



**Implementation of the Aarhus Convention
in EU Member States
Case Study Collection
2006**



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Introduction

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

Having started its work as informal network already on year 2003, the first full-year workplan has been developed by J&E in the year 2006. In 2006, transposition and implementation of the Convention on access to information, the public participation in decision-making and access to justice in environmental matters (the Aarhus Convention) has been chosen by the J&E as one of the three topics of concern. Within this topic J&E members present two collections: Collection of Analysis and Collection of Case Studies.

The Collection of Case Studies consists of a general section and individual section. In the general section we summarize cases, present interesting legal sentences adjudicated in those cases and draw conclusions.

Individual section contains six case studies prepared by lawyers from Austria, Czech Republic, Estonia, Hungary, Poland and Slovakia.

Summary of cases

| Country | Case | Brief facts | Legal impact |
|----------------|--|--|--|
| Austria | Klosterneuburg Bypass | A project of regional bypass road with big environmental impact (2 effected NATURA sites) was "sliced" into small sections and case by case screening ended by decision that no EIA is necessary. | In Austria cases ending at screening stage exclude public from any form of participation and (negative) EIA decision is binding for permitting process: Public can not participate in screening proceedings, public can not refer to EIA issues in subsequent permitting proceedings and public has no access to justice to challenge outcome of EIA proceedings. Moreover in permitting proceedings individuals may not refer to environmental law issues in general (like air/water quality standards, EIA application etc). |
| Czech Republic | Ruzyne airport runway | 170 citizens, whose ownership rights would be affected, lodged objections against modification of land use plan concerning the planned construction of the new runway for the international Prague-Ruzyne airport, which was approved by the Council of the Prague city. Proposed construction did not contain any alternatives, no SEA process and would result in rapid increase of noise. The Supreme Administrative Court cancelled modification of land use plan due to serious mistakes during its approval. | The court in this case adjudicated direct applicability of Aarhus Convention and its preference over Czech law. Further it ruled that plans can be reviewed by court and that public affected by content of land use plans may demand judicial review from both substantive and procedural aspects. |
| Estonia | SEA of the Restructuring Plan for the Oil-Shale Energetics | Ministry of Economic Affairs denied request of Estonian Green Movement (EGM) to carry out Strategic Environmental Assessment for Restructuring Plan for Oil-Shale Energetics. 90% of energy in Estonia is produced from the oil-shale thus the Plan would have major impacts including impacts on environment. During the court review Supreme Court takes important position in its judgment regarding standing of EGM and implementation of Article 9.2 of the Convention. | Case provided for direct applicability of the Aarhus Convention and strengthened position of environmental NGOs since it adjudicates that environmental NGOs can challenge any decision, act or omission made under Aarhus Convention provided that they are challengeable (by anyone) under national law. Moreover these decisions are challengeable not only if they are in controversy with the Convention, but also if they contradict other legal acts (including provisions of national law). |

| Country | Case | Brief facts | Legal impact |
|----------|------------------------------|---|--|
| Hungary | Hotel Excelsior Budapest Spa | Foundation for Budapest World Heritage appealed administrative permit to build excessive 31 meter high hotel hosting 93 luxury apartments in the picturesque Buda Hill neighboring the Budapest World Heritage. Administrative authority denied standing to the foundation, which consequently filed a lawsuit. Capital Court annulled administrative decision and granted standing despite the fact that claimant is not a membership based, environmental organization. | The case created valid legal basis for standing of (even) non-membership and non-environmental organizations (contrary to previous legal provisions), which makes it an inspiring example of implementation of the Aarhus Convention, Article 3.9. |
| Poland | Trees in Bialowieza forest | NGO Green Federation Gaja brought a damage claim against State Forest enterprise for cutting trees (seven over 100-years old oaks) in strictly protected area of primeval forest. Court of final instance decided against this claim, however it is the first case of civil law claim for damage in nature protection case in Poland. | NGOs can use civil courts and civil law suits to challenge acts or omissions of private persons or public authorities “where the threat of violation affects the environment as a common good”. Interesting example of implementation of the Article 9.3 of Aarhus Convention via civil law instruments (Polish Environmental Protection Law Act) |
| Slovakia | Pezinok Waste Dump | Active citizen of Pezinok, living close to waste dump (with disputable legality), claimed standing in re-licensing proceeding. After his standing was denied, he approached Constitutional court arguing violation of fair trial. Constitutional Court decided in his favor stating that Supreme Court violated basic right for fair trial by issuing arbitrary and improperly reasoned verdict. | Constitutional court set standards to be met by courts and administrative authorities when standing is denied (such as proper reasoning, sufficient consideration of arguments raised). On the issue of standing Supreme Court stated that claim for administrative standing must be viewed and assessed in light of a content, impact and philosophy of <i>lex specialis</i> (in this case waste law) and in light of constitutional right to a healthy environment and right to private and family life. |

All of the cases further described in this collection touch the aspect of legal standing – either standing of individual or that of organization (mostly environmental organization). This aspect is crucial in incorporating provisions of the Aarhus Convention.

The cases are examples of:

- broadening legal standing (in Hungary for non-membership and non-environmental organizations),
- confirming rights of participants (to review both substantive and material aspects of decision in Czech republic, or to have properly reasoned decision denying standing in Slovakia)
- assuring new positions in standing (in Poland standing in civil law suits to challenge acts against environment or in Estonia standing of environmental NGOs in all issues related to Aarhus Convention challengeable under national law)

In addition three of the cases (Czech republic, Estonia and Hungary) refer to Aarhus Convention as a legal norm from which rights and obligations stem directly.

These positive and inspiring examples are unfortunately not prevailing in our countries. Standing for environmentally concerned individuals or legal persons other than environmental organizations (with one exception from Hungary) as members of “public concerned” is not secured in any of our jurisprudences. When these categories of concerned public claim standing they must refer to impairment of their rights – mostly rights related to property. It seems that environmental rights or right to privacy are “second class rights” with no real contend in our legal systems.

Quotes from the cases

Important legal sentences adjudicated by courts in case studies described further in this collection have an impact on further decision making of courts and other authorities. Even in civil law countries these sentences can be quoted and used as solid legal arguments:

Judgment No. 1 Ao 1/2006, 18th of July, 2006, the Supreme Administrative Court, Czech Republic:

(excerpts)

“Perceiving urban plan and its modifications as measure of general nature, and thus allowing for judicial protection of its procurement and modification, is inevitable in light of obligation of the Czech republic stemming from international law and communitarian law. International legal frame is determined by the Convention on access to information, the public participation in decision-making and access to justice in environmental matters (hereinafter “Convention”)..... which has been concluded in Danish Aarhus, on June 25th, 1998...”

Precisely procurement of urban planning documentation is an initial stage of decision-making when all choices and alternatives are still open and when public participation can be effective. In the moment of land use decision-making it is impossible to effectively address issue whether particular construction will be realized or not; at this stage the question is not “if” but “how”. Effective legal remedy must therefore concentrate to the moment when the issue is really being decided.

Supreme administrative court is in the context of the current legal system obligated to interpret national law in such a way that effective protection of rights of physical and legal persons is provided for. Therefore if procurement or modification of land use documentation can be perceived in different ways in light of national law, thus such interpretation which fulfills requirements of the Convention should be prioritized.

The same can be concluded in the context of law of European Communities (communitarian law): Council Decision No 2005/370/EC, dated February 17th, 2005 states that European Community also ratified the Convention.... The Convention thus became part of the communitarian law... Fact that the Convention became the part of communitarian law is reflected by systemic qualities of communitarian law attached to it as a consequence, particularly – when given conditions determined by communitarian law are met, it has priority and direct effect. ... Nonetheless even if provisions of Convention were not able to carry direct effect in legal systems of member states, compatible interpretation of national law by institutions of member states is an obligation – in another words, they are obligated to interpret their national law in compliance with international legal obligation of European Community. “

Judgment No. 1.K.33.389/2005/28. of the Capital Court, Hungary:

(excerpts)

"That circumstance can be definitely established in the case, as the Capital High Court stated, that the case affects the legitimate interests of the plaintiff, since the area, although not being part of the World Heritage, and not neighboring thereto, it can be seen together with it, thus the affectedness is established.

(...)

Art. 3.9 (of the Aarhus Convention) says that "within the scope of the relevant provisions of this Convention, 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". This reference also affirms the standing of the plaintiff."

Judgment No. 7 SŽ 104/03 of the Supreme Court of Slovakia:

(excerpts)

"In case of disputable interpretation of scope of participants it is the task of administrative authority to deduce from the content of applicable law, from its philosophy and assessment of possible impact on subjects, which claim to be impaired on their rights and legally protected interests. In a given case it was beyond any doubt that proceeding according to Waste Law is a sensitive one, which, after all, can have positive or negative impact on subjects in a broader sense of the word and not only on those specific subjects which according to administrative decision are obligated to act or bear something. ...

... Under given circumstances the issue must be assessed in compliance with constitution, which determines essential philosophy of legal provisions... in a given case we must point at Article 44 of the Constitution (right to a healthy environment)... From the point of view of applicable law, constitution and Article 8 of the European Covenant of Human Rights (right to private and family life) the legal position and the scope of participants appears differently ..."

Judgment of the Supreme Court of Estonia, 29th of January 2004, in administrative case No 3-3-1-81-03 (Estonian Green Movement – FoE Estonia v Ministry of Economic Affairs):

(excerpts)

"The [Administrative Law] Chamber [of Supreme Court] is of opinion that the reservation in Convention about possibility to challenge legality of any decision, act or omission subject to the provisions of other relevant provisions of the Convention only where so provided for under national law, implies that it is possible to challenge such decisions, acts or omissions in case they are challengeable in court proceedings according to national law. The national law does not have to contain special regulation about standing in this matter. The standing for challenging legality of any decision, act or omission subject to the provisions of other relevant provisions of the Convention exists if such decision, act or omission is challengeable in court proceedings according to national law.

Such interpretation is in better accordance with the general goal of the Convention, which is broadening possibilities for public participation and access to justice in environmental matters. This opinion is further justified by explanatory letter of draft law for ratification the Convention in Estonia, which stated that interest of non-governmental organizations whose purpose is nature and environmental protection, shall be deemed sufficient and such organizations shall be deemed to have rights capable of being impaired. Therefore, such organizations shall have standing for legal challenge and they don't have to prove direct relation to certain decision, act or omission, in order to initiate court proceedings."

Conclusions

This collection of cases can be used as inspiring reference to mostly positive case law concerning Aarhus Convention, particularly legal standing, in Austria, Czech Republic, Estonia, Hungary, Poland and Slovakia.

On the other hand it is obvious that our countries have a long way to go to achieve conformity with principles and philosophy of the Aarhus Convention namely as far as the standing of individuals and other than environmental NGOs is concerned as well as efficiency and scope of court review. The latter issue is reflected specifically in: insufficient application of injunctive relief, review of EIA screening decisions, insufficient application of the Article 9.3 of the Convention.

(For further information see “Aarhus topic - Collection of Analysis” prepared by J&E, 2006.)

Case Studies

AUSTRIA



1. Title of case:

Umfahrung Klosterneuburg (Klosterneuburg Bypass)

2. Matter of case:

A regional bypass road project was “sliced” into smaller sections, allegedly to avoid an EIA-proceeding.

An EIA-proceeding had started, but was recalled later. After an amendment of the federal motorway act the competent authority for respective EIA proceeding moved from federal to the regional level.

After that the same project went through an EIA case by case screening proceeding that ended with the result that no EIA is necessary even though exactly the same project was subject to an (undecided) EIA proceeding before.

The screening proceeding did not consider respective planned affiliations that are mentioned even in the project material and that would lead to a tremendous amount of additional traffic and environmental impact (for example a road track/bridge through Natura 2000 Danube meadow).

In addition screening did not consider another designated Natura 2000 site that is directly touched even by the “sliced” bypass.

In Austria public concerned has neither participation rights nor Access to Justice in EIA-screening proceedings. In addition this (negative) EIA-decision is binding for all subsequent permitting proceedings of the respective project. The decision is final and must not be challenged by any party, even though for example neighbours and public concerned have no access to screening proceedings.

This case study shows the legal and factual consequences of the public’s exclusion of EIA-screening proceedings. The main flaw of respective EIA-act provisions as well as Austrian case law is that the public concerned has no Access to Justice and must not refer to EIA-issues in any subsequent project permitting proceedings.

OEKOBUERO elaborated the legal issue in J&E Workplan 2006 legal analysis on EIA and Aarhus Convention.

