (EFSA), which constitutes the assessment report of a notification concerning the placing on the market of GMOs. In Norway, where specific legislation on access to GMO information is in place, the public generally has six weeks for comments. In Austria, after the public announcement of a notification for the deliberate release of a GMO, the public may submit written comments to the competent authority within three weeks, during which the public has the right/possibility of access to the notification. If the public provides comments, the competent Austrian authority has to hold a public hearing within three weeks after the end of the commenting period.

<sup>98</sup> Article 6 *bis* para 2.

sounds more or less ambiguous, the key point is the consistency. Therefore, the national implementing measures should keep the line not only with Article 6 *bis*, but also with the objectives of the Cartagena Protocol on Biosafety. Besides, it is worth mentioning that Article 3 (5) of the Convention on the minimum requirement principle cited in the previous chapter has to be applied also in this context. Consequently, a Party may introduce measures providing for more extensive public participation in decision-making in GMOs than required by Article 6 *bis*.

The Annex I *bis* on modalities determines possible exceptions to the public participation procedure as well. In fact, these exceptions are not obligatory and, therefore, the Parties can apply them at their own discretion. The notion behind this provision is that the potential impact of a given activity on the environment is generally proportional to the size of the venture. As balancing potential risks for the environment against potential benefits for the society always results in a compromise depending on the case, each exemption demands a detailed statement of grounds.<sup>99</sup> The exemptions are specifically determined for each two different categories. Firstly, in the case of deliberate release of a GMO, the Parties are entitled to provide for exemptions to a public participation procedure laid down in the Annex if such a release under comparable bio-geographical conditions<sup>100</sup> has already been approved within the Party's regulatory framework and sufficient experience<sup>101</sup> has already been gained with the

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<sup>99</sup> *Draft of Revised Implementation Guide* op. cit., p. 167.

<sup>100</sup> The wording 'comparable bio-geographical conditions' should be seen against the background that potential effects of GMOs on the environment depend not only on the type of the GMO but also on the prevailing environmental conditions (e.g. climatic factors, number of generations of target pest, occurrence of non-target organisms, wild relatives, agricultural practice etc.). Data gained in a field trial with a GMO in a region under a particular set of conditions cannot substitute experimental releases in environments with differing conditions. Thus, any decision to grant an exemption has to be judged on a case-by-case basis and the concept of bio-geographical regions may provide basic guidance in this respect.

<sup>101</sup> What 'sufficient experience' means, may in practice vary from country to country. As one example, according to EU Directive 2001/18/EC certain criteria, specified

release of the GMO in question in comparable ecosystems. These are conjunct conditions; both of them are, thus, required to justify the exemption. Secondly, in the case of placing of a GMO on the market, the Parties can rely on exemption, if it was already approved within the regulatory framework of the Party concerned; or it is intended for research or for culture collections, keeping in line with the principle of freedom of science and research. As the wording shows, the components of the exemptions are alternative.

Moreover, Annex I *bis* lays down an active obligation of the Parties to provide and make available certain information to the public, more concretely, a summary of each notification introduced to obtain an authorization for the deliberate release into the environment or the placing on the market of a GMO on its territory, as well as each assessment report if available should be announced to the public.<sup>102</sup> Furthermore, Annex I *bis* specifies the threshold of the confidentiality, listing concrete information categories which must in no case consider as confidential (general description of the GMOs; methods and plans for monitoring and for emergency response; environmental risk assessment),<sup>103</sup> and affirmed the decision-making procedures.<sup>104</sup>

### 3.3.3 Access to Justice in Environmental Matters

The third pillar of the Convention establishes access to justice in two main categories (Article 9 of the Convention). Firstly, the access to justice

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in Annex V, have to be met before a proposal for a differentiated procedure can be submitted. According to Annex V, for instance, sufficient information on any interaction of particular relevance for the risk assessment needs to be available and the GMO shall not present additional or increased risks to human health or the environment under the conditions of the experimental release. Under the Directive, the public has 60 days to comment on the reasoned proposal for the application of a differentiated procedure.

<sup>102</sup> Annex I *bis* Paragraph 3.

<sup>103</sup> Annex I *bis* Paragraph 4.

<sup>104</sup> Annex I *bis* Paragraphs 5 and 7.



can be regarded as a tool, which can underpin the previous two pillars, namely it establishes a review procedure with respect to information requests, as well as with respect to project-type decisions which are subject to public participation requirements.<sup>105</sup> Access to information appeals means a review procedure before a court or another independent and impartial body established by law (e.g. Ombudsman). The Convention aims at ensuring a low threshold for such appeals by requiring that where a Party provides for a review by a court, it should ensure that such a person also has an access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. The main consideration of this provision is, that in several Member States, the problematic combination of the 'loser-pays principle' and high legal costs may present a considerable obstacle, making it more difficult to take full advantages of the opportunities that the Convention can offer.

Moreover, the Convention provides for a right to seek a review in connection with decision-making on projects or activities covered by Article 6. The review may address either substantive or procedural legality of a decision, or both. The scope of persons entitled to pursue such an appeal is similar to, but slightly narrower than, the 'public concerned', involving a requirement to have a 'sufficient interest' or maintain impairment of a right (though the text also states that these requirements are to be interpreted in a manner which is consistent with 'the objective of giving the public concerned wide access to justice').<sup>106</sup>

Secondly, the access to justice realises also challenges to breaches of environmental law in general.<sup>107</sup> The Convention requires the Parties to

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<sup>105</sup> Article 9 (1) of the Convention.

<sup>106</sup> See Article 9 (2).

<sup>107</sup> See CARDWELL, M. op. cit., p. 17. Cardwell refers to the specific situation of the UK: a report of 2008 suggested, that large NGOs were able to maintain actions, but individuals and local action groups would have been materially deterred if they wanted to bring environmental matters to action.

make administrative or judicial procedures accessible in order to challenge acts and omissions by private persons and public authorities which violate laws relating to the environment. The question of standing as well as the issue of whether the procedures are judicial or administrative, should be principally determined at a national level.<sup>108</sup> It is, however, questionable, how these provisions should apply to GMOs. As regards the first category, the applicability regarding the access to information appeals is not restricted. As mentioned above, access to information also covers environmental information concerning GMOs; therefore, if a public authority refused to provide the requested GMO information, the person concerned can rely on an appeal according to Article 9 (1).

The situation with the public participation appeals is slightly complicated. Based on the existing text version, one can conclude, that impairment of a right, or public participation refusals in GMO matters can be appealed only if a country handled a disputed subject as meeting the 'feasible and appropriate' extent in terms of Article 6 (11) and for this reason, the public participation requirements have been fully applied. Otherwise, the public participation appeal is inadequate. And what will be the status of public participation appeals after entering in force of the Almaty Amendment? Since Article 9 (2) explicitly refers back to Article 6 as a ground, and not to the new Article 6 *bis*, the opportunity to a review procedure in this regard will be not allowed to public participation cases based on the GMO Amendment. However it seems to be quite unreasonable and paradoxical. While the Almaty Amendment points towards a wider public involvement, Article 9 counteracts and excludes the possibility of appeal in the field of GMOs. Moreover, it should not be left unmentioned that neither Article 6 *bis*, nor Annex I *bis* give explicit point on the access to justice, so the narrow scope of Article 9 is also illogical from a systematic point of view. As a consequence, after the Almaty Amendment shall enter into force, we have to face a strange situation, that Article 6 (11), which is based on a restricted scope, will be underpinned by the access to justice provisions of the Convention and will oblige the non-Parties of the

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<sup>108</sup> Article 9 (2) of the Convention.

Amendment, while the more significant instrument, Article 6 *bis* as well as Annex I *bis* will not take in hand the requirements regarding the access to justice. Because of these concerns, a hypothetical assumption would be not far from being plausible that the Parties simply “forgot” to modify the reference in Article 9. Anyway, if that would have occurred, the strict reference of Article 9 could not be jumped over. Therefore, the only possible way to solve these contradictions and improve effects of the new Article 6 *bis* would be by amending Article 9 with an exact reference to the new provisions in question.

Finally, the last component of the access to justice, which should apply to general violations of environmental law, raises no questions in this regard. To challenge an act or omission by private persons or public authorities that contravenes national environmental law, covers also the GMO matters; consequently it will be relevant to both non-Parties and Parties to the Almaty Amendment.

### **3.4 Conclusion**

As the previous examination has shown, the Parties to the Aarhus Convention have taken major steps towards the improvement of public participation rights. Already in 2002, the Lucca Guidelines have set a valuable example, which is the most far-reaching and detailed instrument on public participation in GMOs, but its non-binding character is the biggest obstacle to become general among the Parties to the Convention. The Almaty Amendment is a promising instrument and can become an essential promoter in the disputes over the public participation, even if the above analysis has exposed some problematic points and inherent contradictions in the text. Nevertheless the new Article 6 *bis* and Annex I *bis* will demonstrate, that ensuring the public participation is not only a formal obligation of the Parties. It is indeed a dialogue, in which the public can provide inputs and the competent authority must take these inputs into consideration when deciding on GMO relevant subjects. The public involvement in GMO matters is considerably important, because the decision-making process is not immune from social, cultural and contextual

considerations; thus the public should play a balancing role towards the other internal and external factors. Therefore, the legitimacy of these decisions can be improved if the public has the opportunity to get informed on the possible environmental risks and to play active role in the procedures.

## PART II. NATIONAL IMPLEMENTATION PORTRAITS

### 4. The Czech Republic Present Implementation, Future Perspectives

#### 4.1 Introduction

The Aarhus Convention was signed by the Czech Republic on its adoption in Denmark on 25 June 1998. The Czech Parliament ratified the Convention on 6 July 2004.<sup>109</sup> The position of international agreements within the system of the Czech law is defined by Art. 10 of the Czech Constitution; it stipulates that the agreements that have been approved by the Parliament and that are binding for the Czech Republic constitute a part of the legal order, and in case of conflict with national law, the international agreement will thus apply. This applies also for the Aarhus Convention. Moreover, the Czech Republic is, as a member state of the EU, bound by the Aarhus Convention under the EU law and is obliged to implement all the European legislative acts adopting the Aarhus Convention in the EU.

#### 4.2 Legislation Implementing the Aarhus Convention

The content of the three pillars of the Convention has been transposed in several pieces of legislation in the Czech Republic; either in separate laws (the first pillar) or in numerous individual provisions of several laws and decrees (the second and third pillar). This makes the legislative background of the Convention rather disorganized and troublesome, which results in several implementation problems.

**The first pillar on the access to information** is clearly embodied into a separate law – Act No. 123/1998 Coll.,<sup>110</sup> on the Access to Information on

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<sup>109</sup> The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was published in the Official Journal of International Treaties of the Czech Republic as No. 124/2004 Collection of International Conventions [Sb. m. s. in Czech].

<sup>110</sup> In this book, “Coll.” is used for the Czech Collection of Laws [“Sb.” for “Sbírka zákonů” in Czech].

the Environment.<sup>111</sup> The Act covers both passive and active access of the public to environmental information in a sufficient scope and definiteness, and also includes a review procedure for applicants who claim that their request was not answered or dealt with correctly.

The situation of the other two pillars is much less transparent as their requirements are treated (or better to say 'hidden') in a number of specific provisions in several pieces of environmental and administrative legislation.

In **the second pillar on public participation**, the most important rules emerge from environmental impact assessment legislation and also from the regulation of opportunity of environmental NGOs to participate in administrative proceedings.

The environmental impact assessment (EIA) and strategic environmental assessment (SEA) are covered in Act No. 100/2001 Coll., on the Environmental Impact Assessment. The participation rights and the rules for the course of the proceedings in this Act are satisfactory as they enable anybody to comment on any aspect of the matter during several stages of EIA and SEA. However, the voice of the public is rather ineffective: the law does not give instruments strong enough to enable taking into account public comments in the subsequent decision-making. The main problem is that the EIA and SEA processes are separate procedures, detached from the decision-making in the matter as such (e.g. territorial plan decisions or building permits) and the EIA and SEA findings are not materially binding for the decision-maker in the matter.

The opportunity of environmental NGOs to participate in administrative proceedings is granted in several environmental laws, with the Nature and Landscape Protection Act<sup>112</sup> playing the key role. In Section 70, this Act enables the environmental NGOs to participate in any administrative proceedings concerning the protection of nature. Any environmental NGO

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<sup>111</sup> In fact, the Czech Republic has two 'information' laws – apart from the environmental one there is a general law, the Act No. 106/1999 Coll., on the free access to information, which applies to all kinds of information.

<sup>112</sup> Act No. 114/1992 Coll., on Nature and Landscape Protection.

may register at competent authorities to be informed on all administrative proceedings that these authorities are opening. If an NGO wishes to participate in particular proceedings, it is sufficient to notify the competent authority about it in writing and the NGO thus acquires a position of a participant, which brings an opportunity to make comments during the proceedings and to appeal against the final decision. The Czech NGOs often use this provision, which is relatively wide because it covers proceedings running not only under the Nature and Landscape Protection Act but also under other Acts (e.g. the Building Act, Water Act, Clean Air Act), if such proceedings involve nature protection. Similar, but more restrictive clauses are enshrined in the Environmental Impact Assessment Act,<sup>113</sup> in the Water Act,<sup>114</sup> and in the Integrated Prevention Act<sup>115</sup>. Together, these provisions cover a significant part of the requirements of the second pillar of the Aarhus Convention. However, they do not apply in the whole sphere of the environment, but only in the sectors mentioned. Therefore, in other environmental sectors the public cannot participate in administrative proceedings, which causes a deficiency in implementation of the second pillar of the Convention.

The legislative background of **the third pillar on access to justice** generally derives from rules on judicial review of administrative acts, which are set out in the Czech Administrative Justice Code.<sup>116</sup> The crucial question for the implementation of the third pillar of the Convention is, who may initiate a review procedure of decisions of administrative authorities; it is solved in Section 65 of the said Code. The general rule is that all persons *directly affected* by an alleged act have standing to open a judicial review procedure. However, in environmental cases, environmental NGOs or other persons defending the environment are unlikely directly affected. Instead, they may use the second standing clause given in Section 65: also persons not directly affected may initiate a review procedure before a court if they were a party

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<sup>113</sup> Section 23 of the Act No. 100/2001 Coll.

<sup>114</sup> Section 115 of the Act No. 254/2001 Coll., Water Act.

<sup>115</sup> Section 7 of the Act No. 76/2002 Coll., on integrated prevention (IPPC Act).

<sup>116</sup> Act. No. 150/2002 Coll., the Administrative Justice Code.

to previous administrative proceedings and if they assert that their rights have been infringed in those proceedings and that this infringement could lead to illegality of the final act.

This provision is symptomatic of the Czech administrative justice regulation, which is based on the so-called 'impairment of a right' doctrine derived from the Austrian-German administrative system. According to this doctrine, parties to a procedure should be able to prove that they have experienced a violation of *their rights* due to a situation subject to that procedure.<sup>117</sup> In environmental cases, the right to environment could be such a right. The Czech Constitution contains the right to a favourable environment in Art. 35. However, this right remains almost unapplied because of several legislative and interpretative reasons,<sup>118</sup> and its violations cannot be effectively claimed in these review cases. The significant implementation problem of the third pillar of the Convention in the Czech Republic is that it is almost impossible to prove that the violation of environmental norms as such infringes *the rights* of any concrete person.

The next section will analyse the mentioned implementation problems of the second and third pillar of the Convention in more detail, with regard to the development of the implementation critique by the Czech authors and its recent (2012) confirmation by the Compliance Committee of the Aarhus Convention.

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<sup>117</sup> ČERNÝ, P. *Nedostatky implementace článku 9 Aarhuské úmluvy v České republice* [online]. Praha: Ekologický právní servis, 2010, p. 4. Available at: <[http://www.eps.cz/sites/default/files/publikace/nedostatky\\_implementation\\_c19\\_aarhuske\\_uumluvy.pdf](http://www.eps.cz/sites/default/files/publikace/nedostatky_implementation_c19_aarhuske_uumluvy.pdf)>.

<sup>118</sup> See e.g. MÜLLEROVÁ, H. Human Rights Approaches to Environmental Protection at the International Level and their Application in the Czech Republic. *Common Law Review*, Issue 11, Autumn 2009, p. 24-27. Available online at: <<http://www.commonlawreview.cz/human-rights-approaches-to-environmental-protection-at-the-international-level-and-their-application-in-the-czech-r>>.

DAMOHOŘSKÝ, M. and MÜLLEROVÁ, H. Právo na příznivé životní prostředí v České republice. In Gerloch, A. – Šturma, P. a kol. *Ochrana základních práv a svobod v proměnách práva na počátku 21. století v českém, evropském a mezinárodním kontextu*. Auditorium, Praha 2011. ISBN 978-80-87284-23-0, p. 115 – 126.



### 4.3 Main Deficiencies in the Implementation and Their Causes

The first voices, that uncovered the implementation shortages, came from the Czech environmental NGOs, whose members faced troubles trying to apply the rules of the Aarhus Convention in practice and who expressed severe doubts about the correct implementation of certain Aarhus Convention provisions. Until now, there have been several studies, analyses and assessments of how good or rather poor the Czech law in that implementation is. The studies formulated the main weak points of the legislation and interpretation and their argumentation became polished and refined to give the whole issue deeper theoretical grounds. These studies emerged within the said environmental NGOs<sup>119</sup> and also in the academic sphere that gave the matter a deeper theoretical framing.<sup>120</sup> Both NGOs and

<sup>119</sup> See esp. ČERNÝ, P. *Analýza implementace Aarhuské úmluvy v právním řádu ČR*, 2007, p. [online]. Available at: <[www.eps.cz](http://www.eps.cz)>. FRANC, P. Soudní ochrana veřejného zájmu. *Právní rozhledy*. 2007, č. 5. MOTZKE, R. and PODSKALSKÁ, S. Aarhuská úmluva ve správní a soudní praxi. *Planeta*. 2007, Issue 6.

<sup>120</sup> See e.g. BĚLOHRADOVÁ, J. Aarhuská úmluva - aktuální otázky. *COFOLA 2011: Sborník z mezinárodní konference* [online]. Brno: Masarykova Univerzita, 2011, p. Available at:

<[http://www.law.muni.cz/sborniky/cofola2011/files/participace/Belohradova\\_Jitka\\_6005.pdf](http://www.law.muni.cz/sborniky/cofola2011/files/participace/Belohradova_Jitka_6005.pdf)>.

BĚLOHRADOVÁ, J. Participace veřejnosti v rámci povolování provozu nadlimitního zdroje hluku. *Časopis pro právní vědu a praxi*. 2011, Issue 2, p. 144-148. ISSN 12109126.

FRANKOVÁ, M. and HUMLÍČKOVÁ, P. Public Participation in Environmental Protection in the Czech Republic – Current Tendencies. In DAMOHORSKÝ, M. and STEJSKAL, V. (Eds.) *Czech Environmental Law 2010, Yearbook – Volume 4*. Prague: The Czech Environmental Law Society 2010, Publishing House: Eva Rozkotová, 2010, p. 19 – 29. ISBN 978-80-87488-00-3.

FRANKOVÁ, M. and HUMLÍČKOVÁ, P. Application of the Aarhus Convention in the Czech Republic at 2011. In DAMOHORSKÝ, M. and STEJSKAL, V. (Eds.) *Czech and European Environmental Law*. The Czech Society for Environmental Law 2011, Publishing House: Eva Rozkotová, p. 22 – 26. ISBN 978-80-87488-07-2.

SOBOTKA, M. and HUMLÍČKOVÁ, P. Rozšíření účasti veřejnosti (?) aneb několik

academic authors concluded that the Czech Republic is not in full compliance regarding at least some of the Aarhus requirements. On the contrary, the official opinion of the Czech Ministry of the Environment insisted on full compliance, which has changed only recently.<sup>121</sup>

To sum up, the Czech legal experts have found main legislative deficiencies in the following articles of the Aarhus Convention:

- **Art. 6 (3)** – the definition of the term ‘the public concerned’ is too narrow in the Czech law and on that account the public cannot effectively participate in the decision-making process;
- **Art. 6 (8)** – the legislation does not guarantee that opinions of the public in the EIA procedure will be effectively taken into account in the subsequent stages of decision-making to permit an activity, and not all members of the public concerned may effectively comment on proposed activities;
- **Art. 9 (2)** – NGOs have too limited rights to access review procedures regarding final decisions permitting proposed activities (e.g. building permits); they can take a legal action in a review procedure only against procedural mistakes of the previous process, but not against substantive illegality of the decision; moreover, the law does not enable at all the Czech public to challenge the legality of EIA screening conclusions;<sup>122</sup>

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poznámek k jedné zbytečné novele zákona o posuzování vlivů na životní prostředí. *České právo životního prostředí* 2010 (27), Issue 1, p. 94 - 98. ISSN 1213-5542.

<sup>121</sup> The recent Aarhus Convention Implementation Report 2010 made by the Ministry of the Environment mentions also several obstacles to a correct implementation. See *Czech Republic Aarhus Convention Implementation Report 2010*, 2010, [online]. Available at:

<[http://www.mzp.cz/C1257458002F0DC7/cz/dokumenty\\_aarhuska\\_umluva/\\$FILE/OMV-Narodni\\_implementationacni\\_zprava\\_AJ\\_2010-20101215.pdf](http://www.mzp.cz/C1257458002F0DC7/cz/dokumenty_aarhuska_umluva/$FILE/OMV-Narodni_implementationacni_zprava_AJ_2010-20101215.pdf)>.

<sup>122</sup> Screening conclusions are preliminary conclusions in individual cases deciding whether the “full EIA” will be held or not; the impossibility to appeal these conclusions is especially problematic in negative screening conclusions, i.e. conclusions that the process of the environmental impact assessment will not be

- **Art. 9 (3)** – the Czech law does not grant the public legal standing to challenge certain environmental decisions, namely in the area of enforcing the noise limits by private operators and in the area of issuing spatial plans.<sup>123</sup>

Despite the mentioned critique, neither the legislation, nor the mainstream judicial interpretation has changed. To be precise, the legislation has changed only in small details irrelevant to the overall compliance assessment.<sup>124</sup> As regards Czech courts, they count among the most restrictive national courts in many aspects of the Aarhus Convention's implementation but also in environmental rights as such. The Czech high courts consolidated the restrictive interpretation of both substantive and procedural environmental rights in the 1990s and have not changed or developed it since then.<sup>125</sup>

In 2010, 'Ekologický právní servis' (Ecological Legal Service – EPS), one of the leading Czech environmental NGOs, used the opportunity of members

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run in the given case because no significant environmental impacts of the planned activity are expected.

<sup>123</sup> See e.g. ČERNÝ, P. *Analýza implementace Aarhuské úmluvy v právním řádu ČR*, 2007 [online]. Available at [www: <www.eps.cz>](http://www.eps.cz).

<sup>124</sup> E.g. the amendment of the Act on Environmental Impact Assessment that slightly changed the conditions of public participation regarding NGOs.

<sup>125</sup> As regards the public participation in environmental decision-making, particularly the NGOs opportunities in the review procedure, one may distinguish three approaches of national courts: the extensive approach (*actio popularis*), the restrictive approach requiring to prove an impairment of a subjective right, and the intermediate approach, characterized by the requirement of proving sufficient interest in the court. See OBRADOVIC, D. EU Rules on Public Participation in Environmental Decision-Making Operating at the European and National Levels. In PALLEMAERTS, M. (Ed.) *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law*. Groningen, Amsterdam: Europa Law Publishing, 2011, p. 180. ISBN 978-90-8952-048-7. The European Court of Justice is also counted to very restrictive jurisdictions. On the opposite side are for example the British and other common law countries courts. E. g. CARNWATH, R. The Role of Courts and Judges in Environmental Protection. Conference presentation in the International Conference on the Application of the Aarhus Convention in Practice. The Supreme Administrative Court, Brno, 16 – 17

of the public to join the control mechanisms of the Convention and submitted a communication to the Compliance Committee of the Aarhus Convention.<sup>126</sup> The findings of the Committee confirmed the long-term doubts about the compliance of the Czech law with the Aarhus Convention.<sup>127</sup> The proceedings and the findings of the Compliance Committee are explained in Chapter 5.

The described legal weaknesses have deeper causes lying in both the legislation and the interpretation. The key questions are: 1. who may take the legal action, i.e. who may join the administrative proceedings as a party and who may initiate the review procedure of that proceedings; 2. what that person may challenge, i.e. what type of mistakes or illegalities of the previous process and resulting decision he or she may claim. These two problems will be now elaborated in more detail.

#### 4.3.1 Personal Scope: Criteria for Standing

In the Czech law, the conditions of participation in administrative decisive procedures and in judicial review procedure are interconnected. Legal standing in a review procedure depends above all on the person's *previous* participation in a decision-making process, meaning the administrative proceedings. Conditions for participating in administrative proceedings are not regulated homogenously. That also means that differing laws regulating public participation determine who may open the review procedure. As mentioned earlier, Section 70 of the Nature and Landscape Protection Act, as well as several similar provisions of other laws, enable the environmental NGOs to participate in administrative proceedings. But there are certain

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April 2009. See <[http://www.mzp.cz/cz/pristup\\_k\\_pravni\\_ochrane](http://www.mzp.cz/cz/pristup_k_pravni_ochrane)> (cited 12 July 2013).

<sup>126</sup> ČERNÝ, P. *Podnět Výboru pro dodržování Aarhuské úmluvy*, 2010, p. [online]. Available at www: <[www.eps.cz](http://www.eps.cz)>.

<sup>127</sup> See the Findings of the AC Compliance Committee - Czech Republic, Aarhus Convention Compliance Committee, ACCC/C/2010/50, 2012, para. 89. Available at www: <[http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-50/Findings/ece\\_mp.pp\\_c.1\\_2012\\_11\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-50/Findings/ece_mp.pp_c.1_2012_11_eng.pdf)>.

laws that exclude the public from participation at all (e.g. noise limits setting laws or nuclear act), which consequently prevents the public from participating at a review procedure at all. Moreover, in some administrative procedures with the public participation, certain aspects of that participation are limited; therefore, it can't be ensured that voice of the public will really be reflected in the final decision.<sup>128</sup>

Unfortunately, the absence of public participation rights in certain types of procedures cannot be resolved through a direct application of the relevant provision of the Aarhus Convention. The Czech courts have repeatedly held that the provisions of the Aarhus Convention cannot be directly applicable because they are not 'sufficiently specific' or 'self-executing'.<sup>129</sup> That means that Czech citizens cannot derive their rights directly from the Convention and as a result, an implementing legislation is needed. NGOs attempted several times to base their claims on the assertion that their legal standing to sue emerges *directly* from Art. 9 of the Aarhus Convention, but without success. On the other hand, now it seems that basing the claims on that assertion is futile because the Court of Justice of the EU issued a key finding on the matter in 2011, in which it said no to the direct applicability of Art. 9 (3) of the Convention.

It was the judgment upheld in a preliminary ruling procedure on the request of the High Court of Slovakia in the case of Slovak NGO Lesoochránárske zoskupenie VLK (for details of the case, see the chapter on the Slovak implementation of the Aarhus Convention). In the judgment

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<sup>128</sup> See esp. ČERNÝ, P. *Nedostatky implementace článku 9 Aarhuské úmluvy v České republice* [online]. Praha: Ekologický právní servis, 2010, p. 5. Available at [www:  
<http://www.eps.cz/sites/default/files/publikace/nedostatky\\_implementace\\_cl9\\_aarhuske\\_uumluvy.pdf>](http://www.eps.cz/sites/default/files/publikace/nedostatky_implementace_cl9_aarhuske_uumluvy.pdf).

<sup>129</sup> MÜLLEROVÁ, H. *Judykatura najvyššieho saudu administracyjnego republiky czeskiej w przedmiocie bezpośredniej stosowalności konwencji z Aarhus w czeskim porządku prawnym* [Jurisprudence of the Czech Supreme Administrative Court concerning direct applicability of the Aarhus Convention in the Czech legal order]. *Udział społeczeństwa w zintegrowanej ochronie środowiska*. Issue 55 (2010), p. 59-65. Transl. W. Radecki. ISBN 978-83-60644-05-8.

the Court of Justice concluded that: *“Article 9 (3) of the Aarhus Convention does not have direct effect in EU law.”*<sup>130</sup> In other words, the Court ruled that Article 9 para. 3 cannot be applied directly without any implementing legislation. After this interpretation made by the Court of Justice, the Czech courts have referred to this judgment, and this way of interpreting the matter has become even more strongly embedded in the Czech jurisprudence. However, the ECJ did not end with the cited rule; on the contrary, it has considerably ‘softened’ this very strict interpretation in following conclusions that Article 9 (3) has to be *“interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law”* and that it is for the referring court to *“interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that Convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.”*<sup>131</sup> The later rule of an extensive interpretation has not yet been reflected by Czech courts.

#### 4.3.2 Scope of Review

Concerning the question what the petitioner may claim, the persisting restrictive interpretation of the constitutional right to a favourable environment is crucial. The Czech Constitutional Court and the Supreme Administrative Court held that only natural persons (individuals) can enjoy the right to a favourable environment in its entirety, both in substantive and procedural elements. On the contrary, legal entities, including

<sup>130</sup> Lesoochránárske zoskupenie VLK vs. MŽP SR Rozsudek, Soudní dvůr EU, C-240/09, 2011, para. 52. Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=80235&pageIndex=0&doclang=CS&mode=lst&dir=&occ=first&part=1&cid=399279>.

<sup>131</sup> *Ibid.*, para. 51 and 52.

environmental NGOs, may challenge only procedural rights in the field of environmental protection. Here is the well-known and often cited argumentation of the Constitutional Court of 1997: *“It is clear that rights concerning environment belong only to individuals because they are biological organisms which are, in contrast with legal persons, influenced by eventual negative impacts of the environment.”*<sup>132</sup> In other words, the Court said that legal entities cannot suffer from damaged environment or cannot enjoy a favourable environment, and, thus, they cannot have the rights related to environmental quality.<sup>133</sup>

This restrictive interpretation adverse to environmental NGOs has led to many discrepancies. We can suppose that the real purpose of the claims of NGOs are mostly violations of substantive environmental law provisions. But due to the mentioned interpretation, environmental NGOs turned to using something like artificial or ‘camouflage’ reasoning in their complaints. They base their claims on procedural errors and thus probably have better chances in changing or even cancelling the administrative decisions in question. But as one of the leading environmental NGOs proponent and advocate Pavel Černý noticed, this method has been misunderstood by the general public, which often accuses NGOs of formalism and obstruction.<sup>134</sup>

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<sup>132</sup> Resolution of the Constitutional Court of 6 January 1997, No. I.ÚS 282/97, p. 2. Available at <<http://nalus.usoud.cz>>.

<sup>133</sup> About the constitutional right to a favourable environment in the Czech Republic, see e.g. MÜLLEROVÁ, H. Human Rights Approaches to Environmental Protection at the International Level and their Application in the Czech Republic. *Common Law Review*, Issue 11, Autumn 2009, p. 24-27. Available online at: <<http://www.commonlawreview.cz/human-rights-approaches-to-environmental-protection-at-the-international-level-and-their-application-in-the-czech-r>>.

DAMOHOŘSKÝ, M. and MÜLLEROVÁ, H. Právo na příznivé životní prostředí v České republice [Human right to a favourable environment in the Czech Republic]. In GERLOCH, A. – ŠTURMA, P. et al.. *Ochrana základních práv a svobod v proměnách práva na počátku 21. století v českém, evropském a mezinárodním kontextu*. Praha: Auditorium, 2011, p. 115 – 126. ISBN 978-80-87284-23-0.

<sup>134</sup> ČERNÝ, P. *Nedostatky implementace článku 9 Aarhuské úmluvy v České republice* [online]. Praha: Ekologický právní servis, 2010, p. 10. Available at:

Another aspect of what any petitioner may claim is also important. He or she may only claim *his or her individual rights*. Courts insist in interpretation that it is *not* possible to claim exclusively an infringement of a public interest (e.g. environment) without challenging an infringement of one's own rights. The Czech Republic has no legal provisions establishing a public interest litigation (*actio popularis*).

The courts used a more favourable approach to the standing and to the grounds of the environmental claims only in a few exceptional cases.<sup>135</sup> The most surprising way of argumentation came from the High Court in Prague in 1997 in the case of *Motorway Bypass of Pilsen*, in which the petitioners (an environmental NGO) claimed only environmental violations and no individual rights. The court held that because of missing legal regulation of public interest litigation, there is no one (except for individual proprietors) who can protest in court against breaches of environmental laws and, thus, the Court in that individual case admitted the standing of the petitioners. Regrettably, this approach was not followed by subsequent case law.<sup>136</sup>

## 4.4 Future Perspectives

After drafting this gloomy image, the future perspectives of the Aarhus rights in the Czech Republic are worth-questioning. There are several conceivable starters for improvement.

### 4.4.1 Possible 'Starters'

Firstly, the change of legislation requires political will. However, in the Czech Republic, environmental concerns are not the leading ones in the

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<[http://www.eps.cz/sites/default/files/publikace/nedostatky\\_implementatione\\_cl9\\_aarhuske\\_umluvy.pdf](http://www.eps.cz/sites/default/files/publikace/nedostatky_implementatione_cl9_aarhuske_umluvy.pdf)>.

<sup>135</sup> See e.g. ČERNÝ, P. *Nedostatky implementace článku 9 Aarhuské úmluvy v České republice* [online]. Praha: Ekologický právní servis, 2010, p. 9. Available at:

<[http://www.eps.cz/sites/default/files/publikace/nedostatky\\_implementatione\\_cl9\\_aarhuske\\_umluvy.pdf](http://www.eps.cz/sites/default/files/publikace/nedostatky_implementatione_cl9_aarhuske_umluvy.pdf)>.

<sup>136</sup> Decision of the High Court in Prague of 25 August 1997, No. 6 A 40/96-140.



whole political, economic and social context. This is unlikely to change in the near future.

Secondly, the Compliance Committee confirmed the Czech non-compliance with the Aarhus Convention. The findings of the Committee are binding for the Czech Republic, and, thus, it will be most interesting to monitor the respective steps of the Ministry of the Environment, responsible for the environmental legislation, esp. to what extent the laws will be proposed to be amended.

The third starter for improvements could be some piece of European Union law, obliging the member states to transpose or adopt it into national law. In this context, it is necessary to mention the proposal of a Directive on access to justice in environmental matters that had been elaborated in EU institutions in 2003 and 2004. The Directive should have implemented the requirements of the third pillar of the Aarhus Convention. Unfortunately, the legislative process faded out in 2004 and it is unclear if it can be resumed in the future.

