Access to Justice in matters of environmental law

REPORT ON POLAND

The Supreme Administrative Court and the National School of Judiciary and Public Prosecution.

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.

We have not seen any changes, however please read the description of the Supreme Administrative Court judgement below.

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.

As far as I am concerned there was no changes in the jurisprudence concerning standing of individuals/ NGO's as a result of the recent judgements. The idea has been already implemented by the Supreme Administrative Court. It is worth mentioning that for example in the case, which concerned the right of recourse by an environmental organisation to the review procedure, the Supreme Administrative Court concluded that the Court of first instance breached Article 1 (2), read in conjunction with Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175, p. 40) amended by 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 (OJ L 156) of 15 June 2003, due to the non-application of the Article, despite the fact that before 15 November 2008 there was an inconsistency between national and Community law.

According to the Supreme Administrative Court, the crucial issue to be resolved consisted in conducting a legal assessment to determine whether the provision of Article 33 Paragraphs 1 and 1a of the Act Environmental Protection Law, which may be applicable in the current case, takes precedence over Article 10a of the above Directive. The latter provision provides that Member States shall ensure that, in accordance with the relevant national legal system, members of the public who: have legitimate interest or who possibly claim impairment of law, where administrative procedural law of a Member State requires this as a precondition, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this directive.

The above directive was to be transposed into national law by 25 June 2005 at the latest. This was done by the Act of 18 May 2005 amending the Environmental Protection Law Act

and certain other acts (Journal of Laws No. 113, Item 954), which entered into force on 28 July 2005.

Article 33 Paragraph 1 of the Environmental Protection Law Act clearly provided that it is only the environmental organisations which volunteer to participate in specific administrative proceedings requiring public participation – justifying their involvement by the territorial scope of their operation – and which have submitted their comments or requests in the framework of the proceedings that can act as parties to such proceedings (Article 31 § 4 of the Code of administrative procedure does not apply). This means that the participation in the proceedings is limited by a deadline, and in the case of an environmental organisation, also by its area of operation and by the requirement to submit comments and requests within prescribed time-frames.

Therefore the European Commission concluded that the term "public concerned" referred to in Article 1 (2) of Directive 85/337/EEC was transposed incorrectly, which led to substantial broadening of the scope of the rights of environmental organisations in administrative procedures with public participation and in procedures concerning environmental impact assessments (see Government's Explanatory Memorandum for the draft Act on public access to information about the environment and environmental protection, participation of the public in environmental protection and environmental impact assessments). On the other hand, of course, the directive was fully transposed only in Article 44 of the cited Act of 3 October 2008.

Furthermore, the Supreme Administrative Court indicated that in the light of the legal norm in Article 153 of the Act of 3 October 2008, also the provisions of the Environmental Protection Law Act should be applied, i.e. Article 33 Paragraphs 1 and 1a of the Act, even though the Act of 18 May 2005 amending the Environmental Protection Law Act and certain other acts did not fully transpose Council Directive 85/337/EEC, as it introduced certain restrictions to the access of environmental organisations to the procedure.

In the current case, the Supreme Administrative Court concluded beyond any doubt that Directive 85/337/EEC amended by Directive 2003/35/EC of the European Parliament and of the Council was not implemented in full by the revision of the Environmental Protection Law Act and certain other acts of 18 May 2005, because the full transposition was made only on 15 November 2008, i.e. on the day of entry into force of the Act of 3 October 2008, and as regards the participation of the environmental organisation in the administrative proceedings concerned, this was done under Article 44 of the Act. Meanwhile, the deadline for the transposition of the directive expired on 25 June 2005 (Article 6 of Directive 2003/35/WE of the European Parliament and of the Council of 26 May 2003 – OJ L 2003.156.17).

However, according to the panel of the Supreme Administrative Court, if, as in the current case, there is an inconsistency between Article 10a of the Directive and Article 33 Paragraphs 1 and 1a of the Environmental Protection Law Act, EU law takes precedence. In the case under examination, this means that the provisions of Article 33 Paragraphs 1 and 1a of the Environmental Protection Law Act, as applicable on 15 November 2008, in the light of Article 153 paragraph 1 the Act of 3 October 2008 will not be applicable to the participation of the environmental organisation concerned in the administrative proceedings in the current case, because it is the provision of Article 10a of Council Directive 85/337/EEC, as applicable after its revision by Directive 2003/35/WE of the European Parliament and of the Council (OJ L 2003.156.17), that takes precedence (compare Judgment of the European Court of Justice of 15 October 2009 in Case C-263/08).

