Access to Justice in matters of environmental law
Report on the Czech Republic

Research and Documentation Service of the Czech Supreme Administrative Court

A. General Questions

1. What was the influence on your national legal order, if any, of the recent developments in the case law of the Court of Justice of the European Union (CJEU) on standing of individuals and/or NGOs (notably cases C-237/07 *Janecek*; C-263/08 *Djurgarden*; C 115/09 *Trianel*; C 240/09 *Slovak Brown Bear; C 416/10, Krizan*). Have environmental laws been amended? Please illustrate.

To our knowledge, the recent CJEU case-law developments had little to no influence on related environmental Acts. National law amendments, if related at all to Union law, have followed the purpose to prevent or forestall an action brought by the European Commission against the Czech Republic for not fulfilling requirements laid down in the relevant environmental law directives.

Nevertheless, an amendment act to the Building Act (Act No. 350/2012 Coll., Amendment to the Building Act and Related Acts) was passed in September 2012. The amended Section 65 (6) of the Building Act now provides for the use of procedure laid down by the Act No. 114/1992 Coll., on Conservation of Nature and Landscape (hereinafter referred to as "the Act on Conservation of Nature and Landscape") connected to the assessment of implications for the site in question. It is specifically stated in the statement of reasons for the amendment act that this method was chosen so that the relevant provisions of the Act on Conservation of Nature and Landscape may be amended effectively, according to the future developments of CJEU case-law or Commission opinions.

2. Have there been any changes in the jurisprudence of the national courts concerning standing of individuals and/or standing of NGOs as a result of CJEU's recent judgements? Have the courts in your country relied on the principle of effective judicial protection or used arguments about CJEU case law in order to widen up standing for individuals and/or NGOs in environmental procedures since the signing/ratification of the Aarhus Convention? If so, please illustrate.

The Czech administrative courts, including the Supreme Administrative Court (hereinafter referred to as "the Court"), follow the CJEU case law and are consistent with it.

The *C-240/09 Slovak Brown Bear* and the *C-115/09 Trianel* decisions were referred to in several cases, for example:

the decision of 22 July 2011, File No. 7 As 26/2011-175;
the decision of 31 January 2012, File No. 2 Ao 9/2011-72;
the decision of 27 April 2012, File No. 7 As 25/2012-21;
the decision of 5 February 2012, File No. 1 Ao 1/2012-66;
the decision of the Regional Court in Brno of 14 December 2011, File No. 30 Ca 23/2008-123;

The *C-263/08 Djurgarden* decision was referred to in

the decision of 13 October 2010, File No. 6 Ao 5/2010-43;

the decision of 26 June 2013, File No. 6 Aps 1/2013-51;

All of the abovementioned decisions are available on "www.nssoud.cz".

The Constitutional Court ruled (see resolution of the Constitutional Court of 6 January 1998, File No. **I. ÚS 282/97**) that the right to a healthy environment belongs only to an individual as biological organism since only individuals could be negatively affected by changes in an environment. With regard to this ruling, legal entities such as NGOs are not allowed to bring an action alleging that their right to a healthy environment has been violated by an administrative body. The NGOs are allowed to allege only that the administrative body infringed into their procedural rights in the course of administrative procedure.

A significant change in this jurisprudence has been reached by the decision of 13 October 2010, **File No. 6 Ao 5/2010-43**. In this case, a NGO filed an action against the Rules of the National Park that has been adopted in the form of a measure of a general nature (a type of decision-making by administrative bodies, introduced into the Czech legal system by the Code of Administrative Justice, and modelled on the "*Allgemeinverfügung*", existing in the Germanic legal culture). The access to a judicial review procedure in case of a measure of a general nature is allowed under the condition that substantial rights have been infringed. The Court ruled that the Rules of the National Park fall within the scope of Art. 1 of the EIA Directive and referred to Art. 10a of the EIA Directive. Section 23 (10) of the Act No. 100/2001 Coll., on the Environmental Impact Assessment (hereinafter referred to as "the EIA Act") stipulates that NGOs, whose main purpose of activities is the protection of an environment, public health or the a cultural sight and which have submitted their written comments on the EIA documentation or an expert report within the statutory time limits are entitled to bring an action against the administrative body that issued the following administrative decision in the EIA process. The Court concluded that in accordance with the EIA Directive the NGOs shall be entitled under Section 23 (10) of the EIA Act to file an action against the measure of a general nature (the Rules of the National Park) and allege the infringing of their substantial rights.