3. Country:

Austria

4. Location:

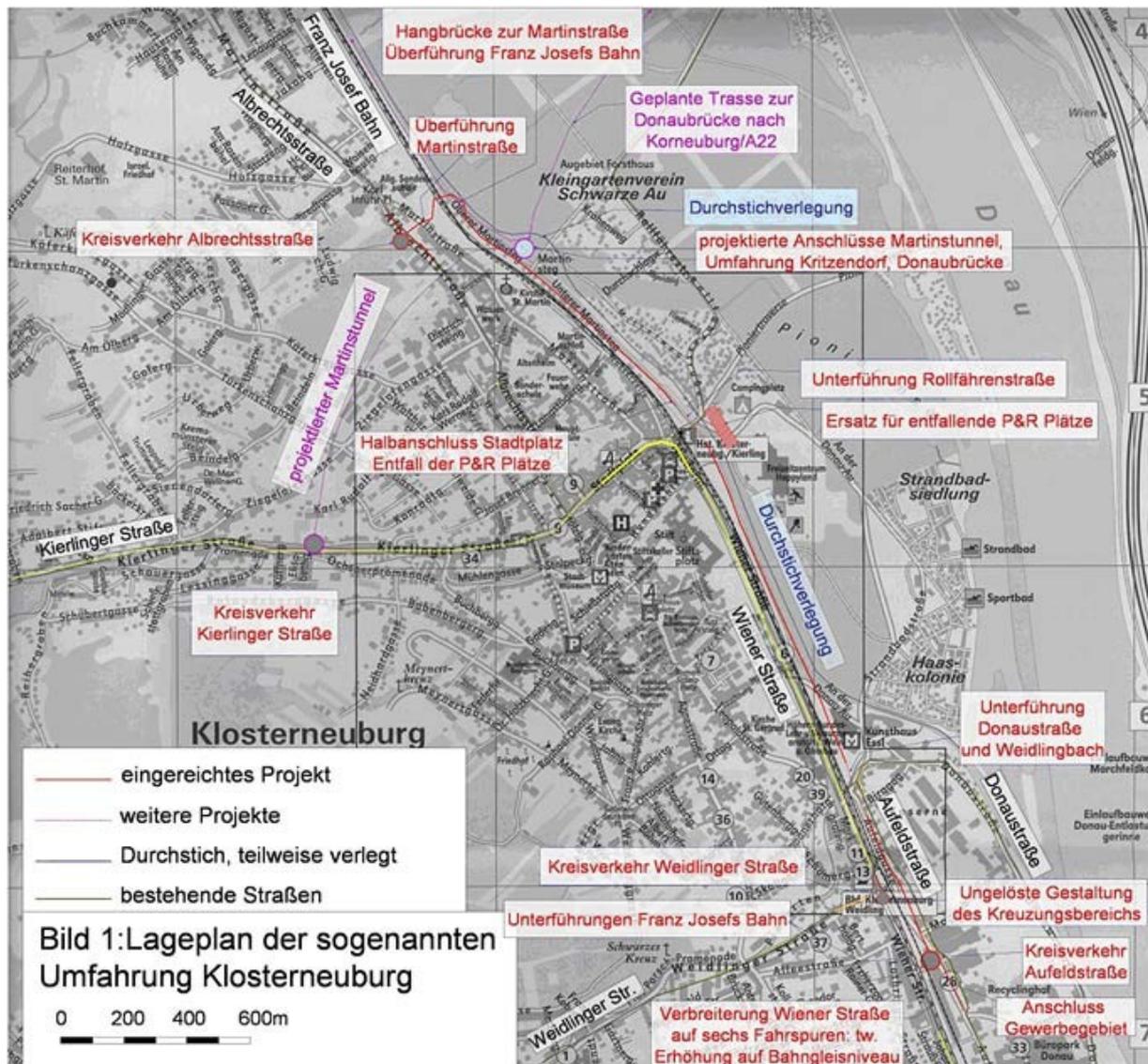
Klosterneuburg (neighbouring town of Vienna; located north of Vienna)
(see maps following 2 pages)



- ① Stelzenbrücke
- ② Stelzenstraße zur Donaubrücke
- ③ Verlegter Durchstich
- ④ Unterführung der Rollfahnenstraße
- ⑤ Unterführung Weidlingbach und Strandbadstraße
- ⑥ 50m-Kreisverkehr - Anbindung der B14 ans Industrieviertel mit 2-maliger Unterfahrung der Bahn

Map showing overview of area.

Source: www.unser-klosterneuburg.org



Detailed map of area: Source: www.unser-klosterneuburg.org

5. Geographic dimension:

- It's a local bypass of regional importance.
- The bypass would be tremendously oversized if it would serve for local needs only.

6. Initiator of case:

Region of Lower Austria (Bundesland, <http://www.noel.gv.at/>)

7. Participants involved:

Several citizens' groups as well as neighbours that finally established the PUK-platform (Plattform Bypass Klosterneuburg): www.unser-klosterneuburg.org

Contact details are available at OEKOBUERO and at www.unser-klosterneuburg.org/puk/mitarbeiter

9. Other interested parties and/or stakeholders:

Environmental Ombudsman (no activity)
Municipality Klosterneuburg (no activity)

10. Background facts:

The city of Klosterneuburg is located at the “port to Vienna” and affected by commuter’s traffic towards Vienna.

The initiator of the project is the region of Lower Austria (Niederösterreich).

The project should officially serve as a local bypass for Klosterneuburg only.

Critics say that the project is much more than that as there is supposed to be an additional Danube bridge for traffic from/towards Vienna. This leads to the result that the bypass would not relax local traffic situation, but lead to a tremendous amount of additional traffic.

A direct affiliation from the bypass through a Natura 2000 site (Danube meadow “Tullnerfelder Donauauen”) and a bridge across the Danube River is planned, but officially neglected, even though this bridge project is expressly mentioned in the project materials of the EIA-screening proceeding.

On political level as well as in project materials of respective development consent proceedings the following sections of the project are mentioned:

1. Amendment B14, located east of Weidling
2. B14 track along Danube
3. Martinstunnel (affiliation Kirlingtal/Donautal)
4. Affiliation towards Krizendorf/Höflein
5. Danube bridge towards Korneuburg.

Sections one to three were subject to an EIA-proceeding that started in the year 1999. Competent authority for EIA was the Federal Ministry of Transport (BMVIT). The Austrian Ministry of Environment (MoE) made a very negative statement on the project materials and the environmental impact statement. After some time the proceeding was no longer pursued by the initiator and the proceeding stopped without a decision.

After an amendment of the Austrian federal motorway act in the year 2002 the competent EIA authority for the respective project shifted from Ministry of transport (BMVIT) to the regional administration of lower Austria.

This legislation amendment lead to the situation that for projects that were initiated after the amendment, **the initiator of the project was identical with the permitting authority.**

Subsequently, at the end of the year 2002 an EIA-case-by-case screening for the same project (section 1 to 3) that was subject to an EIA proceeding in 1999 at the federal authority (above mentioned) was initiated:

Initiator of the case: Region of Lower Austria
Competent authority: Region of Lower Austria

The screening decision neglected that an EIA would be necessary.

The screening decision did not consider

- **respective planned affiliations** that are mentioned even in the project materials (Section four and five) and would lead to a much longer distance than the screening case of 4,7km;
- the fact that respective affiliations would go straight through **Natura 2000** site Tullnerfelder Donauauen
- a designated Natura 2000 site that would be directly affected by the track,
- that air quality limit values were exceeded.

The following facts (among others) are of particular importance in EIA-case by case screening to assess the potential environmental impact with regard to the Austrian EIA act as well as EC EIA Directive (among others EIA-Act Annex threshold values, Annex III EIA-Directive, cumulative effects):

- Distance of a road track
- Natura 2000 impact
- Level of air quality standards
- Traffic figures
- Planned affiliations at the same location

From our understanding, and there are a lot of arguments, complaints and studies available, that it is undoubtedly that an EIA for the project would have been necessary for the above mentioned reasons (project and argument details are available at OEKOBUERO; in particular interdisciplinary case study of *Mauerhofer* (2004) on Natura 2000 and EIA-Directive issues that served as base for EC-complaint of the public concerned).

The public concerned had no chance to appeal against the screening decision and to bring up the EIA issue in any subsequent permitting proceedings. All attempts were unsuccessful and rejected due to Austrian legislation.

9. Applicable international, European and national legislation

The legal core problem is the exclusion of the public concerned from EIA-case-by-case screening procedure (and respective Access to Justice). Affected groups and individuals must not challenge the screening decision and must not refer to EIA-issues in all following permitting procedures.

In our J&E Workplan 2006 Aarhus legal analysis Austria we argued as follows:

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

The provisions on EIA- case by case screening procedure (Article 3/7 UVP-G; Article 24/5 UVP-G for federal transport projects)¹ can be seen as the core problem of Austrian EIA-Directive and Aarhus Convention implementation from our understanding.

¹ Article 3/7 UVP-G read as follows:

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

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

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

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

- for **activities** with lower threshold values (compared to Annex I) (and) in **sensitive areas** (Article 4.3 and **Annex III** EIA Directive),
- for **extensions and amendments** of existing of existing activities
- because **cumulative effects** of different projects,
- because of **salami-slicing of one project**.²

The main problem with regard to the Austrian EIA-case by case screening procedure is that (estimated) 80 % of screening proceedings end with the result that no EIA is necessary.³ The **public may**

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

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

- infringement of EIA-Directive,
- ECJ-case law,⁴
- Austrian constitutional and administrative law⁵ as well as the
- Aarhus Convention.

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

- This legal position is, from our understanding, in contrast to **Article 6 and 9/2** of the Aarhus Convention that provides for Public Participation and Access to Justice for activities listed in Annex I of the Aarhus Convention.
- In addition this legal position is in contrast to **Article 9/3** of the Aarhus Convention that provides for Access to Justice to acts of public authorities in environmental matters.

Infringement of EC-Environmental Law

- The Austrian legal position on screening proceedings precludes any reference on EIA-directive in a project's permitting procedure. This is contrast to ECJ⁶ case law whereas

² Please read EIA-case study for details.

³ There is no official available statistic. The 80 % rate was researched by OEKOBÜERO by individual interviews and calculations. The figure is mentioned by civil servants in official talks.

⁴ ECJ 7.1.2004, C-210/02, *Delena Wells*; ECJ 16.9.1999, C-435/97, *World Wildlife Fund (WWF) u.a.*; ECJ 24.10.1996, C-72/95, *Kraaijeveld u.a.*; ECJ 7.9.2004, C-127/02, *Niederländisches Waddenmeer*, ECJ 19.9.2000, C-287/98, *Linster*, ECJ 16.9.2004, C-227/01, *Commission vs Spain*, ECJ 2.2.1998, C-321/95, *Greenpeace vs Commission*

⁵ Read *Raschauer/Ennöckel* § 3 Rz 41 for details

⁶ ECJ 7.1.2004, C-210/02, *Delena Wells*; ECJ 16.9.1999, C-435/97, *World Wildlife Fund (WWF) u.a.*; ECJ 24.10.1996, C-72/95, *Kraaijeveld u.a.*; ECJ 7.9.2004, C-127/02, *Niederländisches Waddenmeer*, ECJ 19.9.2000, C-287/98, *Linster*, ECJ 16.9.2004, C-227/01,

concerned subjects have the right to directly refer to EIA-directive (if they did not have the chance to do in another stage of a proceeding).

- In a recent judgement (ECJ 4. May 2006, C-290/03 Diane Barker) the ECJ ruled that “Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location.”
- and “that the competent authority is, in some circumstances, obliged to carry out an environmental impact assessment in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved (see, in this regard, *Commission v United Kingdom*, paragraphs 103 to 106). This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment.”
- Austria would have to directly apply⁷ EIA-Directive and Aarhus Convention as the Austrian legislation is in contrast to EC Environmental law with regard to *de Berre* judgement (C-213/03, C-239/03)⁸ and the above mentioned ECJ decisions.

In spring 2006 the **European Commission** stated in an official press release that the Commission – after having received many similar individual complaints from Austria - may have observed **a potential structural flaw** in Austrian EIA-legislation as to the combination of high threshold values and **weak case by case screening** proceedings.⁹”

10. Type of procedures (administrative and/or judicial):

Administrative procedures

11. Administrative and judicial procedural history/timeline:

1999

- EIA proceeding initiated
- Ministry of transport (BMVIT, www.bmvit.gv.at) is competent authority

2001

- Very critical comments of Ministry of Environment (MoE; www.lebensministerium.at) on the project and respective environmental impact statement.
- EIA proceeding was not further pursued by initiator and did not end with a decision

2002

- Amendment of federal motorway act

Commission vs Spain, ECJ 2.2.1998, C-321/95, *Greenpeace vs Commission*

⁷ C-213/03. “A provision in an agreement concluded by the Community with a non member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.”