The most recent affair coming from the European Commission, which can have a strong potential to initiate a change in legislation, is the infringement procedure opened in April 2013 against the Czech Republic. Despite it concerns implementation of the Environmental Impact Assessment Directive and not directly the “Aarhus” legislation, it is closely connected with public participation in environmental decision-making procedures. The Commission allegedly<sup>137</sup> reproaches the Czech Republic for having an appropriate scope of persons entitled to make comments only in the procedure of environmental impact assessment itself, compared to the narrower scope in subsequent – decisive and thus more important – phases of the process.<sup>138</sup>

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<sup>137</sup> There is no official report on the matter yet, as the rule is not to publish details of not finished infringement procedures. For general unofficial (media) information see e.g. <<http://euro.e15.cz/archiv/chaos-jenz-muze-ozebracit-stat-1021248>>.

<sup>138</sup> The same objection to the Czech EIA legislation was already raised by the Commission in 2009 but the former legislative solution seemed to be insufficient.

#### 4.4.2 Possible Changes

Another question is how the compliance could be achieved; there are the two main ways – the legislative and the interpretative.

Considering legislative changes, there are of course variable scenarios possible. However, most of them are in my opinion only hypothetical. This way we may dream of harmonization or unification of all the environmental procedures giving the public an opportunity to participate. Similarly, we may dream of a law that would implement all the aspects of the human right to a favourable environment as granted by Art. 35 of the Czech Constitutional Charter. Unfortunately, such visions seem unrealistic in today's political environment of the Czech Republic.

On the other hand, even smaller legislative changes could be beneficial if aimed to solve the individual objections formulated by the Aarhus Convention Compliance Committee. However, 'opening' the environmental laws for a legislative process of amending them poses some risks, too; namely introducing other and let's say environmentally unfriendly changes during the legislative process. In this context, it is particularly important to defend the contents of our Nature and Landscape Protection Act that originated in the first wave of environmental laws after 1989 and whose environmental values remain top-level. As it was mentioned, just Section 70 of this law gives the public the widest access to administrative proceedings (despite several unsuccessful attempts in the Parliament to reduce it, it is still in force).

The change of the deep-rooted judicial interpretation that would leave away its most restrictive elements (e.g. the personal scope of the right to a favourable environment) is the other way how to achieve compliance. Knowing possible risks of amending legislation shifts even more emphasis towards the re-interpretation of existing legislation. Much positive

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See esp. SOBOTKA, M. – HUMLÍČKOVÁ, P. Rozšíření účasti veřejnosti (?) aneb několik poznámek k jedné zbytečné novele zákona o posuzování vlivů na životní prostředí. *České právo životního prostředí*, 2010, Issue 1, p. 94-98. ISSN: 1213-5542.

inspiration may be found abroad – e.g. in Finland or France courts recognized the standing also for entities for whom the standing was not guaranteed in law in force, just by extensive interpretation and supporting the public interest in environmental protection.<sup>139</sup> Judicial interpretation plays and for sure will play a key role in the legal protection of the environment.

#### 4.5 Conclusion

Despite the 15-year existence of the Aarhus Convention in the Czech law, several implementation shortages still remain. Experts have been fruitlessly pointing out these shortages for years. Recent official confirmation of non-compliance by the Compliance Committee of the Aarhus Convention provides a strong stimulus for the Czech competent authorities to make legislative and interpretative changes to achieve full compliance. Only when this will be achieved, we can speak about the environmental democracy in the Czech Republic.

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<sup>139</sup> KUUSINIEMI, K. – PASSER, J. Aarhus Convention in Court Practice – Finish and Czech Perspectives. Conference presentation in the International Conference on the Application of the Aarhus Convention in Practice. The Supreme Administrative Court, Brno, 16 – 17 April 2009. See <[http://www.mzp.cz/cz/pristup\\_k\\_pravni\\_ochrane](http://www.mzp.cz/cz/pristup_k_pravni_ochrane)> (cited 12 July 2013).

## 5. Czech Republic Before the Aarhus Convention Compliance Committee

### 5.1 Introduction

Article 15 of the Aarhus Convention on review of compliance requires the Meeting of the Parties to establish “*optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention*”. The Meeting of the Parties adopted at its first session in October 2002 decision I/7 on review of compliance<sup>140</sup> and elected the first Compliance Committee of the Aarhus Convention (hereinafter referred to as “the Compliance Committee”).<sup>141</sup>

The compliance mechanism may be initiated in four different ways:

- (1) Party may make a submission about compliance by another Party;
- (2) Party may make a submission concerning its own compliance;
- (3) Secretariat may make a referral to the Committee;
- (4) Members of the public may make communications concerning a Party's compliance with the Convention.

Over the existence of the Aarhus Convention Compliance Committee (hereinafter ACCC), only one complaint of a Party about compliance by another Party has been submitted;<sup>142</sup> the second and the third options of

<sup>140</sup> The full text of decision I/7 on review of compliance:

<<http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.a.dd.8.e.pdf>>.

<sup>141</sup> One of the first members of the Aarhus Compliance Committee was also from the Czech Republic – JUDr. Eva Kružíková. For all the members of the Committee please see:

<<http://www.unece.org/env/pp/ccmembership.html>>.

<sup>142</sup> See case ACCC/C/2004/03 Romania about compliance by Ukraine: <<http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppcc/envpps submissions/ukraine-2004.html>>.

initiating the proceedings, i.e. the Party complaint against itself or referral by the Secretariat, have never been used. On the contrary, at the time of this publication there have been already 83 complaints submitted by members of the public. Thus, communications from the public are the most common way of initiating the compliance proceedings. Moreover, the frequency of the public submissions increases over time, which can be certainly considered as a proof of the functionality of the compliance mechanism.<sup>143</sup>

In the course of its work the Compliance Committee develops specific details of its modus operandi. The Compliance Committee modus operandi is described in detail in the Guidance Document on Aarhus Convention Compliance Mechanism.<sup>144</sup> For the purpose of this chapter, it is not necessary to describe the modus operandi in a greater detail. What is important is the fact that the whole process is very informal and focuses on the most effective solution. Members of the public may even use free assistance from experienced NGOs. The only drawback of the process is its slowness (the Compliance Committee is meeting every three months); solving a case usually takes several years.

The other question is the binding nature of ACCC findings. The Compliance Committee cannot issue binding decisions, but rather make recommendations to the Meeting of the Parties, or, in certain circumstances, directly to individual Parties. Nevertheless, the findings of the Compliance Committee after approval by the Meeting of the Parties are observed in the majority of cases.

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<sup>143</sup> Since its establishment, the Compliance Committee has reached a number of findings with regard to compliance by individual Parties. The Compliance Committee's considerations with regard to specific provisions of the Convention have been compiled in a brochure by Resource & Analysis Center "Society and Environment".

<sup>144</sup> The Guidance Document see: [http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC\\_GuidanceDocument.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf).

## 5.2 Case ACCC/C/2010/50

The first Czech submission is not related to any particular case. On the contrary, it is a very complex material based on many years of experience with the application of the Convention in the Czech Republic. It is, therefore, quite ideal material for a comprehensive description and analysis of Czech *status quo*. Because of the clarity of the text, I will divide the findings into 9 separate points.

The Compliance Committee finding in the first Czech case – ACCC/C/2010/50 – was adopted on 29 June 2012.<sup>145</sup> Recommendations proposed by the Committee will be adopted by the Meeting of the Parties to be held in 2014 in Kiev. If these recommendations are not met, the Meeting of the Parties may adopt certain measures against the Czech Republic (the declaration of non-compliance with the Convention, warning or even suspension of rights of the Czech Republic to the Convention).

The communication was submitted by the Czech association Environmental Law Service (Ekologický právní servis, hereinafter referred to as “EPS”) in June 2009. EPS was claiming that the Czech Republic does not comply with obligations arising from the provisions of Article 3, paragraph 1, Article 6, paragraph 3 and 8 and Article 9, paragraph 2, 3 and 4 of the Convention:

### **1. Clear, transparent and consistent framework of legal protection – Article 3 (1) of the Convention**

The complainant claimed that the Czech Republic does not fulfil the provisions of Article 3 (1) of the Convention because neither regulations implementing Article 9 (3) and 9 (4) nor judicial practice provide a clear, transparent and consistent framework to fulfil these provisions. The Committee decided that this claim was not addressed because it was considered insufficiently evidence-based.

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<sup>145</sup> The full text of the findings (including all documents submitted during the compliance mechanism) is available for free download at: <http://www.unece.org/env/pp/compliance/Compliancecommittee/50TableCz.html>.

## 2. Definition of the public concerned – Article 2 (5) of the Convention

The public concerned is defined in Article 2 (5) of the Convention as the public, *"which is, or may be affected by environmental decisions, or has an interest in making this decision."* The definition of 'public concerned' in the Convention is narrower than the definition of 'public', but its interpretation is still quite wide. Whether an individual member of the public is affected by the project depends on the nature and size of the project. For instance, in case of nuclear power plant construction, the relevant public is much broader than in case of construction of slaughterhouses. In the Czech practice, we can unfortunately meet the cases where affected owners in densely populated areas were defined by the range of 50 meters from the planned building (this was a case of construction of a private medical complex in the middle of residential buildings). This procedure leads to a *de facto* exclusion of the majority of the public concerned.

The concern of members of the public then depends on interference to their right with a respective plan or project. This regards not only property rights, but also the material and social rights or the right to a favourable environment. The public concerned should always cover also **the tenants** (including short-term), as was emphasized by the Compliance Committee:

*"67. A tenant is a person who holds, or possesses for a time, land, a house/apartment/office or the like, from another person (usually the owner), usually for rent. An activity may affect the social or environmental rights of the tenants, especially if they have been or will be tenants for a long period of time. In that case, to a certain extent, the interests of the tenants would amount to the interests of the owners. Although the relationship of the tenant to the object is always intermediated, since tenants, even short term tenants, may be affected by the proposed activity, they should generally be considered to be within the definition of the public concerned under Article 2, paragraph 5, of the Convention and should therefore enjoy the same rights as other members of the public concerned."*<sup>146</sup>

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<sup>146</sup> See Findings and recommendations with regard to communication ACCC/C/2010/50 concerning compliance by the Czech Republic Prepared by the Compliance Committee and adopted on 29 June 2012.

In the Czech Republic, about 22% of households live in rented flats.<sup>147</sup> Approximately one fifth of the population does not therefore own their property, but only rents it. The Czech Building Act expressly excludes tenants of apartments from participation in decision-making and this attitude was confirmed by the Czech Supreme Administrative Court.<sup>148</sup> Moreover, the Supreme Administrative Court excludes tenants from the public concerned in proceedings where the Building Act does not exclude them explicitly, i.e. in area of spatial planning.<sup>149</sup> The Supreme Administrative Court has ruled that *“the tenant of real property on the area regulated by the spatial plan does not have standing to sue for abolishing of the respective spatial plan or its part”*, because the rights of the tenants *“are not related directly to the area (land) in question, but to the person (owner) who enabled them to use it on the base of contract”*.

The second problem is a status of **non-profit organizations**. The Convention does not require an environmental NGO as a member of the public to prove that it has a legal interest in order to be considered as a member of the public concerned. Article 2 (5) rather deems NGOs promoting environmental protection and meeting any requirements under national law to have such an interest. In the Czech legal theory, environmental NGOs do not have such rights as the right to life, to privacy or to a favourable environment<sup>150</sup> that could be affected, which has consequences described further.

Because of the ‘impairment of a right’ doctrine, the Czech Republic has a narrow interpretation of public concerned. The Compliance Committee concluded that **the interpretation of the ‘public concerned’ is restrictive** in the Czech Republic. The Czech Republic therefore fails to provide for effective public participation and access to justice.

<sup>147</sup> See official statistics of the Ministry for Regional Development: [http://www.mmr.cz/cs/Ministerstvo/Ministerstvo/FAQ/III-BYTOVA-POLITIKA#Z\\_kladn\\_daje\\_o\\_bydlen](http://www.mmr.cz/cs/Ministerstvo/Ministerstvo/FAQ/III-BYTOVA-POLITIKA#Z_kladn_daje_o_bydlen).

<sup>148</sup> See Supreme Administrative Court decision No. 2 As 1/2005–62 of 2 March 2005.

<sup>149</sup> See Supreme Administrative Court decision No. 1 Ao 1/2009–120 of July 2009.

<sup>150</sup> At the first time, the Constitutional Court expressed this view in its Decision dated 6 January 1998, ref. no. I. ÚS 282/97.



### 3. Effective participation at each stage – Article 6 (3) of the Convention

Article 6 of the Convention guarantees rights to the public in the decision-making process for particular types of projects; generally in those that have or could have a negative impact on the environment. These projects are often permitted in the Czech Republic in a multilayer decision-making process (environment impact assessment - EIA, planning permissions and building permits<sup>151</sup>, etc.). An EIA finding is not a decision in itself, but a basis for subsequent spatial planning and building permitting processes. The EIA procedure is an open participatory process, whereas participation in the decision-making for the subsequent phases is limited to those members of the public that are recognized by law as parties to planning permission proceedings and building permit proceedings. The Building Act usually limits the parties to natural persons whose rights *in rem* are affected or likely to be affected.<sup>152</sup> Consequently, members of the public concerned during the EIA procedure are not the same as the members of the public in the subsequent spatial planning and building permitting procedures. As a result, NGOs have limited rights to participate after the conclusion of the EIA procedure and tenants, while they may be able to participate in the EIA procedure, are not able to participate in the subsequent stages, because the law does not recognize them as parties to those procedures.

The Convention requires that in multilayer decision-making processes, as it provides under the Czech law, the right of the public concerned to participate should be guaranteed **in each stage of the decision-making process**.<sup>153</sup> Therefore, the Compliance Committee notes that the

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<sup>151</sup> Building permits constitute the final permit (decision) in the context of Article 6 of the Convention in the Czech Republic.

<sup>152</sup> See e.g. § 85 (2) (b) of the Building Act: *persons whose property or other property right to neighbouring buildings or adjacent land or buildings on them may be directly affected by planning permission decisions*.

<sup>153</sup> See STEC, S. and CASEY-LEFKOWITZ, S. *The Aarhus Convention: An Implementation Guide (First Edition)*, New York and Geneva, 2000: „This provision of the Convention also refers to “the different phases”. Considering the rationale behind

environmental decision-making is not limited to the EIA process, but it also applies to subsequent decision-making process as planning permission and building permitting proceedings, as long as the planned activity has an impact on the environment. The public concerned shall have an opportunity to participate in planning permission and building permitting proceedings. Although the results of the EIA procedure are taken into account in the subsequent phases of the decision-making, members of the public shall also be able to examine and to comment on elements determining the final building decision throughout the land planning and building processes.

The Czech Republic does not provide effective participation in the decision-making procedures following the EIA process, and therefore fails to comply with Article 6 (3) of the Convention. The Committee therefore recommends the Czech Republic to take the necessary regulatory, administrative and other measures to ensure that all individual members of the public concerned, including tenants and non-governmental organizations that meet the requirements of Article 2 (5) of the Convention, have right to effectively participate and provide comments throughout the decision-making process subject to Article 6 of the Convention.

#### **4. Authorities take due account of the outcome of public participation in the decision – Article 6 (8) of the Convention**

The Convention provides for the obligation of public authorities to properly take into account the outcome of the public participation in the decision-making process. As described above, participation in the Czech Republic is fairly extensive by the EIA. However, the public comments on the EIA process are not taken into account in subsequent proceedings

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*the need for adequate time-frames (giving information, allowing the public to prepare, and effective participation), the reference to “phases” should relate directly to the phases of the public participation procedures. Thus, each phase during the public participation procedures must include reasonable time-frames taking into account the fundamental requirements of public participation. In complex cases where public participation may take place at several points in the decision-making process, the reference to different phases may also be taken to refer to phases in the overall decision-making process.”*

(mainly land-use and building permit) as the outcome of the EIA is not objectively binding and a part of public concerned cannot attend follow-up stage of process and cannot require consideration of its comments.

In light of the above described facts, the Compliance Committee believes that the Czech Republic does not fulfil the requirements set out in Article 6 (8) of the Convention, because of the fact, that it fails to ensure that results of public participation are duly taken into account in decision making.

Furthermore, the Compliance Committee points out that under Article 6 (7) of the Convention the public shall have the **right to submit any comments**, information, analyses or opinions that are relevant to the project, including their view on the admissibility aspect of the project and compliance with environmental law. It does not, therefore, have to be only a comment on the impact on the environment.

#### 5. Access to justice – locus standi – Article 9 (2) of the Convention

Under the Czech law, the decisions may be sued primarily by the so called interested parties that participated in the process in which the decision was issued; typically property owners. Because the part of public concerned has not the right to participate in the proceedings, this group also does not have any right to sue decisions (e.g. NGOs or property tenants regulated by a spatial plan cannot sue for annulment of the spatial plan<sup>154</sup>).

The Compliance Committee recalls its previous findings,<sup>155</sup> which states that although the Parties to the Convention have the discretion in determination of scope of the public with the right to access to justice, this determination must be consistent *"to enable the public concerned wide access to justice within the scope of the Convention."* Therefore, the exercise of this discretion of the Parties to the Convention cannot interpret these criteria in a way that would significantly narrow the *locus standi*.

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<sup>154</sup> See Supreme Administrative Court decision No. 1 Ao 1/2009–120 of July 2009.

<sup>155</sup> See ACCC findings ACCC/C/2005/11.

The Compliance Committee notes that if Czech courts systematically interpret the provisions of § 65 of the Administrative Procedure Code in such a way that the "right" that *"was nullified or impaired"* in administrative proceedings apply only to property rights and may not contain any other rights or interests of the public in relation to the environment (including the rights of tenants), then such action may prevent general access to justice and be in breach of Article 9 (2) of the Convention. However, this violation cannot be stipulated because of the lack of documented evidence of judicial case law.

With regard to *locus standi* of environmental NGOs, the Compliance Committee notes that the Czech law is not entirely clear and consistent. What is clear is that NGOs cannot participate during all stages of procedures. The Compliance Committee believes that this feature of the Czech legal order restricts the rights of non-governmental organizations in the approach to review procedures of final decisions authorizing implementation of projects, such as building permits. In this context, the Party does not comply with Article 9 (2) of the Convention. The Committee therefore recommends the Czech Republic to take the necessary regulatory, administrative and other measures to ensure that non-governmental organization meeting the requirements of Article 2 (5) have the right to review any procedures subject to Article 6 of the Convention.

## **6. Access to justice – substantive review of a decision – Article 9 (2) of the Convention**

As regards the access to the courts in the Czech Republic, each applicant has to demonstrate that his or her rights are affected (so-called 'impairment of a right' doctrine). Individuals have both procedural and substantive rights; the substantive rights may include also rights or interests relating to the environment. According to settled case-law,<sup>156</sup> **non-profit**

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<sup>156</sup> The Constitutional Court ruled that *"NGOs cannot claim a right for a favourable environment, as it can self-evidently belong only to natural, not legal persons . . . In the administrative procedure concerning permission for starting the operations in the nuclear power plant, rights of an environmental NGO for protection of life,*

**organizations as legal persons do not have the right to a healthy environment;** they have only procedural rights that may be affected. This practice reduces the status of non-profit organizations before the courts, because before administrative courts non-profit organizations can only enforce their procedural rights applicable to administrative proceedings and not the substantive rights.

The Compliance Committee noted that the access to courts under the Convention covers both substantive and procedural legality. Under the Czech law, an individual may request a review of the process and the limited substantive legality of a decision under Article 6 of the Convention, and non-governmental organizations may request only a review of a procedural legality of decisions. In the case of limited rights of NGOs to initiate a review procedure only for breaches of procedural rights, the Compliance Committee notes that the Czech Republic does not comply with Article 9 (2) of the Convention.

Therefore, the Compliance Committee recommends that the Czech Republic shall take the necessary regulatory, administrative and other measures to ensure that non-governmental organization meeting the requirements of Article 2 (5) of the Convention have the right to review any procedures subject to Article 6 of the Convention due to its procedural but also substantive legality.

### **7. Judicial review of EIA screening conclusions – Article 9 (2) of the Convention**

The Compliance Committee then discussed separately the judicial review of the **screening conclusions of the EIA proceedings**. The Convention requires in Article 6 (1) (b) that each Party, including the Czech Republic, shall determine whether the project, which is outside the scope of Annex I, and which may have a significant impact on the environment, falls under

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*privacy or favourable environment could not be affected, because these rights cannot belong to legal persons. Therefore, in that respect they also cannot claim violation of the right to access to court (due process of law)."* Decision of the Constitutional Court No. I ÚS 2660/08 of 2 September 2010.

the provisions of Article 6 of the Convention and shall decide whether it will be subject of the Convention or not. Under the Czech law, these decisions are made in practice through EIA screening conclusions. The Supreme Administrative Court has ruled that “*Article 9 of the Aarhus Convention shall not be interpreted in a way that it requires separate review of any decision, act or omission in the scope of permitting the activities subject to Article 6 in a separate review procedure*” and that “*it is sufficient if such acts are subject to the review procedure at the stage when they can infringe the subjective rights of the affected persons.*”<sup>157</sup> In addition, the Court has stated that in general there is no need for the screening conclusion to be examined separately from the subsequent permits and that the EU law leaves it to discretion of its Member States to decide at what stage the decisions, acts or omissions can be challenged.<sup>158</sup>

The Compliance Committee states that the access to justice includes necessarily also decisions whether the project is subject to the Convention or not. Therefore, members of the public concerned shall have access to a review procedure to challenge the legality of the outcome of an EIA screening process.

## **8. Judicial review of omissions – Article 9 (3) of the Convention**

Article 9 (3) of the Convention stipulates the right of the public to review any acts or omissions by private persons and public authorities which contravene provisions of national environmental law. It is enough to claim that such a violation has occurred, and there may be any violation of law relating to the environment in a broader sense (noise, health, etc.).<sup>159</sup> The criteria for *locus standi* under Article 9 (3) of the Convention cannot be so severe as to effectively bar all or almost all environmental organizations or members of the public to challenging acts of omissions under this

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<sup>157</sup> See Supreme Administrative Court decision No. 1 As 13/2006–63 dated 29 August 2007.

<sup>158</sup> See Supreme Administrative Court decision No. 1 As 13/2006–63 dated 29 August 2007 and No. 2 As 68/2007–50 of 5 September 2009.

<sup>159</sup> See ACCC findings n. ACCC/C/2006/18.

paragraph.<sup>160</sup> The Compliance Committee considered in this respect three topics: Atomic Act, noise exception permits and spatial plans.

The Compliance Committee found a violation of Article 9 (3) of the Convention in the case of noise exception permits and spatial plans. If an operator exceeds a certain noise limit prescribed by law, the members of the public in the Czech Republic cannot participate in decision-making about this exception and ask for a judicial review of noise exception permits against the operator (private person) or of omissions of a public authority that had to oversee compliance with the law.<sup>161</sup> In the case of land-use plans, a considerable portion of the public, including NGOs, cannot challenge their issue in contravention of urban and land-planning standards or other environmental protection law. The common interpretation of *locus standi* in the Czech Republic gives the right of access to justice only to applicants and owners of neighbouring properties, eliminating tenants of the property or NGOs.

The Committee noted that the breach of Article 9 (3) of the Convention for the management of the Nuclear Act<sup>162</sup> had not been sufficiently established.<sup>163</sup> However, the Compliance Committee adds that if the *locus standi* to bring an action on the operation of nuclear authorizations is indeed limited for the reason that public participation is limited, then there

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<sup>160</sup> See ACCC findings n. ACCC/C/2005/11.

<sup>161</sup> The public is completely excluded from the decision-making to authorize the use of excessive noise source. Pursuant to § 94 paragraph 2 of Act No. 258/2000 Coll., on Protection of Public Health, the applicant, i.e. the operator is the only participant of the proceedings. Till January 2008, there was a total number of 131 such permissions issued in the Czech Republic, some of them relating to a number of noise sources (in one case, nearly two hundred individual sources) - in most cases the roads. See < [http://hluk.eps.cz/files/Analyza-hlukovych-vyjimek\\_EPS.pdf](http://hluk.eps.cz/files/Analyza-hlukovych-vyjimek_EPS.pdf)>.

<sup>162</sup> Act No. 18/1997 Coll., on Peaceful Exploitation of Nuclear Energy (Nuclear Act) provides for the issuance of a number of decisions and on the subject of standing states that “*the operator shall be the only party to the procedures according to this act*” (sect. 14, para. 1).

<sup>163</sup> The presented case law excluded public from the permit challenging on the grounds that public participation is not necessary in issues of nuclear safety.

are serious concerns of the Compliance Committee of the failure not only of Article 9 of the Convention, but also Article 6 of the Convention.

### **9. Minimum standards applicable to access to justice procedures — suspensory effect and injunctions – Article 9 (4) of the Convention**

The communicant – EPS – also made allegations that proceedings before Czech courts take a very long time, while the criteria for granting injunctive relief of suspensory effect are interpreted and implemented in a very limited way. This constitutes non-compliance with Article 9 (4) of the Convention which requires effective judicial protection.<sup>164</sup> Pending the decision on the complaint, however, there was a change in legislation (new conditions for granting suspensory effect<sup>165</sup>) as well as a shift in the case law (see e.g. judgment of the Supreme Administrative Court<sup>166</sup> stressing that the courts should grant suspensory effect if they are requested by the public concerned in judicial proceedings relating to environmental protection, to avoid that at the time the court will decide the project will be already implemented).

<sup>164</sup> See more: BLACK, P., PLŠEK, J. *Suspensory Effect of Administrative Actions of NGOs in Environmental Matters*. Environmental Law Service, 2010 [online] [cit. 01.06.2013]. Available at: [http://aa.ecn.cz/img\\_upload/98a9a0fe3779d35f22dc8d93fe87df89/Odkladne\\_uci\\_nky\\_NNO.pdf](http://aa.ecn.cz/img_upload/98a9a0fe3779d35f22dc8d93fe87df89/Odkladne_uci_nky_NNO.pdf)

<sup>165</sup> Compare the wording of § 73 paragraph 2 of Act No. 150/2002 Coll., on Administrative Procedure after the amendment effective as of 1 January 2012: *"At the request of the applicant after the response of defendant, the court admits suspensory effect, if the execution or other legal consequences of the decision meant for the applicant disproportionately greater harm than may occur to others by granting suspensory effect, and if it does not conflict with important public interest."* with the version prior to this amendment, *"At the request of the applicant after the response of defendant the court admits suspensory effect, if the execution or other legal consequences of the decision meant irreparable harm to the applicant, the granting of suspensory effect will not unreasonably affect the rights acquired by third parties and is not contrary to the public interest."*

<sup>166</sup> See for example the judgments of the Supreme Administrative Court of 28 June 2007 No. 5 As 53/2006-46 or 29 August 2007, No. 1 As 13/2007-63. Available from: <http://www.nssoud.cz>.



Therefore, the Committee concluded that the breach of Article 9 (4) of the Convention has not been sufficiently proven.

### 5.3 Other Czech cases

Besides the above mentioned communication of the EPS, also two other communications from the Czech Republic have been submitted to the Compliance Committee. These communications cover specific cases. They illustrate the most serious cases of environmental decision-making in the last years in the Czech Republic very well. The first communication concerned the **EU Emission Trading System**.<sup>167</sup> In the EU Emission Trading System, new rules apply since 2013, according to which emission allowances are mainly purchased in auctions. However, the Czech Republic applied for an exemption – a possibility to allocate a certain number of allowances free-of-charge and prepared and submitted the documents required by the European Commission - the National Investment Plan. The National Investment Plan has to provide for investments in retrofitting and upgrading of the infrastructure and clean technologies, as well as for the diversification of the country energy mix and sources of energy. The communicant claimed that in course of the preparation and adoption of the National Investment Plan the Czech authorities have failed to comply with Article 7 of the Aarhus Convention (in conjunction with applicable provisions of Article 6, para. 3, 4, and 8) in providing for the public participation during the preparation of plans and programs relating to the environment.

The second communications concerned the **Nuclear Power Plant Temelin**.<sup>168</sup> In this case, a German citizen complained about discrimination based on nationality during the public hearing in EIA proceedings. The complainant pointed out the lack of organizational information before public hearing and also the distance of place of public hearing.

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<sup>167</sup> ACCC/C/2012/70. See <http://www.unece.org/envenv/pp/compliancecommittee/70tablecz.html>.

<sup>168</sup> ACCC/C/2012/71. See <http://www.unece.org/envenv/pp/compliancecommittee/71tablecz.html>.

## **6. Poland**

### **The Aarhus Convention in the Polish Legal System**

#### **6.1 Introduction**

The Aarhus Convention was ratified by Poland on the basis of previous consent contained in the parliamentary act passed on 21 June 2001 on ratification of this Convention<sup>169</sup> and published in the Polish Journal of Law in 2003.<sup>170</sup>

According to Article 91 part 2 of the Polish Constitution passed on 2 April 1997, an international convention ratified with previous consent contained in the act has a priority over an act, if the act is not in concordance with the Convention. In this way the Aarhus Convention has the second place in the hierarchy of sources of law, after the Constitution, but before an act. It does not, however, mean that the legislation on the public participation in environmental matters began only after the Aarhus Convention. On the contrary, the basis had been already prepared before; however, it must be distinguished between the possibility to participate in administrative proceedings belonging to civil society organizations on one hand and the general public participation on the other hand.

#### **6.2 Participation of Civil Society Organizations According to the Code of Administrative Procedure**

This possibility appeared on 1 January 1961, when the Code of Administrative Procedure,<sup>171</sup> adopted on 14 June 1960 and amended many

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<sup>169</sup> Ustawa z 21.6.2001 o ratyfikacji Konwencji o dostępie do informacji, udziale społeczeństwa w podejmowaniu decyzji oraz dostępie do sprawiedliwości w sprawach dotyczących środowiska (DzU 2001, nr 89, poz. 970).

<sup>170</sup> Konwencja o dostępie do informacji, udziale społeczeństwa w podejmowaniu decyzji oraz dostępie do sprawiedliwości w sprawach dotyczących środowiska (DzU 2003, nr 78, poz. 706).

<sup>171</sup> Ustawa z 14.6.1960 Kodeks postępowania administracyjnego (DzU 1960, nr 30, poz. 168).

times, entered into force.<sup>172</sup> Article 28 of this Code in the primary version provided:

*Article 28. An organ of the state administration provides a civil society organization with rights belonging to the party in administrative proceedings concerning another person, if that participation is justified by statutory aims of this organization and if public interest requires it. A civil society organization, which was not admitted to the proceedings, may submit a complaint.*

The text of this Article obtained new number 31 and a new content. Article 31 in binding version states:

*Article 31. § 1. A civil society organization may in a matter concerned another person demand for:*

- 1) instituting administrative proceedings,*
- 2) participation in proceedings*

*if it is justified by statutory aims of this organization and if it is in public interest.*

*§ 2. If the organ of public administration evaluates the demand of the civil society organization as justified, decides about instituting proceedings or about participation of this organization in the proceedings. The civil society organization may submit a complaint against refusal to institute the proceedings or to admit its participation.*

*§ 3. Civil society organizations participate in the proceedings with rights belonging to a party.*

*§ 4. The organ of public administration, which initiated the proceedings in a matter concerning another person, shall inform about it the civil society organization, if it estimates that the civil society organization may have an interest to participate in this proceedings because of its statutory aims and if it is in public interest.*

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<sup>172</sup> For the final version, see DzU 2013, poz. 267.

*§ 5. A civil society organization, which does not participate in the proceedings with rights belonging to the party, may, with a consent of the organ of public administration, submit its opinion in the matter, prepared by its statutory organ.*

This Article was and in some cases still may be a legal basis for participation of civil society organizations in administrative proceedings in environmental matters. However, the legislation in the 1980s and in the first decade of the XXI century has created a special new basis for civil society (later ecological) organizations just in the environmental matters.

Nevertheless, the sources of these provisions must be searched in the amendment of the former Polish Constitution.

### **6.3 Constitution of the Polish People's Republic after 1976**

The Constitution of the Polish People's Republic adopted on 22 July 1952 did not, of course, contain any provisions concerning environment or nature protection. This situation changed on 10 February 1976, when the amendment of the Constitution was passed. This amendment introduced into its text two new provisions directly concerning the environmental protection:

- Article 12 part 2, according to which the Polish People's Republic was obliged to ensure protection and rational shaping the natural environment, which was a nationwide good,
- Article 71, according to which citizens of the Polish People's Republic had a right to enjoy the values of the natural environment and a duty to protect it.

In this way the environmental protection was introduced into sphere of the state obligations (Article 12) as well as the citizens' rights (Article 71, first sentence) and duties (Article 71, second sentence).

The right to enjoy the values of the natural environment was a subject of significant interest in the Polish legal doctrine. Two main interpretations were created. According to the first one, it meant a right to a sound (healthy)

environment without pollution exceeding admissible limits as well as to enjoy the beauty of natural areas and objects.<sup>173</sup> According to the second one, this right meant first of all (if not exclusively) a right to enjoy the values of valuable landscape. The core of this right was an access to national and landscape parks, to forests and green spaces and to open waters.<sup>174</sup>

#### **6.4 Participation of Civil Society Organizations According to the Environmental Protection Act 1980**

On 1 September 1980, the first Polish Environmental Protection Act, passed on 31 January 1980, entered into force.<sup>175</sup> The preamble of this act proclaimed, that one of its aims was to create conditions for realization of citizens' right to versatile enjoyment of the values of the environment. This idea had to be introduced first of all by activities of civil society organizations.

This act devoted a special Article 100 to civil society organizations having an interest in environmental protection because of their subject of activity; in this article the act:

1) empowered such organizations to demand:

a) organs of state administration to use legal instruments in order to remove environmental danger,

b) courts to initiate civil proceeding for abandonment from infringements of environmental protection on a defined place and for restoration of the previous state or repairing damages and for a ban or limitation of activities threatening the environment,

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<sup>173</sup> RADECKI, W. *Obywatelskie prawo do środowiska w Konstytucji PRL* [Citizen's right to the environment in the Constitution of the Polish People's Republic], Jelenia Góra 1984, p. 99.

<sup>174</sup> SOMMER, J. *Prawo jednostki do środowiska – aspekty prawne i polityczne* [Right of an individual to the environment – legal and political aspects], Warsaw 1990, p. 189.

<sup>175</sup> Ustawa z 31.1.1980 o ochronie i kształtowaniu środowiska (DzU 1980, nr 3, poz. 6; tekst jednolity DzU 1994, nr 49, poz. 196 ze zm.).

2) obliged an organ of state administration, which decided on localization or place of building projects with a significant impact on the environment to inform about the prepared projects civil society organizations corresponding to subject of their activity; civil society organizations could submit their remarks and proposals, the organ was obliged to examine them and to inform organizations about the way of dealing with them.