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?

It should be born in mind that ensuring a wide access to justice for individuals/NGOs is not an aim in itself. The main idea of Aarhus goals- access to information and participation in the

decision-making processes and access to justice should be understood and realised in the wider scope meaning a better implementation and enforcement of the environmental legislation and most of all strengthening environmental protection.

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?

As the authors of the report presented on the web pages of DG Environment said, the Polish system of review in environmental matters cannot be considered as prohibitively expensive.

Filing an appeal to the administrative authority of the second instance (and - at the same time the appeal procedure) is free of charge (the Stamp Duty Act of 2006 exempts appeal procedure from charges - Annex to the Act, part I item 53, column IV).
Theoretically, a party to the proceedings (including appeal proceedings) and persons with the rights of a party may however be charged the costs of proceedings which (1) were caused by fault of the party, e.g. when the authority has to repeat certain acts during the proceedings because the party failed to take part in this act; (2) occurred in the interest or upon a motion of the party and at the same time do not result from the statutory duties of the authorities, e.g. when the party demands calling of another additional expert-witness (Article 262 of APC-Administrative Procedure Code). The costs of proceedings may include e.g. travel costs of witnesses and expert witnesses or costs of examination on the spot (Article 263 of APC), as well as - translation costs in case of foreigners participating in the proceedings. No statistical data is available on how often authorities make use of those provisions; however the authors of this report have never come across such a case in their legal practice.
For the court fee for complaint to the administrative court of the first instance, Polish legal system uses court fees which vary according to "the value of the case" - but only in cases when the value of the case at stake may be measured (if the case concerns monetary obligation, for example the payment of a fee for the use of the environment or the administrative fine for non-compliance with the environmental requirements). In such cases a court fee is:
- *for the cases of the value at stake up to PLN 10.000 (EUR 2500) - 4% of the value at stake, but not less than PLN 100 (EUR 25);*
- *for the cases of the value at stake between PLN 10.000 (EUR 2500) and PLN 50.000 (EUR 12.500) - 3% of the value at stake, but not less than PLN 400 (EUR 100);*
- *for the cases of the value at stake between PLN 50.000 (EUR 12.500) and PLN 100.000 (EUR 25.000) - 2% of the value at stake, but not less than PLN 1500 (EUR 375);*
- *for the cases of the value at stake over PLN 100.000 (EUR 25.000) - 1% of the value at stake, but not less than PLN 2000 (EUR 500) and not more than PLN 100.000 (EUR 25.000) (see para 1 of the Council of the Ministers Regulation7).*

However, in the majority of the environmental cases, the value of the case at stake cannot be measured. In such cases, the court fee for complaint to the administrative court of the first instance in environmental cases is fixed by para 2.6 of the aforementioned Council of the Ministers Regulation for PLN 200 (about 50 EUR). This is a relatively small amount and cannot be regarded as an obstacle in access to justice.
The court fee for complaint to the administrative court of the second instance is 50% of the first instance court fee due a given case - but not less than PLN 100 (EUR 25).
Apart from the court fees parties have to cover its own expenses (such as travels to the court), including attorney costs (if they decide to have an attorney).

Neither the administrative authorities of the second instance, nor the administrative courts do not call witnesses or experts, so there are no costs related to their participation.
Nevertheless, the parties may wish to order and submit to the authority or court the expert's opinion supporting the party's view. Cost of such an opinion is not reimbursed by the losing party.
According to Articles 199 - 202 of PACLA - the Proceedings before Administrative Courts Law Act if the authorities lose the case they have to pay the winner his costs (both court and attorney fees but not costs of potential experts), but if authorities win - they are not entitled to claim their costs.
According to the general rules, the claimant is not obliged to pay a bond.
As mentioned above, the exemption from this general rule may be applied in situation when the appeal proceedings concerns construction permit and the claimant files a motion for injunctive relief. In such cases the court may impose the bond, calculating its amount on the basis of the information provided by the developer (his calculation of potential damages caused by suspension of the execution of the permit).