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

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

⁸ ECJ C-213/03 (15 July 2004), *Syndicat professionnel coordination des pêcheurs de l'étang de Berre and de la région v Électricité de France (EDF)*; ECJ C-239/03 (7 October 2004), *Commission vs France*

⁹ *Inringment procedure Tauernbahn, siehe newflash juli 2006 für nachweis*

- Regional of Lower Austria (Niederösterreich) is respective EIA-competent authority after the amendment.
- EIA-Screening procedure initiated
 - no standing and Access to Justice for public concerned

January 2003

- Negative EIA-Screening decision (for the same project as in 1999; read above)
 - No EIA necessary
 - Natura 2000 impacts not considered
 - Air quality limit values exceedences not considered
 - affiliation projects not considered
 - toward Kritzendorf, Höflein
 - affiliation to A22 motorway through Danube meadow (Natura 2000) and Danube not considered
- The public was not informed about the screening decision.
- It was an effort for the public concerned to get access to the screening decision.
- Public concerned Access to Justice and standing rejected by competent authority
- Respective regional permitting proceedings initiated
 - Regional road act Lower Austria (NÖ-StraßenG)
 - Water
 - Forestry

November 2003

- Oral proceedings on the project

April 2004

- Development consents issued
 - Road Act; including expropriation
 - Water (with stipulation that additional water permit on groundwater is necessary before constructions start)
 - Forestry
- All decisions appealed by public the public concerned (neighbours) in May 2004:
 - Neighbours access to Justice is limited
 - Neighbours may not offend an infringement of environmental legislation in general, but only provisions that are supposed to protect them in particular (like noise, smell).
 - This means aspects like air quality, nature protection and application of environmental law are not subject to the standing rights of neighbours.
 - Standing provisions for neighbours are not based on the Aarhus Convention but on Austrian administrative law principles only.
 - This is no effective legal redress as to the Aarhus Convention and respective EC Directives.
 - Neighbours must not refer to any EIA-issue as the screening decision is final and binding for all subsequent permitting proceedings.

July 2004

- Comprehensive (40 pages and 31 appendixes) complaint based on thorough interdisciplinary study submitted to the European Commission
- Complaint has been pending since

September 2004

- II. instance decision on forestry
- no remedies taken (as to limited neighbour's rights)

October 2004

- Appeal to highest Administrative Court on expropriation
- Claim on
 - substantive EIA-issues (mentioned above)
 - ault screening proceeding provisions (lack of Access to Justice)
- Appeal dismissed by Administrative Court in February 2006

November/December 2004

- II. instance decision on Road Act
- Appeal to highest Constitutional Court
- Constitutional Court forwards appeal to highest Administrative Court
- Case pending

September 2005

- II. instance decision on water act
- Complaint to highest Administrative Court
- Case pending
- Parliamentary initiative and request of the affected groups to Austrian federal parliament

2006

- Start of constructions
 - without additional groundwater permit
 - although highest courts appeals are pending
- Federal Ombudsman (<http://www.volksanw.gv.at/>) investigation (not to mix up with Environmental Ombudsman (details in Aarhus legal analysis))

12. Outcome of the actions:

All remedies not successful until now. Read point 11.

13. Remedies taken:

Read point 11.

14. Current status of case:

under construction
Highest Court appeals pending

15. Conclusions:

The legal position on EIA-case by case screening makes EIA-circumventions relatively easy in Austria.

The fact that the public has no Access to Justice as to the screening decisions and must not bring up any EIA issue in subsequent permitting proceedings may make “arbitrary” or fault screening decisions legally binding.

Please note that affected individuals may only refer to acts that are supposed to protect them, but not environmental law issues in general (like air/water quality standards, EIA application etc). Thus subsequent standing rights are limited as compared to EIA-proceedings and Aarhus Convention provisions.

This situation is not only in contrast to rule of law as well as administrative law principles but also contradicts respective EC environmental law and the Aarhus Convention.

The fact that Austria has not implemented Article 9/3 of the Aarhus Convention at all (see details in J&E Workplan 2006 Aarhus case study Austria) makes the situation even worse.

In addition the case shows that it is very problematic if project initiators and competent authority are the same legal body.

Please note that some Aarhus Convention principles might not have been in force when the case was initiated. But the respective legal position has not changed since then and the problems in application became even worse.

OEKOBUERO has collected information on up to 30 similar cases that occurred in the last two years only.

16. Lawyer and organization:

Several law firms and legal experts
Contacts available at OEKOBUERO

17. Contact information:

Contacts available at OEKOBUERO

18. Abbreviations

BGBI Bundesgesetzblatt, (official federal journal), <http://ris1.bka.gv.at/authentic/index.aspx>
BMVIT Bundesministerium für Verkehr, Innovation und Technologie (Federal Ministry of Transport, Innovation and Technology) www.bmvit.gv.at
B-VG Bundes-Verfassungsgesetz (federal constitution act)
UVP-G Federal EIA-Act
UIG Federal Environmental Information Act
EIA Environmental Impact Assessment

| | |
|--------------|--|
| ECJ | European Court of Justice |
| PP Directive | Directive 2003/35 EC (read below for details) |
| SP-V, | Federal Act on Strategic Assessment of Transport, (read below for details) |
| USG | Bundesgesetz über den Umweltsenat (Umweltsenatsgesetz: Environmental Senate Act, BGBl I 114/2000) |
| UVP | Umweltverträglichkeitsprüfung (EIA) |
| UVP-G | Federal Act on Environment Impact Assessment (EIA Act 2000, read below for details) |
| Umweltsenat | Environmental Senate (EIA appeal body) |
| VfGH | Verfassungsgerichtshof (Constitutional Court) www.vfgh.gv.at |
| VwGH | Verwaltungsgerichtshof (Administrative Court) www.vwgh.gv.at |

19. Literature

Mauerhofer (2004) on Natura 2000 and EIA-Directive issues that served as base for EC-complaint of the public concerned in the case Klosterneuburg bypass (Please contact <http://www.unser-klosterneuburg.org/>)

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

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

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

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

Öhlinger, Verfassungsrecht, Wien (20056)

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

20. Legislation and decisions

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

AWG: Abfallwirtschaftsgesetz, BGBl 2002/102)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CZECH REPUBLIC



1. Case title:

The new runway at the international Prague – Ruzyne airport

2. Case subject:

The Council of the capital city of Prague has approved the modification to city land use plan concerning the planned construction of the new runway for the international Prague – Ruzyne airport. Realization of the runway would result in a marked increase in the noise burden affecting the inhabitants of the town district of Prague – Nebušice and other Prague town districts. The main legal question was whether a court can examine land use plans and modifications to them according to Czech law.

3. Country:

Czech Republic

4. Location:

The capital city of Prague, particularly the town districts of Prague – Ruzyne and Prague-Nebušice.

5. Geographic dimension:

National

6. Initiators of case:

- a) Občanské sdružení Pro Nebušice (The For Nebušice Civic Association), Pod Starou školou 69, 164 00 Prague 6- Nebušice – initiator for protest against establishment of a new flight path, <http://www.pronebusice.wz.cz>
- b) the owners of property affected by construction of a new runway – approx. 170 of them have lodged protests against the modification to the land use plan, 2 have filed a motion for cancelling it with the Supreme Administrative Court

7. Participants involved:

- a) The Municipal Authority of the capital city of Prague - the acquirer of the modification to the land use plan of the town of Prague, www.praha-mesto.cz
- b) The Council of the capital city of Prague – the body in whose jurisdiction it is to approve the modification to the Prague land use plan, www.praha-mesto.cz
- c) The Hygienic Station of the capital city of Prague – the affected body for protection of public health, www.hygp Praha.cz
- d) The Ministry of the Environment of the Czech Republic – the affected body in whose jurisdiction it is to assess the impact of the modification to the land use plan on the environment (SEA), www.env.cz/
- e) Prague Airport , state company – the operator of the international Prague-Ruzyne airport and the future investor into the construction of the new runway, www.prg.aero/cs

8. Other interested parties and/or stakeholders:

- a) The town district of Prague – Nebušice – the part of Prague most affected in the event that the new runway will be constructed, repeatedly expressed its disagreement with this intention, <http://www.prahanebusice.cz>
- b) The town districts of Prague-Suchdol and Prague - Lysolaje – parts of Prague , which also expressed their disagreement with construction of the new runway <http://www.praha-lysolaje.cz> , <http://www.praha-suchdol.cz>
- c) The government of the Czech Republic - the body that approved the “Plan for development of transportation networks in the Czech Republic“ <http://wtd.vlada.cz>
- d) The Czech Republic Parliament - the body that approved act no. 544/2005 Coll., regarding construction of take-off and landing runway 06R – 24 L at the Prague – Ruzyne airport, <http://www.psp.cz> , <http://www.senat.cz>
- e) The Environmental legal service – NNO specialising in legal protection of the environment, the lawyers of which represented the owners of the affected properties <http://www.eps.cz/>
- f) The Šárcké Valley Association – NNO endeavouring to protect nature and the environment in Prague 6, submitted disagreeing comments to the draft for modifications to the land use plan

9. Background facts:

9.1 Account of facts

The Prague Airport state company is planning construction of a new runway for the largest international airport in the Czech Republic, the Prague – Ruzyne airport. The intention is related to the expected increase in transport volume at the airport. The new runway would bring airport traffic closer to a densely inhabited area. Consequently the surrounding town districts, their inhabitants and local civic associations are protesting against its construction. They are particularly concerned with the increase in noise burden affecting the inhabitants. Construction of the new runway is being supported by the government and other state bodies and the town of Prague.

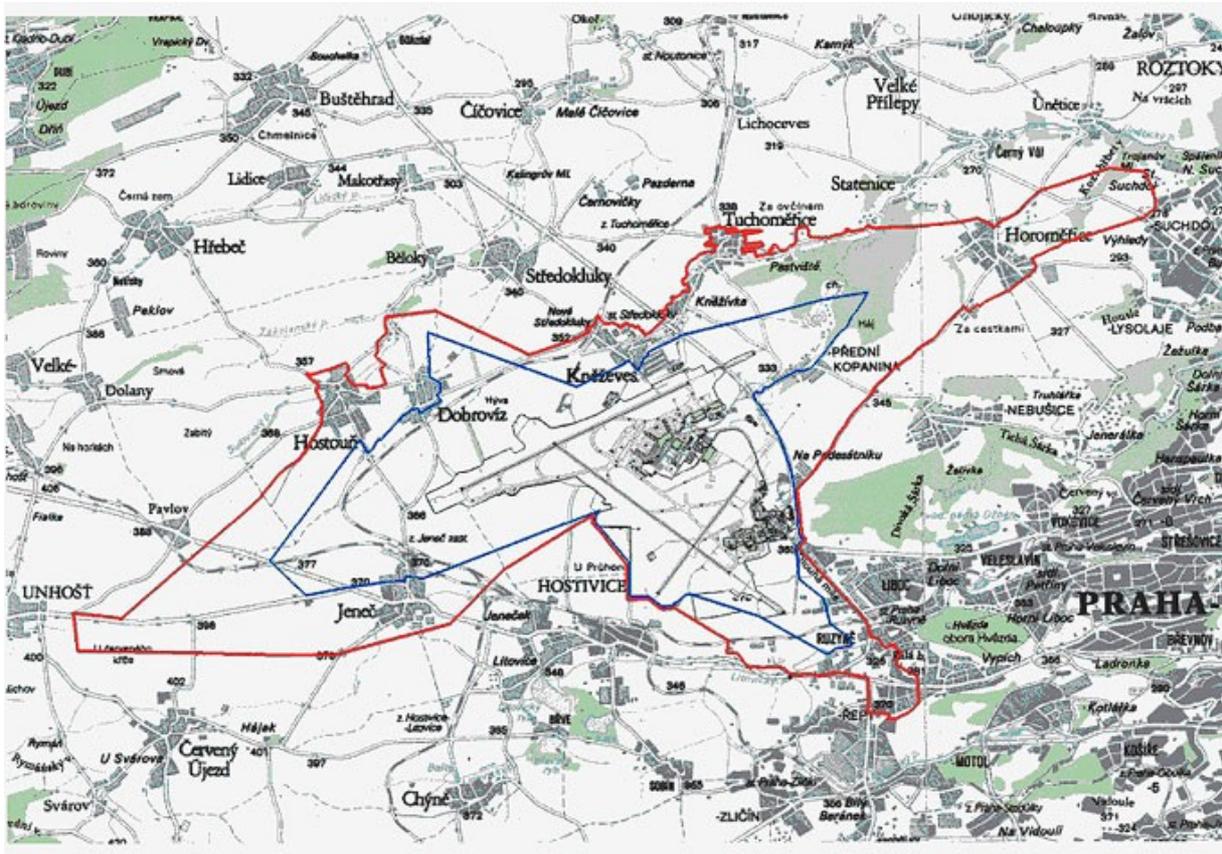
In autumn 2005 the Prague Council approved the modification to the city land use plan, which would enable construction of the new runway before 2010 as a so-called “publicly beneficial project”. Before approval of the modification the protests of more than 170 owners of properties had not been settled. The modification to the land use plan was not assessed in an SEA process. No protective zones against noise from the new runway were marked in the land use plan.