3. What are, to your opinion, the main challenges for judges in your national legal system when it comes to access to justice in the field of environment and the development of the CJEU´s case law?

Since 19th century the admissibility conditions for actions under the Czech administrative procedural law are based on the so called "infringement of rights doctrine". According to this doctrine an infringement of substantive right is required for admissibility of the action. Hence, the petitioner must prove that their substantive right has been violated by an administrative body. The petitioner could also allege violation of his or her procedural rights in the administrative decision-making process if those procedural defects affected his or her substantive right. The petitioner must prove that his or her **own** right has been infringed upon. Hence, the *actio popularis* is not allowed. Furthermore, the Constitutional Court stated that the right to a healthy environment only belongs to an individual as biological organism because only individuals could be negatively affected by the changes in an environment. However, the party to the administrative decision-making procedure (whose substantive right has not been violated – e.g. NGO) has a right of action in case the administrative procedure infringes upon party's procedural rights and this fact could result in an unlawful administrative decision. In the course of an administrative decision-making procedure NGO is allowed to plead that substantive right of others has been violated, if this substantive right (e.g. right to a healthy environment) is the main purpose of NGO activities. Therefore, NGOs are allowed to file an action under the condition that they participated on the previous administrative procedures which are regulated by specific environmental laws.

Since the environmental law became the significant part of the European law and the international law (mainly the Aarhus Convention), the conformity of legal orders of member states with these provisions must be reached through the amendments of related national laws and through the national case law. Under the impact of European and international law, the conditions of active legitimacy have been newly determined (see above mentioned case law of the Court). Although the recent ECJ case law has already answered some of the complicated questions, the national courts will be in prospective cases forced to solve the questions of active legitimacy through a) the possibility to refer for a preliminary ruling or b) the challenging interpretation of the national legal order.

4. Taking into account that access to justice in environmental matters is required to not be prohibitively expensive (cf. Art 25.4. IED; Art 11.4. EIA Directive, both reflecting Art 9.4. Aarhus Convention): How do you, all in all, evaluate the system of access to justice in your country when it comes to costs and liability for costs (e.g., court fees, lawyer´s fees, cost for administrative procedure, expert fees)? Do costs have a chilling effect in environmental litigation?

In the course of the administrative procedure, the interested parties (e.g. the NGOs, individuals) are not obliged to cover any costs and are not obliged to be represented by a lawyer. However, the interested party is obliged to cover court fees to be able to file an action with the administrative court. The Act No. 549/1991 Coll., on Court Fees, stipulates that the court fee of 3 000 CZK (approximately 115 EUR) for the submitting of an administrative action shall be covered by the petitioner. In the course of administrative proceeding, representation by a lawyer is not obligatory either. The cost of a cassation complaint is also stipulated in the Act on Court Fees – the complainant is obliged to cover 5 000 CZK court fee (approximately 192 EUR). The party to the cassation proceeding is obliged to be represented by a lawyer. Lawyer fees are regulated by the Act No. 177/1996 Coll., the Attorney Tariff. The amount of the lawyer fee is dependent on the amount of the legal acts conducted by the lawyer in the proceeding. The cost of a single legal act in an administrative proceeding is set as the amount of 1 000 CZK (38 EUR). Several organisations offer free legal aid and expert advice on environmental matters. With regard to aforementioned facts, the costs of administrative justice in the environmental field **cannot** therefore be regarded as "prohibitively expensive".

B. Examples:

Example 1: The competent authority has adopted an action plan on air quality that will not adequately reduce the risk of exceeding EU air quality limits (contrary to relevant secondary EU law).

Questions Example 1:

B.1. What are the possibilities open for the public to legally challenge the plan and to ensure that an adequate plan is adopted and implemented? If any, who (individuals, NGOs, other) is entitled to challenge the plan? Is the appellant/plaintiff required to provide evidence on potential harm/damage and to specify the measures that should have been taken?