The most important amendment of Article 100 of the Environmental Protection Act was made by the act passed on 29 August 1997 amending this Act and some other acts.<sup>176</sup> After this amendment the tasks of civil society organizations in localization and building proceedings significantly increased. The principles were as follows:

1) Organs of the public administration deciding on:

- a) conditions for building and arranging an area,
- b) building permits

were obliged to inform about prepared projects before making a decision concerned with projects harmful to the environment or human health or potentially worsening the state of the environment. Lists of such projects were established by regulations. Auxiliary entities of local government bodies and civil society organizations had the right to be informed in the scope respective to the subject and place of their activity. Such entities and organizations could submit their remarks and proposals within 30 days;

2) an organ of the public administration was obliged to examine submitted remarks and proposals as well as to inform about the way of dealing with them,

3) auxiliary entities of local government bodies and civil society organizations corresponding to subject and place of their activity could participate in administrative proceedings connected with the environmental protection with rights belonging to the party,

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<sup>176</sup> Ustawa z 29.8.1997 o zmianie ustawy o ochronie i kształtowaniu środowiska oraz o zmianie niektórych ustaw (DzU 1997, nr 133, poz. 885).

4) organs of public administration obliged to inform about such projects were also obliged to lead the list of civil society organizations, which – correspondingly to their objectives – had submitted demands to obtain such information.

The day of entry into force of this amendment – 1 January 1998 – was the “first apogee” of rights belonging to civil society organizations having interest in environmental matters.

### **6.5 Environmental provisions in the new Polish Constitution**

On 17 October 1997 the Constitution of the Polish Republic, adopted on 2 April 1997, came into force. This Constitution took into account the environmental protection in several provisions, namely:

- according to Article 5, the Polish Republic ensures the protection of the environment in concordance with the principle of sustainable development,
- according to Article 31 part 3, constitutional rights and freedoms may be restricted in order to protect the environment, if these restriction are introduced on the basis of an act, they are necessary in the democratic state and if they do not violate essence of the rights or freedoms,
- according to Article 68 part 3, public authorities are obliged to prevent effects of environmental degradation, which are harmful to human health,
- according to Article 74 part 1, public authorities lead politics ensuring ecological safety for present and future generations,
- according to Article 74 part 2, the environmental protection is an obligation of public authorities,
- according to Article 74 part 3, everyone has a right to information about the state of the environment and its protection,

- according to Article 74 part 4, public authorities support citizens' activities for protection and improvement the state of the environment,
- according to Article 86, everyone is obliged to care about the state of the environment as well as he or she bears responsibility for any deterioration of this state caused by them; the principles of that responsibility must be defined by an act.

It must be stressed out that the only constitutional environmental right is the right to information about the environment, its state and protection of it. The constitutional legislator has proclaimed neither the right to enjoy with values of the natural environment (according to a pattern of the Constitution 1952, amended in 1976) nor the right to a healthy (sound) environment. As one of the members of the Constitutional Commission explained, this Commission wanted to reduce constitutional provisions connected with the environmental protection to a minimum, but make them directly enforceable.<sup>177</sup>

The right to the environmental information (Article 74 part 3 of the Constitution) may be fulfilled in limits defined by an act. The state's obligation to support citizens' activities for environmental protection (Article 74 part 4 of the Constitution) may be used to the ecological organizations too, but it is only a programmatic provision.<sup>178</sup>

## **6.6 Public Participation and Ecological Organizations after the Great Reform of Environmental Law**

On 1 October 2001, the fundamental act adopted on 27 April 2001 – the Environmental Protection Law<sup>179</sup> entered into force; it was many times amended.<sup>180</sup>

<sup>177</sup> MAZURKIEWICZ, M. Regulacja konstytucyjna ochrony środowiska w Polsce [Constitutional regulation of the environmental protection in Poland]. In: H. Lisicka (Ed.) *Ochrona środowiska w polityce* [Environmental protection in politics], Wrocław 1999, p. 23.

<sup>178</sup> WINCZOREK, P. *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku* [Commentary to the Constitution of the Polish Republic from 2 April 1997], Warsaw 2008, p. 176.

<sup>179</sup> Ustawa z 27.4.2001 Prawo ochrony środowiska (DzU 2001, nr 62, poz. 627).

<sup>180</sup> For the final version, see DzU 2008, nr 25, poz. 150 ze zm.



This act in primary version introduced – as the European Law demands – procedures of the environmental impact assessment concerned with:

- a) politics, strategies, plans and programs,
- b) projects

completed by procedures of transfrontier assessment.

In connection with them, the act in primary version contained provisions concerning access to information about the environment and its protection (Articles 19-24) and public participation in proceedings in environmental matters (Articles 31-39).

The Environmental Protection Law defined a term “ecological organization” as a civil society organization, whose statutory aim is environmental protection (Article 3 point 16).

A category “proceedings with public participation” included:

- 1) procedures in matters assessment of politics, strategies, plans and programs,
- 2) administrative proceedings concerning projects, if during them an environmental impact statement had been prepared,
- 3) preparing an outside operational-protection plan for a case of an industrial accident.

A procedural situation of an ecological organization was regulated in Article 33 part 1 of the Environmental Protection Law. According to it, if an ecological organization with a relevant place of activity submits its application to participate in a defined proceedings enabling public participation, it shall participate in it with rights belonging to a party; provision contained in Article 31 § 4 of the Code of Administrative Procedure shall not apply. This last sentence meant, that an organ of the public administration had not been obliged to inform ecological organizations about proceedings, they had to learn themselves about the proceedings and to submit desires to participate in it.

In comparison with the previous legal state, the rights of social (ecological) organizations were essentially decreased.

The next development of the legislation 2003-2007 went in direction aiming at restriction of the rights belonging to ecological organizations:

1. The act passed on 27 March 2003 on the amendment the Building Law<sup>181</sup> excluded using Article 31 of the Code of Administrative Procedure in building permit proceedings,

2. The act passed on 18 May 2005 on the amendment of the Environmental Protection Law<sup>182</sup> made the environmental impact assessment an independent procedure, which then became an autonomous procedure ending in a form of a decision on environmental conditions of a consent for realization of a project. Simultaneously, this amendment introduced two significant changes concerning the ecological organizations:

a) It excluded application of Article 31 of the Code of Administrative Procedure in proceedings in matters of decisions on environmental conditions of consents for realization of projects,

b) It made previously submitting remarks and proposals to be a new condition for participation of ecological organizations on the basis of Article 33 of the Environmental Protection Law.

3. The act passed on 26 April 2007 on the amendment the Environmental Protection Law<sup>183</sup> changed once again Article 33 of the Environmental Protection Law in the way, that it introduced a new part 1a. According to this part an announcement of an ecological organization about its intention to participate in proceedings must have been done simultaneously with submitting remarks and proposals. An announcement after remarks and proposals was ineffective, which meant that lateness with announcement of the intention to participate closed the opportunity to participate.

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<sup>181</sup> Ustawa z 27.3.2003 o zmianie ustawy – Prawo budowlane oraz o zmianie niektórych ustaw (DzU 2003, nr 80, poz. 718).

<sup>182</sup> Ustawa z 18.5.2005 o zmianie ustawy – Prawo ochrony środowiska oraz niektórych innych ustaw (DzU 2005, nr 113, poz. 954).

<sup>183</sup> Ustawa z 26.4.2007 o zmianie ustawy – Prawo ochrony środowiska oraz o zmianie niektórych innych ustaw (DzU 2007, nr 88, poz. 587).

The above mentioned act, passed on 26 April 2007, also excluded water permit proceedings by using Article 31 of the Code of Administrative Procedure.

Finally, it may be said, that the legislation in early years of XXI century has been gradually reducing rights belonging to civil society organizations having an interest in environmental protection by:

1) exclusion using Article 31 of the Code of Administrative Procedure in the matters of:

- a) building permits,
- b) decisions on conditions of consent for realization projects,
- c) water permits,

2) adding new restricting conditions to Article 33 of the Environmental Protection Law.

This direction of legislation could cause serious doubts, if it was consistent with international law (the Aarhus Convention) and European Law.

## **6.7 Public Participation on the Basis of the Act Adopted on 3 October 2008**

On 15 November 2008 the Act on Access to Information on Environment and its Protection, Public Participation in Environmental Matters and Environmental Impact Assessment, adopted on 3 October 2008, entered into force.<sup>184</sup>

This Act was passed under direct influence of the Aarhus Convention. The legislator took out three horizontal instruments from the fundamental Environmental Protection Law:

- 1) Access to information,
- 2) Public participation,

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<sup>184</sup> Ustawa z 3.10.2008 o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko (DzU 2008, nr 199, poz. 1227 ze zm.).

3) Environmental impact assessment  
and made an autonomous act of them.

The structure of this act is as follows:

Chapter I. General provisions (Articles 1-7).

Chapter II. Access to information about the environment and its protection (Articles 8-28).

Chapter III. Public participation in environmental matters (Articles 29-45).

Chapter IV. Strategic impact assessment (Articles 46-58).

Chapter V. Environmental impact assessment and assessment of impact on Natura 2000 (Articles 59-103).

Chapter VI. Transfrontier impact assessment (Articles 104-120).

Chapter VII. General Director for Environmental Protection and Regional Directors for Environmental Protection (Articles 121-136).

Chapter VIII. Amendments of other provisions and final provisions (Articles 137-174).

This act regulates the access to information and general public participation exactly according to the requirements of the Aarhus Convention. In particular:

- According to Article 4 of this act, everyone has the right to information about the environment and its protection on conditions defined by this act; this principle has been developed in Articles 8-28,
- According to Article 5 of this act, everyone has the right to participate – on conditions defined by this act – in every procedure demanding public participation,
- According to Article 29 of this act, everyone has the right to submit remarks and proposals in every procedure demanding public participation.

Ecological organizations are especially privileged in these provisions; they have not only the right to participate in administrative procedures, but also to initiate a judicial procedure in favour of environmental protection. The most important provision concerned with ecological organizations is Article 44 of this act, which states:

*Article 44. 1. Ecological organizations, which, invoking on their statutory aims, submit a wish to participate in proceedings demanding public participation, participate in it with rights belonging to the party.*

*2. An ecological organization may appeal to a higher instance against any decision passed in proceedings demanding public participation, if it is justified by its statutory aims also in a case when it did not participate in the proceedings demanding public participation before an organ of the first instance; this appeal is unequivocal with submitting a wish to participate in the proceedings. The ecological organization participates before the higher instance with rights belonging to the party.*

*3. An ecological organization may lodge a complaint in the administrative court against any decision passed in proceedings demanding public participation if it is justified by its statutory aims also in a case when it did not participate in administrative proceedings demanding public participation.*

*4. Against the refusal to admit to proceedings, the ecological organization may submit a complaint.*

The term “proceedings demanding public participation” means proceedings concerned with projects according to Annexes to the EIA Directive 2011/92/EU, but only if in the proceedings an environmental statement has been prepared.

## **6.8 Conclusion**

Article 44 of the act passed on 3 October 2008 means the “second apogee” of rights belonging to ecological organizations in administrative proceedings demanding public participation in environmental matters, because:

- The only requirement for an ecological organization is an interest in environmental protection according to a statute of such organization,
- An ecological organization may be without legal subjectivity, it may be an ordinary association even created *ad hoc*,
- An ecological organization is not obliged to prove local interest,
- It is not a condition to submit previously remarks or proposals,
- An ecological organization may begin its procedural activity with an appeal against any decision even if it did not participate in the proceedings in the first instance; it may also begin with complaint to the administrative court even if it participated in the proceedings neither in the first nor in the second instance.

It must be added, that even an environmental impact statement has not been prepared, that means, that conditions of Article 44 of this act do not exist, an ecological organization may participate on the basis of Article 31 of the Code of Administrative Procedure.

These wide possibilities belonging to ecological organizations on the basis of Article 44 of the act passed on 3 October 2008 are criticized. In particular, access to justice without previous participation in administrative procedure is evaluated as a controversial one, because it means a groundless exception from general rules.<sup>185</sup>

In practice, some ecological organizations evidently abuse their rights. These rights are used to aims, which have nothing in common with environmental protection. In extreme cases they are misused to extort from investors some pecuniary performance in compensation for abandoning their procedural activities. These cases are called “eco-extortion money” cases.<sup>186</sup> As a counteraction, the Ministry of Environment has prepared a

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<sup>185</sup> GÓRSKI, M. (Ed.) *Prawo ochrony środowiska* [Environmental Protection Law], Warsaw 2009, p. 133.

<sup>186</sup> DOBROWOLSKI, G. *Decyzja o środowiskowych uwarunkowaniach* [Decision on environmental conditioning], Toruń 2011, p. 262.

draft of an amendment in order to restrict rights belonging to ecological organizations. According to it an ecological organization must be active in the field of environmental protection at least 12 months before participation in an administrative procedure. Nevertheless, this solution causes a question if it will be in concordance with the Aarhus Convention.

## 7. Slovak Republic Implementation of the Aarhus Convention – Slovak Perspective and Vision

### 7.1 Introduction

The Aarhus Convention entered into force in the Slovak Republic on 5 March 2006. The Aarhus Convention became a part of the Slovak national legal system, being published in the Collection of Acts of the Slovak Republic as item No. 43/2006. The agency responsible on the national level for implementation of the Aarhus Convention is the Ministry of the Environment of the Slovak Republic. The Slovak Republic ratified also as one of the first parties The Protocol on Pollutant Release and Transfer Registers (on 1. 4. 2008) as well as the amendment on the Convention on public participation in decisions on the deliberate release into the environment and placing on the market of genetically modified organisms (GMOs) (on 1. 4. 2008).

Resulting from the obligations set by the Aarhus Convention, until now the Slovak Republic has submitted **three Implementation reports** – in 2008, 2011 and 2012.<sup>187</sup>

The first national report on the Aarhus Convention was sent to the Secretariat in February 2008, the second national implementation report in May 2011. The third national implementation report was submitted in November 2012 and was prepared under the obligations of the Slovak Republic as the Party to the Aarhus Convention. The abovementioned report was prepared in accordance with the decision IV/9e on compliance by the Slovak Republic, registered under reference no. ECE/MP.PP/2011/L.16, endorsed and adopted by Parties to the Aarhus Convention at the fourth session of the Meeting of the Parties to the Aarhus Convention on 27 June

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<sup>187</sup> Available at the web site of the Ministry:

<<http://www.minzp.sk/eu/medzinarodne-dohovory/aarhusky-dohovor/>> as well as on the page <<http://www.unece.org/env/pp/welcome.html>> (last visited on 21.7.2013).



– 1 July 2011 in Chisinau (Moldavia). In this regard it is necessary to mention that the last report was connected with the case ACCC/C/2009/41/Slovakia concerning public participation in the decision-making for the construction of the Mochovce Nuclear Power Plant (to be analysed in detail further).

## **7.2 Problems of Implementation of the Aarhus Convention Within the Slovak Law and Relevant Case Law**

### **7.2.1 Aarhus Convention as a Part of the Slovak Legal Order**

When analysing, how the Aarhus Convention is being implemented into the Slovak legal order, analytical approach can be used. By using this approach it will be examined, how the individual pillars of the Aarhus Convention are implemented into the Slovak law.

Taking into consideration the Slovak legal order in its full complexity, it is needed to mention that the implementation of the Aarhus Convention into the Slovak law had gone its way and had taken longer time. As a result it can be seen, that each pillar of the Aarhus Convention is being implemented into various Slovak acts.

The first pillar of the Aarhus Convention, which declares the right to access to environmental information, had been implemented into two Slovak acts:

**1. Act 211/2000 on Free Access to Information** as amended, amending some other Acts (Information Act);

**2. Act 205/2004 on Collecting, Keeping and Distributing Information on the Environment**, amending some other Acts.

The Information Act is important in the Slovak legal environment, as it codifies the right of citizens to access to environmental information. The importance of the second act, namely the Act 205/2004 on Collecting, Keeping and Distributing Information on the Environment, is especially in that, that this act represents an implementation of the Directive 2003/4/ES

of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC.

The second pillar of the Aarhus Convention, declaring public participation in environmental decision making, is currently an inherent part of the Slovak law by having been implemented into following Slovak acts:

1. Act 17/1992 on the Environment, as amended;
2. Act 543/2002 on Nature and Landscape Protection, as amended;
3. Act 24/2006 on Environmental Impact Assessment, as amended;
4. Act 245/2003 on Integrated Pollution Prevention and Control (IPPC) and Amending Some Other Acts, as amended;
5. Act 359/2007 on Prevention and Remedy of Environmental Damage and Amending Some Other Acts, as amended.

By adopting the Acts 24/2006 on Environmental Impact Assessment, as amended and the Act 245/2003 on Integrated Pollution Prevention and Control (IPPC) and Amending Some Other Acts, as amended the Slovak Republic fulfilled its obligation towards the EU environmental law also in that sense, that both those acts represent an implementation of the Directive 2003/35/EC of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice.

The third pillar of the Aarhus Convention, declaring access to justice, was implemented into following Slovak acts:

1. The Constitution of the Slovak Republic 460/1992, as amended;
2. Act 71/1967 on Administrative Procedure, as amended (Administrative Rules);
3. Act 372/1990 on Infringements, as amended.

After previous detailed analyse it can be clearly seen, that the Aarhus Convention is currently an essential part of the Slovak law. Nevertheless,

despite the full implementation of the Aarhus Convention into the Slovak legal order, legal and especially practical problems still occur. Moreover, with regard to cases, which will be analysed further, resulting out of practical application of implemented Aarhus Convention in Slovak legal environment, the main problematic area seems to be the area of public participation in decision making.

Most important changes in law and amendments of acts, which have occurred in relation with the implementation of the Aarhus Convention in the Slovak legal order, were the following amendments:

1. Amendment of the Act 543/2002 on Nature and Landscape Protection:

The amendment has been in force since 1. 12. 2007. It brought an important change in Article 82 paragraph 3 of this Act. The most important change which was brought by this amendment was a change in position of civil associations dealing with nature and landscape protection for a period of at least one year, which have notified their participation in the administrative procedure in a written form in accordance with the Act, from a proceeding stakeholder to a participating person (Article 15 of Administrative Rules).

According to this amendment, a participating person according to the Administrative Rules and according to the Civil Legal Procedure is not entitled to submit an appeal against a decision of a nature protection body according to this act, to submit a draft for renewal of the procedure, or to bring a legal action to review the decision of the administrative body by a court.

The amendment allows for participation in procedures according to this act also for other associations established pursuant to other legal instruments, e.g. the interest associations of legal entities established according to the Slovak Civic Code in a position of a participating person.

2. Amendment of the Act No. 24/2006 Coll. on Environmental Impact Assessment:

The amendment of the Act No. 24/2006 Coll. on Environmental Impact Assessment was carried out by the amendment No. 145/2010 amending,

inter alia, Article 24 defining the term “public interested”. The amendment has been in force since 1. 5. 2010. It brought an important change in Article 24 of this Act.

The position of public has significantly changed by this amendment. Under the requirements prescribed, natural persons, a civil group, a civil association or NGOs supporting the environment protection can become a party to the proceeding within the subsequent approval procedure. So far such persons have acted as a person concerned, which has thus significantly strengthened the right of public to participate in the decision-making process (e.g. the right to file for remedy).

## 7.2.2 Relevant Slovak Case Law

As was already mentioned above, most problematic area within the implementation of the Aarhus Convention seems to be the area of public participation in decision making. Therefore, two most important cases related to public participation in decision making will be analysed in further part.

### 7.2.2.1 “VLK” Case

Case C – 240/09 Lesoochrannárske zoskupenie “VLK” (Association for protection of environment “Wolf”, hereafter only as “VLK”) vs. Ministry of the Environment of the Slovak Republic (8. 3. 2011) was the most important case regarding public participation in decision making. The case which started as a case at a national level, but was later brought also by the Slovak highest court before the Court of Justice of the European Union (hereafter only as “CJEU”) for a reference for preliminary ruling. This case is thus not only important for the Slovak law in the meaning of a correct implementation of the Aarhus Convention into the future, but its sense is especially in that the case is of legal importance also for other EU member states.

### *Important facts of the proceeding before the Slovak courts*

Legal basis can be found in the following Slovak acts:

*Article 82(3) of Law No 543/2002 on the Protection of Nature and the Countryside, as amended, (zákon č. 543/2002 Z.z. o ochrane prírody a krajiny), which applies to the dispute in the main proceedings; an association having legal personality is to be regarded as a 'participant' in administrative proceedings, within the meaning of that provision, if, for at least one year, it has pursued the objective of protecting nature and the countryside, and it has given a written notice of its participation in those proceedings within the period prescribed in that Article. The status of 'participant' confers on it the right to be informed of all pending administrative proceedings relating to the protection of nature and the countryside.*

*Article 15a(2) of the Code of Administrative Procedure (Správny poriadok); 'a participant' is entitled to be informed that administrative proceedings have been initiated, to have access to files submitted by the parties to the administrative proceedings, to attend hearings and on-the-spot inspections, and to produce evidence and other information on the basis of which the decision will be taken.*

*Article 250(2) of the Code of Civil Procedure (Občiansky súdny poriadok); any natural or legal person who/which claims that his/its rights, as a party to the administrative proceedings, have been prejudiced by the decision taken or by the procedure followed by the administrative authority is to have the status of an applicant. Any natural or legal person not appearing at the administrative proceedings and whose presence, as a party to the proceedings has been requested, may also be an applicant.*

*Article 250(m) of the Code of Civil Procedure; persons having the status of parties to the proceedings are those who were parties to the administrative proceedings and the administrative body whose decision is to be reviewed.*

Regarding the dispute in the main proceedings before the Slovak courts, following facts are important:

1. "VLK" was informed on the initiation of a number of administrative proceedings brought by various hunting associations or other persons

concerning the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas or the use of chemical substances in such areas.

2. “VLK” applied to the Ministry of the Environment of the Slovak Republic (hereafter only as “Ministry”) to be a ‘party’ to the administrative proceedings concerning the grant of those derogations or authorisations and relied on the Aarhus Convention for that purpose. Subsequently, the Ministry rejected the request brought by “VLK”<sup>188</sup> as well as an administrative appeal subsequently brought by the “VLK” against that rejection<sup>189</sup>.

3. “VLK” then brought a contentious appeal against the two decisions at the District Court of Bratislava, arguing in particular that the provisions in Article 9 (3) of the Aarhus Convention had a direct effect. The District Court of Bratislava decided on the matter the same way, as the Ministry.<sup>190</sup>

4. Subsequently “VLK” brought an appeal against the decision of the District Court of Bratislava at the Highest Court of the SR. The Highest Court of the SR decided to stay the proceedings and refer questions to the CJEU for a preliminary ruling.

*Important facts of the proceeding before the CJEU:*

As mentioned above, judgment of the CJEU on the case C 240/09 was issued as a reference on preliminary ruling under Article 234 EC from the Highest Court of the Slovak Republic. The basis of this case was the interpretation of Article 9 (3) of the Aarhus Convention.

Reference has been made in proceedings between Lesoochranárske zoskupenie VLK, an association established in accordance with Slovak law

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<sup>188</sup> Decision of the Ministry no. 3376/2008-2.1/KD from 22.04.2008.

<sup>189</sup> Decision of the Ministry on administrative appeal no. 24/2008-rozkl. from 26.06.2008.

<sup>190</sup> Decision of the District Court of Bratislava no. 3S 174/2008-72 from 10.03.2009.

whose objective is the protection of the environment, and the Ministry of the Environment of the Slovak Republic, concerning the association's request to be a 'party' to the administrative proceedings relating to the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas, or the use of chemical substances in such areas.

Regarding the judgement in this matter, the CJEU ruled, that:

*“Article 9 (3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 does not have direct effect in European Union law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such as the Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.”*

This judgement was of a crucial importance for the further proceeding in the Slovak Republic. Under the influence of this ruling, the Highest Court of the SR decided on the case<sup>191</sup> and granted to “VLK” the status of the 'participant' in administrative proceedings.

The importance of this judgement on the Slovak level as well as on the European level is clear. It can be also very well shown by the press release,

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<sup>191</sup> Decision of the Highest Court of the SR no. 3 Szp/46/2009 from 7.7.2011 (available at the official web site of the Highest Court of the SR – <[www.nssr.sk](http://www.nssr.sk)> ). Most important parts of the judgement in Slovak are available also on <<http://www.najpravo.sk/judikatura/obcianske-procesne-pravo/spravne-sudnictvo/ucastnik-spravneho-konania-podla-aarhuskeho-dohovoru.html>> (last visited on 21.7.2013)

which appeared on the “VLK” web page after the final decision on the case before the Highest Court of the SR, where the “VLK” stated: *“We won for the Europe the obligation to comply with the Aarhus Convention”*.<sup>192</sup>

#### 7.2.2.2 “Mochovce” Case

The Case ACCC/C/2009/41/Slovakia - public participation in the decision making for the construction of the Mochovce Nuclear Power Plant (2011) (hereafter only as “Case Mochovce Nuclear Power Plant”) was based on questions related to the public participation in decision making, in particular on the problem, that the public was not early and effectively enough involved in the decision process of building the 3rd and 4th part of the Mochovce Nuclear Power Plant. In 2008, the Slovak Nuclear Regulatory Authority decided about a change of the building approval for the Mochovce Nuclear Power Plant and de facto issued the approval for final building of its 3rd and 4th part.

The most problematic point in this regard was that the original approval for building the Mochovce Nuclear Power Plant was from 1986. At that time and that political regime the Slovak law did not allow (or count with) consultations with public on matters related to environmental protection, which is from the current view contrary to the principles of the Aarhus Convention.

The Slovak Republic was recommended to review its legal framework so as to ensure that early and effective public participation is provided for in decision-making when old permits are considered or updated or the activities are changed or extended, compared to previous conditions, in accordance with the Convention.

On the fourth session of the Meeting of the Parties to the Aarhus Convention the Slovak Republic was invited to submit a progress report to the Compliance Committee on 1 December 2011 and an implementation report on 1 December 2012 on achieving the abovementioned recommendation, which the Slovak Republic fulfilled on time.

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<sup>192</sup> See <<http://www.wolf.sk/sk/clanky/vyhrali-sme-pre-europu-dodrzivanie-aarhuskeho-dohovoru>> (last visited on 21 July 2013)



The Slovak Republic has taken the recommendations of the fourth session of the Meeting of the parties to the Aarhus Convention into serious consideration and has made important changes in legislation in this regard.

Subsequent changes in Slovak law and acts amended were as follows:

1. Acts 287/2009, 145/2010, 408/2011 amending the Act 24/2006 on Environmental Impact Assessment;
2. Act 117/2010 amending the Act 543/2002 on Nature and Landscape Protection;
3. Act 350/2011 amending the Act 541/2004 on Peaceful Use of Nuclear Energy (Atomic Act).

The most important changes in this regard were the amendments of the **Act 24/2006 on Environmental Impact Assessment**.

The objective of all these amendments was to harmonize the rights of the public concerned with the European legislation and relevant international conventions. The amendments specified more precisely the *term of the public concerned both for natural and legal persons*. The restricting condition has been dismissed, as well as the spectrum of administrative proceedings, where a civic initiative, a civic association and non-governmental organizations can be a party to subsequent permitting procedure, has been extended.

### **7.3 Conclusion: Slovak Vision Into the Future: Where Are We Going?**

When speaking about the implementation of the Aarhus Convention in the Slovak Republic, it can be said without any doubt, that the Aarhus Convention is now fully implemented into the Slovak legal order. The Slovak Republic has adopted all necessary amendments of respective laws; despite that, problems still occur and rules, which have been set, do not have the intended real effect in practice. Therefore, the question remains whether the implementation is in some way and in certain cases only “formal” or “ineffective”. In this regard it is important to mention that changes in law and application of laws are sometimes influenced by political interests or

sometimes also by political “unwillingness”. The environmental protection still represents a sensitive topic, where the interests of NGOs, other environmental organizations, as well as interests of the public are sometimes contrary to other interests (political, financial) and for most countries, it is sometimes very difficult to balance them.

In my opinion, future consequences will be displayed especially through the case law, which will further play an important role in the environmental protection. Moreover, the NGOs and other organizations (Greenpeace, “Vlk” organization) will play an important role in the future. Nowadays they have very effective tools and will be for sure important also in the future, so that the aims intended by the Aarhus Convention will be achieved in the Slovak Republic.

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## **8. Germany**

### **German Implementation of Article 9 (2) of the Aarhus Convention**

#### **8.1 Introduction**

The Concept of German standing to sue in an administrative procedure has been in strong defence stance for the last couple of decades. The traditionally restricted access to administrative justice has been subject to criticism and passionate debates. Especially in the area of environmental law the restricted access to justice has been made co-responsible for the poor enforcement of the environmental law. In effort to fight these shortcomings the European Court of Justice (ECJ) started to mobilize individuals to sue violations of the environmental law of the European Community (EC) origin in front of national courts in order to enhance the enforcement of the environmental law. Next to this development, part of the scholars, some European as well as national institutions and non-governmental organizations (NGOs) promoting protection of the environment started to call for a public interest action that would enable environmental NGOs to bring the violation of environmental law provisions to national courts. After signing the Aarhus Convention in 1998 the process of implementation of this Convention has started and the effort to establish an environmental association lawsuit has received an emphatic support of international law. While the European Community, nowadays the European Union (EU), has signed and later also ratified the Aarhus Convention, the implementation of the Aarhus Convention became a complicated multilevel process. Nevertheless, this connection has turned out to be crucial for the successful introduction of an environmental association public interest litigation in Germany.

In the following survey, this aforementioned development will be summarized. After an introduction of the traditional concept of standing to sue in German administrative procedure (8.2), consequences of this concept to access to Justice in environmental matters will be outlined (8.3). A chapter about collective access to environmental justice will sum up the

main features and problems concerning the public interest litigation in environmental matters and its development in Germany (8.4). Then, after a brief display of the provisions of Art. 9 (2) of the Aarhus Convention and its equivalent implemented in the directives of the EU (8.5), the German implementation will be introduced (8.6). The survey will continue with the preliminary ruling decision of ECJ of 12 May 2011, which declared that the German implementation is not in conformity with the EU law (8.7) and with the reaction of the German legislator for enhancement (8.8). The conclusive observations will finally make clear that even despite the recent positive developments there are no final victories in this topic and that there are still plenty of unresolved issues and problems (8.9).

## **8.2 Traditional Concept of Standing to Sue in German Administrative Procedure**

The German access to administrative justice is in general very restricted. Administrative proceedings concentrate on the protection of a subjective individual right rather than on the objective legality of an administrative decision as it is the case for example in France.<sup>193</sup> This system decision makes part of the German constitutional system and is enshrined in Art. 19 (4) of the German constitution - The Basic Law for the Federal Republic of Germany.<sup>194</sup> This provision states that *“any person, whose rights should be violated by public authority, may have recourse to the court.”* This constitutional provision is further specified in the § 42 section 2 of the Code of Administrative Court Procedure – *“Verwaltungsgerichtsordnung”*, which sets down: *“Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims*

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<sup>193</sup> More about the difference between the German and French administrative Justice system in SKOURIS W. *Verletztenklagen und Interessentenklagen im Verwaltungsprozess: eine rechtsvergleichende Studie zur Anfechtungslegitimation des Bürgers*, Heymann, Köln 1979, ISBN 3452185389, p.142.

<sup>194</sup> Translation taken from the German Federal Ministry of Justice - Bundesministerium der Justiz; Available at: [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

*that his/her rights have been violated by the administrative act or its refusal or omission*".<sup>195</sup>

This provision, respectively the meaning of the wording "his/her rights", has been traditionally interpreted by courts in a very restricted manner.<sup>196</sup> Only a violation of individual rights regulated by public law opens the court's door to the plaintiff. The impairment of the individual right determines also the scope of the judicial control and the action is well founded just in case that such an individual right has been indeed infringed.<sup>197</sup> It is - in line with the constitutional principle of rule of law - the task of the legislator to determine such an individual right.<sup>198</sup> As matter

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<sup>195</sup> Translation taken from the German Federal Ministry of Justice - Bundesministerium der Justiz; Available at:

[http://www.gesetze-im-internet.de/englisch\\_vwgo/englisch\\_vwgo.html#p0161](http://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html#p0161)>.

<sup>196</sup> ROLLER, G. Locus Standi for Environmental NGOs in Germany: The (Non-) implementation of the Aarhus Convention by the Umweltrechtsbehelfsgesetz - Some critical remarks. In PALLEMAERTS M. (Eds.) *The Aarhus Convention at ten: Interactions and tensions between conventional international law and EU environmental law*. Groningen: Europa Law Publishing, 2011, ISBN 9089520481, p. 356.

<sup>197</sup> Section §113 section 1,5 of the Code of Administrative Court Procedure; SCHWERDTFEGER, A. *Der deutsche Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention. Zugleich ein Beitrag zur Fortentwicklung der subjektiven öffentlichen Rechte unter besonderer Berücksichtigung des Gemeinschaftsrechts*. Tübingen 2010, ISBN 9783161504235, p.64.

<sup>198</sup> WINTER, G. Individualrechtsschutz im deutschen Umweltrecht unter dem Einfluß des Gemeinschaftsrechts, *Neue Zeitschrift für Verwaltungsrecht*. 1999, Issue 5, S.467-475, 468.

SCHOCH, F. Individualrechtsschutz im deutschen Umweltrecht unter dem Einfluß des Gemeinschaftsrechts, *Neue Zeitschrift für Verwaltungsrecht*. 1999, Issue 5, p. 457-467, 457 ff.

KLOPFER, M. *Umweltrecht*. 3.Auflage, München:Verlag C.H.Beck 2004, ISBN:3406520448, p. 581.

SCHWERDTFEGER, A. *Der deutsche Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention. Zugleich ein Beitrag zur Fortentwicklung der subjektiven öffentlichen Rechte unter besonderer Berücksichtigung des Gemeinschaftsrechts*. Tübingen 2010, ISBN 9783161504235, p.62.

of fact the standing to sue cannot be granted just because of an individual impairment.<sup>199</sup> Next to this factual adverse effect there has to be a normative individual reference to the public law rule, which grants the plaintiff legal protection of his individual interests.<sup>200</sup> This leads to the distinction between the rules that are designed to protect individual interests and rules designed just for the purpose of following the interests of general public. The first ones confer a legal protection of individual interests, while the objective public rules are being enacted just for the purpose of solely public interests and individuals cannot bring violation of such rules before an administrative court. The same public law rule can also be designed to protect both an individual as well as public interest. In this case or in a case of doubts about the protective purpose of the norm, violation of such a norm can be brought before a court.<sup>201</sup>

This distinction has its roots in the time of the birth of the German constitutionalism in the second half of the 19th century. At that time the

<sup>199</sup> That would be the case in the French administrative justice system, where in case of a factual doctrine individual or collective interests of material, non-material, moral, as well as potential etc. art the standing to sue is granted on a regular basis; see WEGENER, B.W. *Rechte des Einzelnen: Die Interessentenklage im europäischen Umweltrecht*. Baden-Baden: Nomos Verlagsgesellschaft 1998, ISBN:3789052892, p. 141.

CALLIESS, CH. *Europäische Vorgaben für die umweltrechtliche Verbandsklage*, *Zeitschrift für Europäisches Umwelt- und Planungsrecht*. 2003, Issue 1, p.7-18,11.