Two owners of property from the nearby town district have contested the approved modification to the land use plan at the Supreme Administrative Court. They based the admissibility of the motion and their standing to sue i.a. on the Aarhus Convention. The court complied with their motion and cancelled the modification to the land use plan with immediate effect. The judgement clearly states that the Aarhus Convention is directly applicable and has preference over Czech law.

9.2 Description of the project and its main environmental impacts

The Prague-Ruzyne airport is the largest international airport in the Czech Republic. It is located on the northeastern edge of the capital city of Prague. The extended surroundings of the airport are composed of densely inhabited areas (the edges of Prague and part of the Central Bohemian Region with numerous smaller settlements – see picture no. 1).

Picture no. 1 – the surrounding are of the Prague-Ruzyně airport (with the current noise zones marked)



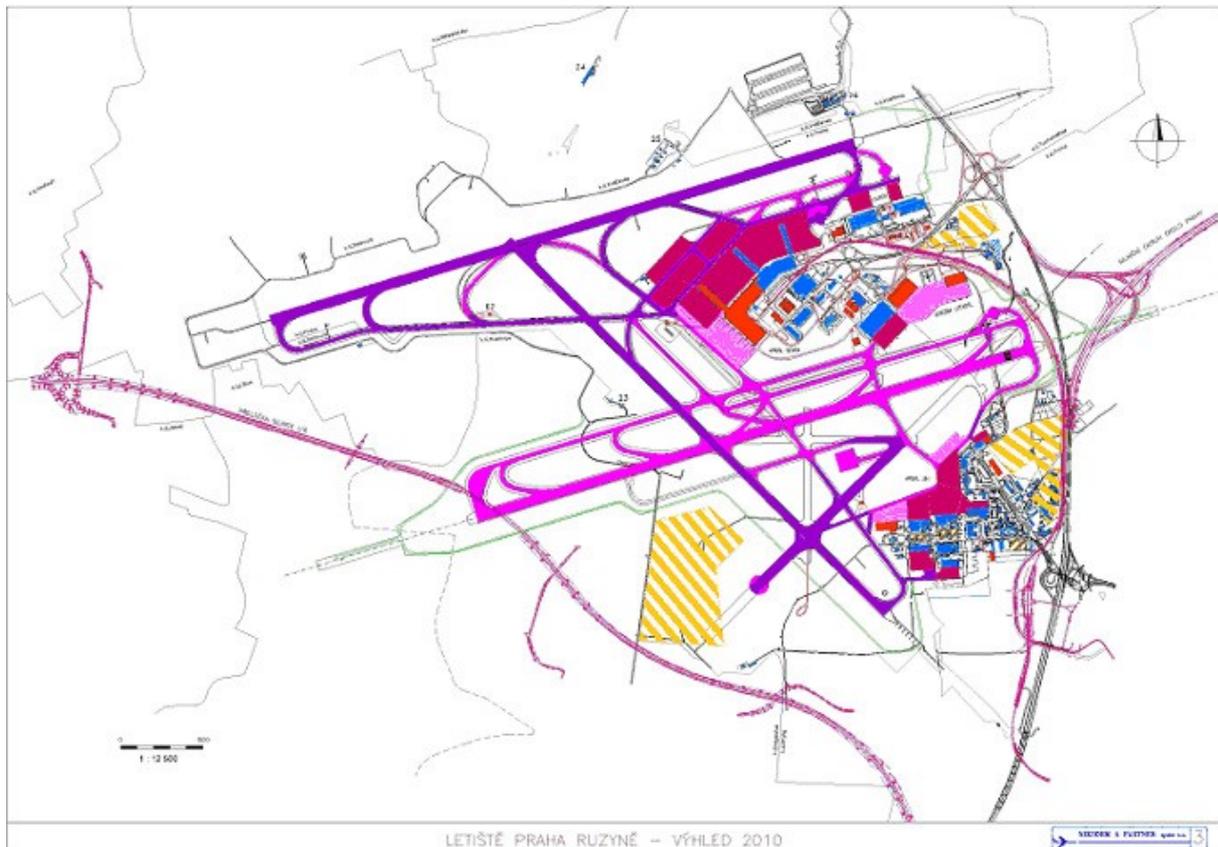
Air traffic at the airport is year round and the airport is in operation 24 hours a day. In 2005 the traffic intensity was approx. 160 000 take-offs and landings (this concerns approx. 90% of the air transport in the Czech Republic). According to the intention of the airport operator, the Airport Prague state company, the number of take-offs and landings should markedly increase in the following years – to approx. 227 600 take-offs and landings in 2010, an 280 000 in 2015 (see picture no. 2).

Picture no. 2 – the expected increase in the intensity of traffic at the Prague-Ruzyne airport



The current airport runway system would not be sufficient for the expected increase in traffic. Consequently the operator is planning construction of a new runway (parallel to the runway that is most used at present – see picture no. 3), which would bring airport traffic approx. 1.5 km closer to the nearest residential development (to a distance of approx. 500 m).

Picture no. 3 – the current Prague-Ruzynee airport runway system and the plan for construction of a new runway.



The increase in airport capacity and construction of the new runway were supported by the Czech Republic government, apart from others in the approved “Proposal for development of transportation networks in the Czech Republic.” The Czech Republic Parliament approved special act no. 544/2005 Coll., “regarding construction of new take-off and landing runway 06R – 24L at the Prague-Ruzynee airport” in 2005, which declares the construction of the new runway to be in the public interest.

Already the environmental impact of the existing traffic at the airport, particularly noise and also fall-out of pollutants from airplane traffic, noticeably discomforts the inhabitants of the surrounding inhabited areas. The noise under existing traffic conditions however does not exceed the highest permissible hygienic limits (an average noise value throughout the period from 6.00 a.m. to 10.00 p.m. of 60 dB, throughout the period from 10.00 p.m. to 6.00 a.m. 50 dB).

After putting the new runway into operation these limits would undoubtedly be exceeded in the nearest residential development. The overall burden on the areas of several of the closest town districts would also be noticeably increased (Nebušice, Horoměřice, Suchdol and Lysolaje). The increase in airport traffic intensity would result in an increase in passenger and freight transport, which would also increase the noise burden on the area. According to the details prepared by the operator some of the nearest localities would become completely uninhabitable (the immediate noise levels in these places would repeatedly achieve values of over 90 dB) The houses located in these localities would consequently have to be purchased or dispossessed. The increase in traffic intensity would also negatively effect the nature

reservation of Divoká Šárka and the surrounding area, which is one of the most abundantly used recreational areas in Prague.

The airport operator puts forward arguments to the benefit of the new runway, stating that after it is put into operation the use of one of the existing runways, the axis of which is directed above the densely inhabited development of central Prague, would be markedly restricted. If this new runway is not constructed it would reputedly result in an increase in the volume of traffic at the airport (see above) and a worsening of the noise burden affecting a greater number of Prague inhabitants than would be damaged by construction of the new runway. This argument however issues from the apriori assumption of the unavailability, essentiality and necessity of a marked increase in the overall intensity of airport traffic. In the operator's opinion the environmental conditions in the nearest town districts must be "sacrificed" for this.

10. Applicable EC and/or international laws:

The Convention on access to information, the public participation in decision-making and access to justice in environmental matters (the Aarhus Convention).

Council Decision 2005/370/EC dated 17/02/2005 regarding conclusion of the Convention for access to information, public participation in decision-making and access to justice in environmental matters in the name of the European Union.

Council Directive no. 85/337/EEC, regarding assessment of the impact of some public and private projects on the environment as amended in directives no. 97/11/EC and 2003/35/EC – will be applicable in the related phases of the case, which are not the subject of this study

11. Applicable national laws:

Act no. 50/1976 Coll., regarding land use planning and building regulations (the Building Act). Determines the process of acquisition and approval of land use plans and modifications to these, including the rights of the affected public, particularly the owners of affected properties.

Act no. 500/2004 Coll., Rules of Administrative Procedure
Generally defines the term "measures of a general nature"

Act no. 150/2002 Coll., Court Rules of Administrative Procedure
Determines the conditions for judicial review of measures of a general nature by the Supreme Administrative Court

Act no. 244/1992 Coll., regarding assessment of impacts on the environment
Until 30/04/2004 determined the assessment of impacts of concepts, including land use plans, on the environment (SEA process)

Act no. 100/2001 Coll., regarding assessment of impacts on the environment
From 01/05/2004 determines the assessment of impacts of concepts, including land use plans, on the environment (SEA process)

Act no. 258/2000 Coll., regarding assessment of impacts on the environment
Determinates protection against noise, including noise from public airports.

12. Type of procedure

a) administrative

- acquisition of a modification to the Prague land use plan (April 2004 - October 2005)
- assessment of the impact of construction of a new airport runway on the environment (EIA, commenced in August 2005 – not the subject of this study)

b) judicial

- judicial review of the approved modifications to the Prague land use plan as measures of a general nature by the Supreme Administrative Court (June – July 2006)

13. Administrative procedural history

29/04/ 2004: Council of the capital city of Prague approved “assignment of modifications to the Prague land use plan”, including modification no. 939 – “realisation of runway RWY06R/24L before 2010, declaration of a construction work in the public interest.” This modification was proposed as a single alternative (without any other alternatives).

10/01/ - 08/02/2005: The proposal for modifications to the land use plan, also including modification no. 939, concerning the new Ruzyne airport runway, was made public

09/02/ – 23/02/ 2005: More than 170 citizens whose ownership rights would be affected by the construction work, lodged objections against this modification within the statutory time limit. The town districts of Prague-Nebušice, Prague-Horoměřice, Prague-Lysolaje, Prague-Suchdol expressed their fundamental disagreement with this modification in compliance with Charter of the town of Prague. Disagreeing comments with regard to the proposal for the modification were also lodged by the local NNO. Objections and disagreeing standpoints protested chiefly against the increase in noise burden and other negative impacts on the inhabitants and on the worsening of the environment within the whole region. They demanded submission of alternatives of construction of the runway and assessment of the impacts of the proposed modification to the land use plan (within the scope of an SEA process). They also pointed out the fact that the proposal does not contain protective noise zones for the new runway.

10/02/2005: The Hygienic Station of the capital city of Prague made its agreement with the modification of the land use plan conditional to proof that the construction of the new runway will not result in an increase in the noise burden affecting the inhabitants in the surrounding areas.

15/02/2005: The Ministry of the Environment stated in its standpoint to the proposal for modifications to the land use plan, with respect to the modification concerning the runway, “it does not consider it to be beneficial”.

01/-17/06/2005: meetings between the acquirer of the modifications to the land use plan (the Municipal Authority of the capital city of Prague), the airport operators and the Hygienic Station of the capital city of Prague took place. The Hygienic Station first of all insisted on the fact that the modification concerning the new runway can only be approved at the same time as declaration of a protective noise zone. However following subsequent negotiations it agreed with the protective noise zone being declared only before issue of planning permission regarding location of the construction.

20/10/ 2005: The Council of the capital city of Prague approved the “proposal for modifications to the Prague land use plan”, including modification no. 939, concerning the new Ruzynee airport runway.

01/09/2005: *Commencement of the process of assessment of the impacts of the construction work on “Parallel runway RWY 06R/24L, Prague Ruzyne airport” on the environment (EIA –still taking place, not a subject of this study)*

14. Outcome of the actions:

The Council did not take the arguments given in the objections by the affected owners of property, the comments by the town districts or the NNO, into account, nor did it formally come to a decision with regard to these. The town districts that applied subsequently delivered fundamental comments, were notified in writing by the Municipal Authority that their requirements would not be complied with.

The disagreement (“non-recommendation”) contained in the standpoint by the Ministry of the Environment was acknowledged by the Council, but without the Council dealing with it in any way. The original conditions set by the Hygienic Station of the capital city of Prague – first of all proof that the noise burden affecting the inhabitants would not be increased, then at least declaration of a protective noise zone – were modified during the course of negotiations (see above point 13).

15. Remedies taken:

The approved modification to the land use plan did not contain any measures to exclude or restrict the negative impact of the new runway. The requirement for declaration of a protective noise zone, which apart from the affected owners was also originally supported by the Hygienic Station of the capital city of Prague, was moved to a later phase of permission for the construction of the new runway.

16. Judicial procedural history/time line:

14/06/2006: Two owners of properties in the town district of Prague-Nebušice contested the approved modification to the land use plan, concerning construction of the new runway, at the Supreme Administrative Court. They demanded that it be cancelled as a so-called measure of general nature.