B. Examples:

The aim of the following examples is to facilitate understanding of standing rules and conditions for access to justice in the various legal systems. The aim is to illustrate how different countries provide for access to justice in environmental matters and to prepare a discussion on the topic. **Please highlight the specific aspects of your legal system without going to much into detail. If possible, please deal with all the examples.** *Please feel especially welcome to illustrate your answer by referring to examples of national case law.*

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?

Air quality action plans are considered to be "local laws" (art.84.1 in conjunction with art. 91 and 92 EPLA-the Environmental Protection Law Act of 2001) therefore theoretically they may be challenged at courts by persons having legal interest in the case (proving of which might be difficult). No special rights for NGOs.

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?

In case when such a project is subject to EIA procedure (according to EIA Directive EU and Polish provisions on EIA), it would need an EIA decision. The aspects of impact on Natura 2000 site would be then considered within the EIA procedure (or at least at screening).
In such a case the rules as described in the answer for question 1 (second paragraph) would apply.
In case when the infrastructure project would not be covered by the EIA procedure, it would nevertheless need another authorising decision: construction permit or - in case of roads - special decision allowing for localization and construction of roads, or - in case of railways - special decision allowing for localization and construction of railways (however roads and 27 railways are usually covered by the EIA provisions, thus the for them the rules mentioned in the previous paragraph would apply).
The parties to the proceedings regarding these decisions would be entitled to challenge them (although, as mentioned above, the circle of parties may by limited).
In addition, in case when the project might have impact on the Natura 2000 site, the "appropriate assessment" as required by Art. 6.2 of the Habitats Directive (so-called habitat assessment) shall be carried out.
Such an assessment involves environmental authorities (the regional director for environmental protection) however needs to be initiated by the authority competent to issue the "main" decision (e.g. the construction permit).
In case the habitat assessment is carried out, the circle of parties to the proceedings regarding the construction permit is established on the general rules as provided by APC (the parties are entitled to challenge the decision).
Also NGOs may participate in the proceedings and challenge the decision (the environmental NGOs would enjoy more far-reaching rights that other NGOs).
If however the authority competent to issue the "main" decision fails to initiate the habitat assessment (involve the regional director for environmental protection etc.), the access to justice possibilities would be limited only to the parties to the proceedings.

In case when the impairment of Natura 2000 site would constitute a criminal offence, every person should also notify a public prosecutor.

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?

Filing an appeal to the administrative authority of the second instance has a suspensive effect (Article 130.1 and 2 of APC).
In exceptional cases the authority of the first instance may grant its decision on the so-called order of immediate enforceability ("go-ahead order"). Granting of such an order determines that the decision of first instance may immediately be enforced regardless of whether an appeal has been filed or not (in this case the appeal has no suspensive effect). Conditions under which an order of immediate enforceability may be granted are: protection of human

health or life, other important public interests or particularly important interest of a party (Article 108 of APC).
If the order is issued, there are no other means available at the administrative level to suspend the enforceability of the decision, however the order (which constitutes part of the administrative decision) may be challenged into the administrative court.
Filing a complaint to the administrative court of first instance does not automatically suspend execution of the administrative decision subject to complaint. However, the administrative court may suspend the execution of the decision, upon the motion of the claimant, in case when there is a threat that execution may cause a significant damage or effects hard to reverse (Article 61.3 of PACLA). In such cases the claimant has to demonstrate that the threat is plausible.
Normally, the claimant is not obliged to deposit any lump sum (bond) as a guarantee, however such an obligation may be imposed by the court in proceedings regarding construction permit. In case when the complaint is dismissed, the bond is transferred to the developer in order to cover his claims (Art. 35a of BLA – the Building Law Act of 1995).
In cases when a decision was granted order of immediate enforceability at the administrative level (and no one has challenged the order in the court, or the court upheld the order), the court would probably also dismiss the motion to suspend the execution of the decision (see verdict of the Supreme Administrative Court of 1 March 2011 (I OSK 289/11) in which the court stated that such a suspension would be contrary to the institution of "immediate enforceability" and its statutory goal).
Although the administrative courts indicate that the conditions under which the order of immediate enforceability may be granted shall be interpreted strictly, it is commonly used by administrative authorities in case of EIA decisions in particular for the public infrastructure projects such as roads (under Polish law the EIA decision is the first decision required in the investment process; the subsequent decision, allowing for commencing the development of the project is e.g. construction permit, mining concession etc.). Granting such an order for the EIA decision means that the developer is entitled to apply for the "subsequent decision" before the appeal regarding the EIA decision is decided by the second instance authority.
On the other hand, when a person (or NGO) challenging the EIA decision in the court files a motion regarding suspension the execution of the decision, the courts often reply that the suspension cannot by applied to the EIA decision, as this decision does not give the right yet to commence the development of project (as the developer needs to obtain another decision(s)) - see verdict the Supreme Administrative Court of 6 July 2010, II OZ 658/10; verdict of the Supreme Administrative Court of 14 October 2010, II OSK 2028/10; verdict of the Regional Administrative Court in Wrocław of 10 September 2010, II SA/Wr 433/10.

