THE AARHUS CONVENTION TASK FORCE ON ACCESS TO JUSTICE

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**The 3rd Pillar of Aarhus Convention – many Questions or a Clear Message?**

- Some notes and general remarks on the Slovak decision making procedure

concerning the application of the 3rd pillar

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**I. Foreword**

1. – Starting point:

As a short introduction I would like to say a few words. The Slovak Republic has been the Member State of the European Communities (later EU) since the 1st May 2004 and because of the fact it is a small European country (approximately 5, 5 million inhabitants and 50.000 km2 ) with good relations to its environment nobody was expecting any problems in the sphere of environmental protection. As the years went slowly they were only rarely marked by political problems but nothing signalized any “sleeping” problem concerning the environmental protection. At the beginning of the year 2008 it seemed that everything would be as usual but a problem suddenly arose - some brown bears completed their hibernation and they leaved their dens to welcome the incoming spring of 2008. Some Slovak judges swiftly started to study a convention with a strange name – the Aarhus Convention. [[1]](#footnote-1)

But what was the reason for these activities? There is a very clear answer. At that time huge numbers of hunting clubs and associations signalized many dangerous collisions between tourists, forest workers and mushroom-pickers on one side and representatives of Bears team on the other. Therefore the above mentioned hunting clubs brought applications before the Ministry [[2]](#footnote-2) regarding the granting of derogation to the system of protection of brown bears. [[3]](#footnote-3) Despite all negative expectations Slovak bears left the courtrooms as winners and maybe we all did too. This is the starting point of my contribution.

2. - The Slovak judicial system in brief:

Now I would like to introduce the Slovak judicial system briefly. It belongs to the continental legal systems based mainly on the French and German procedural concepts and legal doctrines. The Slovak legislature is wholly granted with power to make law (supremacy of the only lawmaker) and the roots of law are deduced from parliament. The Slovak courts are competent to solve disputes between individuals or between state authorities and individuals and sometimes they can determine some individual legal affairs. However the decision-making procedure is not ruled by the doctrine of precedent.

There is only one uniform framework of general courts divided into three levels – the Supreme Court of the Slovak Republic (hereinafter “**Supreme Court**”) is at the level of the Republic, [[4]](#footnote-4) 8 regional courts residing in regional capitals [[5]](#footnote-5) accompanied by the Special Criminal Court [[6]](#footnote-6) and approximately 55 district courts that are present in some local capitals. The Slovak Constitutional Court is on the top of the hierarchy. District courts are competent to act as trial courts. [[7]](#footnote-7) The role of courts of appeal [[8]](#footnote-8) is performed by regional courts. The Supreme Court with 85 justices rules both on ordinary remedies against regional courts and the Special Criminal Court decisions and on extraordinary remedies against district courts, regional courts, the Special Criminal Court and the Supreme Court decisions where the law provides so. The Supreme Court resolves conflicts of jurisdiction *in rem* between courts and bodies of public administration.

Slovak Republic has no separate system of administrative courts. The administrative matters are therefore dealt only by specialized judges at 8 regional courts (1st level) and at the Supreme Court. [[9]](#footnote-9)

Primarily each Department of the Supreme Court is responsible for a due interpretation of interpretation of laws and other generally binding legal regulations. If there are serious different opinions between its different chambers it shall adopt interpretative positions (of informative but authoritative nature) on the basis of initiatives from individuals or lower-level courts on the harmonisation of the interpretation. The Plenum of the Supreme Court has the same competence to harmonise the contrary interpretation of laws and other generally binding legal regulations in issues related to different divisions or issues disputed between its divisions.

Another source of harmonisation of the decision-making process are discussions of the Plenum of the Supreme Court on reports about the application of laws and other generally binding legal regulations, which are used as a basis for proposals for new or regulations or as a basis for the modification of existing regulations submitted to the Minister of Justice.