26/06/2006: The capital city of Prague expressed its standpoint with regard to the motion, chiefly refusing the possibility of judicial review of the modification to the land use plan as a measure of general nature by the Supreme Administrative Court. In the supplement to its statement it also stated that the petitioners were not entitled to lodge objections against the modification to the land use plan, regarding which the Council would have to come to a decision. It also refused other reasons for cancelling the modification given by the petitioners.

11/07/ 2006: A hearing at the Supreme Administrative Court. Both parties to the dispute insisted on their standpoints.

18/07/2006: The Supreme Administrative Court issued a judgment cancelling the modification to the land use plan of the capital city of Prague no. 939, concerning realisation of the new Ruzyne airport runway effective immediately, as “part of a measure of a general nature, which was not issued by the procedure stipulated by the law”. The court found the reasons for

cancelling the modification in the fact that during its approval a number of serious mistakes occurred, particularly

- the Council did not come to a decision on the objections by the petitioners and the other affected owners or on the fundamental comments by the town districts
- no assessment of the impact of the modification on the environment was performed (SEA)
- no protective noise zones were declared.

17. Outcome of the actions:

As a result of the judgement by the Supreme Administrative Court, modification to land use plan no. 939 was cancelled and the land use plan was consequently “returned” to the state in which it was before approval of this modification. This means that the new runway is not included in the binding part of the land use plan. It is only contained in the so-called informative section, which counts on its perspective realisation (after 2010). The expansion in the territory that the modification planned for the new runway was also cancelled. With regard to the contents of the court judgement and the circumstances of approval of the original version of the land use plan the actual legality of the existence of the new runway within the scope of the Prague land use plan can also be doubted. These and other possible results of the court judgement will only be manifested during the following legal steps.

The generally important results of the court dispute are the statement by the Supreme Administrative Court regarding the possibility of judicial review of land use plans and their modifications as a measure of a general nature and particularly regarding the direct applicability of the Aarhus Convention (see point 20 in more detail).

18. Current status of case:

It is not possible to appeal against the judgement by the Supreme Administrative Court and it is effective from the day it is declared.

The process of assessment of the impact of the intention of construction of the new runway on the environment is taking place (EIA), on the basis of requests by the Ministry of the Environment the operator is supplementing the documentation. The judgement in the matters of the land use plan must be taken into account during the EIA process.

19. Follow-up actions planned and their time line (in the case of ongoing matters, also the estimated end date of the case):

The airport operator will continue to attempt to acquire the necessary permits for construction of the new runway. At present the operator is attempting to acquire a consenting standpoint from the Ministry of the Environment within the scope of the EIA process. The operator still gives 2009 as the expected period for commencement of construction of the new runway.

The opponents to the construction of the new runway will take part in all proceedings connected with it. The continuation and potentially also the conclusion of the EIA process can be assumed in 2007. It is not possible to estimate this period for related proceedings regarding permission for construction of the runway.

Using the judgement of the Supreme Administrative Court it is possible to attempt to completely delete the intention of construction of the new runway from the Prague land use plan.

20. Analysis of legal problems:

The motion for cancellation of the modification to the Prague land use plan concerning the new runway was the first time an attempt to contest a land use plan before a court as a “measure of general nature”. Consequently the Supreme Administrative Court first of all had to assess whether it is at all possible to review land use plans and modifications to these judicially. **It answered positively to this key question when it deduced the admissibility of judicial review of land use plans both from national law and also from the international obligations of the Czech Republic – from the Aarhus Convention.**

Land use plans are measures of general nature

On the level of the national legislation the court agreed with the opinion of the petitioners that the land use plans and the modifications to these are so-called measures of a general nature. The court dealt with the matter of what the concept “measure of a general nature” actually means, and what type of action by an administrative body this concerns and what its attributes are. It emphasised that the title is not decisive for determination of whether a certain action (act) by a public authority is a measure of a general nature, but fulfilment of certain factual attributes. These are chiefly the “specifically defined subject of the regulation” (compared to the law a measure of a general nature determines a specific, not general, situation) and the generally defined group of addressees (definition of conditions for anyone who finds themselves in a specific situation). Land use plans and modifications to these fulfil both these conditions: They deal with use of a specific region and simultaneously determine binding rules for everyone who would wish to build within this region or otherwise use it.

The Aarhus Convention is a directly applicable international contract and has preference over Czech law.

The court further stated that land use plans and modifications to these must be subject to a judicial review also with regard to the international-legal and community obligations of the Czech Republic, specifically to the Aarhus Convention and its position in the Czech Republic and European Union legal system.

The court issued from article 10 of the Czech Republic Constitution, according to which “declared international treaties, the ratification of which the Parliament approved and by which the Czech Republic is bound are part of the legal system; if the international contract determines something other than the law, the international contract is used”. It also referred to article 1. 2 of the Constitution, which determines that the “Czech Republic adheres to the obligations that issue to it from international law”. According to the court, with regard to these provisions of the Constitution it is necessary to interpret Czech law in compliance with the requirements of the Aarhus Convention (i.e. so that effective protection of rights of private individuals and legal entities is enabled). In the case of inconsistencies between the Aarhus Convention and the Czech legal system the provisions of the treaty would be used (it would have so-called “applicable preference”). According to the generally accepted opinion of theory and court practice only so-called “directly applicable” international contracts, from the provisions of which it is possible to directly deduce the rights of private individuals and legal entities towards the state, can have preference over Czech laws in accordance with article 10 of the Constitution.

Consequently the court clearly stated that the Aarhus Convention is a directly applicable international treaty. Specifically it is possible to directly invoke the rights that the Aarhus Convention guarantees before Czech authorities and courts.

According to the court these conclusions also issue from the fact that the Aarhus Convention was ratified by Council decision 2005/370/EC dated 17/02/2005, by the European Union. The Aarhus Convention thereby became “a part of Community Law” which provides it with its system properties, i.e. chiefly, under fulfilment of the conditions prescribed by Community Law, with preference and direct applicability”.

From these results the court then deduced that it is necessary to apply articles 2. 5, 6, 7 and 9 of the Aarhus Convention in particular to acquisition of land use plans and modifications to these.

With regard to the relation between the definition of the public concerned according to article 2. 5 of the Aarhus Convention and national legislation for acquisition of land use plans, the court stated that in the case of the petitioners as owners of family homes, located within a distance of approx. 2 km from the current runway, i.e. less than 1 km from the axis of the new runway, it is absolutely beyond dispute that they are included under this definition. However it furthermore added that in accordance with the Aarhus Convention during land use planning the “public concerned” must be considered to be all persons who are directly affected by the results of the proposed measures, for example noise or emissions, because “their interest in protection of their property and healthy environment is more than sufficient”. The court also added that with regard to social changes related to the lifestyle of modern civilisation, the greatest risk to property owners during land use planning does not have to be how they will be able to develop their own land, but more how the neighbouring land will be used.

The court also came to the conclusion that land use plans are not only “a plan and program” in accordance with article 7 of the Aarhus Convention, but – if its approval is essential for realisation of an intention given in appendix I of the Convention – it is also an “act”, to which its articles 6 and 9. 2 apply. With reference to article 6. 4 the court stated that “acquisition of land use planning documentation is the initial phase of decision-making when choices and alternatives are open and when participation of the public can be effective.” Consequently the national legal system must enable participation by the public during acquisition and approval of land use plans and modifications to these. **“Persons from among the affected public, who have sufficient interest” must however also have the opportunity of achieving a judicial review of the legality of the land use plans from the material aspect (i.e. its contents) and also the procedural (i.e. the process of their acceptance) aspect, in compliance with article 9. 2 of the Convention.**

Some specific reasons for cancellation of the contested modification to the land use plan

a) non-settlement of the objections by affected owners

The judgement implies that breach of rights of the affected owners of properties for a due decision regarding their objections, may be by itself a reason to cancel the land use plan. The court identified the statement by the town of Prague, that neither of the more than 170 persons who lodged objections against the modification concerning the new runway, were entitled to do so, to be “absolutely indefensible” and stated that “this conclusion contradicts the purpose of participation of the public in decision-making in environmental matters”.

b) missing SEA standpoint

The approved modification to the land use plan was also illegal according to the court because its impact on the environment was not assessed within the scope of an “SEA” process. In relation to this it is interesting that it was not possible to derive the duty of assessment of the modification in an “SEA” process from Directive of the Parliament and the Council 42/2001/EC, regarding assessment of the impacts of some plans and programs on the environment. With regard to the wording of article 13. 3 of this directive, the itself directive

did not apply to the modification. However the court deduced this duty from the national law, which transposed the SEA directive (as of 01/05/2004), because this law did not assume its “suspensory” provision of article 13. 3. Furthermore assessment of the impacts of the land use plan on the environment was already determined in a certain form in Czech law before the transposition of the directive.

c) no definition of protective zones for sources of noticeable noise

The court found a significant material-legal defect in the approved modification to the land use plan in the fact that no protective noise zones were marked for the new runway. It also pointed out the prognosis of an increase in traffic at the Ruzyne airport by 2015 (see above point 9.2). It stated that the approved modification to the land use plan would actually enable this increase, which would undoubtedly lead to a marked increase in the noise burden (as also issues from the original standpoints of the Hygienic Station of the capital city of Prague - see above point 13). Under these circumstances the court identified the approved modifications without declaration of a protective zone as being “a practice that can be hardly understandable, however certainly illegal”.

21. Conclusions:

The most important general conclusions from the case are confirmation of the character of land use plans as measures of general interest and particularly the direct applicability of the Aarhus Convention (its preference over Czech law). The Supreme Administrative Court deduced from both these conclusions that the public affected by the contents of the land use plans or modifications to these may demand their judicial review from both the material and procedural aspects.

Everyone, to whom the definition of the public concerned according to article 2. 5 of the Aarhus Convention, has the standing to file such a motion. In the opinion of the court this concerns at least all the owners of land and structures that may be affected by negative impact of the approved use of the territory (noise, emissions, etc.).

The potential importance of these general conclusions by the Supreme Administrative court (which should be respected in the decisive practice of courts of a lower instance) is marked. Apart from the option of the affected public to demand judicial review of land use plans, which should be unquestionable, this may be manifested in other spheres to which the Aarhus Convention applies. If the Supreme Administrative Court remains consistent in its opinion of the position of the Aarhus Convention in Czech legal system, it should also state that courts are required to deal with petitions against final opinions issued during the EIA processes, which they refuse for the time being with reference to their non-binding character. These and other possible consequence (for example in relation to the requirements in article 9. 4 of the Aarhus Convention, i.e. the effectiveness of the judicial review) remain open for the time being.

21. Lawyer and organization:

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ESTONIA



1. Title of case:

SEA of the Restructuring Plan for the Oil-Shale Energetics in Estonia

2. Matter of case:

The Restructuring Plan for the Oil-shale Energetics in Estonia determined major changes in structure of oil-shale and energetics sector of Estonia, but no SEA was made to this plan. Estonian government claimed that the plan is only internal document and therefore it is not disputable under Aarhus Convention.

3. Country:

Estonia

4. Location:

Estonia

5. Geographic dimension:

national

6. Initiators of case:

Eesti Roheline Liikumine (Estonian Green Movement – Friends of Earth Estonia)

7. Participants involved:

Government of Estonian Republic
Ministry of Economic Affairs

8. Other interested parties and/or stakeholders:

Estonian environmental NGOs (Estonian Fund for Nature, Nõmme Tee Selts)

9. Background facts:

In March 2001, the Estonian Government gave its approval to Restructuring Plan for Oil-Shale Energetics in Estonia (hereafter referred to as the Plan). As 90% of energy in Estonia is produced from the oil-shale, the Plan would possibly have major impacts to oil-shale sector which in turn has major impacts to the environment (the negative impact of oil-shale mining and usage of oil-shale as energy source is the biggest environmental problem of Estonia). In opinion of the environmental NGOs, the biggest problem was that the Plan set the competitive ability of the oil-shale sector as priority, declaring that there are no serious alternatives. The Plan also envisaged unification of oil-shale mining and production of energy into one system. The environmental NGOs were of opinion that the Plan would factually be creating closed market for production of electricity and complicate use of renewable energy sources enormously. Another problematic factor was an intention of the government to sell part of sofar 100% state-owned energy company AS Eesti Energia to foreign investors however, this intention was finally not realised due to high political pressure).

The environmental NGOs required for SEA to be made, in order to guarantee proper assessment of all environmental impacts of the Plan as well as public participation. As the authority responsible for composing the Plan for Ministry of Economic Affairs (MoEA), the request was presented to MoEA. The demand was supported by the Ministry of Environment (MoE) and Estonian ombudsman. The MoEA, however, claimed that the requirements for carrying out an SEA to national plans are not clear (as well as it is not clear who should carry out the SEA in this case).