SCHWERDTFEGGER, A. *Der deutsche Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention. Zugleich ein Beitrag zur Fortentwicklung der subjektiven öffentlichen Rechte unter besonderer Berücksichtigung des Gemeinschaftsrechts*. Tübingen 2010, ISBN 9783161504235, p.53 ff.

<sup>200</sup> ROLLER, G. op. cit., p.356.

SCHOCH, F. op. cit., p. 458.

WINTER, G. op. cit., p. 467 ff.

<sup>201</sup> WINTER, G. op. cit., p. 468.

SCHWERDTFEGGER, A. *Erweiterte Klagerechte für Umweltverbände – Anmerkung zum Urteil des EuGH v. 12.5.2011 in der Sache Trianel* *Zeitschrift Europarecht*. 2012, Heft 1, p. 80-89, 86.

civil society forced the monarch with the acts of parliament to provide regulations that would protect their own independent sphere of civil liberties from the intervention of the state power.<sup>202</sup> This distinction is yet in the modern democratic state overcome as each act of the state authority is - in line with the rule of law principle - bound by law and all the public interest policies are to be implemented not only in interest of the general public but in favour of all the individuals as well.<sup>203</sup> Nevertheless this doctrine of distinguishing different purposes of legal norms – the so called “*Schutznormtheorie*”<sup>204</sup> – still creates the main obstacle for standing to sue in German administrative proceedings in environmental matters and enjoys almost religious significance.<sup>205</sup>

The purpose of such a narrow interpretation of the provisions on standing to sue is to preclude not only *actio popularis*, but any kind of public litigation or a class action that would go beyond alleging a violation of individual rights.<sup>206</sup> The strong limited access to administrative justice is on the other hand compensated through a high density of judicial control, which safeguards the full review of the factual as well as legal respect of

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<sup>202</sup> WINTER, G. op. cit., p. 468.

MASING, J. *Die Mobilisierung des Bürgers für die Durchsetzung des Rechtes. Europäische Impulse für eine Revision der Lehre vom subjektivöffentlichen Rechts.* Berlin: Duncker & Humblot 1997, ISBN 3428089286, p. 56 ff.

<sup>203</sup> WINTER, G. I op. cit., p. 468.

<sup>204</sup> BÜHLER, O. *Die Subjektiven öffentlichen Rechte und ihr Schutz in der deutschen Verwaltungsrechtsprechung.* Berlin: Kohlhammer, 1914, p. 21, 42f.

<sup>205</sup> SCHOCH, F. op. cit., p. 458, footnote 10: “*In the constant jurisdiction stays the doctrine of „Schutznormtheorie“ undisputed.*” (the Author’s translation from German).

<sup>206</sup> ROLLER, G. op. cit., p. 356.

SCHOCH, F. op. cit., p. 457 ff.

SCHWERDTFEGGER, A. *Der deutsche Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention. Zugleich ein Beitrag zur Fortentwicklung der subjektiven öffentlichen Rechte unter besonderer Berücksichtigung des Gemeinschaftsrechts.* Tübingen 2010, ISBN 9783161504235, p.59 ff.

the case including the interpretation and application of the vague legal concepts.<sup>207</sup>

### 8.3 Consequences for the Access to Justice in Environmental Matters

The above mentioned concept<sup>208</sup> applies also to environmental law and has some far going consequences for the judicial review of decisions of the public authorities that can have an impact on the quality of environment.

#### 8.3.1 Key Role of the Substantive Law Provisions

In German administrative proceeding the substantive law plays a crucial role, while the procedural rules have - contrary to the EU law<sup>209</sup> - more of an instrumental function.<sup>210</sup> Therefore, in general a breach of procedural law opens no standing to sue for individuals. To be able to submit an admissible action, a substantive environmental individual right has to be impaired.

The German constitutional order does not contain any fundamental right for a favourable environment. Art. 20a of the constitution just states a very general goal to protect natural foundations of life and animals and cannot provide any subjective individual rights.<sup>211</sup>

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<sup>207</sup> SCHWERDTFEGGER, A. *Ibid.*, p.65.

<sup>208</sup> It is important to remind that this concept is not a statutory legal rule, but a doctrine established on the basis of case law and a theory of scholars.

<sup>209</sup> EKARDT, F. Das Umweltrechtsbehelfsgesetz vor dem EuGH und dem BVerwG. Ende der reduktionistischen Debatte um Verbandsklage, verwaltungsrechtliche Fehlerlehre und Vorsorgeprinzip? *Neue Zeitschrift für Verwaltungsrecht*. 2012, Issue 9, p. 530-535,533; SCHOCH, F. *op. cit.*, p. 466.

<sup>210</sup> SCHOCH, F. *op. cit.*, p. 459 ff.

LEIDINGER, T. Europäisiertes Verbandsklagerecht und deutscher Individualrechtsschutz. Das Trianel-Urteil des EuGH und seine Folgen für das deutsche Verwaltungsrechts-system, *Neue Zeitschrift für Verwaltungsrecht*. 2011, Issue 22, p. 1345-1351, 1350.

<sup>211</sup> See VOßKULE, A. Umweltschutz und Grundgesetz, *Neue Zeitschrift für Verwaltungsrecht*. 2013, Issue 1-2,p. 1-8,1.



Hence, the most of the actionable individual rights in environmental law are created through a reference to an environmental norm for protection of human health, resp. to a fundamental right to life and physical integrity that is enshrined in Art. 2 (2) of the constitution, or through a reference to violation of the fundamental property rights that are protected in Art. 14 of the constitution.<sup>212</sup> Most of the environmental issues, resp. protective legal provisions that are subject to environmental legislation are very difficult to determine as an individual right.

### 8.3.2 Prevention vs. Precaution

The above mentioned distinction between the purposes of the public rule to protect individual or general public interests in environmental law is reflected in the differentiation between the measures of prevention and precaution. The environmental rules implementing the prevention principle are set up to protect the public safety against specific environmental threats. The goal of the rules implementing the precautionary principle is to prevent degradation of the environment that could at some point in the future lead to such a specific threat mentioned above.<sup>213</sup> According to German doctrine and jurisprudence in general only the rules implementing the prevention principle grant individual rights and could be subject to judicial review.<sup>214</sup> Once again, the EU law has here a different notion as it does confer subjective individual rights to individuals just through a

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<sup>212</sup> *Ibid.*, p. 8.

<sup>213</sup> EKARDT, F. op. cit., p. 534.

For distinguishing between the rules implementing prevention and precautionary principle especially in Nuisance Law see ROLLER, G. op. cit., p. 362 ff.

<sup>214</sup> ROLLER, G. op. cit., p. 362 ff.

SCHWERDTFEGGER, A. *Der deutsche Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention. Zugleich ein Beitrag zur Fortentwicklung der subjektiven öffentlichen Rechte unter besonderer Berücksichtigung des Gemeinschaftsrechts.* Tübingen 2010, ISBN 9783161504235, p.70 ff.

KOCH, H. J. Die Verbandsklage im Umweltrecht, *Neue Zeitschrift für Verwaltungsrecht.* 2007, Issue 4, p. 369-379, 369 ff.

connection of the protective objective of an environmental norm and the possibility of an adverse effect to human health - for example in the case of exceeding the ambient air quality limits - without distinguishing between the prevention and precaution.<sup>215</sup>

### 8.3.3 Environmental Norms that Confer Individual Rights

If we apply the aforementioned traditional concept of standing to sue to access to justice in cases relating to protection of environment, we will find out that just the following rules confer individual rights, whose violation can be brought to court:

Nuisance law provisions implementing the prevention principle (nuisance values);<sup>216</sup>

Precautionary provisions protecting against detrimental harm and implementing the best possible risk management in Atomic, GMO and Hazardous substances law;<sup>217</sup>

Planning approval procedure (prevention).<sup>218</sup>

On the other hand, the following examples show the branches of environmental law, whose provisions are designed just for the protection of general public. These provisions do not confer any individual rights and

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<sup>215</sup> LEIDINGER, T. op. cit., p. 1348 ff.

SCHOCH, F. op. cit., p. 464.

Case C-237/07 Janacek, 25. 7. 2008, (2008) ECR I-06221, para. 38.

<sup>216</sup> § 5 Section 1 Nr.1 of the Federal Nuisance Protection Act - *"Bundesimmissionsschutzgesetz"*

<sup>217</sup> Unitary assessment of risk of detrimental harm - no strict distinguishing between the principle of prevention and precaution; BVerwGE 72,300, (315) -Wyhl=NvWZ 1986, 208; BVerwGE 101, 347-Krümmel=NvWZ 1997, 161; different situation in case of assessment of residual risk of Transport - Precautionary principle - no standing: BVerfG, NVwZ 2009, 515 - Castortransporte.

<sup>218</sup> In case of reference of the provisions to protection of human health, resp. protection of property rights for example: § 17 Motorway Act - *"Fernstraßengesetz"*; § 8 (1), § 29b Air Traffic Act - *"Luftverkehrsgesetz"*.

as a result of this the violation of their provisions cannot be brought to court:

Waste law;

Nature protection law;<sup>219</sup>

Water protection law (except of the competitive action of water users);

Nuisance law implementing the precautionary principle (emission values);<sup>220</sup>

Climate protection law.

As a consequence of the aforementioned doctrine the application of the majority of the environmental rules in administrative procedure stays outside of judicial control. Prof. Gerhard Roller concludes that up to 90% of the obligations of a plant operator, that are set up for environmental protection, do not confer subjective individual rights and their fulfilment could not be reviewed by the court.<sup>221</sup>

#### **8.4 Collective Access to Environmental Justice**

Since the beginning of the 1970s, the first legislative measures to counterattack the degradation of the quality of the environment have been undertaken on international, EC as well as on the national level.<sup>222</sup> Almost simultaneously, major shortcomings in the enforcement of the environmental legislation have been observed.<sup>223</sup> These deficits have been duplicated as it became evident that, firstly, the EC environmental Directives

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<sup>219</sup> BVerwGE 128, 358 – Mühlberger Loch = NVwZ 2007, 1074.

<sup>220</sup> § 5 Section 1 Nr.2 of the Federal Nuisance Protection Act – “*Bundesimmissionschutzgesetz*”; in the case of no nuisance values the emission values confer the individual rights – BVerwGE 119, 329, (333) = NVwZ 2004, 610.

<sup>221</sup> ROLLER, G. op. cit., p. 363.

<sup>222</sup> KOCH, H. J. op. cit., p. 369.

<sup>223</sup> Ibid.

– the main legislative instrument of the European environmental policy - have often not been implemented on time or rightfully and, secondly, that national implementation of the EC Directive has not or could not been enforced properly. In Germany some scholars, environmental associations and the German Advisory Council on the Environment<sup>224</sup> have pointed out that one of the major reasons for these shortcomings is narrow access to justice, which does not enable the judicial review and, thus, the effective enforcement of the objective environmental law.<sup>225</sup> As a solution, it has been proposed to enact an association lawsuit in environmental law. This has started a long and troublesome story and passionate debate about the collective access to environmental justice, resp. about the environmental association lawsuit.

Next to this development, the EC started to confer through its environmental directives more individual rights to individuals and the ECJ has encouraged the individuals to enforce their rights in front of the national courts mostly with reference to the principles of effective system of justice and effectiveness of the EC law.<sup>226</sup> This influence of the EC law has provided for even more pressure on the traditional concept of standing to sue in Germany.

The very last reason that ends up leading to the enactment of the environmental association lawsuit was the ratification of the Aarhus Convention.<sup>227</sup>

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<sup>224</sup> Official body advising the German Ministry of Environment – “*Sachverständigenrat für Umweltfragen-SRU*”

<sup>225</sup> REHBINDER, E., KNIEPER, R. and BURGBACHER, H. G. *Bürgerklage im Umweltrecht*. Berlin: Schmidt, 1972, ISBN 3503008659, p. 15 ff.

<sup>226</sup> Some German scholars talk in this respect about mobilizing or functional subjectivizing of the citizens for the purpose of enforcement of the EC-directives. This progress is a part of the broader process of Europeanization of the national administrative law, that goes back to the Case C 26/62 Van Gend & Loos, 5.2.1963, (1963) ECR 1; further German related case law: Case C-131/88 Grundwasser, 28.2.1991, (1991) ECR I-825; Case C-362/88 Schwefeldioxid, 30.5.1991, (1991) ECR I-2567; Case C-59/89 Blei, 30.5.1991, (1991) ECR I-2607; Case C-237/07 Janacek, 25.7.2008, (2008) ECR I-06221.

<sup>227</sup> See subchapter 8.5.

#### 8.4.1 Development of the Public Interest Litigation in Environmental Law

As it is anticipated in the § 42 section 2 of the Code of Administrative Court Procedure with the wording “*Unless otherwise provided by law...* ”, statutory enactment of other standing to sue provisions is not only possible, but also provided for by statute itself. The traditional standing to sue is to be seen like a minimal standard that has to be safeguarded and as a limit to statutory provisions that would enshrine other standing requirements.<sup>228</sup> These cannot threaten or limit the minimal standard of judicial protection of individual public rights.

In 1976 the attempt to enact the environmental association lawsuit into the Federal Nature Conservation Act failed, nevertheless, environmental NGOs gained the right to participate in the planning approval procedures to promote the Nature Protection according to the Federal Nature Conservation Act. In case of neglect or breach of these participative rights the administrative courts have acknowledged the Action of the environmental association for enforcement of their rights to participate in the decision-making procedure “*Partizipationserzwingungsklage*”.<sup>229</sup> With this action NGOs won the possibility to enforce their participative rights, but still remain lacking the possibility to review the legality of the final decision of the public authority itself.

Another way that the environmental association started to use in order to bring a case to the court has been the so called “*Sperrgrundstücksklage*”. Through an acquisition of ownership of real estate property in the neighbourhood of a planned project that was subject of an authoritative decision, an NGO gained the access to justice, while its subjective right to property could have been infringed through the decision. Federal

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<sup>228</sup> SCHWERDTFEGGER, A. *Der deutsche Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention. Zugleich ein Beitrag zur Fortentwicklung der subjektiven öffentlichen Rechte unter besonderer Berücksichtigung des Gemeinschaftsrechts.* Tübingen 2010, ISBN 9783161504235, p. 59.

<sup>229</sup> BVerwGE 87,62,(71-74)=NVwZ 1991, 214; BVerwGE 104, 367,(372)=NVwZ 1998, 279; BVerwGE 127, 208, para. 14-28-Flughafen Frankfurt=NVwZ 2007, 576.

Administrative Court acknowledged this practice at first, but ruled lately that such an action is not acceptable in case of abusive acquisition of real estate property just for the purpose of gaining standing to sue without any other use of the property.<sup>230</sup>

In between the years 1979 and 2002, 14 of the 16 federal States have enacted an association lawsuit in nature protection law on the state level. The empirical findings to the use of this association lawsuit in the federal states were the main reason for the enactment of the association lawsuit in Federal Nature Protection Act on the federal level in 2002.<sup>231</sup>

To bring such a Nature Protection Association lawsuit to court, an officially registered NGO has to claim, that the decision or omission violates legal provisions that are relevant to Nature Protection Law (wide scope of provisions);<sup>232</sup> an NGO was entitled to and, in fact, took part as well in a public participation procedure or that such a participation was unlawfully not allowed and that the NGO has been affected through the decision in its statutory field of duty to protect the nature.<sup>233</sup> This nature protection association lawsuit could open the judicial review of waivers of permits and bans for nature protection in Nature conservation areas, National Parks and other protective areas and of planning permissions of projects that could have a significant impact on the protection of the nature as long as the decision is subject to public participation procedures. No violation of subjective individual rights is needed to bring such an action to court, which makes this public interest lawsuit an ideal tool to review the legality of administrative decisions. Nevertheless, the scope of this lawsuit is limited just for the legal provisions related to the protection of nature and landscape.

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<sup>230</sup> BVerwGE 112, 135, (136-138)=NVwZ 2001, 427.

<sup>231</sup> § 61 (since 2010 § 64) Federal Nature Protection Act – „*Bundesnaturschutzgesetzes*“; KOCH, H. J. op. cit., p. 372.

<sup>232</sup> § 61 (2) nr.1 Federal Nature Protection Act 2002, resp. § 64 (1) nr. 2 Federal Nature Protection Act 2010.

<sup>233</sup> § 61 (2-4) Federal Nature Protection Act 2002, resp. § 64 (1) nr. 2, 3 Federal Nature Protection Act 2010.

#### 8.4.2 Pros and Cons of an Environmental Association Lawsuit

Just to summarize the long-lasting development of the environmental association lawsuit and the related debates, a brief summary of the main reasons for and against the enactment of an environmental association lawsuit follows.

##### *8.4.2.1 Pros*

As it has been mentioned above, not the lack of environmental legal standards has been considered as one of the main reasons for the ongoing degradation of the quality of the environment, but the shortcomings in its enforcement.<sup>234</sup> Restricted access to justice is one of the reasons for the shortcomings in the enforcement of the environmental law. Enactment of an environmental public lawsuit would bring the violation of the objective environmental rules to courts and thus stimulate the enforcement of environmental law and concurrently it would help to reduce the shortcomings of its enforcement.<sup>235</sup>

The possibility of NGOs to come up to courts with environmental cases would help to equalize the disproportion between the access to justice of a plant operator – a user of the environment, and the environment itself. The addressee of the licensing decision gains always the standing to sue, while his economic interests are safeguarded through individual rights and thus he can always seek justice to protect his interests, resp. to moderate the environmental requirements imposed on him in the permitting decision. The environment is an interest in common and it is very difficult to stipulate the protection of these diffuse interests of the public on the healthy environment into a legal norm that would confer a subjective individual right. Most of environmental legal provisions are designed for the purpose of the protection of general public. As a result of the traditional

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<sup>234</sup> Sachverständigenrat für Umweltfragen-SRU: Umweltgutachten 1974, 1978, 1994, 1996, 2002, 2004, 2005; on the european level see Directive draft KOM(2003)624, 24.10.2003, p. 3.

<sup>235</sup> KOCH, H. J. op. cit., p. 370.

concept of standing to sue, most of the environmental norms stay out of judicial control. The environmental association lawsuit would not only help to promote more efficiently the environmental interest in the evaluation of all the interests involved in the decision-making, but would also give the environmental watchdogs – NGOs an effective tool to enforce the protection of environment in front of the courts. Further on, it seems in general not to be in line with the principle of rule of law that whole areas of administrative decisions should stay out of judicial control.<sup>236</sup>

The last reason for the enactment of the environmental association lawsuit is the preventive effect of this public lawsuit. The possibility to bring the violation of environmental provisions in administrative decisions to court would lead to a higher quality of administrative decisions and to a more effective public participation on one hand. On the other hand it would bring a higher acceptance of the decision within the public.<sup>237</sup>

#### 8.4.2.2 Cons

Most of the critical remarks towards the idea of environmental association lawsuit have been coming from administrative courts and traditionally also from trade associations.<sup>238</sup>

First of all, opponents of the environmental association lawsuit point out that environmental NGOs have no legitimacy to protect public interests that would go back to electoral processes as the main source of legitimacy in democratic legal systems. This can lead to a far going breach of the system of checks and balances of state powers.<sup>239</sup> The environmental associations

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<sup>236</sup> Ibid.

<sup>237</sup> Ibid. p. 371.

<sup>238</sup> Ibid; see also WEYREUTHER, F. *Verwaltungskontrolle durch Verbände? Argumente gegen die verwaltungsgerichtliche Verbandsklage im Umweltrecht*. Düsseldorf: Werner, 1975, ISBN 3804139426; Expert opinion from v.Danwitz for the Syndicate of German electricity industry: Zur Ausgestaltungsfreiheit der Mitgliedsstaaten bei der Einführung der Verbandsklage anerkannter Umweltschutzvereine nach den Vorgaben der Richtlinie 2003/35/EG und der so genannten Aarhus Konvention, Oktober 2005.

<sup>239</sup> KOCH, H. J. op. cit., p. 371.



do not guarantee that they would not abuse the association lawsuit for private purposes. The environmental association lawsuit would create an illegitimate privatization of public interests. It is the administration only, who is responsible for the protection of public interests, resp. for the environmental protection.

This notion misinterprets the main idea of the public interest litigation. Environmental NGOs do not seek the power to make decisions instead of public authorities or to decide legal disputes instead of courts. They just seek the opportunity to initiate judicial review of an administrative decision. It is still the independent court who decides. The legitimacy of NGOs can be arranged through an active participation in the decision making procedure and through an official process of recognition. For example according to the Federal Nature Protection Act, only recognized NGOs, who have in fact taken part in the public participation procedure and who have been affected through the decision in its statutory field of duty to protect the nature, can bring the lawsuit to the court.<sup>240</sup> The danger of the misuse of the lawsuit for private interests instead of public interest on environmental protection can be minimized through strict conditions of recognition of the NGOs as well as through detailed requirements for the admissibility and scope of the judicial review.

Secondly, the wide access to justice for environmental NGOs could cause a flood of association lawsuits that would lead to serious delays in infrastructure and business projects and could threaten the functioning of the administrative justice in general.<sup>241</sup> As it will be shown in the next section (8.4.3), the empirical findings have not confirmed any of these fears.

Finally, the enactment of the environmental association lawsuit would create an unjustified privilege of the environmental associations towards individuals, which could cause a threat to the constitutional right to access to justice under Art. 19 (4) of the Basic Law. Some of the critical voices

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<sup>240</sup> See above in subchapter 8.4.1.

<sup>241</sup> KOCH, H. J. op. cit., p. 372.

WEYREUTHER, F. op. cit., p. 23.

started - in this regard - to call for a limitation of the environmental public law suit on the review of individual rights according to the traditional concept of standing to sue in Germany. Such a limitation would lead to an absurd situation in which NGOs would be able to bring to court the same violations of environmental provisions as the affected individuals. This double protection of the individual environmental rules would leave the objective environmental norms – up to estimated 90% of all environmental provisions<sup>242</sup> out of judicial control and the shortcomings of enforcement would still go on.

#### 8.4.3 Some Empirical Findings Instead of Interim Results

In the last decades, a number of empirical studies have been elaborated on the national<sup>243</sup> as well as on the European level<sup>244</sup> with the objective to evaluate the experience with the environmental association lawsuit in respect to its influence on promotion of the protection of environment, support of enforcement of the environmental law and with regard to the remarks of the opponents of this legal instrument.

##### 8.4.3.1 European Empirical Comparative Study

In all countries that were subject of the comparative study of *Sadeleer/Roller/Dross*, the overall numbers of the actions brought before

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<sup>242</sup> See footnote 216 above.

<sup>243</sup> BIZER/ORMOND/RIEDEL, *Die Verbandsklage im Naturschutzrecht*, 1990, BLUME/SCHMIDT/ZSCHIESCHE, *Verbandsklagen im Umwelt- und Naturschutz in Deutschland 1997-1999*; SCHMIDT/ZSCHIESCHE/ROSENBAUM *Die Naturschutzrechtliche Verbandsklage in Deutschland*, 2004; SCHMIDT/ZSCHIESCHE/LUDORF/MISCHEK, *Die Entwicklung der naturschutzrechtliche Verbandsklage von 2002 bis 2006*.

<sup>244</sup> SADELEER/ROLLER/DROSS, *Access to Justice in Environmental Matters*. Darmstadt/Brest/Bingen, 2003; online accessible at:

<http://www.oeko.de/publikationen/dok/1192.php?id=&dokid=207&anzeige=det&ITitel1=access%20to%20Justice%20in%20environmental%20matters&IAutor1=Dross&ISchlagw1=&sortieren=date&dokid=207>.

courts by environmental associations<sup>245</sup> disprove clearly the argument of the opponents of the introduction of the environmental association lawsuit, that it could overburden courts and cause a breakdown of administrative justice.<sup>246</sup> Even in legal systems with a wide access to justice for NGOs this fear seems to be unjustified. Moreover, the study did not confirm the first sight implication, that legal systems with wider access to justice would necessarily produce more cases.<sup>247</sup>

Another finding of the aforementioned study is the high success rate of environmental NGOs actions<sup>248</sup> in comparison to the average success rate of overall administrative actions. This successful rate could implicate persisting shortcomings in the enforcement of environmental law. On the other hand, it might be explained with the risk of lost trial costs and by the fact that NGOs do not dispose of enough financial and also human resources to follow and sue all the cases. This all makes NGOs to choose very diligently the cases they decide to bring to court. They mainly concentrate on cases of very serious violations of the environmental law, where the chances for success seem to stand rather high. All in all *“the high success rate of actions brought by environmental associations in the public interest also indicates that they fulfill an important function in the enforcement of environmental law and that they are generally brought for legally sound reasons.”*<sup>249</sup> This seems to be a convincing argument against the fear of misuse of the environmental association action.

In most of the examined countries the association lawsuit concentrates on violation of nature protection law; nevertheless Germany is the only state, where the NGO lawsuit is limited just to this particular area of environmental law.<sup>250</sup>

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<sup>245</sup> See the Table 1.

<sup>246</sup> KOCH, H. J. op. cit., p. 374.

ROLLER, G. op. cit., p. 357.

SADELEER/ROLLER/DROSS, op. cit., p.5.

<sup>247</sup> SADELEER/ROLLER/DROSS, op. cit., p.5.

<sup>248</sup> See Table 1.

<sup>249</sup> SADELEER/ROLLER/DROSS, op. cit., p.8.

<sup>250</sup> KOCH, H. J. op. cit., p. 374.

Table 1: Estimated absolute number of court cases brought by environmental associations and their success rate in %

1996-2001	Belgium	France	Netherlands	Portugal	Italy	Germany	UK	Denmark
Nr. of cases	146	1197	4000	57	117	115	102	4
Success rate (%)	48,8	56,5	50	46	44,3	26,4	39	Not representative

#### 8.4.3.2 German Empirical Findings

Should we have a look at the findings of German empirical studies, we would end up seeing very similar results. In between the years 2002 and 2004 environmental NGOs have brought an average of 30 actions annually.<sup>251</sup> The following numbers of overall actions have been brought to administrative courts in Germany: in 2002 – 190 875 cases; in 2003 – 201 603 cases; in 2004 – 206 855 cases. These numbers implicate a ratio for environmental NGOs' actions in all the administrative actions of 0,016; 0,0149; resp. 0,0145 per cent in each of the above mentioned years,<sup>252</sup> which once again proves the fear of “floods” of environmental association actions to be unjustified.

Other interesting numbers were brought in the empirical study of *Schmidt et al.*, which has elaborated 115 cases brought to courts by environmental NGOs within the years 1996 and 2001. Out of these 115 cases, 87 (75,7 %) did end up at the first instance.<sup>253</sup> Study from *Blume et al.* covering the years 1997-1999 came even to a higher rate of association lawsuits that ended up at the first instance – 82,1 %.<sup>254</sup> This high ratio disproves the notion that the environmental association actions prolong administrative procedures and can lead to delay of important infrastructure and business projects.

<sup>251</sup> KOCH, H. J. op. cit., p. 373.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> Ibid.

As it has been already mentioned above, the German environmental NGOs' actions are compared to other EU member states not the most successful,<sup>255</sup> but the success rate of 26,4 % is still much higher than the one of all administrative actions in Germany, which is estimated to be 20 %.<sup>256</sup>

All the empirical findings lead to a conclusion that environmental associations do use their lawsuits very reasonably, their actions bring to courts serious violations of environmental law, they contribute to the enforcement of environmental law and quality of the decision making process, as well as they seem to enhance the environmental awareness within the public. Therefore, it would be reasonable to introduce the environmental association lawsuit to other areas of environmental law as well.<sup>257</sup>

### **8.5 Article 9 (2) of the Aarhus Convention and Its Implementation in EU-Law**

A lot has been written and said about the Aarhus Convention.<sup>258</sup> Therefore, just a brief summary will follow of those pieces of information, which are necessary for understanding of the problem that the

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<sup>255</sup> See above the Table.

<sup>256</sup> KOCH, H. J. op. cit., p. 373.

<sup>257</sup> Ibid. p.369, 373,379.

<sup>258</sup> The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25 June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the "Environment for Europe" process.

For further information about Aarhus Convention see: von DANWITZ T. Aarhus-Konvention: Umweltinformation, Öffentlichkeitsbeteiligung, Zugang zu den Gerichten, *Neue Zeitschrift für Verwaltungsrecht* 2004, Issue 3, p. 271- 282, 272 ff.

EPINEY A. Zu den Anforderungen der Aarhus-Konvention an das europäische Gemeinschaftsrecht, *Zeitschrift für Umweltrecht*. – Sonderheft 5, 2003, p. 176-184, 176 ff.

REHBINDER, E., Rechtsschutz gegen Handlungen und Unterlassungen der Organe und Einrichtungen der Europäischen Gemeinschaft im Lichte der Aarhus-Konvention. In KADELBACH S. and GITANIDES CH. (Eds.) *Europa und seine*

Implementation of Art. 9 (2) has caused in Germany. Art. 9 (2) obliges the Parties to the Convention to assure that members of the public concerned have access to justice to challenge the substantive and procedural legality of any decision, act or omission that are subject to the participation rights granted according to Art. 6 of the Convention.<sup>259</sup> This provision safeguards not only the right to take part in the decision making procedure on these specific activities,<sup>260</sup> but also gives the possibility to challenge the legality of the final decision of this permitting procedure. As the scope of the acts that could be subject of the review is clear, it was the wording of the requirements of the standing to sue, which have caused the main confusion.

### 8.5.1 Privileged Standing to Sue for Environmental NGOs

The Convention stays open for the two main systems of administrative jurisdiction and leaves it on the parties to choose whether they will require a sufficient interest or impairment of a right as a main precondition for granting the standing to sue. Nevertheless, it further states that: *“what constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.”*<sup>261</sup> So far, we are still dealing with the requirements for standing to sue of the public concerned in general, that according to Art. 2 (5) already includes environmental NGOs.

In the third sentence of Art. 9 (2) the Convention stipulates extra standing to sue provisions implied in law with regard to environmental NGOs

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*Verfassung: Festschrift für Manfred Zuleeg zum siebzigsten Geburtstag.* Baden-Baden: Nomos-Verl.-Ges., 2005, ISBN 3832912193. p. 650-667, 650 ff.

ZSCHIESCHE, M. Die Aarhus-Konvention – mehr Bürgerbeteiligung durch umweltrechtliche Standards? *Zeitschrift für Umweltrecht.* 2001, S.177-183, 177 ff.

<sup>259</sup> All activities that are subject to environmental impact assessment procedure.

<sup>260</sup> See above in subchapter 8.4.1 „Partizipationserzwingungsklage“.

<sup>261</sup> Art. 9 (2) sentence 2 of the Aarhus Convention.

that fulfil the requirements of Art. 2 (5) with reference to both sufficient interest and impairment of a right.<sup>262</sup>

According to the prevailing opinion, this provision obliges the parties to introduce an environmental association lawsuit that would enable the judicial review of violation of environmental law regardless of the fact whether the infringed provision of environmental law does or does not confer individual rights.<sup>263</sup> On the contrary, some scholars hold the opinion that this provision obliges an introduction of a public interest action for environmental NGOs, but leaves a national legislator an option to reduce the scope of the association lawsuit to certain violations of environmental rules.<sup>264</sup>

### 8.5.2 European Implementation

The EC, nowadays the European Union, as one of the Parties to the Aarhus Convention, has issued Directive 2003/35/EC on public participation<sup>265</sup> in

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<sup>262</sup> Art. 9 (2) sentence 3: *"To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above."*

<sup>263</sup> KOCH, H. J. op. cit., p. 376.

EPINEY, A. op. cit., p. 176-184, 176 ff., p. 179.

ZSCHIESCHE, M. op. cit., p.182.

KLOPFER, M. op. cit., § 9, Rn. 140.

ROLLER, G. op. cit., p. 360.

<sup>264</sup> SEELIG R. and GÜNDLING B. Die Verbandsklage im Umweltrecht – Aktuelle Entwicklungen und Zukunftsperspektiven im Hinblick auf die Novelle des Bundesnaturschutzgesetzes und supranationale und internationale rechtliche Vorgaben, *Neue Zeitschrift für Verwaltungsrecht*. 2002, Issue 9, p. 1033-1041, 1040 (not that convincing).

Von DANWITZ, T. op. cit., p. 279, with reference to STEC/CASEY/LEFKOWITZ/JENDROSKA, *Aarhus Convention – An Implementation Guide*, 2000, p.129.

<sup>265</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans

order to implement the Art. 9 (2) of the Aarhus Convention, resp. to bring the so called EIA Directive 85/377/EEC<sup>266</sup> and the so called IPPC Directive 96/61/EC,<sup>267</sup> resp. nowadays the IED Directive<sup>268</sup> in conformity with the Aarhus Convention. Directive 2003/35/EC on public participation has amended the above mentioned directives through introduction of new Art. 10a in the EIA Directive and Art. 15a in the IPPC Directive<sup>269</sup>, resp. Art. 25 in the IED Directive. As the Directive 2003/35/EC on public participation pretty much implemented Art. 9 (2) of the Convention word for word, it has not changed anything on the interpretative problem mentioned above.

## 8.6 German (Non-)Implementation – Environmental Appeal Act 2006

The Environmental Appeal Act (EAA) – *“Umweltrechtsbehelfsgesetz”*<sup>270</sup> entered into force on 15 December 2006; it was more than one and a half year after the implementation deadline of Directive 2003/35/EC on public participation, which was 25 June 2005. The EAA introduced an

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and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

<sup>266</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.

<sup>267</sup> Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

<sup>268</sup> Directive 2010/75/EU of the European Parliament and of Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

<sup>269</sup> Art.16 of the Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version).

<sup>270</sup> Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG; Next to the EAA there has been enacted two more acts: Environmental Information Act – so called *“Umweltinformationsgesetz”* and the Public participation Act – so called *“Öffentlichkeitsbeteiligungsgesetz”*, which makes the German Implementation of Aarhus Convention pretty well arranged.



environmental association lawsuit *sui generis*, which was from the beginning subject to harsh criticism and polemic debates.<sup>271</sup>

### 8.6.1 The Scope of the Environmental Association Lawsuit

The scope of decisions, acts and omissions that could be subject of the lawsuit is limited through enumeration and contains the following:

1) according to § 1 Sect. 1 Nr.1 EEA: all the licensing decisions for which there is or could be an obligation to carry out the EIA<sup>272</sup> and all the land-use plans that according to the Federal building code could be subject to an action,

2) according to § 1 Sect. 1 Nr.2 EEA: all the decisions approving facilities that require special license under the Federal Nuisance Protection Act; decisions on additional regulation § 17 Sect. 1a Federal Nuisance Protection Act; permissions under § 2,7 (1) S.1 of the Water Management Act; planning permission on waste landfill facilities under the § 31 (2) of the Recycling and Waste Management Act.<sup>273</sup>

The EAA applies also in cases of unlawful omissions or fraudulent evasions of the obligation to carry out the prescribed permitting procedure that falls within the scope of the EAA.<sup>274</sup>

### 8.6.2 Requirements of the Environmental Association Lawsuit

Standing to sue is granted only to the environmental Associations officially recognized according to § 3 EAA under the following conditions that are to be fulfilled cumulatively (§ 2 Sect. 1 EAA):

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<sup>271</sup> SCHLACKE, S. Das Umwelt-Rechtsbehelfsgesetz, *Zeitschrift für Natur und Recht*. 2007, Issue 29, p. 8-16, 8.