3. - The Slovak judicial techniques:

A judge ruling on a dispute concerning environmental protection cases performs administrative justice procedure. In the exceptional cases [[10]](#footnote-10) the court may render evidence, necessary for the review of the appealed decision. The court as an administrative body that decides in a dispute or in any other legal matter resulting from the civil law, labour law, family and commercial relations in accordance with a special legal act or decides about imposing a sanction, is not bound by the facts ascertained by the administrative body. The court may proceed from the facts ascertained by the administrative body, it can repeatedly render evidence already rendered by the administrative body, or it can carry out probation of evidence in accordance with the third part of Chapter Two (rules of evidence).

In principle, a Slovak court can issue three different types of rulings.

1. Firstly, the Slovak court confirms the challenged decision of the administrative authority with a judgement and rejects the action as unfounded.
2. In the second possible verdict, the Slovak court annuls (quashes) the challenged administrative decision with a judgement and remits the case back to the competent administrative authority for further proceedings and deliberations.
3. In the last possible verdict, the Slovak court discontinues the proceedings on grounds of established procedural irregularities [[11]](#footnote-11) with a resolution.

Furthermore the Slovak court has no possibility of issuing a verdict of partial cancellation of the contested administrative decision and/or of imposing additional requirements to the verdict concerning the waste management or other items of nature such as indicated above. The cassation principle applied in the Slovak administrative justice prevents the application of this procedure.

In Slovak administrative justice, regarding the interim relief [[12]](#footnote-12) the only possibility is to postpone the enforcement of the contested administrative decisions due to the reason that court proceedings, which were opened based on the action, do not affect the non-enforceability of the contested decision (in our case the proposed waste activity). Other interlocutory injunctions are inadmissible in administrative justice. Upon a party’s request, the presiding judge may rule the postponement of administrative decisions enforcement if the immediate enforcement of the challenged decision could cause serious detriment. The party must always prove their statement that there is a threat of a serious detriment, or that this detriment has already occurred and continues. If the presiding judge does not satisfy the request, they shall inform the party concerned.

4. - The Slovak process of judicial international law application:

It is obvious that there is a conflict of sovereignty between the national parliament, a direct “regulator” of social-economic relations by national legal acts on one hand and many international global or regional organisations, which produce many new legal rules containing various individual rights for huge number of addressees [[13]](#footnote-13) on the other hand.

The Slovak process of judicial international law application is based on the legal monism doctrine. [[14]](#footnote-14) The monism doctrine governs the application of the Aarhus Convention too. In short it means a system of incorporating treaties and conventions into the domestic legal order by means of e.g. ratification procedure. There are some Slovak constitutional barriers that constitute special legal hierarchy for international legal pieces. The first group [[15]](#footnote-15) is due to its nature called exceptional group. It consists of international treaties

* on human rights and fundamental freedoms
* for which the exercising of the law is not necessary and
* which directly confer rights or impose duties on natural or legal persons

If these treaties were ratified by the President of the Republic [[16]](#footnote-16) and promulgated in the way prescribed by the law [[17]](#footnote-17) they shall have precedence over laws.

The second group of the international treaties consists of other international legal pieces.

The decision-making procedure responsibility of the Slovak judges is stipulated by Article 144 (1) of the Slovak Constitution as follows:

*“Judges, in the performance of their function, shall be independent and, in decision making shall be bound by the Constitution, by constitutional law, by international treaty pursuant to Article 7 paragraphs 2 and 5, and by law”*.

The Vienna Convention on the Law of Treaties (1969) is a very important interpretative mean for judicial application of any international treaty. There are guidelines for interpretation of any international treaty in the Vienna Convention, in particular Article 31. [[18]](#footnote-18) It should be stressed that a text of preamble is as an important source for interpretative techniques.

II. The Aarhus Convention and its application

1. – The nature of the Aarhus Convention:

The Aarhus Convention was subject to ratification procedure in the Slovak Republic. The National Council of the Slovak Republic approved the Aarhus Convention by the decree No. 1840 from 23rd September 2005 and classified the Convention belonging to treaties with precedence over laws according to the Article 7 (5) of the Slovak Constitution. The President of the Republic ratified it on 31st October 2005. The Slovak ratification document was given to the deposit of the Secretary – General of the United Nations on 5th December 2005. In Slovak Republic this Convention entered into force in accordance with the Article 20 (3) of the Convention on 5th March 2006. All text of the Aarhus Convention was published in the Slovak legal gazette No. 43/2006. From the Slovak perspective it is clear, especially considering the above mentioned facts that the Aarhus Convention belongs to the first mentioned group of international treaties and is therefore a bounding legal accord for Slovak judges.