The adopting of an action plan has been regulated under Section 8 of the Act No. 86/2002, on Air Protection. Under this Section the action plan has been adopted in the form of the regional

by-law (an Order of the Region). The Court in the decision of 21 January 2011, File No. 8 Ao 7/2010-72, held that the power to annul an action plan in the form of an Order of the Region is outside of the jurisdiction of administrative courts since solely the Constitutional Court is empowered to abolish an Order of the Region under Art. 87 (1) (a) of the Constitution.

In 2012 the new Act No. 201/2012 Coll., on Air Protection, came into effect. Under Section 9 of this Act the Ministry of Environment has the power to issue an action plan in the form of a measure of a general nature. There is no relevant case law related to the possibility to challenge the action plan adopted in such legal form, however under Section 101a of the Code of Administrative Justice the access to a judicial review in case of a measure of a general nature is allowed under the condition that substantial rights have been infringed.

Example 2: The competent authority has issued a permit for an infrastructural construction project (e.g., a motorway, a power line or a funicular). Part of the site concerned is situated in a Natura 2000 area. In spite of a negative assessment of the implications for the Natura 2000 site, the competent authority agreed to the project for imperative reasons of overriding public interest (Art 6.4. Habitats Directive).

Questions Example 2:

B.2.1. Who (individuals, NGOs, other) is entitled to challenge this decision by legal means? In what way do individuals need to be affected by the decision in order to have standing? With regard to standing rules for individuals and NGOs, does it make any difference whether the project in the example is subject to an EIA or not?

The admissibility of such project would have been assessed within a landscape planning procedure (on regional or municipal level). In the course of this procedure, it is necessary to carry out strategic environmental assessment (SEA) as well as the assessment of impacts on given locality, according to Section 45h of the Act on Conservation of Nature and Landscape in the meaning of Art. 6 (4) of the Council Directive 92/43/EEC.

The landscape plans are issued as measures of general nature. The access to a judicial review in case of a measure of a general nature is allowed under the condition that substantial rights have been infringed. Hence, there must be a link between rights of the petitioner and the locality regulated by the landscape plan.

An active legitimacy is therefore granted to municipalities and individuals who have property rights and easements in given locality. As an example we can point out the decision of the Court of 20 May 2010, File No. 8 Ao 2/2010. In this case the Court annulled the zoning plan of Prague on the basis of the petition of municipalities and aggrieved individuals, since the assessment of impacts of the zoning plan on the special area of conservation had not been carried out.

In the cases where environmental impact assessment is required, the case law grants active legitimacy also to environmental NGOs whose main purpose of activities is the protection of the environment, public health or a cultural sight and which have submitted their written comments on the EIA documentation or expert report within the statutory time limits [the aforementioned Section 23 (10) of the EIA Act]

B.2.2. Does an administrative appeal or an application for judicial review automatically have a "suspensive effect" on the decision at stake?

In case there is no automatic suspension in your national legal order: Under which conditions can the appellant obtain a suspension of the permit decision for the infrastructural project? Are there other measures of interim relief available to prevent

negative harm to the environment until the final decision has been taken? In case of an automatic suspension: Can the developer of the infrastructural project ask for a "go-ahead-decision" in your national legal order?

An application for judicial review with an administrative court, i.e. submitting an action against administrative decision, has **no suspensive effect** under the provision of Section 73 Code of Administrative Justice. However, at the request of the petitioner or complainant, the administrative courts may allow suspensive effect under three conditions: **a)** the execution of the administrative decision or its legal consequences could cause harm to the petitioner/complainant; **b)** there is disproportion between the harm to the petitioner/complainant and harm to others: the harm to the petitioner/complainant is much more extensive. **c)** the administrative decision contradicts important public interest. The administrative court shall take a decision about such a request without unreasonable delays. If there is danger of default, the administrative court shall decide within 30 days. The Court has stated that the administrative court must allow suspensive effect, if there is a danger that the projects of conceptions in question would be realized before the final decision of the administrative court. If under these circumstances, suspensive effect was not allowed to the petitioner, such practice violates Art. 9 (4) of the Aarhus Convention (the decision of the Court of 14 June 2007, File No. 1 As 39/2006-55).