KOCH, H. J. op. cit., p. 373,378 ff.

ROLLER, G. op. cit., p. 364.

<sup>272</sup> Annex I and II of the EIA Directive.

<sup>273</sup> Project permitting under the IPPC Directive, nowadays under the IED Directive

<sup>274</sup> SCHLACKE, S. op. cit., p. 10.

1) An NGO has to claim that the decision or omission violates legal provisions that: aim to protect the environment, confer individual rights and could be relevant for the decision (*Schutznormtheorie*),

2) further, the NGO has to claim that it has been affected through the decision in its statutory field of duty to protect the environment, and

3) finally, the NGO has to claim that it was entitled to and, in fact, also took part in the public participation procedure (§ 1 sect.1) or that such a participation was unlawfully not allowed.

The conditions mentioned above under numbers 1) and 2) have to be proven for the action to be well-founded. Next to the standing to sue conditions, this constitutes another exception from the general provisions of the Code of Administrative Court Procedure.<sup>275</sup>

The § 2 section 3 of the EAA precludes an NGO to use for reasoning of the action all the objections against the decision that the NGO could submit in the process of decision-making, as long as the NGO did have a chance to express these objections (preclusion).

### 8.6.3 Recognition of the Environmental Associations

The EAA states very strict conditions for the NGOs, which they have to fulfil in order to be officially recognized as an environmental association with the right to come up with a lawsuit according to the EAA. Next to environmental associations there is another official recognition procedure for NGOs that are active in the area of nature protection and that are allowed to bring to the courts actions according to the § 64 of the Federal Nature Protection Act. Other not recognized NGOs can still participate in decision making procedures, but their lawsuit would not be admissible under the regime of the EAA.

In order to be recognized, the environmental NGOs have to prove that they are according to their statutes primarily and in long-term promoting their statutory goal of environmental protection. They have to exist and be

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<sup>275</sup> Ibid., p. 12.

active in their statutory goal area at least for 3 years. They have to guarantee an appropriate fulfilment of their tasks; prove record of membership, art and a scope of activity. They must further prove that they follow non-profit purpose and, finally, that their membership is open with a full and equal vote on general meeting.

These strict requirements for the official recognition contribute to the legitimacy of the environmental associations and their right to sue in public interest, and represent an effective safeguard against misuse of the environmental public lawsuit and against ad hoc social groupings that might misuse the public interest litigation for their own egoistic purposes.

In cases of NGOs that are active on the federal level and NGOs from abroad, the Federal Bureau of Environment – “*Umweltbundesamt*” is in charge of the procedure of recognition. Next to it the relevant State agencies are in charge of the recognition for the NGOs that are active just in one Federal State.

Up to now, the Federal Bureau of Environment has recorded that on the federal level there are 87 environmental NGOs, 22 NGOs promoting just nature protection and 10 of them are currently recognized in both areas of public lawsuit.<sup>276</sup>

#### 8.6.4 Evaluation

As it has been already mentioned above, the environmental association lawsuit that has been introduced in EAA in 2006 has directly brought confusion about its function, debates, and doubts about the conformity with Art. 9 (2) of the Aarhus Convention and with Art. 10a of the EIA Directive, resp. Directive 2003/35/EC on public participation. It is interesting to mention that the limitation of the scope of the association lawsuit was not a part of the original draft.<sup>277</sup> This restriction was introduced

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<sup>276</sup> Available at:

<http://www.umweltbundesamt.de/umweltrecht/verbandsklage/umweltvereinigungen.pdf>.

<sup>277</sup> KOCH, H. J. op. cit., p. 378.

during the legislative procedure on the ground of legal opinion of Prof. *von Danwitz* that was elaborated for the Syndicate of German electricity industry.<sup>278</sup> This fact seems to explain a lot.

The environmental association lawsuit of the EAA from 2006 formally introduced a public interest litigation, which breaks the traditional concept of standing to sue. NGOs are in this sense privileged in the standing to sue conditions as they do not need to be infringed in their own individual rights to gain the standing to sue. On the other hand, they do have to fulfil very rigorous requirements on the recognition, which creates their procedural legitimacy for the enforcement of environmental law on behalf of the general public.

The restrictions of the scope of the lawsuit on violations of the environmental provisions that confer subjective individual rights turn the logic of the public litigation upside down. This limitation allows NGOs to claim just the violations of environmental provisions that are accusable for individuals under the traditional conditions of standing to sue. This results in situation when violations of objective provisions of environmental law are still left out of judicial control. In other words, the environmental association lawsuit in this form fails to achieve its main purpose, which is the enforcement of environmental law and reduction of its shortcomings.

An absurd impression is also given by the contradiction between the requirement of being affected in the statutory field of duty to protect the environment and the limitation of the scope of the judicial control just on violations of rights protecting individuals.

The failure to achieve the main goal of the association lawsuit is also clear when we compare the requirements of the EAA's association lawsuit with

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SCHWERDTFEGGER, A. *Erweiterte Klagerechte für Umweltverbände – Anmerkung zum Urteil des EuGH v. 12.5.2011 in der Sache Trianel Zeitschrift Europarecht.* 2012, Heft 1, p. 81 ff.

<sup>278</sup> von DANWITZ T. *Zur Ausgestaltungsfreiheit der Mitgliedstaaten bei Eiführung der Verbandsklage anerkannter Umweltschutzvereine nach den Vorgaben der Richtlinie 2003/35/EG und sog. Aarhus Konvention, Rechtsgutachten, erstattet dem VDEW e.V., Oktober 2005.*

the NGO lawsuit according § 64 of the Federal Nature Protection Act. This NGO action is limited only to the area of nature conservation law, but is an example of public interest litigation, which enables to enforce violations of objective provisions of nature conservation law, that could not be brought to courts by individuals. That way the nature protection association action helps to enforce the nature conservation law and reduces its shortcomings.<sup>279</sup>

## 8.7 ECJ Case C-115/09 Trianel Kohlekraftwerk Lünen

### 8.7.1 Facts of the Case

The local branch of Friends of the Earth Germany – “BUND Nordrhein-Westfalen” – a recognized NGO, brought an action according the EAA against the preliminary decision and the first partial permit of the district administration Arnsberg for the project of the coal-fired power plant of the Trianel Kohlekraftwerk Lünen company. The projected power plant with 1705 MW heat input and 750 MW net efficiency falls without doubt in the scope of the lawsuit under the EAA, resp. within the scope of the EIA Directive. In the region of “Ruhr” there are already some coal-fired power plants and industrial facilities operating and more are being planned to be realized in this area. There are five areas designated as special areas of conservation within the meaning of the Habitats Directive (92/43/EEC) within 8 km distance of the project’s site.<sup>280</sup> The EIA procedure has been carried out and the preliminary decision states that there are no legal concerns about the location of the project.<sup>281</sup>

The NGO claims that the EIA procedure has not been carried out properly and consequently the assessment Art.6 (3) Habitat directive has been omitted.<sup>282</sup> Further it claims a violation of the nuisance limits for protection of the public health and precautionary environmental and health protection

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<sup>279</sup> WEGENER, B.W. Die Europäische Umweltverbandsklage, *Zeitschrift für Umweltrecht*. 2011, Issue 7-8, p. 363-367, 364 ff.

<sup>280</sup> Case C-115/09 Trianel 12. Mai 2011, (2011) ECR, I-03673, para.24

<sup>281</sup> Ibid. para.25.

<sup>282</sup> Ibid. para. 26.

(fine particulates, NO<sub>2</sub>, heavy metals-quicksilver, germ formation), violation of provisions of species conservation, violations of provisions of Water Management law and violation of provisions of land-use planning and spatial development law.<sup>283</sup>

### 8.7.2 Referring Court

The referring court states that the preliminary decision is at least in respect to the omission of the assessment 6 (3) Habitat Directive unlawful<sup>284</sup> and the action would be founded if the EAA would not limit the scope of the association lawsuit on violations of individual public law rights.<sup>285</sup> Because of its doubts with regard to the conformity with Art.10a of the EIA-Directive,<sup>286</sup> the court decided to suspend the proceedings and to refer 3 questions to the Court for a preliminary ruling.<sup>287</sup>

1) Does *“Article 10a of Directive 85/337 precludes legislation, which does not permit NGOs promoting environmental protection ... to rely before the courts ... on the infringement of a rule which protects only the interests of the general public and not the interests of individuals?”*<sup>288</sup>

2) The Second question asks the same as the first question, only in regard to the infringement of environmental provisions of Community law origin. Further the referring court wants to know if the provisions of Community environmental legislation must satisfy any substantive conditions in order to be capable of forming the legal basis for an action?

3) Does Art.10a of the EIA Directive have a direct effect?<sup>289</sup>

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<sup>283</sup> Ibid. para. 28f.

<sup>284</sup> Ibid. para. 27.

<sup>285</sup> Ibid. para. 28f.

<sup>286</sup> Ibid. para. 33.

<sup>287</sup> Ibid. para. 34; decision of the administrative Court in Münster – Beschluss v.8.3.2009, 8 D 58/08.AK, ZUR 2009, 380.

<sup>288</sup> Ibid. para. 35; the referred questions are in para.34 of the judgment, but for higher clarity I have chosen to cite the rephrased version of para.35.

<sup>289</sup> Ibid. para. 34(3): „Does the directive directly entitle non-governmental organizations to a right of access to the courts which exceeds that provided for under the rules laid down in national law?“

### 8.7.3 Preliminary Ruling

The ECJ left no doubts and declared with his judgment from 12 May 2011 that the limitation of the scope of the association lawsuit on violations of environmental provisions conferring individual rights according to § 2 EAA is not in conformity with Art.10a of the EIA Directive and the Aarhus Convention.<sup>290</sup>

The ECJ justifies its notion on the grounds of interpretation of the purpose and objective of the Aarhus Convention, with which the EU law should be “properly aligned.”<sup>291</sup> Next to this interpretation, the ECJ uses the principle of effectiveness.

The ECJ acknowledges the possibility of the member states to base their standing to sue regulations on one of the two premises – sufficient interest or impairment of the rights,<sup>292</sup> but regardless of this option NGOs could not be deprived of the role granted to them in AC and Art. 10a of the EIA-Directive.<sup>293</sup> The limitation that the national law applies on the standing of individuals, cannot apply to recognized NGOs without disregarding the objective of the AC to give the public concerned a wide access to justice.<sup>294</sup>

*“It would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organizations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest.”*<sup>295</sup>

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<sup>290</sup> Case C-115/09 Trianel 12. Mai 2011, 2011 ECR I-03673, para.50; WEGENER, B.W. Die Europäische Umweltverbandsklage, *Zeitschrift für Umweltrecht*. 2011, Issue 7-8, p. 364.

<sup>291</sup> Ibid. para. 41.

<sup>292</sup> Ibid. para.38.

<sup>293</sup> Ibid. para. 42.

<sup>294</sup> Ibid. para. 44-45.

<sup>295</sup> Ibid. para . 46.

The ECJ requests for the recognized environmental association in general the possibility to sue every infringement of rules of national law implementing EU environment law or rules of EU environment law having a direct effect.<sup>296</sup> With regard to the referring case, the ECJ states the same also for the infringement of the rules of national laws flowing from Article 6 of the Habitats Directive.<sup>297</sup>

With regard to the third referred question, the ECJ declares that Article 10a of the EIA Directive leaves the Member States a significant discretion both to determine what constitutes impairment of a right and, in particular, to determine the conditions for the admissibility of actions (individual access).<sup>298</sup> Nevertheless, the last two sentences of section 3 of the Article are unconditional and sufficiently precise and do have direct affect.<sup>299</sup> As a result of this, the recognized NGOs can derive their standing to sue rights directly from this provision of the EIA directive.<sup>300</sup>

### **8.8 Environmental Appeal Act 2013**

On 21 January 2013 the amendment of the EAA was enacted and came into force on 29 January 2013. The German legislator has chosen the most elegant solution and simply removed the condition with wording “confer individual rights” from § 2 section 1 nr. 1 (scope of the action) and from § 2 section 5 nr. 1 (justification) of the EAA. That way the German legislator fulfilled its obligation resulting from EU law and international law and introduced the environmental association lawsuit that enables environmental NGOs to enforce the legality of administrative decisions about specific activities in the scope of Art.6 of the Aarhus Convention, resp. in the scope of EIA Directive and IED Directive.

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<sup>296</sup> Ibid. para. 48.

<sup>297</sup> Ibid. para. 49.

<sup>298</sup> Ibid. para. 55.

<sup>299</sup> Ibid. para. 56 ff.

<sup>300</sup> Ibid. para. 59.



Probably the most discussed issue with regard to the reimplementation of Art. 9 (2), resp. of Art. 10a of the EIA directive was whether it would be plausible to keep the limitation of the environmental association lawsuit in regard to violation of purely national provisions of environmental law and extend the scope of the public lawsuit just in respect to the environmental law provisions of EU law origin. Firstly, such a distinction would be very hard to perform in legal practice as it is estimated that more than 80 % of the national environmental legislative is influenced through the EU law.<sup>301</sup> Secondly, the limitation of the ECJ ruling to infringement of environmental provisions of EU law origin are to be seen more in respect of the delimitation of the competences of the ECJ. It cannot implicate such differentiation, because the connection to the EU law does not lie in the norm that has been infringed, but in the scope of the EIA, resp. IED specific projects that require the public participation process.<sup>302</sup> Recognized NGOs can bring every outcome of such a procedure to court to review its substantive as well as procedural legality. Finally, such a distinction would produce doubts about the conformity of such a solution with Art. 9 (2) of the Aarhus Convention itself, as Germany is one of the Parties to the Convention, too.<sup>303</sup>

The Amendment of the EAA from 2013 brought one more important extension of the scope of the acts, decisions and omissions that can be brought to courts. In order to implement the Environmental Liability Directive 2004/35/CE,<sup>304</sup> the legislator added § 1 section (1) nr. 3., which

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<sup>301</sup> MESSERSCHMIDT, K. *Europäisches Umweltrecht*. München: Beck, 2011, ISBN 9783406598784, p. 45, para. 109.

<sup>302</sup> WEGENER, B. W. Die Europäische Umweltverbandsklage, *Zeitschrift für Umweltrecht*. 2011, Issue 7-8, p. 366.

BUNGE, T. Die Klagemöglichkeiten anerkannter Umweltverbände aufgrund des Umwelt-Rechtsbehelfsgesetzes nach dem Trianel-Urteil des Europäischen Gerichtshof, *Zeitschrift für Natur und Recht*. 2011, p. 605-614, 608.

<sup>303</sup> BUNGE, T. op. cit., p. 608 ff.

<sup>304</sup> Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

contains the decisions under the § 11 of the Environmental Damage Act - "*Umweltschadengesetz*."<sup>305</sup> These decisions fall within the scope of Art. 9 (3) of the Aarhus Convention.

Next to this supplement, the EAA received some new provisions on administrative court procedure that seem to be rather restricting the association's action. The newly added § 4a sets the time limit for founding of the action for 6 weeks with an option to prolong this deadline and introduces some new limitation of the review of the decisions with an evaluation warrant.

## 8.9 Conclusion

The decision of the ECJ in the Trianel case and the following reaction of the German legislator have without doubts brought an enormous extension of the possibilities of judicial control of legality of administrative decisions with a significant impact on the environment. However, this – in my opinion – positive progress does not mean that the story of establishing the environmental association lawsuit has come to a happy end. The controversial reaction on the ECJ decision and the amendment of the EAA shows that the debates about the access to justice in environmental matters are nowhere near the end.

The sceptical voices argue that the suspension of the limitation of the scope of the NGOs' lawsuit under the § 2 EAA has brought the German administrative justice system in an unacceptable imbalance between the individual and collective access to justice. Therefore, it is necessary to reduce the density of the judicial control in association lawsuits in order to make sure that the administrative courts will remain able to safeguard the protection of the individual rights as a constitutional fundament.<sup>306</sup>

Others, on the other hand, still describe the contemporary access to environmental justice as too restrictive and are pointing out obstacles in

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<sup>305</sup> Gesetz über die Vermeidung und Sanierung von Umweltschäden.

<sup>306</sup> See LEIDINGER, T. op. cit.

the access to justice, which might not be in conformity with the EU law. For example *Ekaradt* argues in this sense that possibilities to heal procedural failures and mistakes in discretion decisions until the end of the decision making process, resp. up to the end of the judicial appeal procedure are not in conformity with the EU law.<sup>307</sup> Further doubts have brought the provisions about the preclusion of the objections of the NGOs of the § 2 section 3 of the EAA. These regulations have been introduced into the administrative procedure in order to speed up administrative decision making procedures.<sup>308</sup> With regard to the conformity of the German doctrine on procedural errors with the Aarhus Convention, resp. with the Directive on public participation, there is currently another preliminary ruling case pending in front of the ECJ,<sup>309</sup> which has been referred from the German Federal Administrative Court.<sup>310</sup>

In the future it should also be clarified whether the German individual access to justice in environmental matters, that is limited to control of provisions of environmental law that do confer individual rights, is in conformity with Art. 9 (2) of the Aarhus Convention, mainly with its "*objective of giving the public concerned wide access to justice.*" The ECJ have mentioned in the Trianel decision, that the pleas that could be put forward in support of such an action should not be limited in any way.<sup>311</sup> This could be interpreted against the possibility to limit the scope – not the standing to sue requirements – of an individual action under Art. 9 (2) of the Aarhus Convention just to the provisions of environmental law conferring individual rights. The fact that the EU law does not differentiate

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<sup>307</sup> EKARDT, F. op. cit., p. 532 ff.; see BVerwG, NVwZ 2012, 557; see also Case C-404/09 European Commission v Kingdom of Spain, 24.11.2011.

<sup>308</sup> EKARDT, F. op. cit., p. 532.

<sup>309</sup> Case C-72/12-reference for a preliminary ruling from the Federal Administrative Court „*Bundesverwaltungsgericht*“ in Leipzig, Germany was lodged on 13 February 2012.

<sup>310</sup> BVerwG, Beschluss v.10.1.2012, Az.7 C 20.11.

<sup>311</sup> Case C-115/09 Trianel 12. Mai 2011, 2011 ECR I-03673, para.37.

between the prevention and precaution would be another point relating to this issue to be discussed.<sup>312</sup>

All in all, the story of the access to justice in environmental matters in Germany remains thrilling.

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<sup>312</sup> EKARDT, F. op. cit., p. 534 ff.;  
LEIDINGER, T. op. cit., p. 1348.

## **9. Montenegro**

### **Implementation of the Aarhus Convention in Montenegro**

#### **9.1 Introduction**

Nowadays, in the age of numerous serious environmental challenges and violations of the international environmental law, it is even more emphasized that the healthy living environment has more significance than just a precondition for life in accordance with inherent human dignity. Namely, it became a substantial condition for continuation of human living. The connection of environmental protection with human dignity, as a material source of all human rights and freedoms, provides additional grounds for treating sound environment as a human right, as one of the core rights of importance for the future of collectivity of a mankind.

The developments of the concept of the right to 'adequate', 'healthy', 'satisfactory' or 'sound' environment in international environmental law are connected to the human rights approach, which influenced domestic legislation and institutional and courts' practice, indeed modest one, of Montenegro. The concept of the right to adequate living environment is present in both universal and regional international documents, treaties and declarations,<sup>313</sup> which Montenegro accepted. In addition, there is a constitutional stipulation on dominance of international legal standards and priority of international law over domestic legislation and practice, which derives from the interpretation of Article 9 of the Constitution.<sup>314</sup>

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<sup>313</sup> African Charter on Human and Peoples' Rights, Declaration from UN Stockholm Conference on the Human Environment, The Framework Convention on Climate Changing, The Convention on Biological Diversity, The Rio Declaration, The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, The EU Charter (Art. 37).

<sup>314</sup> Article 9 of the 2007 Constitution (Official Gazette of Montenegro 01/07): "The ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall apply directly when they regulate relations differently than the national legislation."

The approach of connecting environmental protection with human rights is significantly confirmed by the Aarhus Convention from 1998. By stipulating the right to access relevant information, the right to participation in decision making process and right to access to justice in regard to environmental matters, more guarantees were given in regard to the overall protection of the sound environment. This is now a part of Montenegrin legal order as well.

Montenegro acceded to the Convention on 2 November 2009.<sup>315</sup> Having in mind that the Convention is an integral part of the *acquis* and that Montenegro has got a candidate country status to the European Union,<sup>316</sup> the question of harmonization of Montenegrin environmental legislation with EU legislation was imposed soon after the Convention entered into force in February 2010. Namely, it became an integral part of Montenegrin legislation. Additionally, The Aarhus Convention was ratified by all the Western Balkans countries, which gives an additional value to the regional protection of the rights stipulated thereof, as well as to the development of environmental democracy and environmental culture.

Montenegro signed the Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, the so-called Kiev Protocol, on 23 October 2006. However, it has not ratified it yet.

Concerning the Amendment to the Aarhus Convention in 2005 adopted in Almaty, Montenegro has not even signed it.

In general, after the assessment of normative and institutional aspect, as well as relevant practice in Montenegro, it is to state that there is a good

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<sup>315</sup> <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-13&chapter=27&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en)> ; Official Gazette of Montenegro, No. 3/2009

<sup>316</sup> In 2010, the Commission issued a favourable opinion on Montenegro's application. In December 2011, the Council launched the accession process with a view to opening negotiations in June 2012. The accession negotiations with Montenegro started on 29 June 2012. More at: <[http://ec.europa.eu/enlargement/countries/detailed-country-information/montenegro/index\\_en.htm](http://ec.europa.eu/enlargement/countries/detailed-country-information/montenegro/index_en.htm)>

level of harmonization with European environmental standards, particularly with the Aarhus Convention concerning the legislation adopted in that regard.

However, there are certain shortcomings in regard to the institutional framework concerned. Especially, very problematic is a lack of a specialized body to monitor compliance with the Convention. Also, modest judicial and quasi-judicial practice is evident, which gives a ground for undertaking serious steps toward institutionally organized dissemination of the full awareness of all three pillar rights of the Convention, as well as the steps in regard to additional training of judges, Ombudsman staff, etc.

Finally, having in mind that the rule of law has to be strengthened in Montenegro, as the EU found in its reports<sup>317</sup> and it is visible in real life, it is evident that the above-mentioned steps would contribute to this task.

The next pages are dedicated to justification of the above statements, though elaboration of the legislative and institutional framework, to the compliance with the Convention, as well as to description of the situation in practice in Montenegro.

## **9.2 State of the Environmental Legislation in Montenegro**

Considering the legislation of Montenegro since the changes of the status of its statehood in the end of the twentieth century, as well as since its independence in 2006,<sup>318</sup> it could be concluded that this small Balkan state followed the international direction of connecting the human rights with the environmental protection; consequently even the terminology in legal acts.

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<sup>317</sup> More at:

<[http://ec.europa.eu/enlargement/pdf/key\\_documents/2010/package/mn\\_opinion\\_2010\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_opinion_2010_en.pdf)>

<sup>318</sup> Independence of Montenegro was acquired at referendum on 21 May 2006. Declaration on Independence was adopted by The Parliament of Montenegro on 3 June 2006. Montenegro became a member state of the United Nations on 28 June 2006.

The connection between the protection of human rights and environmental protection over time began to crystallize, in particular with regard to the human right to a *healthy*, and later on to an *adequate* or *sound* environment.<sup>319</sup> The legislation in Montenegro followed in that direction.<sup>320</sup>

Some authors of constitutional matters emphasize the right to a sound environment as a collective human right as it is a common human right ('opšteljudsko pravo').<sup>321</sup> Although the right to a sound environment is often classified as a collective human right, especially at the universal level, with explanation that it belongs to the third generation of human rights – solidarity rights,<sup>322</sup> Montenegrin legislator gave to this right also the individual right importance and put it into the common provisions of the section on human rights and freedoms of the Constitution of 2007. As such, it is treated as the core value of Montenegrin constitution - *materiae constitutionis*.

However, it is not for the first time in Montenegrin legal history that the right to a healthy environment is treated as a fundamental human right.

<sup>319</sup> VUKASOVIĆ, V. Human Rights and Environmental Issues. In WEERAMANTRY, C. G. (Ed.) *Human Rights and Scientific and Technological Development*, Tokyo: the United Nations University, 1990, p. 185-202. ISBN 978-9280807318.

<sup>320</sup> Term *adequate* is broader than 'healthy' and it encompasses healthy, safe and ecological attribute, which are actually different terms for the same right – the right to sound environment. This human right has been classified as one of the human rights of the third generation. In African Charter on Human and Peoples' Rights in its article 24, for example, it is classified as a collective human right, i.e. people's right. It says: "All peoples shall have the right to a general satisfactory environment favourable to their development".

<sup>321</sup> PAJVANCIC, M. Ekoloska prava kao ljudska prava – ustavne garancije. In DIMITRIJEVIC, P. and STOJANOVIC, N. (Eds.) *Ekologija i pravo: tematski zbornik radova / Ecology and Law – thematic collection of papers*, Nis: Centar za publikacije Pravnog fakulteta, 2011, p. 199-207. ISBN 978-86-7148-146-5.

<sup>322</sup> Theory of international law on human rights accepted and developed the concept. See: VASAK, K. Pour une Troisième Generation des Driots de L'homme. In SWINARSKI, C. (Ed.) *Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, The Hague, 1984, p. 837. ISBN 978-9024730797.



Namely, there is a certain tradition in that regard since 1991, which started with its explicit recognition in legislation of Montenegro.<sup>323</sup> Furthermore, it was confirmed by concerned stipulation in the Constitution of the Republic of Montenegro from 1992.<sup>324</sup> The new constitutional act of the independent state – the Constitution of Montenegro from 2007,<sup>325</sup> recognizes the right to a sound environment as well, giving it a special status of one of the basic human rights, as elaborated before.

Therefore, the conclusion that there is a defined strategic commitment for the future development of Montenegro to be an ecological state stands in reality since 1991.

The right to a healthy environment, everyone's duty to preserve and promote the environment,<sup>326</sup> as well as state's duty to protect environment,<sup>327</sup> were established by the Constitution of 1992, the first Montenegrin constitution after dissolution of the Federal Republic of Yugoslavia.<sup>328</sup>

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<sup>323</sup> The concept derives from 1991 Declaration of Montenegro as an 'ecological state', the first one with such an official attribute worldwide. Available at: <<http://www.mgreens.co.me/declaration.htm>>

<sup>324</sup> Montenegro was defined as "democratic, social and ecological state" in Article 1 of the 1992 Constitution. Available at: <[http://www.venice.coe.int/docs/2005/CDL\(2005\)096-e.pdf](http://www.venice.coe.int/docs/2005/CDL(2005)096-e.pdf)>

<sup>325</sup> Article 1, par. 2 of 2007 Constitution (Official Gazette of Montenegro, No 01/07): "Montenegro is a civil, democratic, ecological and the state of social justice, based on the rule of law". Available at: <[http://www.unhcr.org/refworld/type\\_LEGISLATION,,MNE,47e11b0c2.0.html](http://www.unhcr.org/refworld/type_LEGISLATION,,MNE,47e11b0c2.0.html)>

<sup>326</sup> Article 19 of 1992 Constitution: "Everyone shall have a right to a healthy environment and shall be entitled to timely and complete information on its state. Everyone has the duty to preserve and promote the environment."

<sup>327</sup> Article 65 of 1992 Constitution: "The state shall protect environment. Freedom of earning and free entrepreneurship shall be restricted by environment protection."

<sup>328</sup> Montenegro was a part of the Federal Republic of Yugoslavia, together with Serbia, until 2003 when the two republics transformed their federation into a new state under new name Serbia and Montenegro. It was just a transitional phase towards dissolution into two independent states, as of success of Montenegrin referendum on independence from May 2006.

Fifteen years later, at the time of regaining Montenegrin independence, the National Strategy of Sustainable Development of Montenegro was adopted in January 2007.<sup>329</sup> It was the first document dedicated to environmental protection and sustainability in new independent state. The Strategy emphasized that the 1991 Declaration was the basis for Montenegrin commitment towards its ecological determination and requirements of its sustainable development.<sup>330</sup>

The concept of an ecological state of Montenegro is reconfirmed by stipulation in Article 1 of the Constitution of Montenegro, adopted in October 2007.<sup>331</sup>

In the period between the two constitutions, from 1992 to 2007, while many political and social changes were undergoing, and especially after Montenegrin independence, set of laws and other legal acts dedicated to environmental protection, or with dominant ecological dimensions, were adopted. That was one of the positive effects of changes, in the times of not many positive happenings for Montenegro in general. Namely, those new laws showed the changes in the main political course towards spreading the ecological values, giving green colour to every day's politics. Due to those initial ecological legal steps, developing the ecological culture, as a part of culture of human right, found a solid ground.

Today the situation in regards to normative framework is much better than in the surrounding states, almost fully harmonized with the EU standards. The implementation, however, gives a lot of room for improvement.

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<sup>329</sup> *National Strategy of Sustainable Development of Montenegro*, Government of Montenegro, 2007. Available at:

<[http://www.uncsd2012.org/rio20/content/documents/Montenegro\\_National%20Strategy%20of%20Sustainable%20Development%20of%20Montenegro.pdf](http://www.uncsd2012.org/rio20/content/documents/Montenegro_National%20Strategy%20of%20Sustainable%20Development%20of%20Montenegro.pdf)>.

<sup>330</sup> *Ibid*, p. 10.

<sup>331</sup> Article 1, par. 2 of 2007 Constitution (Official Gazette of Montenegro, No 01/07): "Montenegro is a civil, democratic, ecological and the state of social justice, based on the rule of law". Available at:

<<http://www.unhcr.org/refworld/type,LEGISLATION,,MNE,47e11b0c2,0.html>>.

### **9.3 Implementation of the Obligations Deriving from the Three Pillars of the Convention**

Having in mind that the Aarhus Convention is the most important contribution to the international legal protection of the right to a healthy environment, as well as that, apart of 45 member states of the UN Economic Commission for Europe, the European Union is also a High Contracting Party to the Convention,<sup>332</sup> it is a very important legal instrument for Montenegro and its path towards the EU. In other words, the implementation of the Aarhus Convention is an unavoidable obligation of Montenegro as its state party, as well as the candidate state to the EU. Namely, it has to show respect and fulfil the obligation as an evidence of its devotion to the principle of environmental protection, also due to the fact that the Convention has become a part of the EU legislation.

Development of the environmental culture, encompassing respect for healthy environmental protection principles, is one of preconditions for full implementation of the Convention. Especially, full enjoyment of the right to have an accurate and timely information on environmental issues, as well as the right to take part in decision-making process concerned are essential contributions to development of democracy. Namely, environmental democracy comprises participations of all structures of society in considering and deciding on environmental issues, as they are such issues which are of everybody's concern.

The connection between human rights and environmental protection as indicated in the preamble and in most of the Articles of the Aarhus Convention, and as such it is transposed in Montenegrin legislation accordingly. The Preamble emphasizes that there is 'the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development', that the adequate protection of environment is 'essential to human well-being and the enjoyment of basic human rights, including the right to life itself', as well

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<sup>332</sup> The EU signed the Convention on 25 June 1998, and approved it on 17 February 2005.

as that ‘every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations’,<sup>333</sup> which can be found in relevant legal acts in Montenegro. Also, it is considered that ‘to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights’, which is followed in relevant Montenegrin laws.<sup>334</sup>

The right to adequate environment is explicitly mentioned in Art. 1 as ‘the right of every person of present and future generations to live in an environment adequate to his or her health and well-being’. The main elements of the right are regulated in detail. They are: rights of access to information, public participation in decision-making, and access to justice in environmental matters. They are known as “three pillars” of the Convention.

Along with the Convention, there are documents of a soft law character that are to be respected in order for each European state to fulfil its environmental obligations. The EU’s Sixth Environmental Action Program, covering the period 2002-2012, features four priority areas: climate change; nature and biodiversity; environment and health; and management of natural resources and waste.<sup>335</sup> All of those areas are relevant to Montenegrin situation, especially the last aspect due to many complaints about so far.

Also, Montenegro keeps implementing principles of universal soft legal acts, which are connected to the principles of the Aarhus Convention. The

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<sup>333</sup> Preamble, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998.

<sup>334</sup> *Ibid.*

<sup>335</sup> <<http://www.epaw.co.uk/ept/eulaw.html>>; <<http://www.eurunion.org/News/eunewsletters/EUFocus/2006/EUFocus-Environ.pdf>>.

right of all citizens to be informed on the environmental state and to take participation decision-making process concerned actually found the source in Principle 10 of Rio Declaration, which says that 'each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes'.<sup>336</sup> Therefore, the Aarhus Convention is considered as great contributor and significant impulse to better protection of principles promoted in Rio Declaration.

Concerning the three core or pillar rights of the Convention, set of laws and bylaws were adopted in Montenegro.<sup>337</sup> Also, new institutions were established such as the Environmental Protection Agency and Aarhus centres. The following pages are dedicated to them.

### 9.3.1 Harmonization of Montenegrin Legislative Framework with the Convention

In Montenegro, which has passed the transition from real socialism towards modern democracy, the human right to adequate / healthy environment was challenged, especially in regard to the connection of enjoyment of one's right to property which happens to – directly or indirectly – at the same time violate other's right to sound environment. The environmental protection is more and more connected with the human

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<sup>336</sup> Principle 10: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

<sup>337</sup> Texts of all relevant legal acts could be found on the website: <<http://www.epa.org.me/index.php/component/content/article/87-azzs/233-zakoni>>.

rights approach in the domestic legislation and courts' practice of Montenegro, which goes along with the developments at international level.

Montenegro accepted all relevant international legal instruments concerning human rights protection and environment protection both at universal and regional level, as previously mentioned. According to Article 9 of Montenegrin Constitution, international legal standards became a part of its legal order.

The Constitution of Montenegro provides that everyone has the right to a healthy environment, the timely and complete information about the state of the environment, the right to influence the decision-making on issues of importance for the environment and the legal protection of these rights.<sup>338</sup> This provision was stipulated under the impact of the Aarhus Convention. Also, everyone, the state in particular, shall be bound to preserve and improve the environment.<sup>339</sup>

Although the right to sound environment is in its inner nature primarily an economic and a social right with the collective right element, Montenegrin legislator situated it within the part of common provisions on human rights and freedoms of the Constitution, guided by the ecological attributes of the Montenegrin state. Another and more important reason for positioning the environmental right in the Part of Common Provisions is its nature of a fundamental general right, which substantially influences the exercise of other rights or limits other human rights performance by requirements for healthy environmental protection.