Estonian Green Movement (EGM) filed a legal action to the court in order to establish illegality of omission of MoEA. In court proceedings, MoEA claimed that as the Plan is not a development plan, but an internal document for the government, the SEA was not obligatory. The standing of EGM was also disputed by MoEA, claiming that the plan did not violate any rights of EGM.

10. Applicable EC and/or international laws:

Aarhus Convention (at the time of the given case Estonia was not a member of European Union)

11. Applicable national laws:

Sustainable Development Act
Environmental Impact Assessment and Environmental Auditing Act

12. Type of procedure (administrative and/or judicial):

Judicial (no administrative proceedings with public participation were carried out by the authorities)

13. Judicial procedural history/timeline:

27.03.2001 – The Estonian Government gives its approval to the Plan, prepared by MoEA

09.07.2001 – letter of the MoE to MoEA with suggestion to immediately initiate SEA of the Plan

18.07.2001 – MoEA responds to MoE that the Plan has already been approved by the Government and that the results of environmental audits of energy companies were taken into account while compiling the Plan

07.08.2001 – MoE points out to MoEA that SEA is required by the EIA Act and that the environmental audits do not replace this obligation

15.08.2001 – MoEA asks from MoE for recommendations how to proceed with the SEA

21.08.2001 – the ombudsman makes suggestion to MoEA to carry out a SEA to the Plan

06.09.2001 – MoE gives recommendations about procedural details for SEA to MoEA

06.09.2001 – MoEA responds to the ombudsman, declaring that since it is hard to determine who should carry out the SEA in this case and who should carry the costs, it is not possible to initiate SEA

December 2001 – Estonian Green Movement (EGM) files a legal action, in order to establish illegality of omission of MoEA

19.03.2001 – Tallinn Administrative Court (the court of first stage) does not satisfy the action, claiming that EGM has no standing

12.09.2003 – Tallinn District Court (the court of second stage) annuls the judgment of administrative court, declaring that EGM had standing

29.01.2004 – Estonian Supreme Court (court of third and highest stage) annuls the judgment of district court and sends the whole case for a new review to the court of first stage¹⁰

19.10.2004 – The first court session of administrative court; the Government informs court and EGM that the Plan has been annulled

14. Outcome of the actions:

As the Plan was declared invalid by the Government, EGM did formally win the case (however, by that time the actual meaning of the Plan was completely outdated).

There is no final and enforced decision about whether the Plan really was a plan (or just an internal document), whether the SEA was obligatory and whether EGM has standing in this case. However, the Supreme Court takes important position in its judgment, regarding standing of EGM and implementation of art 9.2 of the Aarhus Convention in general. This position may have great effect to further judicial practice.

15. Current status of case:

The case is finished

16. Analysis of legal problems:

The main issue, regarding implementation of the Aarhus Convention, was the standing of EGM as an environmental NGO.

EGM claimed in this case that it has a standing because:

- EGM had filed an 'establishment action', asking to establish illegality of omission of MoEA. According to Estonian Administrative Court Proceedings Act, establishment action can only be filed by person, having **sufficient interest**.
- EGM has standing on basis of Art 9.2 of the Convention which stipulates that "*the interest of any non-governmental organisation meeting the requirements referred to in Article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above*". The court is not justified to restrict implementation of this provision by national norms. It has to be noted that the regulation about standing in Administrative Court Proceedings Act is considerably narrower, compared to Aarhus Convention. Therefore is necessary that when determining standing of environmental NGOs, the courts apply directly provisions of Aarhus Convention, otherwise the obligations, rising from the Convention, could be deemed to be violated.

MoEA claimed:

- Art 9.2 of the Convention grants standing to the environmental NGOs only in procedures, carried out on basis of Art 6. The Plan cannot be considered to be a

¹⁰ Supreme Court's decision from 29th of January 2004 in administrative case No 3-3-1-81-03 (Estonian Green Movement – FoE Estonia v Ministry of Economic Affairs)

decision, made on basis of Art 6. Therefore and on basis of Art 9.2 (*The members of public have right "... to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention"*) the standing depends on the provisions of national law. In order to obtain standing according to national law, the complainant must have sufficient interest or its rights have to be violated. In the present case EGM's right have not been violated and EGM has no sufficient interest.

- The legal action was not filed because of public was not involved to the proceedings (that's what Art 7 is aimed at), but because no SEA was made. The question of obligation towards SEA lies within scope of Art 9.3 because this is a question about implementation of national law. Therefore, Art 9.2 is not applicable in this case.
- The Plan is not a national development plan, it is only internal decision which is not obligatory to other persons outside administrative system. Such internal decision cannot have environmental impacts, therefore SEA was not obligatory.

The Supreme Court sent the whole case back for a new review to the court of first stage because the respondent should have been the Government, not MoEA.

However, regarding standing of EGM and implementation of Art 9 of the Aarhus Convention, the Supreme Court took following position:

- The Supreme Court is of opinion that the Plan can be regarded as a plan according to Art 7 of the Convention. Therefore, Art 9.2 is applicable, regarding the standing of EGM.
- Art 9.2 enables to challenge a decision, act or omission not only concerning the accordance with the Convention, but also concerning accordance with other relevant legal acts (laws).
- Art 9.2 of the Convention is phrased in such way that the decisions, acts etc, made under Art 6, are challengeable with no limits, whereas the decisions, acts etc made under other articles of the Convention, are disputable "*where so provided for under national law*". In order to solve the question whether EGM has standing in this case, it is important to determine the meaning of the phrase "*where so provided for under national law*" in Art 9.2 of the Convention.
- The Supreme Court finds that the reservation "*where so provided for under national law*" means that an decision, act or omission is at all challengeable in court under national law. There has to be no special regulation in the national law regarding issue of standing. The Supreme Court finds this interpretation to be in harmony of the general goal of Convention (broadening of public participation and access to justice in environmental matters).
- According to third and fourth sentence of Art 9.2 ("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."), the standing of EGM shall be deemed to exist regarding decisions, acts and omissions under Art 6 as well as under other articles of the Convention.
- The final conclusion about whether EGM has standing in this case or not, depends on whether the Plan is challengeable in administrative court under national law. According to § 4 (1) of the Administrative Court Proceedings Act, "administrative acts against which an action or protest may be filed with an administrative court are the orders, directives, resolutions, precepts or other legislation which regulate individual cases in public law relationships, issued by agencies, officials or other persons who perform

administrative functions in public law”. According to § 4 (2) of the same Act, “measures against which an action or protest may be filed with an administrative court are activities, omissions or delays in public law relationships by agencies, officials or other persons who perform administrative functions in public law”. Therefore, if the Plan appears to be an administrative act or measure in meaning of § 4 of the Administrative Court Proceedings Act (which has to be determined by lower courts in the new review procedure), EGM has standing in this case.

17. Conclusions

Three main conclusions can be drawn of this case, regarding implementation of the Aarhus Convention in Estonia:

1. the Aarhus Convention is directly applicable;
2. all decisions, acts or omissions that are made under some article of the Aarhus convention and can be regarded as administrative acts or measures in meaning of national law, are challengeable by environmental NGOs, whose interest will in all these cases be deemed sufficient and rights capable of being impaired;
3. these decisions, acts or omissions are challengeable not only if they are in controversy with the Convention, but also if they are in controversy with other legal acts (including provisions of national law).

The case is a concrete example of good practice in implementing Aarhus Convention. It could be for inspiration to others, in sense of direct application of the convention instead of getting tangled in national legislation (especially in case the Convention has not yet been fully transposed).

It is also worth following the principle that while interpreting the provisions Convention, it's goals are always to take into account instead of one-to-one grammatic interpretation. In concrete terms, it is only natural that besides the decisions, made under Art 6 of the Convention, all decisions, acts and omissions made under other articles, are also disputable under Art 9.2.

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HUNGARY



1. Case title:

Hotel Excelsior Budapest Spa

2. Matter of case:

Construction permitting of the Hotel Excelsior Budapest Spa

3. Country:

Hungary

4. Location:

Budapest

5. Geographic dimension:

local

6. Initiator of case:

Budapest Világörökségért Alapítvány (Foundation for Budapest World Heritage)

7. Participants involved:

Pro Hill Ingatlanfejlesztő és Vagyonkezelő Kft. (Pro Hill Real Estate Development and Asset Management Ltd.)

Fővárosi Közigazgatási Hivatal (Capital Administration Office)

8. Other interested parties and/or stakeholders:

Municipality of Budapest 2nd District

Budapest Mayor Office, Bureau of the Architect General

Budapest University of Technology

Hungarian Academy of Sciences, Commission of Architectural History and Monuments

UNESCO World Heritage Center

9. Background facts:

9.1 Account of facts

Hotel SZOT (the hotel of the National Council of Trade Unions) was built in Budapest in 1971. The trade unions' obvious political connections to the Hungarian Socialist Workers' Party back in the socialist regime made it possible for them to locate this large concrete-and-steel building in the picturesque Buda Hills, on the Rózsadomb (Rose Hill) area.

After the change of the political system, the building became the property of Pro Hill Ltd. that decided to build a Hotel Excelsior Budapest Spa on the premises. After the first instance construction permit has been issued by the notary of Budapest 2nd District, the Foundation for Budapest World Heritage appealed the permit. The Capital Administration Office, the second level construction authority of Budapest refused the appeal, denying standing for the

Foundation. The latter filed a lawsuit in the issue of standing at the Capital Court that, in its judgment, annulled the second instance construction permit, established standing for the Foundation in the permitting procedure and ordered the Capital Administration Office to reconsider the original appeal in merits.

After intense consultations, the Pro Hill Ltd. and the Foundation eventually reached a peaceful agreement to the dispute and agreed that the Ltd. quits its original idea to enlarge the building with two extra stories and a penthouse.

9.2 Description of the project and its main environmental impacts

According to the construction permit, the project first of all would entail the cutting of 11 trees. It also entails the enlargement of the current building, both by its land cover that would be 20-30 % more compared to the original size, and by its height that would be almost 1,5 times higher (31 meters) than the original height (21 meters). The entire building at the end would host 93 luxury apartments. The major impact of the building would be a further deterioration of the view of the Buda Hills, neighboring to the Budapest World Heritage, due to the large-scale enlargement of the mass of the building.

10. Applicable EC and/or international laws:

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), in particular its Art. 9.2

11. Applicable national laws:

Act No. 81 of 2001 on the Proclamation of the Aarhus Convention
Act No. 64 of 2001 on the Protection of Cultural Heritage
Act No. 53 of 1995 on the General Rules of the Protection of the Environment
Act No. 4 of 1957 on the Rules of Administrative Procedure

12. Type of procedure:

administrative and judicial

13. Administrative procedural history

June 8, 2005: the first instance construction authority, the notary of Budapest 2nd District, issues the construction permit to Pro Hill Ltd.

June 22, 2005: the Foundation for Budapest World Heritage submits an appeal against the first instance construction permit to the Capital Administration Office

14. Outcome of the actions:

July 26, 2005: the second instance construction authority, the Capital Administration Office refuses the appeal of the Foundation without substantive consideration of the reasoning; the Office holds that the Foundation has no standing for two reasons:

- the rights and legitimate interests of the Foundation are not affected because the location of the building is not part of the Budapest World Heritage
- the Environmental Protection Act and the jurisdiction of the Supreme Court ensure standing only to membership NGOs

15. Remedies taken:

September 7, 2005: the Foundation for Budapest World Heritage files a lawsuit as applicant against the Capital Administration Office as defendant against the second instance construction permit at the Capital Court; in the action, the Foundation bases its standing on two grounds:

- although the location of the project is not within the Budapest World Heritage area, it is almost neighboring thereto, therefore its view affects the view of the previous, and this fact establishes the affectedness of rights and legitimate interests of the Foundation, which in turn establishes its standing
- the Aarhus Convention establishes standing of the Foundation especially in its Art. 9.2

16. Judicial procedural history/timeline:

September 12, 2005: the Capital Court halts the preparatory works of the construction by its order

October 20, 2005: the Capital Court allows the Pro Hill Ltd. to take part in the process as a friend-of-the-defendant

January 2, 2006: the Capital Administration Office submits a counteraction against the action of the Foundation for Budapest World Heritage; in the counteraction, the Office emphasizes, that

- the location of the project is outside the Budapest World Heritage area
- the rights and legitimate interests of the plaintiff are not affected directly by the project
- the plaintiff is a foundation that is not a membership NGO
- the plaintiff is not an environmental NGO, therefore it can not base its standing on the Environmental Protection Act
- the Aarhus Convention is not directly applicable in domestic law

March 6, 2006: the Pro Hill Ltd. submits a counteraction against the Foundation for Budapest World Heritage; in the counteraction, the Ltd. emphasizes, that the Foundation has no standing for different reasons, such as

- it is not an environmental NGO
- it is not a membership NGO
- the jurisdiction of the Supreme Court granted standing to environmental membership NGOs only
- the protection of cultural heritage and especially that of the World Heritage sites is a state duty and not the task of NGOs
- the Aarhus Convention is not directly applicable in domestic law

17. Outcome of the actions:

March 27, 2006: the Capital Court annulled the second instance construction permit, established the standing of the Foundation in the permitting procedure and ordered the Capital Administration Office to reconsider the appeal in merits; reasons for accepting the standing of the Foundation were

- the legitimate interests of the Foundation are affected by the project because – although the very location of the project is not within the Budapest World Heritage area – the view of the latter is heavily affected by the view of the project since the two can be seen from the Pest side of the city together

- the Aarhus Convention Articles 2.3.a, 2.4 and 2.5, as well as its Art. 3.9 establish the standing of the Foundation

18. Current status of case:

26 July, 2006: the Capital Administration Office acknowledges the standing of the Foundation and accepts its reasoning contained in the original appeal of June 22, 2005; consequently, the Capital Administrative Office refuses the permit application of Pro Hill Ltd. for having detrimental effects on the view of the Buda Hills as part of the Budapest World Heritage
AUTHORITY LISTENS TO COURT!