Interim relief is also provided for by the Code of Administrative Justice (Section 38). The suspensive effect and interim relief are mutually exclusive, meaning that if a suspensive effect is granted to the petitioner/complainant, an interim relief shall be not granted. The administrative court is allowed to grant an interim relief if **a)** the petitioner submitted the request; **b)** there is necessity to temporarily settle legal relations because of a serious injury. Under these conditions the administrative court could impose on the parties the obligations to perform/refrain/tolerate something. An interim relief can be granted in several types of administrative proceedings (e.g. in cases of an action against an inactivity of the administrative body), whereas the request for suspensive effect is allowed only in the administrative proceeding against an administrative decision.

Example 3: The competent authority has issued a permit and established permit conditions for an installation falling under the scope of the Industrial Emissions Directive – IED (e.g., a waste treatment facility or a tannery) The national permit procedure had been carried out in accordance with requirements on public participation (Art 24 IED).

Questions Example 3:

B.3.1. Are individuals in your country entitled to challenge the permit decision on the grounds that permit requirements of the IED have not been met: say, that the best available techniques have not been applied and energy is not used efficiently?

The IED has been implemented into the Czech legal order by the Act No. 76/2002 Coll., on Integrated Pollution Prevention, which enumerates in Section 7 (1) parties to such administrative procedure: a) an operator of the installation; b) an owner of the installation; c) regions and municipalities which owns the property where installations are localized; d) NGOs, public benefit societies, federations of employers, chambers of commerce and municipalities or regions which could allege that the environment in their locality could be affected by the permit – all under the condition that they submitted their written application for participation within the time limit of 8 days of the date the administrative procedure was initiated. The possibility of individuals to become a party of such administrative procedure is not mentioned in this Section.

Under Section 7 (2) of the Act No. 76/2002 Coll., on Integrated Pollution Prevention, the participation is granted also to the party which was participating to an administrative procedure under the conditions stipulated in special environment Acts – e.g. the Act on Water Protection, the Act on Air Protection (see the decision of the Court of 4 May 2011, File No. 1 As 43/2011-54). Hence, individuals might be entitled to challenge the permit decision in the course of this decision-making procedure under the condition they have participated to previous administrative procedures regulated by the aforementioned environmental Acts.

B.3.2. Is an NGO entitled to judicial review of the permit decision, even if it did not previously take up the opportunity to participate in the decision-making procedure?

Under the condition that the permit decision has been issued without the participation of the NGOs, the NGOs do not have an active legitimacy to file an action with the administrative court against such permit decision. However, the NGOs could become party to the following construction administrative procedure under the condition that the construction is able to affect environment (the decision of the Court of 1 June 2011, File No. 1 As 18/2011). In such a case the NGO became a party to a construction procedure after fulfilling the conditions stipulated in the Section 70 of the Act on Nature and Landscape: The NGOs (with legal personality) whose main purpose of activities is the protection of environment are entitled to be informed in advance about any planned interventions and decision-making process of administrative body that could affect the environment. The NGOs that want to enjoy the right to be informed shall submit their request to the administrative body. The validity of the request lasts one year and can be submitted repeatedly. The administrative body shall deliver announcement about initiating of decision-making process and the NGO becomes a participant if it notifies the administrative body of its participation in writing within eight days from the announcement. Therefore, the NGO participating to construction procedure is entitled to file an action against the final decision of the construction administrative body.

Example 4: Citizens are concerned about a landfill that has been granted permission but is obviously operating in breach of permit conditions. Samples that have been taken by an NGO indicate that there is imminent danger of a drinking water source being contaminated. The competent authority is not taking any action.

Question Example 4:

Evaluate the possibilities of members of the public (individuals, NGOs) to ensure that (remedial) action is taken.

In case of pollution, any member of the public can submit a complaint to the competent administrative body (usually local authorities or the Czech Environmental Inspectorate). The entity submitting the complaint can express in writing their wish to be informed within 30 days, whether the authority has initiated administrative procedure with the polluter or whether it has found the reasons for such administrative procedure were not given. The competent authority should ensure corrective action is taken by the polluter, or if there is danger of default, the authority will take corrective action on account of the polluter. If the competent authority is inactive, members of the public can refer to the superior authority and seek adequate correction [Section 80 (2) of the Act No. 500/2004 Coll., Administrative Procedure Code]. In case of failure to act of the superior authority, the complainant is entitled to file an action against inactivity of the administrative body with an administrative court (Section 79 of the Code of Administrative Justice).