According to the word of the Constitution, the right to sound environment contains two components. They are: the right to a healthy

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<sup>338</sup> Constitution of Montenegro, Article 23 titled "Environment" says: "Everyone shall have the right to a sound environment. Everyone shall have the right to receive timely and full information about the status of the environment, to influence the decision-making regarding the issues of importance for the environment, and to legal protection of these rights. Everyone, the state in particular, shall be bound to preserve and improve the environment."

<sup>339</sup> *Ibid.*

environment of each individual, and the duty of each, especially the State, to protect the environment. The obligation of the State is emphasized, since it determines the conditions and manner of conducting business and other activities, where the responsibility must take in account nature conservation, environmental protection and sustainable development, as stated in the preamble to the Constitution.

Following the international obligations of Montenegro in regard to environmental protection, the relevant existing laws are: The Law on Impact Assessment on the Environment,<sup>340</sup> the Law on Integrated Prevention and Control of Environmental Pollution,<sup>341</sup> the Law on Free Access to Information,<sup>342</sup> Environmental Law,<sup>343</sup> as well as Criminal Code of Montenegro.<sup>344</sup> Some of them have to be further amended in order to be harmonized with *acquis*.<sup>345</sup>

Comparing Montenegrin relevant laws and the Convention, there are some discrepancies.

Montenegrin Law on Living Environment,<sup>346</sup> which entered into force in 2008, although it was amended in 2010 and 2011, is still not completely in line with the Convention. There is space for improvement and harmonization with the *acquis*. For example, the Law remained incomplete in the area of public participation in decision making process on environmental matters; although it is explicitly stated in Article 1 that public participation is a part of the law regulating.

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<sup>340</sup> Official Gazette of Montenegro, No. 80/05.

<sup>341</sup> Official Gazette of Montenegro, No. 80/05.

<sup>342</sup> Official Gazette of Montenegro, No. 68/05.

<sup>343</sup> Official Gazette of Montenegro, No. 48/08.

<sup>344</sup> Official Gazette of Montenegro, No. 70/03, 13/04, 47/06, 40/08, 25/10.

<sup>345</sup> KOSTIC-MANDIC, M. *Izazovi u ostvarivanju prava na zdravu zivotnu sredinu u Crnoj Gori*, Podgorica: OSCE, 2011, p. 11-58. ISBN 978-9940-500-08-5.

<sup>346</sup> Official Gazette no. 48/08 dd. 11.08.2008, no. 40/10 dd. 22.07.2010, no. 40/11 dd. 08.08.2011

Also, the fact is that the Law is dealing with the right to access to information only in provisions concerning principles, definition and jurisdiction of the Environment Protection Agency.<sup>347</sup> Namely, Article 41 named *Informing the Public*, of the Law stipulates that the Agency is obliged to collect and publish information, among else, regarding the reports on state of living environment, estimation on the risk impact to the environment and data received from the monitoring concerned. There is no an open provision which would mean that the Agency has to put at disposal all relevant information that are in its scope to the public.

Furthermore, there are some gaps between the obligations under The Aarhus Convention and Montenegrin Law on Free Access to Information,<sup>348</sup> which entered into force in 2005. In situations in which there is a collision of the norms between two legal instruments, priority should be given to the international norms, as stipulated in above-mentioned Article 9 of the Constitution. In each concrete situation, public authority which applies the law should compare the texts of the Convention and the Law on Free Access to Information, as well as other relevant laws.<sup>349</sup> In this manner, it would be possible to get a valid answer to the question concerning which regulation should be applied.<sup>350</sup>

Anyhow, the general rule has to be respected concerning implementation of the Convention. Namely, whenever the Convention guarantees the larger scope of rights, it has priority in the application due to the obligation of a narrow interpretation of exceptions.<sup>351</sup>

Although it is concentrated to the above mentioned three pillar rights, the Convention gives also the ground for connecting the right to sound

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<sup>347</sup> KOSTIC-MANDIC, M. *Op. cit*, p. 29.

<sup>348</sup> Official Gazette no. 68/05, dd. 15.11.2005.

<sup>349</sup> Namely, sometimes, it is possible that an issue is regulated by some other law (for example, the Law on Impact Assessment on the Environment).

<sup>350</sup> KOSTIC-MANDIC, M. *Op. cit*, p. 31.

<sup>351</sup> *Ibid*, p. 32.



environmental protection to other human rights,<sup>352</sup> for example with the right to property or freedom of information, as the pillar rights are conditioned with the basic ecological or environmental rights, such as: freedom from pollution, ecologic degradation and all activities having negative influence on living areas or threatening to life, health, wellbeing and sustainable development; protection of the air, land, water, seas, flora and fauna; protection of the right to adequate living conditions in safe, healthy and ecological environment. Some of those rights were mentioned in Rio Declaration,<sup>353</sup> as an obligation of a state to protect and compensate damage to victims (Principle 13 and 14,<sup>354</sup> for example), as well. All those are found in the mentioned legislation of Montenegro.

Positive side of Montenegrin environmental legislation is providing for access to justice to all legal and natural persons, including NGOs. The right to judicial protection is in details stipulated in Article 42 of the Law on Living Environment. The Law stipulates also responsibility for damage in living environment, as a civil liability. Negative side, though, is linked with not low level of judicial proceedings in the regard of three pillars of the Aarhus Convention.

European Commission stated in its Progress Report on Montenegro for 2012 that *little progress has been made in the area of the environment*. It

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<sup>352</sup> The right to 'sound environment' is 2007 Constitution of Montenegro term. Previously, the term 'healthy environment' was used for the same meaning. The term 'adequate environment' means a right to adequate living conditions in safe, healthy and ecological environment.

<sup>353</sup> <<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>>.

<sup>354</sup> Principle 13. States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction. Principle 14 States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.

also emphasized one good point that *with regard to horizontal legislation, the parliament amended the Law on Strategic Environmental Assessment (SEA) to ensure full transposition of the SEA Directive.*<sup>355</sup> All in all, the EU concluded that Montenegro has made little progress in the area of environment and climate change. It emphasized that *there are first signs of improvement with the adoption of legislation on waste management, air quality and chemicals and with regard to the administrative capacity and efforts undertaken towards aligning with the climate acquis, that the effective implementation of the EIA and SEA acquis needs to be ensured, and that there is the lack of political priority and adequate financing, as well as limited awareness of environmental and climate requirements are hampering progress in this field.*<sup>356</sup>

### 9.3.2 Institutional Framework of Montenegro in Regard to Obligations under the Convention

In regard to the governmental organizational structure in Montenegro, the implementation of the rights from the Aarhus Convention falls under the scope of the Ministry of Sustainable Development and Tourism of Montenegro.<sup>357</sup> Apart from training on the principles of the Convention and round tables organized in order to inform the public about environmental matters, the Ministry worked out the first state report on the implementation of the Convention and submitted it in 2011.

In order to meet environmental needs, and soon after the Law on Living Environment entered into force, the Government of Montenegro established a specialized body by its regulation.<sup>358</sup> It is Environment Protection Agency of Montenegro.

<sup>355</sup> Progress Report on Montenegro by the EU, p. 56.

[http://ec.europa.eu/enlargement/pdf/key\\_documents/2012/package/mn\\_report\\_2012\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/mn_report_2012_en.pdf).

<sup>356</sup> *Ibid*, p. 58.

<sup>357</sup> [www.mrt.gov.me](http://www.mrt.gov.me).

<sup>358</sup> Decree amending the Decree on organization and functioning of public administration, Official Gazette of Montenegro, no.68/08

Within the period between April 2011 and September 2012, three Aarhus centres<sup>359</sup> were established by or with help of the Agency, with the OSCE support through the Program *Environment and Security* (ENVSEC). Two of them were established under auspices of the Agency, one in capital Podgorica and within the organizational structure of the Agency, and another in Berane, northern part of Montenegro.

In addition to the above mentioned public institutions, there are several NGOs that are very active in regard to environmental protection issues and respect of the Aarhus Convention.

There is *Environmental Movement OZON* situated in the town in northern part of Montenegro – Niksic, but it is active in the whole country. This NGO is an implementing partner of the Agency in several projects. The third Aarhus Centre is an organizational unit of OZON. Also, it is active in working out the environmental legislation.<sup>360</sup>

The NGO *Network for Affirmation of Non-governmental Sector (MANS)* is an organization, situated in Podgorica, which has used many times the legal possibility<sup>361</sup> to sue for violation of environmental law, and especially the Aarhus Convention. The NGO *Green Home* has also logged several applications in regard to the environmental protection issues.

The Court case-law, as well as the other bodies practice, cannot still be the reference for good implementation of the third pillar of the Convention. That is why the Aarhus Centres intensified their work on the right to access the justice by dissemination workshops, trainings and sometimes by organizing legal aid.

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<sup>359</sup> <<http://www.arhuscentri.me>>.

<sup>360</sup> The director of the NGO *OZON* became a member of the working group for preparation of the Law on responsibility for damage in living environment, which was formed by the Ministry of Sustainable Development and Tourism. Source: <<http://www.ozon.org.me/?p=2194>>.

<sup>361</sup> The Law on Living Environment gives possibility for individuals and NGOs to sue for violation of environmental law. Law can be assessed at: <<http://www.epa.org.me/images/zakoni/zakon%20o%20zivotnoj%20sredini.pdf>>.

### 9.3.2.1 Environment Protection Agency of Montenegro

Environment Protection Agency<sup>362</sup> is the only agency in the present structure of Montenegrin government, which is also very disputable fact. Namely, this underlines the importance of implementation of international obligations of Montenegro in regard to environmental matter, and the Aarhus Convention is crucial.

The Agency is actually a competent body for monitoring the state of living environment, as well as for the assessment, analysis and reporting. It issues permissions and fulfils other tasks under the Law on Living Environment. Also, it takes part in working bodies at European level.

Apart from general objectives in regard to sound environment protection, it is emphasized that its mission is also to give reliable and timely information to the public of Montenegro, as well as to the international organizations.

The Agency is funded by the state budgetary sources and donations.

According to the last annual report of the Agency,<sup>363</sup> the Agency was active in taking part in the meetings of the High Contracting Parties to the Aarhus Convention, monitoring the work of the Aarhus Centres as the special unit with the task to implement and assess the implementation of the Aarhus Convention.

### 9.3.2.2 Aarhus Centres of Montenegro

One of six organizational units of the Agency is Aarhus Centre in Podgorica.<sup>364</sup> It started to work on 15 April 2011, with the help of OSCE Mission in Montenegro, as the first Aarhus Centre in Montenegro.

The second Aarhus Centre was established in Niksic, as the biggest Montenegrin municipality in territorial aspect. The centre is a unit of the

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<sup>362</sup> <<http://www.epa.org.me/>>.

<sup>363</sup> <<http://www.epa.org.me/images/izvjestaji/izvjestaj%20o%20radu%20agencije%202011.pdf>>.

<sup>364</sup> <[www.arhuscentri.me](http://www.arhuscentri.me)>.

NGO Ecological Movement *Ozon*, as a civil society organization which works on the whole territory of Montenegro. The Centre started its work on 11 October 2011. This is actually a model of implementation of the Convention, which shows that environmental matters as public function can be entrusted to an NGO.

European Commission in the Progress Report on Montenegro mentioned as positive the founding of the second Aarhus Centre in Niksic, although it emphasized that *no progress was made with regard to access to environmental information, access to justice and environmental liability*, and that in that regard *public consultations with civil society and other stakeholders need to improve*.<sup>365</sup>

The third Aarhus Centre was established in Berane, as the unit of Regional Office of the Environment Protection Agency. It started functioning on the Day of Ecological State – 21 September 2012.

The main goal of establishing Aarhus Centres is to make the bridge between the government and a citizen, as well as between a citizen and local administration and to enable democratic processes in the area of environmental protection. Their mission is connected to facilitation of the Aarhus Convention implementation, which they were named after.

Aarhus Centres mandate is to: provide free access to information on environmental matters; to encourage and stimulate public participation in the process of initiating and making decisions; to contribute to the improvement of public knowledge on environmental protection; to stimulate active participation of citizens, civic associations and the public in planning and decision making in the field of environmental protection; to support the establishment of cooperation and networking of local governments, departments of environmental protection, as well as individuals involved in the protection of the environment; to encourage public participation in the preparation of legally binding normative instruments; providing access to justice; organizing public debates, round tables and panel discussions on

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<sup>365</sup> *Ibid.* Progress Report on Montenegro by the EU, p. 56.

topics in the area of where the representatives of the institutions of pollutants and interested citizens; organizing training seminars for local governments, environmental and other NGOs on the implementation of the Aarhus Convention and strengthening the communication skills with the public; organization of media campaigns to address environmental issues; preparation materials that explain the rights and obligations under the Aarhus Convention.

Aarhus Centres offer services to citizens and associations of citizens at no charge. Among those services the most important is free legal aid in the form of free legal consultations concerning environmental protection matters.

According to the last available report on the work of Environment Protection Agency, 65 requests for access to environmental information were submitted the Aarhus centre of Podgorica, in accordance with the provisions of the Law on Free Access to Information and the Aarhus Convention, during 2011. Number of requests for access to information increased by 95 % during the previous year. This suggests that the awareness of environmental issues is increasing. Most requested information related to the subject area of impact assessment and strategic assessment of the environmental reports on the state of the environment and the environmental inspection. According to the report, all requests were processed within the legal deadline.<sup>366</sup>

The annual plan of the Aarhus Centre in Podgorica, as the organizational unit of the Agency, consists of wide range of activities which are dedicated to improvement of the Convention implementation – from trainings and seminars of civil servants, NGOs and citizens, through dissemination activities on the principles of the Convention with special emphasis to the third pillar, and working out of the common internet presentation for all three Aarhus Centres, to organizing the regional visit to Aarhus Centres in

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<sup>366</sup> *Ibid.* See

<http://www.epa.org.me/images/izvjestaji/izvjestaj%20o%20radu%20agencije%202011.pdf>.

Serbia.<sup>367</sup> All activities are planned to accommodate actual needs and plan of activities of the OSCE Mission in Montenegro, as the main supporter of the Centres' activities. Highly positive point of the annual plan is founding of a working group with the task to make an analysis on the Aarhus Convention implementation so far, as well as to give recommendations for more effective and efficacy implementation.<sup>368</sup>

### 9.3.3 State of the Case-law

Case-law of Montenegrin courts is at very modest level concerning environmental protection. It is found also in the above mentioned Progress Report for Montenegro done by the EU. Such a situation exists concerning the environmental justice concerning the rights stipulated by the Aarhus Convention, as well. It is found as such not only in the official reports of the state, but also in shadow reports of the civil society.<sup>369</sup>

Due to the still insufficient environmental awareness in Montenegro, and thus the lack of information about human right to sound environment, which includes the right of access to information and the right to participate in decisions on matters related to environmental protection, as well as the right of access to justice, protection of these rights in practice cannot be illustrated by examples relating to the protection of these rights. Following the adoption of the Law on Free Access to Information, there have been several decisions of the Administrative Court of Montenegro concerning the right of access to information and participation in decision-making process concerning environmental matters.<sup>370</sup>

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<sup>367</sup> Annual Report 2013, p. 29-36.

<[http://epa.org.me/images/Proaktivni\\_pristup/Godisnji%20program%20rada%20Agencije.pdf](http://epa.org.me/images/Proaktivni_pristup/Godisnji%20program%20rada%20Agencije.pdf)>.

<sup>368</sup> *Ibid*, p. 36.

<sup>369</sup> In the Report of NGO Civil Alliance covering the period after independence (2006-2012) there is no a single line covering case law in regard to protection of the right to sound environment or cognate rights. The report was published in February 2013. Available at: <[http://www.gamn.org/files/ljudska\\_prava\\_u\\_CG.pdf](http://www.gamn.org/files/ljudska_prava_u_CG.pdf)>.

<sup>370</sup> DAŠIĆ-RASPOPOVIĆ, T and BAJIĆ, S. *Normativni okvir u Crnoj Gori za primjenu „trećeg stuba“ Arhuske konvencije– pristup pravosu u*, Podgorica: Regional

In the Report on Courts' Work in Montenegro in 2012, there is no information on cases in regard to environmental justice. It is, though, emphasized that the courts in Montenegro continued cooperation with the Regional Environment Centre for Central and Easter Europe (REC) and the Ministry of Sustainable Development and Tourism in 2012. The main result of such a cooperation is organizing a seminar on "Implementation of the Third Pillar of the Aarhus Convention in Montenegro (access to justice)", which gathered twenty participants (judges, prosecutors, as well as officers from the Ministry, Agency, Ombudsman office and Aarhus Centres).<sup>371</sup> This is the only link with the Aarhus Convention in the annual report on courts' work in Montenegro in 2012.

Having in mind the fact that the Aarhus Convention is essentially connected to international human rights and fundamental constitutional rights and freedoms at comparative level,<sup>372</sup> there is an evident connection with the European Convention of Human Rights. Actually, there is a relationship between one of the basic human rights - the right to just trial, stipulated by the ECHR, and the right to access to justice as stipulated in the Aarhus Convention. Although the latter is neither structurally nor institutionally directly connected to the ECHR, similarity of used terminology in the texts and practice brings conclusion that *despite of the autonomy of the Aarhus Convention vis- -vis the European Convention, the case law of the European Court of Human Rights gives indications what can be assumed under independent and impartial organ as it is defined by the Aarhus Convention.*<sup>373</sup>

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Environment Center, Country Office Montenegro, 2007. Accessible at: <[http://archive.rec.org/REC/Programs/PublicParticipation/improving\\_practices/national/products/mon\\_access\\_to\\_justice\\_assessment.pdf](http://archive.rec.org/REC/Programs/PublicParticipation/improving_practices/national/products/mon_access_to_justice_assessment.pdf)>.

<sup>371</sup> Report on Courts' Work in Montenegro in 2012, pp/ 80-81. <[http://sudovi.me/podaci/vrhs/depo/depo\\_lnk/18-04-2013-Izvjestaj%2018%20april.pdf](http://sudovi.me/podaci/vrhs/depo/depo_lnk/18-04-2013-Izvjestaj%2018%20april.pdf)>.

<sup>372</sup> HAYWARD, T. *Constitutional Environmental Rights*. Oxford: University Press, 2005. ISBN 978-0199278688.

<sup>373</sup> EBBESON, J. Comparative Introduction. In EBBESON, J. (Ed.) *Access to Justice in Environmental Matters in the EU*. The Hague: Kluwer International, 2002, p. 15. ISBN 978-9041118264.



In regard to the practice of ECtHR and domestic courts, the need of harmonization of practices is evident. The practice of the ECtHR is very important for Montenegrin courts, as it is a legal source in Montenegro, which derives from the interpretation of Article 9 of the Constitution. Montenegro's accession to the Council of Europe on 11 May 2007,<sup>374</sup> happened almost a year after it had become High Contracting Party to European Convention for Human Rights on 6 June 2006, which was inherited status from the previous State Union of Serbia and Montenegro.<sup>375</sup> Actually, while being a member state of the State Union, in 2003 Montenegro accepted obligations under ECHR,<sup>376</sup> and when regained its independence on referendum it acceded to the ECHR.<sup>377</sup>

The ECtHR case-law is very illustrative in regard to the connection of human rights and environmental protection. Actually, the standards of protection of environment in connection to other human rights,<sup>378</sup> such as the right to information and the right to property or right to life, are under creation. Having in mind that the European Convention on Human Rights is, according to the Court references, a 'living instrument', the case-law is crucially important in this regard.

#### 9.3.4 Media Contributions

Having in mind that the media in Montenegro have followed the matters of environmental protection since Montenegro ratified the Aarhus

<sup>374</sup> <<http://www.coe.int/en/web/coe-portal/country/montenegro>>.

<sup>375</sup> <<http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=Mot&MA=999&SI=2&CM=3&CL=ENG>>

<sup>376</sup> Official Gazzete no 9/2003. "Službeni list SCG" - Me unarodni ugovori, br. 9/2003. Source: <[http://www.coe.org.rs/REPOSITORY/163\\_ekljp\\_-\\_tekst\\_konvencije.pdf](http://www.coe.org.rs/REPOSITORY/163_ekljp_-_tekst_konvencije.pdf)>.

<sup>377</sup> <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=3&DF=26/05/2012&CL=ENG>> See also: <<http://www.mip.gov.me/index.php/SE/spisak-potpisanih-i-ratifikovanih-konvencija-se-od-strane-crne-gore.html>>.

<sup>378</sup> More in: *Manual on Human Rights and the Environment: Principles emerging from the case/law of the European Court of Human Rights (2nd edition)*. Council of Europe Publishing, Strasbourg, 2011. ISBN 978-9287159809.

Convention, there is significant contribution of theirs in regard to better protection concerned. They inform regularly the public on the plans of the Government, its failure in implementation the Convention and NGOs' activities concerned.

Concerning planning of the Government in 2011 to flood the river of Moraca in order to build a system of power stations, the public did not have enough information about threats to the environment by these projects. Non-governmental organizations (Green Home, Forum 2010, MANS) were repeatedly diverting the attention of the government to inform the public about the plans for the river Moraca sufficiently promptly and accurately.<sup>379</sup> So, independent media of Montenegro contributed to better information on this environmental matter.

According to the Environment Protection Agency, so-called black environmental spots are more numerous each year and almost without any progress, except in respect of tailings rehabilitation in Mojkovac.<sup>380</sup> Namely, for years the same environmental black spots exist, of which three are in Pljevlja.<sup>381</sup> They are: in Podgorica - Aluminum Plant (the red sludge and industrial waste landfills), in Niksic - Steelworks Niksic (dump industrial waste), in Bijela - Bijela Adriatic Shipyard (dump industrial waste grit), in Mojkovac - tailings concerning former lead and zinc mine "Brskovo", in Pljevlja - Thermal Power Plant (coal ash and slag "Maljevac"), Gradac Pljevlja (flotation tailings of the former mine "hollow rock" Pljevlja) and Coal Mine Pljevlja.

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<sup>379</sup> The article „Od Podgorice do Brisela“, Weekly "Monitor", 18 March 2011; The article „Green Home, MANS i Forum 2010 pozvali Vladu i premijera Lukšića da ponište tender o davanju koncesija za gradnju elektrana na Morači“, Daily "Vijesti", 28. March 2011; Undertaken from the NGO Action for Human Rights: <[http://www.hraction.org/wp-content/uploads/Ljudska\\_prava\\_u\\_Crnoj\\_Gori\\_2010-2011.pdf](http://www.hraction.org/wp-content/uploads/Ljudska_prava_u_Crnoj_Gori_2010-2011.pdf)>.

<sup>380</sup> Article „Snijeg zaustavio radove na mojkovračkom jalovištu“, daily "Dan", 5 February 2011.

<sup>381</sup> The article "Crna Gora puna crnih tačaka", daily "Dan", 28 November 2010.

Media, especially the independent ones, regularly inform public on activities of NGOs in regard to environment protection, with special emphasis to public participation.<sup>382</sup>

Right of the public to be informed on the above mentioned issues and to take part in decision-making has been significantly improved by media and by the work of the Agency, especially the Aarhus Centres.

## 9.4 Conclusion and Looking Forward

As a candidate country at the stage of negotiations with the EU concerning its membership, Montenegro is obliged to fully harmonize its legislation with the *acquis* and European jurisprudence in the area of environmental protection and human rights. A special position belongs to the implementation of the Aarhus Convention, as the one of preconditions for realization of the rule of law. Namely, developing the rule of law, protection of healthy life and democratization of society are parts of the conditions post before Montenegro by the EU.<sup>383</sup>

Having in mind modest awareness of environmental protection and human rights concerned, as well as a low level of environmental culture and democracy, Montenegro faces shortcomings in implementing the Aarhus Convention, especially concerning the second and the third pillar. In order to improve the situation, dissemination of environmental values and the Convention's principles is necessary, as well as encouragement of public to use the right to access to justice and to realize the environmental justice.

Additionally, it is to expect that Montenegrin courts would increasingly refer their jurisprudence to the case-law of the European Court of Human

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<sup>382</sup> *Exempli causa*: the article "Ukljuciti javnost u odlucivanje", daily "Pobjeda", 20 May 2011; the article "Primjenom Arhuske konvencije korak blize EU", e-portal "Portal Analitika", 19 May 2011, the article "", the article "Vlada krsi evropske standarde" in daily "Dan", 20 September 2010, the article "Gradjani ne znaju za sudsku zastitu" in daily "Dan", 26 May 2010.

<sup>383</sup> It is one of the seven priorities posed before Montenegro to join the EU. See footnotes 316 and 317.

Rights, and, at the later stage of Montenegrin membership in the EU, to the case-law of the Court of Justice of the EU. Namely domestic courts jurisprudence has to be in accordance with the European one. The international standards set in the European legal instruments, as well as those set by the courts' practices, are crucial for further development in protection of the right to sound environment and cognate human rights, and to ensure the sustainable development in Montenegro.

## PART III. SPECIFIC IMPLEMENTATION ASPECTS IN THE SPOTLIGHT

### 10. Public Participation in Creation and Protection of Natura 2000 Areas

#### 10.1 Introduction

About 20 per cent of the EU's terrestrial area now has some protection status (including the Natura 2000 network) and many of these areas have both a conservation value and a value to local people for purposes such as farming, fishing, recreation and tourism. This can produce a conflict between conservation and existing use of the land; one solution is to encourage direct public involvement in nature conservation. International agreements, such as the Convention on Biodiversity, have recommended public involvement in nature conservation.

It should be remembered that EU law does not provide for a general right of participation, but limits it to certain projects, plans and programs. Moreover, EU law speaks very generally of the 'public concerned' which will be entitled to participate in the decision-making, but leaves the determination of the public concerned in any specific case to the Member States. Furthermore, different directives do not specify how the opinion of the participating public is to be assembled (hearing, written submission, attributed time for oral representation) and how the administration shall manage the collected information: the best would probably be to require a written paper accompanying the final administrative decision which lists the results of the participation process and explains the reasons of the administration for following or not the opinion.<sup>384</sup>

Legal regulation relating to public participation in environmental protection has quite a long tradition in Poland. The first regulation of this issue took place in the act on the protection and shaping the environment

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<sup>384</sup> KRAMER, L. *EU Environmental Law*, London: 2012, p. 141-142.

of 1980.<sup>385</sup> Since 1960, when Code of Administrative Procedure<sup>386</sup> entered into force, we have had regulation of the participation of citizens and their organisations in administrative proceedings in a form of complaints and applications. These provisions have a general nature and relate to all of the proceedings regulated in the Code of Administrative Procedure.

The provisions of Law on the protection and shaping the environment have been amended by the Law of 2000 on access to information on the environment and its protection and environmental impact assessment,<sup>387</sup> which in chapter 3 governed public participation in the proceedings in the case of environmental protection. Then the provisions of this law were included in the Law on Environmental Protection of 2001.<sup>388</sup> In 2008, the current Law on Environmental Impact Assessment was enacted.<sup>389</sup> Both the Act of 2004 and the Law on Impact Assessments from 2008 aimed to implement the Directive 2003/35 of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice<sup>390</sup> into the Polish law.

In some simplification it can be concluded that public participation in the light of the Polish law is modified in submitting complaints and applications according to the Code of Administration Procedure.

The issue of public participation in environmental protection, in two main variants, namely, public participation in decision-making and public participation in the preparation of documents, has been widely described in literature.<sup>391</sup>

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<sup>385</sup> Official Journal no. 3, year 1980, position 3.

<sup>386</sup> Official Journal no. 30, year 1960, position 168.

<sup>387</sup> Official Journal no. 109, year 2000, position 1157.

<sup>388</sup> Official Journal no. 25, year 2008, position 150.

<sup>389</sup> Official Journal no. 199, year 2008, position 1227.

<sup>390</sup> Official Journal of European Union, L 156/17, 25 June 2003.

<sup>391</sup> For example JERZMAŃSKI, J. *Udział społeczeństwa w procesach decyzyjnych*. In RADECKI, W. (Ed.) *Podstawy teoretyczne zintegrowanej ochrony prawnej środowiska*. Wrocław: 2010.

There is a close relationship between public participation and access to environmental information. Environmental information is interesting if it can be used to influence the decision-making. This requires access to decision-making procedures, in other words public participation.<sup>392</sup>

## 10.2 Public Participation as an Obligation and Entitlement

The Polish Constitution of 1997 does not explicitly formulate rights of public participation in decision-making in the field of environmental protection. It speaks explicitly about the responsibilities of public authorities in this regard. The provisions of the Law on Environmental Impact are more complex; on this ground we can talk about a right of each entity and an obligation of administration. It can be argued that the right of public participation in selected proceedings, although it is closely linked to the right to information, should be seen more in the terms of the duty of the administration.<sup>393</sup>

Public participation in protecting the environment (including nature) is most often treated in terms of an entitlement (of a person) and an obligation of administration (an administrative authority).

In a broader sense this institution should be considered also in terms of an obligation (of a person). Nature protection is an obligation of the state (public authorities),<sup>394</sup> which can also be seen in a way that public

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BUKOWSKI, Z. *Prawo ochrony środowiska Unii Europejskiej*. Warszawa: 2007.

SOMMER, J. *Udział obywateli i ich organizacji w ochronie środowiska*, In LISICKA, H. (Ed.) *Instytucje prawa ochrony środowiska. Geneza-rozwoj – perspektywy.*, Warszawa 2010, *Udział społeczeństwa w zintegrowanej ochronie środowiska*. Wrocław: 2010.

<sup>392</sup> JANS, J. H. and VEDDER, H. H. B. *European Environmental Law*. Groningen: 2008, p. 332.

<sup>393</sup> JERZMAŃSKI, J. *Udział społeczeństwa w procesach decyzyjnych*. In RADECKI, W. (Ed.) *Podstawy teoretyczne zintegrowanej ochrony prawnej środowiska*. Wrocław: 2010, p. 300-302.

<sup>394</sup> Article 74 (2) of the Polish Constitution.

authorities are obliged to create regulations for the public to participate in protecting the environment (this follows with paragraph 4 of Article 74 of the constitution stipulating that public authorities support actions of citizens to the protection and improvement of the environment). But does the duty to protect nature lie only on the state?

The negative answer has support even in Article 86 of the Polish Constitution (everyone is obliged to be careful about the status of the environment), as well as in the provisions of Article 4 (1) of the Law on the Protection of Nature of 2004 (where it's provided that the obligation of the different actors, including natural persons, is to care about the nature).

After all, if someone has the obligation to care about the nature, he participates in its protection, and this is the shortest way to summarise or to show the essence of public participation in the protection of nature (but in a broader sense). In this direction it seems to influence M. Pekárek when he writes about the relationship between the environment and the public. In his opinion, a starting point is the fact that the environment is a prerequisite for the existence of human life. The right to a favourable environment includes the obligation and the right to participate in environmental protection.<sup>395</sup>

It could go even further, and based on the legal definition of the conservation of nature, according to which the protection of nature is not only maintenance and renewal but also sustainable use of resources, and constituents of nature (Article 2 (1) of the law on the protection of nature), accept that the public participation is not only the legal procedure, the law of the formal, but also daily activities of each person.

On the one hand this interpretation might seem quite far-reaching.

On the other hand, however, it is supported in terms of the Nature Conservation Act (nature protection it is also its sustainable use) and by

<sup>395</sup> PEKÁREK, M. *Uczestnictwo publiczności w ochronie środowiska w prawie czeskim*, In LISICKA, H. (Ed.) *Udział społeczeństwa w zintegrowanej ochronie środowiska*. Wrocław: 2010, p. 11.



views of the doctrine, in accordance to nature conservation should not be absolutized but to be seen through the prism of human needs and other legal interests. We can also put the thesis that the majority of the population participates in the protection of nature by using it (not always in a sustainable way and often even pathological).

In this way, public participation in the protection of nature may be seen:

- 1) as legally provided procedures contained in a law of 3 October 2008,
- 2) as a sustainable use of resources of the nature,
- 3) as a certain idea rarely seen in reality, because society realistically doesn't treat nature conservation as a priority.

### **10.3 Some Remarks on the Legal Structure of Natura 2000 and its Implementation in the Polish Law**

The legal form of the new institution of nature protection has two visages.

The first recognition-worthy visage manifests itself in an attempt to reconcile the conservation with human activities. If we take into account the facts that on our national level the Natura 2000 area represents approximately 1/5 of our territory, and that the Natura 2000 network is a supranational, European one - operating on the same designated EU law principles, it truly is an innovative and modern approach to conservation, yet unprecedented, both taking into account the scale and methods of protection.

The second visage of the analysed legal institution is not so friendly, especially when we apply it to those, whom the designation of Natura 2000 area directly affects. The most obvious example is the legal situation of a property owner on whose property Natura 2000 area was established.<sup>396</sup>

One can come to a disturbing conclusion that, to some extent, Polish legislator has not adequately guaranteed these rights and has been too imprecise in regulating these responsibilities, which are so important having in mind a constitutionally guaranteed citizen's position.

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<sup>396</sup> HABUDA, A. *Obszary Natura 2000 w prawie polskim*. Warszawa: 2013, p. 249.

This leads to many questions and doubts that appear in both processes of designation and of functioning of a designated Natura 2000 area. It seems that certain obligations were imposed on private parties on fairly dubious legal grounds, whereas other rules, guaranteed by the legal system, such as the promulgation of laws rule, were treated very neglectfully.

You can even raise the question of the quality of the Polish administrative law in this field, which gets worse when an individual person is a subject to duties and no flow of benefits seems to follow it (a lack of equivalence).

The imbalance in the mutual relationship between an individual and the state results in the fact that an individual must exclusively (or almost exclusively) bear the costs of carrying out the public welfare.

Considerations on the legal issues of Natura 2000 areas lead to three conclusions of a fundamental character.

The first conclusion is based on an assumption that the legal institution, in the form of Natura 2000 areas, significantly changes the picture of environmental law, both on the national and the European level. As far as the European law is concerned, which I understand here as the law of the European Union, it seems more appropriate to draw an even further-reaching thesis: regulating the Natura 2000 regulations forms the basis of EU environmental legislation; in principle, they marked the beginning of the legislative activity of the European Union in this regard. There is no doubt that, nearly 35 years that have passed since the “Birds” EU directive was adopted, EU laws on the protection of nature have developed significantly and the need for regulation gained a wide acceptance, the two directives: *the “Birds” and “Habitats”* are considered the core of the sphere of legal regulation. The legal institution of Natura 2000 areas is an important prerequisite for acting in favour of the relative autonomy of the environmental law within the environment protection legislation. Although the genesis of the environment protection is closely related to the nature conservation, which is undoubtedly a lot “older”, yet it seemed that at some point in the development of environmental law it stopped at strict conservation instruments. Meanwhile, the environmental laws have

dynamically developed. In this context, the legislative concept of Natura 2000 represents an indisputable development incentive for the nature conservation.

Therefore, we could conclude that Natura 2000 is an argument in favour for the independence of nature protection law within the broader scope of environmental law. To put it a little more carefully, it brings along a new strong impetus for the development of environmental laws.

It is clearly visible through the legal instruments applied to achieve the goals of the Natura 2000. For the purpose of this form of conservation, new legal instruments were established (e.g. impact assessment on the Natura 2000 area).