At the same time at the stage of a construction permit both the circle of parties and the possibility for NGOs participation are limited and thus often there is no one who could challenge the permit.

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?

A plant carrying out such an activity would need at least the following permits:

 in the construction phase: a construction permit (in some cases also a localisation/siting decision and projects under EIA Directive also an EIA decision),

 to start up and carry out the operation of the installations: so-called "sectoral" emission permits; depending on the types on emissions caused, the plant may need "air emission permit", "water emission permit" and "permit for generation of waste". The permits are to be renewed every 10 years.

The EIA decision may be challenged by the parties to the proceedings as well as by the social organisations (NGOs), including environmental NGOs (in case when the full EIA procedure is carried out within the EIA decision, the environmental NGOs would have more far-reaching rights than other NGOs).
The siting decisions may be challenged by parties and NGOs under general rules.
The construction permit may be challenged by the parties to the proceedings but the circle of parties in this case is limited. Participation of NGOs in the proceedings concerning that permit is also excluded; consequently the NGOs are also not entitled to challenge the permit. Different rules (allowing for both broad participation of parties and participation of NGOs) apply only for those construction permits proceedings within which the "repeated environmental assessment" is carried out.
Participation of NGOs (both environmental ones and others) in the proceedings concerning the sectoral emission permits is excluded; consequently the NGOs are also not entitled to challenge these permits.

Also the circle of parties in such proceedings is very limited which means that usually the neighbours are not parties to the proceedings and are not entitled to challenge the permit. Only in case of the permits for emissions into water the circle of parties (persons entitled to challenge the decision) is broader.

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?

As the judicial-administrative proceedings in case of individual administrative decisions are a follow-up of proceedings before the authority of the second instance, the circle of persons entitled to file a complaint to the court of the first instance is determined by the administrative phase of proceedings. However, a person who has not took part in the administrative proceedings but whose legal interest is affected by the proceedings may also file a complaint (Article 50.1 of PACLA). But for a social organisation to be entitled to file a complaint, it must have participated in the preceding administrative proceedings (Article 50.1 of PACLA).
Apart from the right to file a complaint, PACLA foresees a possibility to participate in the proceedings with the rights of a party to the following individuals:
 persons who participated in the preceding administrative proceedings (both parties to the administrative proceedings and organisations with the rights of a party) but failed to file a complaint to the administrative court (participation of those persons is granted ex officio, without them having to file any motion - Article 33.1 of PACLA);

 persons whose legal interest is affected by the judicial-administrative proceedings, but who have not taken part in the preceding administrative proceedings (participation of those persons may be granted by the court upon their motion; the courts' refusal may be challenged before the administrative court of second instance - Article 33.2 of PACLA); this situation may concern for example a spouse of a person who challenged the tax decision into the administrative authority of the second instance, in case when that decision was originally addressed to both spouses.

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 such a case environmental NGOs are entitled to ask relevant environmental authorities (e.g. inspectorate for environmental protection) to undertake action against the waste landfill operator (on the basis of Art. 31.1.1 of APC). In case when the authority refuses to undertake action, the NGO has a right to challenge the refusal in the administrative court.
The citizens however have very limited possibilities to intervene in such a case. They can only lodge a complaint under the the "complaints and proposals procedure".

In case when the operation of the landfill in breach of legislation would constitute a criminal offence, every person should also notify a public prosecutor.