Finally, the case was closed by a peaceful settlement signed between the Foundation and the Ltd. According to the provisions of the agreement, the Foundation does not hinder the renovation and reconstruction of the building into an apartment complex, and the Ltd. in return will not enlarge the height of the original building with two extra stories and a penthouse.

19. Follow-up actions planned and their timeline (in the case of ongoing matters, also the estimated end date of the case):

There are no follow-up actions planned, taking into account that the case is closed.

20. Analysis of legal problems, conclusions:

The legal problem on stake was clearly the boundaries of standing in domestic law. The plaintiff, quite interestingly, did not meet those criteria that are required to have standing in environmental cases and that were formulated both by the Environmental Protection Act and by the Supreme Court. These latter criteria require that the appellant be a membership NGO (unlike a foundation) created for the protection of environmental interests (unlike for the protection of cultural heritage). This necessitated that the Foundation base its claims on a different ground, which was the Aarhus Convention, in particular its Art. 9.2.

Although the judgment did not refer explicitly to Art. 9.2 of the Aarhus Convention what the plaintiff quoted, and as a supplementary argument, the judgment also refers to Directive 2003/35/EC, its overall relevance for the applicability and enforceability of the Aarhus Convention is unaltered.

21. Conclusions:

We may conclude without exaggeration that the judgment of the court is a landmark decision in the interpretation of standing in Hungary. The court not only gave standing to a non-environmental non-membership non-governmental organization but based its judgment on the Aarhus Convention, on its Art. 3.9. This first of all establishes the direct applicability of the Convention in domestic law; secondly, it creates a valid legal basis for standing; and thirdly, it overwrites more restrictive domestic law and jurisdiction that would otherwise limit the scope of those having a standing to environmental membership NGOs.

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POLAND



1. Case title:

Oaks in Białowieża forest

2. Case subject:

The State Forest Enterprise (an authority managing state owned forests in Poland)

has cut down 7 of over 100-year-old oaks in the Białowieża forest.

In the view of environmental organisations this activity was illegal, so one of them has sued the State Forest Enterprise to the civil court for causing the environmental damage.

The case is an interesting example of application of Art. 9.3 of the Aarhus Convention (access to justice through civil and not administrative court).

3. Country:

Poland

4. Location:

Białowieża Forest (eastern Poland), the case was examined by courts in Bielsk Podlaski and Białystok

5. Geographic dimension:

Local, but as the case was a precedent, its influence may be on national level

6. Initiators of case:

Federacja Zielonych Gaja (Green Federation Gaja), Szczecin (north-west Poland), Poland

7. Participants involved:

Federacja Zielonych Gaja (Green Federation Gaja) - www.gajanet.pl

The State Forest Enterprise (an authority managing state owned forests) - www.lp.gov.pl

8. Other interested parties and/or stakeholders:

WWF Poland, Warszawa (<http://wwf.pl/>)

9. Background facts:

9.1 Account of facts

In the summer of 2003 the State Forest Enterprise decided to cut down 7 of over 100-year-old oaks in the Białowieża forest, justifying this activity by the necessity of protection of the state border and by the alleged risk for human health. This included 4 healthy trees situated at the distance 10-13 meters from the boarder (within so called boarder zone) and 3 trees partially withered, which were situated outside the boarder zone but which were supposed to be dangerous for the workers while cutting down the above mentioned 4 trees within the boarder zone.

Green Federation Gaja from Szczecin (an environmental association) filed a law suit against the State Forest Enterprise claiming decision to cut down the trees to be illegal. The entire area was subject to strict conservation regime which prohibited any logging for whatever purposes.

9.2 Description of the project and its main environmental impacts

Seven over 100-year-old oaks were cut down in the strictly protected area (primeval forest). This caused an environmental damage in biodiversity.

10. Applicable EC and/or international laws:

The Convention on access to information, the public participation in decision-making and access to justice in environmental matters (the Aarhus Convention) - Art. 9.3

If the case took place after Poland's accession to the EU - the Habitats Directive would be applicable, as presently the area is designed as a Natura 2000 area. The logging took however place before accession.

11. Applicable national laws:

Environmental Protection Law Act of 27 April 2001 (EPLA)

12. Type of procedure

Judicial - before civil court

13. Administrative procedural history

N/A

14. Outcome of the actions:

N/A

15. Remedies taken:

N/A

16. Judicial procedural history/timeline:

05.2005 - Green Federation Gaja filed the law suit to the District Court in Bielsk Podlaski

24.08.2005 - the District Court ruled in favour of Green Federation Gaja awarding the compensation as demanded by the plaintiff

12.09.2005 - the State Forest Enterprise challenged the 1st instance judgement to the Province Court in Bialystok

8.11.2005 - the Province Court revoked the first instance judgment and dismissed the claim

17. Outcome of the actions:

Although the final result was unfavourable for the plaintiff, the case may be regarded precedential because it was the first public interest law suit at civil court seeking compensation for causing environmental damage in Poland.

18. Current status of case:

Case closed

19. Follow-up actions planned and their timeline (in the case of ongoing matters, also the estimated end date of the case):

N/A

20. Analysis of legal problems:

Art. 9.3 of the Aarhus Convention states that: *“each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment”*.

While national provisions on challenging acts or omissions by public authorities (using administrative way) are usually well developed in many countries, the second solution (challenging acts or omissions by private persons or public authorities but by using the civil-law way) is much less developed.

Measures provided for by Polish EPLA and used in this case are therefore quite unique and may be regarded as inspiring for other countries.

The claim of Green Federation Gąja was based on Article 323 para 2 of Environmental Protection Law Act of 2001 granting environmental NGOs legal standing in civil cases, *“where the threat or violation affects the environment as a common good”* (see legal analysis).

In the reasoning of its claim the Green Federation challenged the supremacy of the boarder legislation over nature conservation legislation and alleged risk for human health as a sufficient reason to cut down the 3 trees outside the boarder zone. The claim referred i.a. to the necessity of the biodiversity protection. Despite the fact that latter on the entire area was officially designated as Natura 2000 site, the claim was not based on Habitat Directive since the logging took place before the site was designated..

Since the trees had already been cut down the law suit was filed to the civil court claiming compensation amounting about 9.200 PLN (about 2500 EUR) to be paid for activities aiming at protection of the Białowieża forest.

On 24 August 2005 the Province Court in Bielsk Podlaski acknowledged the arguments of the plaintiff and awarded the compensation as demanded. The reasoning of the judgment referred to almost all general principles of environmental protection, including polluter pays principle and precautionary principle but failed to address most of the legal arguments by plaintiffs.

The State Forest Enterprise challenged the judgment of the first instance court to the District Court in Białystok, which on 8 November 2005 revoked the first instance judgment and dismissed the claim. Since in this type of cases the second instance judgment is final and there

are no legal means to challenge it the court did not find it necessary to consider all the arguments put forward by the plaintiff. Moreover, it did not bother to address most of the views expressed by the Province Court. The entire judgment was based on the boarder legislation and simply ignored any relation to nature conservation legislation.

21. Conclusions:

As mentioned above, the provisions of EPLA allowing for challenging acts or omissions by private persons or public authorities before civil courts are quite unique and provide for an interested example of implementation of Art. 9.3 of the Aarhus Convention.

The case itself was precedential because it was the first public interest law suit at civil court seeking compensation from the State Forrest for logging protected trees. Despite final unfavourable judgment, the case should have a preventative effect (clearly proclaimed by the first instance judge) showing that the State Forrest may be held accountable at civil court for its dealings with nature and public interest civil law suits can play a role in protecting the nature. On the other hand, the case show that Polish civil courts are still not prepared to adjudicate sophisticated legal question concerning relation of nature protection legislation to “overriding public interest”, in particular those related to human health and public safety as protected by other legislations.

The legal regime of Habitat Directive did not play a role in this particular case but no doubts one may expect more cases of that kind where it surely will be a factor to be addressed.

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SLOVAKIA



1. Case title:

Pezinok Waste Dump – standing of an individual member of “public concerned”

2. Matter of case:

Town of Pezinok has a waste dump operated by a private investor, Pezinské Tehelne a.s. This waste dump is in a distance of about 150 m from densely populated housing area and does not meet several essential technical and environmental criteria for operation (such as solid bedding). After the new Waste Law has been enacted, the waste dump operation was obligated to re-new its license.

Pezinok Waste Dump has a solid opposition of local citizens. Two of these activists – Mr Pavlovič and Mr Král – requested administrative standing, to participate at re-licensing proceedings. This case study concerns the issue of administrative standing of Mr Král. However since in Slovakia standing to sue to challenge administrative decision depends on administrative standing, this case tackles issues of access to justice as well.

3. Country:

Slovakia

4. Location:

Pezinok town, located in the south western Slovakia, 30 north of the capital city Bratislava

5. Geographic dimension:

Local issue, national and EU legal norms and national significance

6. Initiators of case:

Miroslav Král – citizen of the Pezinok town, activist of local initiative, represented by Eva Kováčechová, attorney cooperating with VIA IURIS.

7. Participants involved:

- a) District Authority – first instance decision-maker on merits (re-licensing of the waste dump)
- b) Regional Authority – appellate decision-maker on merits and first instance decision-maker on the issue of standing
- c) Ministry of Environment – appellate decision-maker on standing issue and defendant challenged by Mr. Kral at the Supreme Court
- d) Supreme Court – court reviewing standing decisions and defendant challenged by Mr. Kral at the Constitutional Court

8. Other interested parties and/or stakeholders:

- a) Pezinok local initiative opposing the Waste Dump
- b) Pezinské Tehelne a.s. investor and operator of the Waste Dump in Pezinok
- c) Municipality of Pezinok, its local parliament and City Council – Mr. Kral was a member of the local parliament at the time of the case

9. Background facts:

The Waste Dump in Pezinok has, since the sixties serves as a regional waste dump. It is located in so called “Old Dump Hole”, only 300 meters from the town centre and 150 meters from the nearest housing (technical standards recommend at least 500 meters). The waste dump is operated contrary to several legal provisions, for example it has no internal drainage system or no system for liquidation of gases, despite the fact that both systems are mandatory for this kind of operation. Given the location of waste dump and type of soil, waste waters can contaminate sources of drinking water and gases can contaminate air. These facts have been stated by a District Investigation Office and by the Slovak Environmental Agency, which issued a statement according to which present situation of this waste dump is “alarming” and there is a threat of “a serious ecological accident”.

The Ministry of Environment in its “Black Book” (issued in the year 1999 at the time when new government came to the office) pointing out environmentally threatening issues in Slovakia, also states “this waste dump does not meet criteria for deposition of dangerous waste. An illegal decision of District authority endangers environment since it permits deposition of dangerous waste at a waste dump, which is unsuitable for such waste.” (compare with position and arguments of the Ministry of Environment described further in this case study)

In 2002 the District authority Pezinok initiated administrative proceedings to renew the license for operation of Waste Dump in Pezinok for a company Pezinské Tehelne a.s. This renewal of license was prescribed by a new Waste Law adopted in the 2001. Mr Král, an active and concerned resident, member of the local parliament of the Pezinok town requested standing in this administrative proceedings. The first instance administrative authority did not make any statement to the effect of requested standing. However he concluded that, since no decision had been delivered to Mr. Kral and from other procedural steps by authority, the requested standing was not granted.

Mr Král appealed the first instance decision of the District authority on merits since his status of a party to proceedings has not been explicitly denied. In February 2003, the Regional authority issued a separate decision denying locus standi to Mr Král.

Mr Král appealed this decision concerning his standing at the Ministry of Environment. On May 2003 the Ministry of Environment declined his appeal and confirmed decision of the Regional authority denying standing of Mr Král.