I realize that the foresaid novelty can be challenged by claiming that the habitat assessment is only a modification of the standard impact assessment, but I do not agree with this position. A number of other legal instruments in relation to Natura 2000 gain a new meaning. Natura 2000 has, as an innovative European concept of nature protection, objectives that could be perhaps achieved without an introduction of new, legally separated forms of protection. Such views appeared in literature.<sup>397</sup>

On the other hand, it can be argued, however, that the intention of the European legislator was not to duplicate the already existing, standard protective measures (conservation), based on a system of specific prohibitions, but the introduction of a new quality of protection that assumes the coexistence in different fields of human activity, whether economic or "natural" with no strong primacy of any of them. This new "quality of protection" may be more strongly emphasized by the formal introduction of a separate legal institution.

There seems to appear the impression that the legislator introducing a new form of protection into the Polish law, may have too hastily, and in a sense "taking a shortcut", wanted to fulfil the European requirements, without having a sufficient regard for the complicated relationship of legal regulation of Natura 2000 with the existing legal order.

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<sup>397</sup> JERZMAŃSKI, J. *Nowa ustawa o ochronie przyrody*, Zeszyty Komunalne 2005/1.

The second conclusion relates to the complexity of the legal forms of environmental protection of Natura 2000 areas. This complexity can be seen on several levels.

Firstly, the Polish law of nature protection has not yet seen an institution that would be based in such a wide range on supranational regulations, particularly on the law of the European Union. This gives rise to difficulties in practical functioning of Natura 2000, resulting in the need to refer to supranational law. EU legislator does not lead Polish lawmakers 'by hand', which would be the case if clear, precise and well-defined legal instruments prevailing in the Polish law directly were to be established.

The introduction of Natura 2000 into the Polish law was based on directives (the Directive of 1979 on the conservation of wild birds and the Directive of 1991 on the conservation of natural habitats and of wild fauna and flora), which indicate curtains goals to achieve, often leaving a considerable degree of freedom in the selection of specific instruments.

Secondly, a Natura 2000 area, as a form of nature protection, is applied to previous legal regimes of nature protection. It can happen therefore, that a particular area is a subject to regulations related to the fact that, for example, it is a national park or a nature reserve, combining the requirements related to the functioning of the Natura 2000 area. An entity, who previously used to be a director of the national park, receives new powers associated with his role of "a supervisor of the Natura 2000", and the derivatives, however, which were used to manage the protection of the park - the protection plans require a correlation with the instruments for a management of the Natura 2000 area.

Thirdly, the concept of environmental protection, whose expression is the Natura 2000 area, redefines in an appreciable degree the relationship between public law and private law, in particular representing a new approach to finding balance between the public interest and a private interest. The assumption underlying the Natura 2000 is not limited to a simple reduction of an individual interest for the benefit of the public welfare.

It may happen though that an individual can meet restrictions of his freedom of action. However, such restrictions are not imposed automatically as a necessary result of the designation of Natura 2000 area. The possible restrictions are a result of case-by-case research of an impact of the respective project on the objectives which Natura 2000 pursues.

It may happen that a particular activity may be carried out within a specific area of Natura 2000, but the action of the same type and of the same scale will not be able to be implemented in a different area of Natura 2000.

Fourthly, a very complex legal character of Natura 2000 results from overlapping of instruments which are seemingly close and is, moreover, exemplified by the relationship between impact assessments (ordinary and habitats).

Considering the problem from the subject-matter point of view, when speaking about entities responsible for applying the law, it must be emphasized that the specific feature of Natura 2000 is its inclusion in national administrative bodies of the European Union Member States.

Fifthly, the doubts arise about the unambiguous legal qualification of certain forms of operation of bodies responsible for the designation procedure of the Natura 2000 area.

The third and the most sceptical conclusion, relates to finding out whether legislative concept of Natura 2000 adopted in Poland is sufficiently clear and whether it perhaps overly focuses on achieving certain objectives at the expense of individual rights. This raises an even broader reflection: the administrative law, including the environmental law, is not created for the individuals (administrative subjects), but primarily focuses on the implementation of the objectives and tasks of the various organizations whose business area is regulated. This results in magnitude of administrative acts, often inconsistent and even contradictory, that are not respected and not implemented by their addressees who - unfortunately more and more often - do not even know that these acts exist.

It seems that in the adopted Polish legislative idea of Natura 2000 these undesirable phenomena can be identified.

The synthesis of the three general conclusions presented above allows defining a thesis that an introduction of a new form of national nature protection law, which characterizes by its complex and multi-faceted nature, has changed the concept of legal protection of nature in an unprecedented extent, rendering it more European. The result of this new concept is a complex legal institution that uses instruments of various types.

The legal regulations on environmental protection related to Natura 2000 must be the in their substance similar in every individual Member State since there are based on the same EU directives. The details, however, may be different but, of course, have to be within the limits of EU law. However, the above mentioned regulations that do not take sufficiently into account the constitutionally protected individual rights represent a “big fly in the ointment”.

#### **10.4 Public Participation in Creation of Natura 2000 Area**

In the process of creation of Natura 2000 areas there is generally no public participation. If we would, however, generalise, we could treat participation of local communes as the public. Local communes have the right to give opinions about projects in the list of Natura 2000 areas (which are situated within the territory of the municipalities, Article 27 (2) of the Nature Conservation Act), prepared by General Director of Environmental Protection (an environmental authority in Poland). Such opinions are not binding.

Sometimes doubts are expressed whether in the designation process of the Natura 2000 areas a municipality is not in a too weak position, in respect of the patterns of constitutional affairs (particularly Articles 5 and 166 of the Constitution). Some say that we are dealing here with the upset of proportions between the interests of the national and the local level.

## 10.5 Public Participation in Protection of Natura 2000 Areas

### 10.5.1 Legal Measures of Protection Natura 2000 Areas

Protection of the Natura 2000 areas manifested itself apparently by:

1) The institution of habitat assessment, which runs the procedure in accordance with plans and projects, which may indeed have an impact on the Natura 2000 area, must be assessed with a view to their consequences for Natura 2000; as regards the rules for the negative result of the assessment excluded the possibility of project implementation (there are, however, exceptions),

2) The institution of plans for the protection – protection plans of Natura 2000 – it should be remembered that Natura 2000 area is not eliminating human activity but is to be reconciled with the nature conservation.

Habitat assessment differs from the usual environmental impact assessment with legal effect. Generally, the negative conclusions of the ordinary impact assessment do not prohibit the implementation of the project. The habitat assessment negative evaluation is essentially a ban on the project. The results to which these two assessments should lead are very similar: 1) it should provide decision makers with information on the environmental consequences of proposed activities (programmes, policies), 2) it requires decisions to take in account that information, 3) it provides a mechanism for ensuring the participation of potentially affected persons in the decision-making process.<sup>398</sup>

Public participation takes place both in the habitat assessment, and in formulating plans for the protection of the Natura 2000 area.

### 10.5.2 Public Participation in the Habitat Assessment

Only after habitat assessment has been carried out and after the opinion of the general public has been obtained the competent national authorities may agree to a plan or a project.<sup>399</sup>

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<sup>398</sup> SANDS, P. *Principles of International Environmental Law*. Cambridge: 2003, p. 800.

<sup>399</sup> Case C-256/98 Commission vs France.

Assessment of the impact of the project on Natura 2000 area is governed by section 5 of the Act on Environmental Impact Assessment. Generally the implementation of projects which are likely to have significant adverse effects on the Natura 2000 are prohibited (this follows from Article 33 of the Polish Nature Conservation Act). Opinion about the impact of the investment on the Natura 2000 area is made after assessing the impact of the project on a Natura 2000 area.

Under the Polish law, the projects, whose implementation is subject to approval (decision), qualify for habitat assessment. In other words, this is an undertaking that may be realised after obtaining a relevant administrative decision.

The authority competent to issue this decision is required to consider whether the undertaking could potentially have significant effects on the respective Natura 2000 area.

If the competent authority finds that there should not be any significant effects – it seems to be the appropriate decision – an undertaking can be implemented and the subsequent stages of assessing the impact on the Natura of 2000 are left out.

If the competent authority finds that there will be significant effects, the problem shall be decided upon submitting set out documents to the regional director of the environment.

Then the regional director of environmental protection will decide whether to impose the obligation to habitat assessment or not.

If it finds that not – there are not further stages of the assessment. If it finds that yes – an assessment should be carried out.

After evaluation, depending on its findings, a regional director is facing the need to either give consent to the presented conditions for the implementation of the undertaking, or refuses this consent. Just before this settlement the need of public participation arises.

Before issuing the order (order of a regional director of environmental protection on the coordination of the conditions for the implementation of



the undertaking, in respect of the impact on Natura 2000 area) the authority (a director shall present to the authority competent to issue a decision required before implementing the project, which has a duty to consider whether the project could potentially have significant effects on the Natura 2000 area) to ensure opportunities for public participation in the preliminary Article 33 – 36 and 38 of the law on Environmental Impact Assessment and shall forward to the authority report on effects of projects on Natura 2000 area.

Article 33 lists the information which authority competent to decision should make public:

- 1) Accession to evaluate the impact of the project on the environment,
- 2) Initiation of procedure,
- 3) The subject of the decision to be taken in the case,
- 4) The authority competent to take a decision and the authorities competent to issue an opinion and an agreement,
- 5) Opportunity to review the documentation of the case (request for a decision; required by the regulations: a) the provisions of the authority competent to take a decision, b) the views of the other organs, where the positions are available at the deadline for submission of comments and proposals and the place where it is available for inspection,
- 6) Possibility to submit comments and proposals,
- 7) How and where to submit comments and proposals, indicating the 21-day deadline for their submission,
- 8) The authority competent to examine comments and suggestions,
- 9) Date and place of the administrative hearing open to the public, referred to in art. 36, if it is to be carried out,
- 10) Procedure for the transfrontier impact on the environment if it is carried out.

Comments and proposals can be made: 1) in writing, 2) orally for the record, 3) by means of electronic communication.

The authority competent to issue the decision shall inform the public about the decision, and ensure the capacity of the public to familiarize with its contents.

The authority competent to issue a decision required before implementing the project shall transmit comments and conclusions notified by the public to the regional director. The regional director will examine those comments and conclusions. Order of the regional director is binding. That means that the authority issuing the decision required before implementing the project must adapt to it. It must be justified, and, therefore, must, *inter alia*, contain the information how comments and conclusions from the public were taken into account, and to what extent they have been taken into account.

In conclusion: public participation appears after the impact assessment on the Natura 2000 area, and before the consent of the regional director (refusal of consent) for the undertaking. The procedure of public participation will not be carried out by the regional director, but by the authority competent to issue a decision on the implementation of the undertaking. The competent authority will forward the comments and proposals to the regional director, and the regional director should examine them. Justification of a regional director order, regardless of the requirements of the Code of Administrative Procedure, shall include information about the performed procedure requiring public participation, and about how they were taken into account and to what extent the comments and proposals submitted in connection with public participation were taken into account.

### 10.5.3 Public Participation in Planning on Natura 2000 Areas

It is first of all the public participation in the proceeding, which has to draw up a plan to protect the area of the Natura 2000. Generally speaking, procedure of public participation in relation to the draft act on the planning of the Natura 2000 area has the same legal shape (the same procedure), as public participation in the preparation of plans related to the protection of other forms of protection, for which provisions provide the obligation to establish a protection plan (a national park, the nature reserve).

In this sense, public participation in the preparation of proposals for protection plan protective (tasks) for Natura 2000 does not constitute anything new against the background of this type of proceedings relating to the earlier listed forms of protection of nature.

In accordance with the provisions of Chapter 3 of the Polish law on Environmental Impact Assessment (Article 39 – 43), regulating public participation in the elaboration of any documents, the proceeding can be divided into three consecutive phases:

1. An informational phase, in the course of which the authority will disseminate some data (concerning accession to the development of the plan, stating his subject matter, indicating the potential to familiarise themselves with the necessary documentation, announcing the possibilities for the submission of complaints and applications together with an indication of the way of the competent authority for treatment, and place for the submission deadline).

2. An analytical phase, i.e. examining, considering the statements contained in the complaints and conclusions.

3. A decision-making phase, in which the authority shall respond to lodged complaints and applications, explains the recitals seized position (but of course it is not the decision in the meaning of administrative law).

The authority making the draft plan protection for the Natura 2000 area will provide stakeholders (the public concerned operating in the area of the Natura 2000) participation in the work relevant for drawing up this project of the plan (Article 29 (5) the Nature Conservation Act). In addition, the establishment of a protection plan shall be preceded with the procedure of society participation.

It should be stressed out that the respective authority is not bound by the complaints and applications (proposals) submitted during the public participation procedure. However, due to some of the fundamental principles of the rule of law and the principles of administrative procedure the respective authority should carefully consider them. The specificities of the

conservation of nature in the form of Natura 2000, where it is not about eliminating human activity, but its reconciliation with requirements of natural resources, should be also taken into consideration.

## 11. The Aarhus Convention and the Czech Building Act: Public Participation in Spatial Planning and Subsequent Procedures

### 11.1 Introduction

The main goal of this chapter is to highlight the main changes and the current developments in the issues of public participation (2<sup>nd</sup> pillar of the Aarhus Convention) in the procedures under the Building Act (Act No. 183/2006 Coll., on Spatial Planning and Building Rules).<sup>400</sup> The Building Act was changed significantly by the Act No. 350/2012 Coll. that came into force on 1 January 2013. Another important current issue that shall influence the legal situation in the Czech Republic is the publication of Recommendations and Findings of Aarhus Compliance Committee (ACCC/C/2010/50) adopted on 29 June 2012<sup>401</sup> concerning the Czech Republic that are related in a large extent to the Spatial Planning and Building Rules and to the Environmental Impact Assessment procedure.

The projects within the scope of Article 6 of the Aarhus Convention require a multi-layer permitting process in the Czech Republic and a planning permission and a building permit are considered as ones of the most important permits. Decision-making procedures under the Building Act are the key procedures in the environmental matters; these procedures

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<sup>400</sup> The Building Act in an English translation from 2009 (i.e. of the former version) is available at the website of the Czech Ministry of Regional Development at: <[http://www.mmr.cz/getmedia/9a941cf5-268b-4243-9880-d1b169fb33d6/SZ\\_angl.pdf](http://www.mmr.cz/getmedia/9a941cf5-268b-4243-9880-d1b169fb33d6/SZ_angl.pdf)>. It is worth mentioning that regarding the **English translations of the basic terminology of the Czech Building Act** in this book, we follow the above mentioned translation of the Act, published officially by the Czech Ministry of Regional Development, although different ways of translation are also possible (e.g. the ones used in the Findings and recommendations with regard to communication ACCC/C/2010/50 concerning compliance by the Czech Republic). We keep this way of translations: Spatial planning [územní plánování]; Spatial plan [územní plan]; Planning permission proceedings [územní řízení]; Planning permission [územní rozhodnutí]; Building permit proceedings [stavební řízení]; Building permit [stavební povolení].

<sup>401</sup> See more in Chapter 5.

include spatial planning, planning permission proceedings and building permit proceedings. Spatial planning and planning permission proceedings are considered as the early stages<sup>402</sup> *when all options are open*.<sup>403</sup>

To understand the importance of the procedures under the Building Act in the environmental matters it is necessary to clarify the relationship between spatial planning procedures and the Environmental Impact Assessment. The EIA procedure (regulated by the Act No.100/2001 Coll., on the Environmental Impact Assessment)<sup>404</sup> is a self-contained process, separated from the decision-making procedure that comes after the EIA. Usually it is the planning permission proceedings that come after the EIA. The EIA process is completed with an “EIA statement” that is not binding but constitutes the opinion on the basis of which a decision-making (usually the planning permission decision-making) process takes place. This procedure is open to the public (anyone can raise comments) but in the next steps (planning permission and building permit procedures) the public participation is limited.<sup>405</sup>

<sup>402</sup> See e.g. Constitutional Court Decision No. IV ÚS 2239/07 dated 17. 3. 2009, available at:

<http://nalus.usoud.cz/Search/ResultDetail.aspx?id=61911&pos=1&cnt=1&typ=result>.

<sup>403</sup> Art. 6 par. 4 of the Aarhus Convention: „4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.”

<sup>404</sup> The English translation of the Czech EIA Act is available at the website of the Ministry of the Environment at: [http://www.mzp.cz/ris/vis-legcz-en.nsf/0/B3E5ACA81B717965C125735C00438142/\\$file/2001100Sb\\_kv.pdf](http://www.mzp.cz/ris/vis-legcz-en.nsf/0/B3E5ACA81B717965C125735C00438142/$file/2001100Sb_kv.pdf).

<sup>405</sup> According to Recommendations and Findings of Aarhus Compliance Committee (ACCC/C/2010/50) adopted on 29. 6. 2012 concerning the Czech, p. 17, available at:

[http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-39/ece.mp.pp.c.1.2012.11\\_as\\_submitted.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-39/ece.mp.pp.c.1.2012.11_as_submitted.pdf):> „(a) through its **restrictive interpretation of “the public concerned”** in the phases of the decision-making to permit activities subject to article 6 that come after the EIA procedure, the system of the Party concerned **fails to provide for effective public participation during the**

The important **amendments to the Building Act** with regard to environmental decision-making that will be mentioned in this chapter concern:

- Public participation in the spatial planning procedures;
- Possibility to join EIA and planning permission decision-making procedure;
- Public participation in the planning permission decision-making procedure.

## 11.2 Spatial Planning Documents

The Czech system of planning the territory consists of 4 spatial planning conceptual documents (Spatial Development Policy for the whole territory of the Czech Republic, Regional Spatial Plans called “Spatial Development Principles” for the territory of a region, Municipal Spatial Plans and Regulatory Plans for selected parts of the territory of a region or a municipality) that are binding for the subsequent step, for the concrete planning decision-making procedures.

**Spatial Development Policy.** During the approval procedure of Spatial Development Policy, the public is entitled only to so-called consultative participation, i.e. the public may make comments, but these comments are not binding (public comments shall be taken into account only in general). The real effectiveness of these comments is questionable. There are no

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*whole decision-making process, and thus is not in compliance with article 6, paragraph 3 of the Convention .... (b) by **failing** to impose a mandatory requirement that the **opinions of the public in the EIA procedure are taken into account in the subsequent stages of decision-making to permit an activity subject to article 6, and by not providing opportunity for all members of the public concerned to submit any comments, information, analyses or opinions relevant to the proposed activities in those subsequent phases, the Party concerned fails to comply with the requirement in article 6, paragraph 8, of the Convention to ensure that in the decision due account is taken of the outcome of the public participation.***”

safeguards for the final act to take into account these comments, no obligation to deal with comments in justification of the respective act. The amendment to the Building Act provides for public hearing for Spatial Development Policy proposal. Before adopting the amendment only written comments were allowed during the approval procedure of the Spatial Development Policy. The experience with public hearing as a public participation tool used e.g. in the EIA procedure or in the approval procedure of local or regional spatial plans shows that public hearings can make public participation more efficient.

**Regional Spatial Plans (Spatial Development Principles).** There are two participation tools in the regional spatial planning: comments and objections.

Comments (so called consultative participation) can be raised by anyone; there is, however, a problem with their effectiveness, because there are no safeguards for the final act to take these comments into account.

Another tool – objections – is really effective; objections are to be decided on and although it is not possible to appeal against such a decision, other possibilities for review including the judicial one are allowed. It is very important that the annulment or change of the Spatial Development Principles can be achieved with this tool. Objections can be raised only by a limited scope of subjects: by the municipality concerned, by the “public deputy” – a representative of the public that represents a specific number of citizens of the municipality, and by owners or managers of technical infrastructures, i.e. an owner or a manager of roads, power lines, pipelines, drainage etc. This limited scope of participants represents only a very small part of the public concerned according to Article 2 of the Aarhus Convention.

The amendment to the Building Act (Act No. 350/2012 Coll.) provides for the participation of the public in an earlier stage of the regional spatial planning procedure, so now the public can apply comments twice in two different stages of the approval procedure of Regional Spatial Plans.

**Municipal Spatial Plans.** The legal regulation of the approval procedure of Municipal Spatial Plans is very similar to the legal regulation of the



Spatial Development Principles approval procedure. There also exist two public participation tools (comments and objections). According to the amendments to the Building Act, the consultative participation can be realised twice in two different stages of the approval procedure of the spatial plan. Objections, that are to be decided on, can be raised only by a limited number of participants (a public deputy, an owner/manager of technical infrastructures and concerned owners). The Act No. 350/2012 Coll. changed the definition of the “owner concerned”; the new definition is broader than the existing one. Objections to the Municipal Spatial Plan can be raised by an owner whose real estate (land, building) is impacted by a local spatial plan proposal.<sup>406</sup>

### 11.3 Planning Permission Proceedings

As it has been mentioned in the beginning of this chapter, planning permission proceedings belong to the most important procedures in the environmental decision-making processes, during which placing of a project is decided. That is why the special provisions on participation in the Building Act are so important for the public participation in environmental issues and for fulfilment of obligations arising from Article 6 of the Aarhus Convention. However, the Building Act provides a rather restrictive definition of a party to planning permission proceedings.<sup>407</sup> Especially some categories of natural persons considered as the public concerned by the Aarhus Convention are excluded from the public participation under the Czech legislation; it is for instance obvious in case of tenants.<sup>408</sup> A person

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<sup>406</sup> See Section 52 (2) of the Building Act.

<sup>407</sup> FRANKOVÁ, M. and HUMLÍČKOVÁ, P., *Public Participation in Environmental Protection in the Czech Republic – Current Tendencies*. In DAMOHORSKÝ, M., STEJSKAL, V. (Eds.) *Czech Environmental Law 2010, Yearbook – Volume 4*. Prague: The Czech Environmental Law Society 2010, Publishing House: Eva Rozkotová, p. 19 – 29. ISBN 978-80-87488-00-3.

<sup>408</sup> Participation of tenants in the planning permission proceedings - see e.g. the Czech Supreme Administrative Court Decision of 31 October 2011, no. 5 As 69/2010 – 115, available at:

can become a participant of the planning permission proceedings only as an applicant for the planning permission oneself, an owner of the land on which this project shall be located (usually, the applicant is also the owner of the land concerned), and as a “neighbour” – i.e. an owner of neighbouring lands or buildings whose rights (ownership or similar rights) could be affected by the final decision (planning permission).<sup>409</sup> NGOs promoting environmental protection can also become parties to the planning permission proceedings.<sup>410</sup> Their participation in this process is based on special acts – Act No. 114/1992 Coll., on Nature and Landscape Protection (in practice the only efficient one) and the EIA Act whose conditions for participation of NGOs in following processes are restrictive and complicated.<sup>411</sup> Therefore, NGOs make use almost solely of the special provision on public participation in the Nature and Landscape Protection Act (Act. No. 114/1992 Coll. as amended) under which they can participate in any process that concerns protection of nature or landscape.<sup>412</sup>

The amendment to the Building Act does not change the scope of participants but provides for limited grounds for objections that NGOs can

[http://www.nssoud.cz/files/SOUDNI\\_VYKON/2010/0069\\_5As\\_10\\_201111031254\\_20\\_prevedeno.pdf](http://www.nssoud.cz/files/SOUDNI_VYKON/2010/0069_5As_10_201111031254_20_prevedeno.pdf).

<sup>409</sup> See § 85 (2) (b) of the Building Act: *„persons, whose proprietary or another real right to the neighbouring structures or neighbouring grounds or the structures built up on them may be directly affected by the planning permission. “*

<sup>410</sup> See Art. 85 (2) (c) of The Building Act: *„persons, who are specified in the special regulation. “*

<sup>411</sup> See: SOBOTKA, M. and HUMLÍČKOVÁ, P. Rozšíření účasti veřejnosti (?) aneb několik poznámek k jedné zbytečné novele zákona o posuzování vlivů na životní prostředí. *České právo životního prostředí* 2010 (27), Issue 1, p. 94 - 98. ISSN 1213-5542.

<sup>412</sup> See § 70 of the Act No. 114/1992 Coll., on Nature and Landscape Protection, as amended. See also: STEJSKAL, V. *Úvod do právní ochrany přírody a péče o biologickou rozmanitost*. Praha: Linde, 2006, p. 520 – 522. ISBN 80-7201-609-1. FRANKOVÁ, M. and HUMLÍČKOVÁ, P. Application of the Aarhus Convention in the Czech Republic in 2011. In DAMOHORSKÝ, M. and STEJSKAL, V. (Eds.) *Czech and European Environmental Law*. The Czech Society for Environmental Law 2011, Publishing House: Eva Rozkotová, p. 23 – 24. ISBN 978-80-87488-07-2.

apply in this decision making procedure. An NGO can raise only objections relating to the public interests concerned in such planning permission proceedings provided that such an NGO deals with the protection of this public interest. It means that for example NGOs dealing with nature protection can't raise objections concerning noise or air pollution. This restriction certainly does not comply with the Aarhus Convention, in particular with Art. 6 (7),<sup>413</sup> according to which the public is allowed to submit any relevant comment.

#### **11.4 The Integration of the EIA Procedure to the Planning Permission Proceedings**

The amendment to the Building Act provides for the possibility to join some stages of the EIA procedure with the planning permission proceedings. This possible integration is now regulated differently and in much more detail than in the past. The amendment provides for the following conditions, under which the integration is possible:

- The project is listed in Annex II of the Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment;
- The Regional Authority for EIA procedure is the competent authority (not the Ministry of the Environment);
- The “case-by-case” examination under Art. 4 (2) of the Directive 2011/92 (“screening”) has been completed.

If these conditions are fulfilled, the regional EIA authority can allow the integration; vice versa it means that this authority can exclude the integration and that the possibility to join the EIA with the planning permission proceedings depends on the rationalized opinion of the Regional EIA Authority.

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<sup>413</sup> According to Article 6 (7) of the Aarhus Convention: *„Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, **any comments**, information, analyses or opinions **that it considers relevant to the proposed activity.**“*

The integration of the EIA to the procedures governed by the Building Act is undoubtedly a very positive tendency, but conditions that the Building Act requires for this integration are very restrictive and will probably be fulfilled only in a very small number of cases. Presumably it would be difficult to implement this integration in practice. The integration of the EIA procedure to the planning permission proceedings is not possible for the projects subject to Annex I of the Directive on EIA (projects which have potentially “more” significant effects on the environment than the projects from Annex II).

Moreover, there is a very important and new provision; it is a special provision on public standing in the planning permission proceedings in the case of integration of the EIA procedure to the planning permission proceedings, under which participants to the planning permission proceedings are NGOs protecting the environment or the public health or cultural monuments.<sup>414</sup> According to this provision an NGO that is considered the public concerned according to Article 2 (5) of the Aarhus Convention becomes automatically a participant of the planning permission proceedings.

## 11.5 Conclusion

Amendments to the Building Act have brought small but important changes<sup>415</sup> that should make the public participation possible in earlier stages and more efficient. Public hearing during the approval procedure of Spatial Development Policy could make participation of the public more efficient, but it does not ensure it. Possibility to raise comments twice during the approval procedure of Spatial Development Policy or Municipal

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<sup>414</sup> See Art. 91 par. 7 of the Building Act

<sup>415</sup> One of the original purpose of this act was to limit participation of NGOs in the procedures under the Building Act. See the Explanatory report to the Government Bill on the Amendments to the Act No. 183/2006 Coll. on Spatial Planning and Building Procedure (Building Act) - Důvodová zpráva k vládnímu návrhu zákona č. 183/2006, kterým se mění zákon o územním plánování a stavebním řádu (stavební zákon), sněmovní tisk č. 573/0, p. 142 – 147, available at: <http://www.psp.cz/sqw/text/tiskt.sqw?0=6&CT=573&CT1=0>.

Spatial Plans enlarges possibilities of the public to participate. To evaluate the legal changes in the planning permission proceedings is more problematic. The tendency to integrate some stages of the EIA procedure to the spatial planning process is positive. However, the limitation of grounds for objections that NGOs can apply during the planning permission proceedings clearly narrows the public participation.

However, not all the problems related to the Aarhus Convention implementation are solved. Still only a small part of the public concerned has the possibility to participate in a really effective way. During the creation of planning policies (Spatial Development Policy, Spatial Development Principles, Municipal Spatial Plans and Regulatory Plans) the problem with the efficiency of the consultative participation remains. Its real effectiveness is questionable. There are no safeguards that the final act shall take into account comments made by the public. The really effective public participation tool – objections – is reserved only for a small part of the public concerned in the sense of the Aarhus Convention. Only a small part of the public concerned (only NGOs and owners of concerned real estates) can become a party to the planning permission proceedings.

## 12. Restrictions on Public Participation under Amendments to the Czech Building Act: Influence of Renewable Energy Promotion

### 12.1 Introduction

The Aarhus Convention is based on the recognition that public participation in environmental decision-making enhances the quality and the implementation of decisions, contributes to public awareness of environmental issues, gives the public the opportunity to express its concerns, and enables public authorities to take due account of such concerns.

However, in the Czech Republic there still remain efforts to limit public participation in decision-making, especially within procedures under Act No. 183/2006 Coll., the Building Act, as amended.<sup>416</sup>

Therefore, this chapter focuses on selected problematic aspects of public participation (particularly on participation of the public concerned) in the procedures under the Building Act with the emphasis on building permit proceedings. It is an issue of a pressing importance with respect to amendments to the Building Act by the Act No. 350/2012 Coll.

### 12.2 Selected Consequences of Amendments to the Building Act

Under Section 85 (2) (c) of the Building Act, which was not amended, participants in planning permission proceedings are, *inter alia*, persons specified in special legal regulation.

However, public participation in decision-making is entirely eliminated by some special legal regulations. For example, an applicant is the only participant in the administrative procedure regarding the permission for

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<sup>416</sup> The Act No. 183/2006 Coll., on Spatial Planning and Building Rules (Building Act), in an English translation from 2009 (i.e. of the then version) is available at the website of the Czech Ministry of Regional Development at: [http://www.mmr.cz/getmedia/9a941cf5-268b-4243-9880-d1b169fb33d6/SZ\\_angl.pdf](http://www.mmr.cz/getmedia/9a941cf5-268b-4243-9880-d1b169fb33d6/SZ_angl.pdf).

source of noise above limits under Section 31 (1) in connection with Section 94 (2) of Act No. 258/2000, Coll., Public Health Protection Act, as amended. The public concerned is not the participant in this administrative procedure even in a case concerning property rights.

In the context of participation in planning permission proceedings under the Building Act, the provision of Section 70 of Act No. 114/1992 Coll., the Nature and Landscape Conservation Act, as amended, is applied.

Under this provision, nature conservation is provided through immediate participation of citizens, their associations and voluntary bodies, etc. Associations of citizens or their units, whose main purpose (according to their statute) is nature and landscape conservation, are entitled (provided that they have legal subjectivity) to ask competent administrative authorities to be informed in advance of all planned interventions and initiated administrative procedures, all of which may affect interests of nature and landscape conservation under the Nature and Landscape Conservation Act. Under certain conditions, these associations have the right to be participants in these administrative procedures.

Participation of the public concerned under Section 115 (6) and (7) of Act No. 254/2001 Coll., the Water Act, as amended, is a less often used legal instrument.

Similarly to the Nature and Landscape Conservation Act, associations of citizens, whose main purpose (according to their statute) is related to nature protection, are entitled to be informed about initiated administrative procedures under the Water Act provided that they have asked for this kind of information.

It does not apply to building procedures governed by Section 15 of the Water Act. The request shall be specified as regards the object and the place of the procedure. Except for building permit proceedings, these associations have the right to be participants in administrative proceedings under certain conditions.

Considering the amendment to the Water Act by Act No. 350/2012 Coll., legal regulation of participation of the public concerned in building permission procedure under the Water Act was significantly changed. Under Section 115 (7) of the Water Act, the public concerned shall not be a participant in the building permission procedure under Section 15 of the Water Act that governs building permissions for hydraulic structures.

If the public concerned fulfils requirements under special legal regulation, it becomes a participant enjoying full rights in the planning permission proceedings. Nevertheless, the issue is a consequent legal status of the public concerned.

As far as its participation in building permission procedure is concerned, legal regulation of this participation was considerably changed due to the amendment to the Building Act.

Under the provision of Section 109 (g) of the Building Act, the participant in the subsequent building permission procedure is also the person determined by special legal regulation provided that public interests protected by special legal regulations may be concerned in addition to the fact that these matters were not decided in a planning permission. This provision is a base for participation of the public concerned (as mentioned above).

The position of the participant should be effective; therefore, the participant should have the right to raise objections. Taking into account the provision of Section 114 (1) of the Building Act, the scope of objections of participants is significantly narrowed in relation to their property rights, or the right under the contract to build the structure, or the measure or the right corresponding to easement to the grounds or to the structure.

These objections shall contain facts establishing the participant's status as a participant in the procedure, in addition to reasons for objections; objections which exceed the scope stated in the first sentence of Section 114 (1) of the Building Act, are not taken into consideration.

Before this amendment, the Building Act did not directly set the procedure of a building authority in the case when the aforementioned



requirement was not met (i.e. property or other relevant rights are not directly affected); it was questionable whether these objections should be taken into consideration, which entails the proceedings under Section 114 (2) of the Building Act, or if the objections should be dismissed without any assessment.<sup>417</sup>

The focus of decision-making about implementation of a project was transferred to the planning permission proceedings. Nevertheless, the decision-making about all objections regarding impacts of a structure on the environment (including impacts of preparation, implementation and operation of a structure) might not be concentrated within these proceedings because it is not realistically possible.

The concept of the provision of Section 114 of the Building Act is based on the assumption that objections concerning protection of public interests were evaluated in the planning permission proceedings or even in the outputs of land planning activity, which corresponds to the provision of Section 114 (2) of the Building Act.

Objections of the participants in the proceedings, which were or could have been submitted within the planning permission proceedings, within the regulatory plan procurement or within the issuance of the planning measure on a building ban, or the planning measure on area redevelopment, are not taken into account.

However, it is not realistic when big structures are concerned. Some objections related to protecting public interests (such as environmental protection) are decided in the planning permission proceedings formally so that a planning permission may have incorporated requirements, e.g. that an applicant shall submit detailed documentation (if needed, approved by the competent authority concerned), studies, expert opinions, etc., for the purpose of the subsequent permission proceeding.

Thus, the definite outcome of the objection is transferred from the planning permission proceedings to the building permit proceedings.

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<sup>417</sup> *Komentář ASPI* [database]. Wolters Kluwer ČR [cit. 30 April 2013].

Existing case law holds the opinion that *“associations of citizens must be logically enabled to participate actively in the building permission proceedings, in which their objections aimed at public interest protection are decided upon.”*<sup>418</sup>

In most cases, associations of citizens do not meet the requirements under Section 114 of the Building Act. Participants in building permission procedures may submit objections to the contract documents, methods of implementation and use of the structure, or to the requirements of the respective authorities, provided that these factors directly affect their property rights, or the right under the contract to implement the structure, or the measure of the right corresponding to easement to the grounds or to the structure. Therefore, they shall not raise any relevant objections and their participation in the proceeding lacks purpose.