Mr Král challenged the appellate decision of the Ministry at the Supreme Court of Slovakia. A first instance decision, issued in June 2004, was in favour of Mr Král cancelling decision of Ministry and returning the issue for further proceedings.

The Ministry of Environment appealed decision of the Supreme Court and the appellate senate of the Supreme Court overturned the first instance court's decision. This final decision, issued in March 2005, declined petition of claimant (Mr Král) and confirmed the decision of Ministry of Environment denying standing.

Mr Král, assisted by attorney, filed a petition at the Constitutional Court of Slovakia claiming violation of his fair trial. In February 2006 Constitutional Court decided that Supreme Court violated right to a fair trial of claimant, Mr Král, and returned the matter to the Supreme Court for further proceedings.

10. Applicable EC and/or international laws:

The Convention on access to information, the public participation in decision-making and access to justice in environmental matters (the Aarhus Convention).

European Covenant on Human Rights – Article 6 and 8

11. Applicable national laws:

Constitution of the Slovak Republic

Act no. 223/2001 C.c. Waste Law

Act no. 71/1967 C.c., Administrative Proceedings Act (APA)
Generally defines the term “measures of a general nature”

Act no. 272/1994 C.c., Protection of Health of People

Marginally:

Act no. 369/1990 C.c. Municipal Law

Act no. 85/1990 C.C. Petition Law

12. Type of procedure:

a) Administrative proceedings:

- District Authority - first instance waste re-licensing proceedings in accordance with a newly adopted Waste Law. In this proceeding initiator of the case Mr. Král claimed administrative standing.
- Regional administrative authority - denied request for standing as a separate decision from the decision on merits
- Ministry of Environment - confirmed the first instance decision and did not grant standing to Mr. Král

b) General court

- Supreme Court has a jurisdiction for judicial review of Ministry of Environment decision concerning denied standing. First instance court cancelled the MoE decision and granted standing to Mr. Král. MoE appealed this decision.
- Supreme Court (different senate) heard the case at a second instance and cancelled the first instance court decision, confirming denial of administrative standing.

c) Constitutional court

- Claim that constitutional right to fair trial in connection with right to a healthy environment and right to privacy were violated. Constitutional court ruled in favor of Mr. Král declaring his rights violated for issuing arbitrary decision and returning the case to the Supreme Court.

13. Procedural history:

Administrative process:

Year 2002: The district authority starts re-licensing proceedings based on a new Waste Law for Pezinok Waste Dump operated by Pezinské Tehelne a.s.

24/10/02: District authority issues decision (on merits) containing the new license for ongoing operation of the Waste Dump in Pezinok

18/11/02: Mr Král, inhabitant of the Pezinok town, appeals decision of District authority at the Regional authority

February 2003: Regional authority issues decision concerning standing of Mr Král, denying his standing.

March 2003: Mr Král appeals decision of Regional authority denying his standing at the Ministry of Environment.

May 2003: Ministry of Environment upholds the decision of Regional authority, deciding that Mr Král does not have standing.

Judicial process:

July 2003: Mr Král challenges decision of the Ministry of Environment at the Supreme Court.

June 2004: First instance decision of the Supreme Court is in favour of Mr Král, cancelling decision of Ministry of Environment and returning the case there for further proceedings.

March 2005: Second instance decision of the Supreme Court, based on the appeal of Ministry of Environment, declined petition of Mr Král and confirmed decision of Ministry of Environment denying his standing.

July 2005: Mr Král claimed violation of his right to fair trial at the Constitutional Court, which decided that his constitutional right was violated and returned the case to the Supreme Court.

Supreme Court has yet to reach a verdict.

14. Outcome of the actions:

Administrative proceedings – Mr Král lost his claim for standing in both instances (Regional administrative authority and Ministry of Environment) and was not able to participate at re-licensing proceedings for a Pezinok Waste Dump.

Administrative court proceedings – Mr Král won in the first instance and lost in the second instance (both at the Supreme Court). First instance senate of the Supreme Court issued very inspiring verdict.

Constitutional court proceedings – Mr Král won and the case was returned to the Supreme Court for repeated proceedings

15. Current status of case:

The case is back at the Supreme Court, after the Constitutional Court ruled that the Supreme Court violated constitutional right to a fair trial of Mr Král. The first hearing of the case is expected soon.

The waste dump in Pezinok is in operation, since renewed license in accordance with the new Waste Law is effective despite the fact that Mr Král argues that authority denied him his standing rights.

16. Follow-up actions planned and their timeline (in the case of ongoing matters, also the estimated end date of the case):

The particular case is expected to finish in 3 months at the Supreme Court. Outcome of this case is not so important for the Waste Dump case, since this operation is nearly closing (waste dump is full).

However the outcome – decision of the Supreme Court on merits concerning administrative standing of local member of public concerned arguing impairment of right to healthy environment – is immensely important. If the Supreme Court rules in favor of Mr Král, such decision will have a follow on effect in all similar cases. Such decision will in fact broaden public participation and consequently access to justice of physical and possibly even legal persons claiming impairment of environmental rights. This follow on effect will be tested in other environmental standing cases. VIA IURIS plans to spread know-how to activists so that they can use similar arguments to gain environmental standing.

17. Analysis of legal problems:

Case started before Slovakia ratified Aarhus Convention, nevertheless it is great example how administrative authorities till this day handle public participation of concerned public, other than environmental organizations (which have ex lege standing). Due to inter-relatedness of standing in administrative proceedings and their court review, this case also shows barriers in access to justice.

The main issue in this case is administrative standing of Mr Král – local inhabitant who claims that his rights, interests protected by law and obligations are directly impaired by decision renewing license to Pezinské Tehelne a.s. for operation of Waste Dump in Pezinok. His claim is based on right to a healthy environment guaranteed by the Article 44 of the Slovak constitution, which also carries obligation for everyone to protect environment; and right to privacy in accordance with the European Covenant on Human Rights.

Arguments of Mr. Král and his attorney:

- Mr. Král was not simply claiming abstract rights, he claimed his rights in a specific proceeding which concerned specific waste dump with a specific significant deficiencies possibly resulting in specific threats and negative impacts to environment. His claims were supported by specific proofs and links to expert studies indicating that the waste dump is operating contrary to the law and does not meet technical standards. In light of this evidence Mr Král maintains causal link between decision, which can result in further operation of waste dump, and deterioration of his living environment. It is obvious that, given the evidence presented, it is highly dubious that operation of the waste dump is done in compliance with legal provisions. Under these circumstances there is a high likelihood of negative impact on plaintiff's environment.
- The circle of parties to administrative decision-making is broader than those who will, at the end of the day, be directly affected by the decision. What is crucial is a mere *possibility* of being impaired; the law gives standing rights to those whose rights “can” be effected. This regulation does not only provide for protection of rights and interests of persons, but also provides for protection of administration of the given issue at

stake. Such a control mechanism acts as a prevention against insufficient deliberation of the issue and low quality decisions.

Arguments for the Constitutional Court level:

- Mr. Král claimed that during the entire proceedings that authorities did not investigate whether conditions are met to fulfill criteria of standing definition – that his rights, interest protected by law and legal obligations can be directly impaired by decision. The authorities did not in any way deal with his statements that his constitutional right can be directly impaired by decision. The authorities did not investigate the existence of causal nexus between a decision on the issue and a risk of damaging the environment in the location where he lives.

Arguments of Regional Authority deciding on standing, Ministry of Environment as appellate authority and appellate senate of the Supreme Court:

- The town of Pezinok has ex lege administrative standing in accordance to the Waste Law and therefore interests of citizens of Pezinok are represented by the municipal authority. Citizens do not have their own self-standing right and therefore can not be aggrieved directly, but only implicitly – via “intermediary”- their rights and interests protected by law.
- Administrative proceedings in the area of environment has its own definitions of standing, which are narrower compared to the general definition according to the APA. Therefore citizens gain standing in these proceedings usually only if they are claimants. In a legal practice, if a decision will effect a specific person only indirectly, for example economically, not legally, it is insufficient to gain standing.
- Citizens can use other legal tools to influence decision-making of environmental authorities, such as petitions and referenda.
- The constitutional right to a healthy environment can be applied only in the frame of specific laws, which execute this right. Therefore condition, under which this constitutional right is enforced, is to have adequate substantive and procedural regulations in a specific legislation. Presently legislation in the field of environment vests protection of environment to administrative authorities.

Arguments of the first instance senate of the Supreme Court:

- The Waste Law, as applicable in a given proceeding, does not define who has standing in proceedings. The application of a general APA definition of standing must consider content of lex specialis (Waste Law), its philosophy and possible impact of the law on those who claim that their rights can be impaired. In the given case, it is beyond any doubt, that proceeding was in accordance with the Waste Law and such proceeding is always a sensitive proceeding. This kind of proceeding can have effect (both positive as well as negative) on broader circle of subjects and not just subjects directly effected by decision of administrative authority (obligated to fulfil or bear something). Therefore administrative authorities must scrutinize whether there was a causal link between proceeding, which may result in further operation of the Waste Damp, and a risk to harm environment in the location effecting plaintiff.
- Under the above mentioned circumstances, it is necessary to scrutinize the issue at stake in reference to legislation, which forms basis for provisions of lower power. The basis for such considerations is the constitution. The constitution provides for basic philosophy, which must be applied when interpreting other legal provisions. In the given case we must point at Article 44 of the Slovak Constitution, Article 8 of the European Covenant

on Human Rights and Law on protection of people's health. In light of these provisions the issue and a position of parties to administrative proceedings is entirely different.

Arguments of the Constitutional Court:

- The deduction of the Supreme Court (second instance) was entirely unfounded in that in the given case it was not proven that decision-making directly impaired claimant's rights and interests protected by law. The claimant submitted several expert statements during administrative proceedings, which, in his view, prove direct encroachment into his rights and interests protected by law. Therefore it was necessary to deal with this standpoint.
- It falls within competencies of general courts to interpret and apply laws. Unless this interpretation is arbitrary and improperly reasoned, constitutional court may not intervene. However, in this case (given the above mentioned) Supreme Court violated basic right of claimant for fair trial within a court review of administrative authority.

18. Conclusions:

The following approaches and elements of this case are interesting for Slovakia and perhaps inspiring for other countries:

1. The chosen *legal strategy* proved to be a successful one – after loosing the claim of standing in the administrative judiciary we claimed violation of the constitutional right to fair trial. Administrative authorities notoriously neglect reasoning of the issue of standing: they do not deal with arguments and standpoints of persons claiming that their rights are impaired. A Constitutional verdict sets standards which must be met when standing is denied. If an administrative authority does not sufficiently consider arguments on the issue of standing, including arguments why standing was denied, and does not deal with them properly such decision is arbitrary. Improperly reasoned, arbitrary decision violates fair trial.
2. *Constitutional right to healthy environment* – in Slovakia this is a unique reference of a court to this constitutional right. Supreme Court states that claim for administrative standing should be viewed and assessed in light of this right as well as right to respect for private and family life as guaranteed by the Article 8 of the European Covenant of Human Rights. Having said this, the Court instructs administrative authorities to scrutinize causal link between decision and a risk to harm environment in the location of a concern for claimant.
3. *Legal sentences of the first instance of Supreme Court* (read above), especially to the effect that when deciding the issue of standing, authorities must consider content, impact and philosophy (in the meaning of legislative intentions) of *lex specialis* and apply standing provisions in the context of constitutional right to a healthy environment. In sensitive proceedings, such as according to the Waste Law, the circle of impaired subjects is broader than those whose rights are directly aggrieved.
4. A 'negative inspiration' from this case (and other standing cases) is that in Slovakia it is very complicated to prove "*direct impairment of rights, interests protected by law and obligations*" for members of public concerned, other than ecological organizations. Therefore to gain standing in administrative as well as judicial proceedings even after Slovakia ratified the Aarhus Convention we must prove *causality*.

It has not been sufficient to base impairment of rights on the following arguments:

- The waste dump is illegal; it does not meet technical and other legal requirements, thus likelihood of its negative impact on environment and lives of local inhabitants, including claimant is high
- It is located in claimant's vicinity, 150 meters from the nearest housing and 300 meters from the town center.
- The claimant is active inhabitant of the town, steadily engaged on the issue, collected and presented several expert studies, which contain information and expert views on the matter

Counter-“arguments” of administrative authorities include:

- Municipality is ex lege party to a given administrative proceedings and municipal law provides that it represents opinions of its inhabitants.
- Citizens can use other legal tools, such as referendum and petition to express their opinion on the matter.

Despite the fact that these “counter-arguments” fully ignored the standing arguments of Mr. Kral mentioned above, the final Supreme Court decision was in favor of decision-making authorities. By this verdict the Supreme Court also ignored standing arguments of Mr. Kral and violated his fair trial.

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