The Supreme Administrative Court<sup>419</sup> stated that participation may stand without the need of a subsequent decision favourable for the participant. The status of participants in proceedings is linked to significant procedural rights, primarily the right to inspect records, to express opinions on the matter and materials for a decision, to suggest evidence, to apply opinions to the acts of other persons, to be present at hearings. Participants are not obliged to exercise these rights or the right to comment. However, if the participation is refused, the participant's rights are reduced due to this procedure.<sup>420</sup>

Similarly, issues of a technological nature and methods of implementing structures, which are subject to a building permit procedure, relate to the

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<sup>418</sup> Judgment of the Supreme Administrative Court of 1 June 2011 No. 1 As 6/2011-347 [online]. Supreme Administrative Court [cit. 30.04.2013]. Available at: <http://www.nssoud.cz>.

<sup>419</sup> Judgment of the Supreme Administrative Court of 17 December 2008 No. 1 As 80/2008-68 [online]. Supreme Administrative Court [cit. 30 April 2013]. Available at: <http://www.nssoud.cz>.

<sup>420</sup> Point 13 of the judgment of the Supreme Administrative Court of 17 December 2008 No. 1 As 80/2008-68.

protection of the environment including nature conservation. Besides other things, it is necessary to set preconditions for implementing the structure in order not to interfere with natural evolution of plants and animals (not only those specifically protected) by construction works and disturbing effects.

With regard to the amended part of the provision of Section 114 (1) of the Building Act, contained in its last sentence, the objection over the scope of rights, mentioned in its first sentence, is not taken into consideration. In other words, it is possible to conclude that the public concerned deriving its statute as a participant in an administrative procedure from special legal regulations, feels the lack of justification to raise objections of the participant in a building permission procedure due to the restrictive provision (i.e. the limitation by the relation to property right and other rights *in rem*). Therefore, the existing practice with prevailing extended legal interpretation of granting the status of participant in building procedures (including the opportunity to raise relevant objections) should be reassessed.

### **12.3 Impact of the Development of Using Energy from Renewable Sources**

The efforts to limit public participation in decision-making under the Building Act are linked to the issue of promoting the use of energy from renewable sources. Questions *“to what extent people or experts or politicians should have the right to express arguments both pros and cons regarding (locally, regionally or globally beneficial) structures in their surroundings ... to what extent non-professionals are able to understand all possible benefits and risks of specific structures, when even experts are unable to understand it in its fullness”*,<sup>421</sup> relate to the complexity of this issue.

It is not only the matter of locating equipment for generating energy from renewable sources, but also consequent issue of overloaded energetic

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<sup>421</sup> CETKOVSKÝ, S. et al. *Větrná energie v České republice: hodnocení prostorových vztahů, environmentálních aspektů a socioekonomických souvislostí*. Brno: Ústav geoniky Akademie věd ČR, 2010, p. 157. ISBN 978-80-864-0784-5.

structure due to rapid attachment of power stations generating electricity from renewable sources. In order to secure safety and reliability of the grid, it is desirable to accelerate the construction of power lines. Therefore, there is an interest in simplification of the planning permission proceedings “*without required approvals of authorities concerned as well as public participation, in addition to reducing time limits for publishing and submitting reservations and objections*”.<sup>422</sup>

However, under Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, the implementation of this Directive should reflect, where relevant, the provisions of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, in particular as implemented by Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.

Many amendments to the Building Act by Act No. 350/2012 Coll. were justified in connection with the development of the use of energy from renewable sources. The National Action Plan of the Czech Republic for Energy from Renewable Sources, prepared under the Decision of the Commission 2009/548/EC establishing a template for national action plans for energy from renewable sources under the Directive 2009/29/EC,<sup>423</sup> has criticized the previous legal regulation (before amendments in question).

The purpose of some amendments was to prevent the possibility of blocking or postponing any building of structure(s) for generation of energy

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<sup>422</sup> FLÁŠAR, P. Problematické aspekty výstavby energetické infrastruktury. In *COFOLA 2012: the Conference Proceedings* [online]. Brno: Masarykova universita, 2012, p. 1278-1284 [cit. 15 May 2013]. Available at: <<http://www.law.muni.cz/sborniky/cofola2012/sbornik-cofola-2012.pdf>>.

<sup>423</sup> *Národní akční plán České republiky pro energii z obnovitelných zdrojů* [online]. Praha: Ministerstvo průmyslu a obchodu, 2012 [cit. 15 May 2013]. Available at: <<http://www.mpo.cz/assets/cz/2012/11/NAP.pdf>>.

from renewable sources or power lines necessary to attaching these power plants.

Causes of proceedings prolongation (under the terms of planning and building permission procedures) were mentioned in the National Action Plan, in addition to the solution through these measures: centralization of permission procedures consisting in the transfer of these proceedings for structures in question to the level of central authorities, integration of permission procedures (especially consolidation of planning and building permission procedures or else other procedures such as environmental impact assessment), establishing a standardized consultation procedure when dealing with individual state authorities concerned, and introduction of measures aimed at reducing time limits in the permission procedure, both for power plants and power lines.

Furthermore, it was desirable to accelerate and simplify the integration of energy from renewable and other sources into energy systems, e.g. through specification of simplifying procedures for building and modernizing energetic structures (primarily strengthening power lines), or through simplification of selection and preparation of corridors for power lines.

According to the National Action Plan, obstacles in pursuing permission procedures within planning and building procedures and other procedures were caused by complicated legislation and by the need for provision of binding opinions, opinions and foundation decisions (especially the situations of the administrative procedure chain in practice, when it is necessary to wait for some decisions to assume force, then continue by gaining another decision needed to issue a consequent decision, in addition to the probable repeated proceedings in the whole permission procedure).

Most of the proposed amendments to the Building Act were adopted. Considering the structures related to generating energy from renewable sources, one of the significant changes is the provision of 103 (1) (e) of the Building Act. Under this provision, neither building permit nor notification to the building authority is required for structures listed under

numbers 5 and 9, i.e. underground and overhead lines of transmission or an electricity distribution system including support points and systems for measurement, protection, control, security, information and telecommunication technology, excluding buildings and structures for generating energy with a total installed capacity of up to 20 kW, excluding the structures of hydroelectric power plants (it does not apply to the changes of aforementioned structures if their design resulted in exceeding the parameters).

Another relevant change is the new provision of Section 13 (2) of the Building Act, under which the Ministry of Industry and Trade is the planning authority for planning permissions for structures of electricity transmission facilities (if the planning permission proceedings relates to the whole power line construction) and electricity generating plants with a total installed electrical output of 100 MW and higher.

According to the statement of intent of the legislator,<sup>424</sup> unification of procedures in order to eliminate the announcement of implementation of the building plans that are not subject to the decision on location under Section 79 (2) of the Building Act, or the decision on the use of land under Section 80 (3) of the Building Act, were among the targets of these amendments.

The absence of both a building permit procedure and an announcement of a construction entails exclusion of public participation, which is debatable due to the possibility of considerable interference in rights of certain persons (e.g. in connection with protective zones of grid equipment).

Moreover, under Section 96 (3) (d) of the Building Act, no consent of persons having property or other real rights to the neighbouring grounds or the structures built up on them with a common borderline between these grounds and the other grounds under designed structure (except for

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<sup>424</sup> *Sněmovní tisk 573/0, část č. 1/4. Novela zákona o územním plánování a stavebním řádu (stavební zákon)* [online]. Poslanecká sněmovna Parlamentu České republiky [cit. 10.11.2012]. Available at: <http://www.psp.cz/sqw/text/tiskt.sqw?0=6&CT=573&CT1=0>.

structures designed in the distance from the common borderline less than two metres) is required in order to issue a planning consent by a planning authority (this consent is sufficient in the case of structures stated in Section 103 of the Building Act instead of a planning permission).

However, a building authority may decide that the planning permission proceedings has to be performed if the authority concludes that rights of other persons might be directly affected (if they do not express consent), but persons mentioned in Section 96 (3) (d) of the Building Act are excluded from this procedure despite their property right or other rights *in rem*.

## 12.4 Concluding Questions

The information mentioned above implies several questions; especially if procedures under the Building Act allow the public to submit any comments, information, analyses or opinions that it considers relevant to the proposed activity (under Article 6 (7) of the Aarhus Convention), in addition to the question what considerations are reasons for the described restriction of public participation in the procedures under the Building Act (regarding not only the public concerned but also owners and persons with rights *in rem*) that are important enough to justify the aforementioned restriction sufficiently, or more precisely, whether these reasons may be considered as such significant public interests which outweigh the interest to allow public participation in environmental decision-making in accordance with the Aarhus Convention.

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## **13. The Czech Ombudsman and the Aarhus Convention**

### **13.1 Introduction**

As in many other countries, also in the Czech Republic the institute of Ombudsman – the public defender of rights (hereinafter referred to as “Ombudsman” or “Defender”) – was established as a body to supervise the observance of law in procedures involving authorities and other institutions in the field of public administration. The Ombudsman protects people against the conduct of authorities and other institutions also if the conduct does not correspond to the principles of a democratic legal state and the principles of good administration. Most of procedures relating to environmental matters fall within the public administration. Therefore, the Ombudsman also deals with the Aarhus Convention in the scope of his activities.

The following chapter is systematically divided into two parts. The first part briefly deals with the role of the Czech Ombudsman in the scheme of the Aarhus Convention. The second part focuses on the actual activities of the Czech Ombudsman and gives some examples, where the Ombudsman pointed out the Aarhus Convention.

### **13.2 The Position of the Institute of Ombudsman in Terms of the Aarhus Convention**

In the Czech Republic, the institute of Ombudsman is regulated by the Act No. 349/1999 Coll., on the Public Defender of Rights, as amended.<sup>425</sup> The Ombudsman can be addressed by persons with complaints against any authority that performs state administration; on the contrary, he cannot assist with decision-making of self-governing municipalities and with decision-making of courts. Anyone can address a complaint to the Ombudsman. The elements of a complaint are not set too strictly. It is necessary to describe the substantive points of the complainant's

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<sup>425</sup> Available in English at the web site of the Defender at:  
<<http://www.ochrance.cz/en/law-on-the-public-defender-of-rights/>>.



problem, to specify the state administrative authority against which he/she complains and to indicate what he/she wishes to achieve through the complaint. The complainant must also demonstrate that he/she has previously actively addressed the authority to which the complaint pertains and requested a remedy unsuccessfully. The normally available options provided by legislation (appeal, complaints, requests for review) should be exploited before a complainant lodges a complaint to the Ombudsman.

If the matter described in a complaint falls within the mandate of the Ombudsman, and the elements of the complaint are fulfilled, the Ombudsman is able to conduct inquiries into the matter. If he finds that the conduct of the authority was erroneous (against the law, contrary to the principles of good administration, or the respective authority was inactive), the Act on the Public Defender of Rights includes mechanisms how to protect the complainant. If the authority does not accept the arguments of the Ombudsman and does not implement measures to remedy itself and voluntarily, the Ombudsman may inform the superior office and/or the public of his findings. On the other hand, the Ombudsman is not entitled to substitute for the activities of state administrative authorities and he cannot cancel or alter their decisions. The disadvantage of this concept is the fact that the findings of the Ombudsman are not binding for the authorities. Despite this fact, in most cases the Ombudsman's inquiries lead to a successful conclusion and authorities usually remedy their errors themselves.<sup>426</sup>

In the light of the above mentioned facts, the institute of the Ombudsman could be subsumed under Article 9 (3) of the Aarhus Convention, as this paragraph inter alia requires that the parties shall ensure that members of the public have the opportunity to challenge acts and omissions by public authorities which contravene provisions of its national law relating to the environment.

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<sup>426</sup> For more information about the mandate of the Czech Ombudsman see <http://www.ochrance.cz/en/>[online].

In Aarhus Convention national implementation reports of the Czech Republic,<sup>427</sup> the institute of Ombudsman and also the right to file an action to protect public interest (including environmental matters) are inter alia mentioned as implementation of Article 9 of the Convention . Although the Czech legal order does not provide for the right to file an *actio popularis*, Czech legislation gives a special legal standing in order to protect public interest to the Attorney General and to the Ombudsman. Special legal standing given to the Ombudsman is embodied in § 66 (3) of the Act No. 150/2002 Coll., Code of Administrative Justice, as amended.<sup>428</sup> Its significance and importance lies in the fact that if there is a substantial public interest (including an interest to protect the environment), an erroneous decision of the authority can be discharged when a “classic” action cannot be brought and a review proceedings cannot be conducted (the Ombudsman can make a complaint to protect the public interests within three years upon the legal force of decision).

In this case, the public participates in environmental protection indirectly, as the Ombudsman should make this special complaint to protect the public interest in those matters in which he conducted inquiries into complaints from the public.

The Ombudsman has had this special legal standing since the amendment of the Code of Administrative Justice in 2012. In 2012, he used the right to make a complaint to protect the substantial public interest in one case. He challenged a decision which permitted construction of photovoltaic power plants because this decision was issued in violation of the laws in the area of building and environmental law (in particular, an impact of the proposed activity on the environment was not previously assessed, when that building was proposed in the Special Protection Area - SPA and in location

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<sup>427</sup> National implementation reports 2011 are available at:

<[http://www.unece.org/env/pp/reports\\_implementation\\_2011.html](http://www.unece.org/env/pp/reports_implementation_2011.html)>.

<sup>428</sup> Available in English at the website of the Czech Supreme Administrative Court at: <<http://www.nssoud.cz/docs/caj2002.pdf>>; however, this version of the translation does not reflect the last amendments, including the amended version of § 66 (3).

where endangered species of animals lived). The court has not decided the case yet.<sup>429</sup>

As another Ombudsman's competence, which may be also related to the Aarhus Convention, it is necessary to mention comments on draft legislation or other materials submitted to the Government of the Czech Republic or recommendations to the Chamber of Deputies related to the issuing, amendment to or annulment of legal regulations.

### 13.3 The Ombudsman and the Aarhus Convention

As mentioned above, the Ombudsman conducts inquiries into complaints related also to environmental matters. He has dealt with some cases in this area in which public participation was not sufficient, or when the method of informing the public was not convenient in his opinion. In the following section I am going to mention only some selected cases.

The Ombudsman defined some problem areas related to public participation in processes under the Building Act (Act No. 183/2006 Coll., on Spatial Planning and Building Rules, as amended)<sup>430</sup> and in processes related directly to environmental protection.

#### 13.3.1 Selected Processes under the Building Act

Firstly, the Ombudsman considered **delivering the notifications of commencement of the planning permission proceedings by means of a public notice to some participants** as very problematic. The Building Act provided

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<sup>429</sup> For more information see "Souhrnná zpráva o činnosti veřejného ochránce práv 2012" [Annual report of activities in 2012] (online). Office of the Public Defender of Rights, 2013. ISBN 9788090457928. Available at: <<http://www.ochrance.cz/zpravy-o-cinnosti/zpravy-pro-poslaneckou-snemovnu/>>.

<sup>430</sup> The Building Act in an English translation from 2009 (i.e. of the then version) is available at the website of the Czech Ministry of Regional Development at: <[http://www.mmr.cz/getmedia/9a941cf5-268b-4243-9880-d1b169fb33d6/SZ\\_angl.pdf](http://www.mmr.cz/getmedia/9a941cf5-268b-4243-9880-d1b169fb33d6/SZ_angl.pdf)>.

in § 87 (1) that *if within the area there has been issued the plan or the regulatory plan, the notification of commencement of the planning permission proceedings is delivered to the participants in the proceedings mentioned in § 85 (2)*<sup>431</sup> *by means of a public notice.* The situation was similar in the case of delivering the planning permission.

The Ombudsman dealt with complaints of the complainants, who were (resp. ought to have been) participants of planning permission proceedings because of their ownership of neighbouring structures or neighbouring grounds, but did not follow up the official notice board, where the notification on commencement of the planning permission proceedings was published. They did not know that this proceeding was conducted and so they did not submit any objections against the discussed project to protect their rights. If they subsequently found out - for example in the building permit proceedings - that they were participants, they used to submit objections, which should have been solved or dealt with already in planning permission proceedings. The building offices did not take (in accordance with the law) these objections into account in the building permit proceedings.<sup>432</sup>

The Public Defender of Rights already pointed out these shortcomings of the legislation in the previous reports on his activities. Already in 2009 he stated that for the parties to the proceedings, it is not easy to monitor the official notice board of the authority which is often located far from the

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<sup>431</sup> Owners concerned (owner of the ground or the structure, within which the required project shall be realized, if the participant is not the applicant; person, which has a real right to this land or the structure, persons, whose proprietary or another real right to the neighbouring structures or neighbouring grounds or the structures built up on them may be directly affected by the planning permission); persons, who are specified in the special regulation (especially some environmental non-governmental organizations); associations of the owners of flat units pursuant to the special regulation.

<sup>432</sup> See § 114 (2): *The objections of the participants in the proceedings, which were or could have been submitted within the planning permission proceedings (...) are not taken into account.*

building site and the parties' place of residence. The Ombudsman therefore recommended the Ministry of Regional Development to evaluate the positives and the negatives of the chosen legislative solution.<sup>433</sup>

This problem was solved by the amendment to the Building Act which has been in force as of 1 January 2013. Nowadays, the notification of commencement of the planning permission proceedings and other written materials are delivered separately to all participants. The exception is the proceedings involving a large number of participants. Unquestionably, the amendment strengthened awareness of the concerned owners and made a positive step to encourage the activity of participants in planning permission proceedings, and, thus, provided greater protection of their rights.

Secondly, the Ombudsman received also a number of complaints about the **conduct of authorized inspectors in assessing project documentation and issuance of certificate**.<sup>434</sup> Until the end of 2012 there was no mechanism how the persons concerned (especially neighbours) could find out that this process was being conducted if the authorized inspector or builder himself did not inform them about it. These persons lodged their complaints to the Ombudsman and claimed that they were not asked by an authorized inspector or builder for comments on the construction project and that they learned about the certificate issued only when the project was being carried out. The legislation did not provide for building offices any opportunity for intervention because under the applicable legislation, such a certificate, no matter how defective it was, could not be reviewed or annulled by administrative means.<sup>435</sup>

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<sup>433</sup> For more information see Annual report of activities in 2009 [online]. Office of the Public Defender of Rights, 2010. ISBN 9788025466681. Available at: <[http://www.ochrance.cz/zpravy-o-cinnosti/zpravy-pro-poslaneckou-snemovnu/http://www.ochrance.cz/fileadmin/user\\_upload/zpravy\\_pro\\_poslaneckou\\_snemovnu/Reports/Annual\\_2009.PDF](http://www.ochrance.cz/zpravy-o-cinnosti/zpravy-pro-poslaneckou-snemovnu/http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Reports/Annual_2009.PDF)>

<sup>434</sup> This is a procedure that can replace the building permit proceedings.

<sup>435</sup> See MAREČEK, J. Certifikát autorizovaného inspektora po novele stavebního zákona. *Stavební právo: Bulletin*. 2012, Issue 3, p. 53-56. ISSN 1211-6386, VEDRAL,

After an amendment being in force from 1 January 2013, the Building Act tries to prevent this problem by obliging the building offices to publish notifications of construction projects on a official notice board for 30 days. During this period, persons who would be participants in the building permit proceedings (which are replaced by a process of issuing a certificate), can submit their objections (that the project is not the same to which they gave their consent, or that they were not asked for a statement). The objections are decided by an executive authority which would be competent to the appeal. This decision may be subject to judicial review of administrative decisions.

Therefore, it is first of all necessary for potential participants in the building permit proceedings to watch an official notice board and then eventually protect their rights. However, new legislation in terms of ensuring public participation in environmental protection, respectively protection of the rights of potential participants in building permit proceedings, can be undoubtedly described as positive.

In the past, the Ombudsman had sought to achieve a legislative change in the Building Act in order to allow an annulment of a certificate issued at variance with the law. In the past, the administrative action was one possible defence against a certificate issued by an authorized inspector.<sup>436</sup> In 2012, however, a Special Appeal set up by the Act No. 131/2002 Coll. has ruled that the only possible defence against a certificate issued by an authorized inspector is the conduct under § 142 of the Administrative Procedure Code (Act No. 500/2004 Coll., as amended).<sup>437</sup> Under this provision, the respective building office should decide whether a builder has had the right to build proposed construction or not.

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J. K právnímu postavení autorizovaných inspektorů a právní povaze jejich certifikátů. *Stavební právo: Bulletin*. 2010, Issue 4, p. 20 – 33. ISSN 1211-6386 or BRODSKÝ, P. Připomínky k činnosti autorizovaných inspektorů. *Stavební právo: Bulletin*. 2008, Issue 4, p. 44-48. ISSN 1211-6386.

<sup>436</sup> See the judgment of the Supreme Administrative Court of August 4, 2010, File Ref. 9 As 63/2010.

<sup>437</sup> See the judgment of the Special Appeal of September 6, 2012, File Ref. Konf 25/2012.

Nevertheless, after the publication of the above mentioned decision of the Special Appeal, the Defender found interpretative ambiguity related to legal protection of persons who would be participants in the relevant building permit proceedings, and, therefore, requests that the Ministry of Regional Development issues a methodological instruction, which ensures a consistent approach of building offices in processes under § 142 of the Administrative Procedure Code (for the certificates issued until December 31, 2012).<sup>438</sup>

### 13.3.2 Environmental Impact Assessment (EIA)

In the reports on his activities the Public Defender of Rights also pointed out shortcomings in the legislation and incorrect procedure of the administrative authorities in the process of **environmental impact assessment (EIA)**. In relation to public participation the Ombudsman stated that the result of the EIA procedure is not binding (does not have the character of a binding permit), however, it constitutes an indispensable expert basis for a subsequent decision-making procedure. Public involvement in the assessment process can be a great help here.<sup>439</sup>

Under the Czech legislation, the legality of the EIA statement (a result of the EIA procedure) is excluded from direct court review but could be subject to judicial review together with related (subsequent) permit (for example a building permit).<sup>440</sup> Since 2009, special legal standing has been given in the

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<sup>438</sup> For more information, see “Souhrnná zpráva o činnosti veřejného ochránce práv 2012” [Annual report of activities in 2012] (online). Office of the Public Defender of Rights, 2013. ISBN 9788090457928. Available at: <<http://www.ochrance.cz/zpravy-o-cinnosti/zpravy-pro-poslaneckou-snemovnu/>>.

<sup>439</sup> For more information see Annual report of activities in 2010 [online]. Office of the Public Defender of Rights, 2011, ISBN 9788090457911. Available at: [http://www.ochrance.cz/fileadmin/user\\_upload/zpravy\\_pro\\_poslaneckou\\_snemovnu/Reports/Annual\\_2010.pdf](http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Reports/Annual_2010.pdf)

<sup>440</sup> See the judgment of the Supreme Administrative Court of 14 June 2006, File Ref. 2 As 59/2005.

EIA Act (Act No. 100/2001 Coll., on environmental impact assessment, as amended)<sup>441</sup> to some non-governmental organisations and municipalities on the condition that they submitted comments in the EIA process (new provision - § 23 paragraph 10). They have the right to initiate a review procedure before a court against the permit subsequent to EIA process (due to violation of EIA Act).

The problem is that the EIA Act explicitly states that the suspensory effect of this lawsuit is excluded. This fact does not correspond with the findings of the Supreme Administrative Court referred in its judgment of August 29, 2007, File Ref. 1 As 13/2007 (judgment given before the amendment to EIA Act – in that time § 23 paragraph 10 did not exist), which states that under Article 9 (4) of the Aarhus Convention, the courts shall adjudicate the suspensory effect of administrative complaints to prevent situations where at the time of the decision of the administrative action the permitted project has been irrevocably implemented (typically the trees were felled, the building was built). If the suspensory effect is not adjudicated, there would be a breach of Article 9 (4) of the Aarhus Convention and Article 10a of the Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, because the protection provided by the court would not be timely and fair.

In literature, one can nonetheless find an interpretation that the exclusion of the suspensory effect of the lawsuit discussed above is just completely unnecessary, stating that an administrative complaint does not automatically have a suspensory effect, but courts may adjudicate this effect under the provision of § 73 of the Code of Administrative Justice.<sup>442</sup> In my opinion, according to the wording of that provision it seems more

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<sup>441</sup> The English translation of the Czech EIA Act is available at the website of the Ministry of the Environment at: <[http://www.mzp.cz/ris/vis-legcz-en.nsf/0/B3E5ACA81B717965C125735C00438142/\\$file/2001100Sb\\_kv.pdf](http://www.mzp.cz/ris/vis-legcz-en.nsf/0/B3E5ACA81B717965C125735C00438142/$file/2001100Sb_kv.pdf)>.

<sup>442</sup> PAVELKA, I. Nešťastná změna zákona o posuzování vlivů na životní prostředí. *České právo životního prostředí*. 2010, Issue 1, p. 102-103. ISSN 1213-5542.



likely that the aim of the legislator was really to exclude a suspensory effect of the actions without a possibility to adjudicate it.

### 13.3.3 Comments on Legislation

The Ombudsman pointed out to the requirements of the Aarhus Convention in his comments on draft legislation. In this subchapter, I am going to mention two current issues – a draft amendment in the area of protection against noise and in the area of access to information.

The **protection against noise** is regulated especially in the Act No. 258/2000 Coll., on Public Health Protection, as amended. The provision of § 31 (1) of this Act states that, if an operator of the noise source is not able to comply with the limits (i.e. the source of noise exceeds the maximum limits set by implementing legislation), in serious reasons he can operate the noise source further, if he has a special permit issued by the authority competent to protect public health. These permits are called “noise exceptions”. They are issued only for a limited period of time. The noise exceptions are not granted if the whole process is replaced by an IPPC process.<sup>443</sup>

Under § 94 (2) of the Public Health Protection Act, only the applicant (the operator of the noise source) is a party to an administrative procedure on the request for the noise exception. However, it is clear that there can be other persons whose rights could be affected in these proceedings. Most common cause (source) of noise, to which the noise exceptions permits are granted are the roads, respectively some of their parts. There it is more than evident that especially property rights of neighbours of roads and the right to inviolability of their homes may be affected by the noise exceptions permits under § 31 of the Public Health Protection Act. It is also possible

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<sup>443</sup> For more information see MOTEJL, O. et al. Hluková zátěž. Sborník stanovisek veřejného ochránce práv [online]. Kancelář veřejného ochránce práv and Wolters Kluwer ČR. ISBN 9788073574994 Available at: [http://www.ochrance.cz/uploads/tx\\_odlistdocument/Hlukova\\_zatez.pdf](http://www.ochrance.cz/uploads/tx_odlistdocument/Hlukova_zatez.pdf). Also BERNARD, M.; DOUCHA, P. *Právní ochrana před hlukem*. Praha: Linde, 2008, 199 p. ISBN 9788072017362.

to consider the interference with the right to health and the right to a favourable environment. Moreover, in this process also environmental non-governmental organisations or the public as such are neglected.

As a result, the persons whose rights are affected by the noise exceeding the limits, are not participants in these proceedings and have no possibility to influence whether an exception will be issued or not.

In his 2008 Annual Report on activities, the Ombudsman recommended the Chamber of Deputies of the Czech Parliament to request the Government to submit an amendment to the Public Health Protection Act, which would enable participation of persons affected by the operation of a noise source to proceedings on the permission of noise exemption. *“The conduct of the bodies of public health protection would thus be under the critical supervision of those to whose health it directly applies. To achieve this, it would be sufficient to remove the special stipulation of participation in these types of proceedings from the Public Health Protection Act (Section 94 (2)) and consistently apply the Code of Administrative Procedure on the proceedings.”*<sup>444</sup> So far this has not happened.

However, an amendment to the Public Health Protection Act is currently being prepared. In the original proposal (before the comment proceeding) there was stated again that the party to the noise exceptions proceeding is only the applicant. The Ombudsman submitted his comments and inter alia once again pointed out that the persons who could be affected by the ongoing operation of the source of noise could participate in the proceedings on the issuance of the permission. He referred also to the requirements of the Aarhus Convention, in particular to Article 6 and Article 9. The Defender also highlighted the fact that although there is the case law of the Supreme Administrative Court and the Constitutional Court ruling that the Aarhus Convention (although it is part of the Czech legal system)

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<sup>444</sup> Annual report of activities in 2008 [online]. Office of the Public Defender of Rights, 2009. ISBN 9788025447048. Available at: [http://www.ochrance.cz/fileadmin/user\\_upload/zpravy\\_pro\\_poslaneckou\\_snemovnu/Reports/Annual\\_2008.pdf](http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Reports/Annual_2008.pdf)

is not directly applicable, the draft legislation should reflect findings and recommendations with regard to communication ACCC/C/2010/50 adopted by the Compliance Committee of June 29, 2012.<sup>445</sup>

In these findings and recommendations, the Compliance Committee concluded that *“It is clear from the oral and written submissions of the parties, that if an operator exceeds some noise limits set by law, then no member of the public can be granted standing to challenge the act of the operator (private person) nor the omission of the authority to enforce the law. (...) The Committee finds that such a situation is not in compliance with Article 9 (3), of the Convention.”*

The Ombudsman in his comments also highlighted Article 90 of the Compliance Committee findings, in which the Compliance Committee recommended the Czech Republic *“to undertake the necessary legislative, regulatory, administrative and other measures to ensure that members of the public are provided with access to administrative or judicial procedures to challenge acts of private persons and omissions of authorities which contravene provisions of national law relating to noise and urban and land-planning environmental standards.”*

On the basis of these arguments, the Ombudsman recommended to grant the status of a party to noise exceptions proceedings to persons who could be affected by an ongoing operation of a source of noise in that way that § 94 paragraph 2 of the Public Health Protection Act would be modified – i.e. the reference to § 31 (noise exceptions proceedings) in the provision of § 94 paragraph 2 which defines administrative procedures to which only an applicant is a party would be left out.

I would like to point out that another possible, and perhaps even clearer solution, would be to state who is granted to be a party to that

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<sup>445</sup> Findings and recommendations with regard to communication ACCC/C/2010/50 concerning compliance by the Czech Republic. See *Czech Republic ACCC/C/2010/50* [online]. UNECE. Available at: <http://www.unece.org/env/pp/compliance/Compliancecommittee/50TableCz.html>. For details of the Compliance Committee findings, see Chapter 5.

administrative procedure directly in the Public Health Protection Act. The minimum requirement is at least to grant a position of participants to persons who could be affected by an ongoing operation of a source of noise (persons living close to the source of noise). The ideal amendment would grant position of a party also to non-governmental organisations or to open the proceedings to public as such.<sup>446</sup>

At present, the comment proceedings have not yet been finished because the comments are still being settled.

The second draft amendment affecting the rights of public in environmental matters, in which the Ombudsman considered the requirements of the Aarhus Convention, is the area of the **free access to information**. In the Czech Republic, free access to information is regulated in the Act No. 106/1999 Coll., on Free Access to Information (information in general) and in the Act No. 123/1998 Coll., on the Right for Information on the Environment (especially in relation to environmental information), both as amended.

These acts have certain common features (e.g. the basic thesis that fundamentally all the information should be provided and limitations of access to information have to be interpreted restrictively), but some features are different (especially the definition of obliged organisations, period for providing information, the reasons for refusals, remedies).

In 2012, the Government created the draft legislation, according to which providing information (information in general and environmental information) should be unified under the Act 106/1999 Coll., on Free Access to Information. Within the comment proceedings, the Ombudsman applied fundamental comments to the amendment of the law. He deemed most of these changes *“as problematic efforts to improve the law, which instead of simplification may in fact lead to completely new problems during its application. The Defender is of the opinion that the amendment of legal regulations should be approached in a sober and prudent manner.*

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<sup>446</sup> For more information see BĚLOHRADOVÁ, J. Participace veřejnosti v rámci povolování provozu nadlimitního zdroje hluku. *Časopis pro právní vědu a praxi*. 2011, Issue 2, p. 144-148. ISSN 12109126.

*Particularly in cases, where an issue is already properly solved by the case law, a legislative change may bring insecurity into the already stable legal system and may create space for purposeful interpretation or misunderstanding of the purpose”<sup>447</sup>*

In the area of the right to information on the environment, the Defender stressed out that although providing the information is going to be unified into a single process mode, the legislation has to take into account the specificities of environmental information and the new legislation cannot limit or exclude the right to information to the extent that the present legislation establishes. This was not fully respected in some cases in draft amendment. I would like to highlight that unfortunately the explanatory memorandum of the draft amendment did not mention the Aarhus Convention in any item, which in my opinion shows that this important document, although it has been part of the Czech law for almost 10 years, is still not in minds of legislators as deep as it would be appropriate.

In my opinion, the need to distinguish two procedures under the current legislation may seem too complicated, both for applicants (the need to apply the 'correct' appeal in time) and for obliged organizations (they have to solve on the basis of what Act - apart from other special laws – they provide the information). I find the proposed unification of these procedures, i. e. that the procedure of providing information generally defined in the Act on Free Access to Information would also include information on the environment, as positive on the condition that it would be done with a proper care and that the amendment would take into account all the specificities of information on the environment.

The draft amendment has already passed comment proceeding and the comments were settled. The Government Legislative Council is going to discuss this draft in August 2013.

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<sup>447</sup> Information on the activity submitted by the Public Defender of rights for the 4th quarter of 2012 [online]. Available at: [http://www.ochrance.cz/fileadmin/user\\_upload/zpravy\\_pro\\_poslaneckou\\_snemu\\_vnu/Reports/2012\\_Q4\\_E.pdf](http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemu_vnu/Reports/2012_Q4_E.pdf).

### **13.4 Conclusion**

I believe that, although the competence and powers of the institute of Ombudsman in the Czech Republic are limited, it is still a very important institution that guarantees public access (to anyone) to an independent and impartial body. Environmental law is associated inter alia with conducts of authorities, which perform state administration and, therefore, the Defender conducts inquiries into complaints related to environmental matters quite often. As it is evident from the text above, the Ombudsman considers the Aarhus Convention as a very important document to ensure public participation in environmental matters, including access to information and justice.

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## SUMMARY

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the so called Aarhus Convention) of 1998 is aimed at achieving a high level of environmental protection by means of democratic instruments of involving public into decision-making procedures in a wide range of issues concerning the environment. Among the Parties to the Aarhus Convention there are all the four Visegrad countries. In most of the member states to the Convention it was not simple to ensure the correct legislative transposition and full practical implementation of the Convention requirements. In some aspects of their interpretation and application, certain difficulties may still remain. It holds especially true for the so called third pillar of the Convention that consists in an obligation to ensure the public access to a review procedure at court or a similar body.

The book focuses on summarization of the current situation in implementation of the Aarhus Convention in the V4 countries (the Czech Republic, the Slovak Republic, Poland and Hungary) and in two other European countries (Germany and Montenegro), including identification of the main problem areas and outlining possible paths to their resolution.

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