Apparently the Slovak Parliament has yet enacted no legislatively binding measures to implement the Aarhus Convention conditional rights e.g. in Article 9, paragraph 3. Therefore, a very useful question is: How to interpret some international treaties if a Member state as a party of these treaties failed to adopt subsequent law. During an international judicial conference held in Turkey in May 2015 [[19]](#footnote-19) participants solved that question without a common opinion. [[20]](#footnote-20)

From the EU perspective the Aarhus Convention belongs to the group commonly called mixed agreements because it was concluded by the Community and all the Member States on the basis of joint competence (Art. 300 /7/ of TEC). Mixed agreements are concluded because neither the European Union nor the Member states has exclusive competence.

2. – The standing doctrine in Slovakia:

The traditional approach to guarantee public access to justice is based on the doctrine “*locus standi”* [[21]](#footnote-21) or doctrine of protection of the substantial rights. In general, in order to bring an action before a Slovak court, a potential claimant must have an entitlement to do so. Slovak determination of *locus standi* is influenced by classical but restrictive idea – only persons arguing that they were affected or violated in their individual rights have standing unless otherwise stipulated. [[22]](#footnote-22) Only that person as a claimant is entitled to bring an action before a court of the first instance against administrative decisions or procedural irregularities. It means that there is no private prosecutor competent to bring an action on behalf of the others in the position of an “*actio popularis*” claimant. On the other hand only the Slovak Attorney General is competent to bring an action in public interest before a Slovak court. Also the Slovak Ombudsman is competent to defend the rights of the others. This traditional approach creates an obstacle for anyone [[23]](#footnote-23) to challenge a legal situation especially matters concerning the environment.

On the other hand it is very clear that shepherds will not pay more attention to protection of wolfs which are endangered species because of an operation some installations. The situation should be same between fishermen and great cormorants etc.

It seems that Aarhus Convention has broken this approach in favour of the idea of acceptance of “*actio popularis”*  [[24]](#footnote-24) which is brought by members of the public or some associations. How the Slovak case-law develops in application of Aarhus Convention is presented by cases as follows.

3. – The Town of Pezinok for the 1st time or the Jurassic period of the Aarhus Convention:

(No. 1 Sz-o- NS 134/2004)

**The facts**:

The Slovak town of Pezinok is a small historical town with good position for winemaking but also for a production of bricks or pottery. The old mining hole and the new one are the result of an intensive production of bricks. So a concept to use the old mining hole as a landfill site for waste which is produced by the region of the Slovak capital city might seem as an interesting idea but not for all of citizens of Pezinok agreed in the beginning of 90s years. [[25]](#footnote-25) It was during the association period to European Communities and Slovak Republic has not been yet a Contracting party of the Aarhus Convention at that time.

The Environmental District Authority (hereinafter “**District Authority**”) acting on proposal of the bricks producing company (hereinafter “**Bricks Company**”) due to appeal to open new waste landfill site in the town of Pezinok reassessed its previous administrative decision granting an approval for this company to operate an installation for waste disposal in the town and decided to annul the above mentioned approval and not to grant new approval for carrying out other landfill site and simultaneously to grant the approval to close down a landfill site and perform its reclamation including subsequent monitoring.

Both the Bricks Company and Mr. K. as a resident of Pezinok challenged this administrative decision. Mr. K. sought to be approved as a party to pending administrative proceedings. The final decision was made by the Ministry of the Environment of the Slovak Republic (hereinafter “**the Ministry**”), which denied the Mr. K.´s requirement.

**The legal context**:

Mr. K., as the claimant in this case, brought an action against the decision of the Ministry as a defendant before the Supreme Court. The Ministry ruled in its contested decision that Mr. K. is not party to pending proceedings concerning the granting of the approval by the District Authority to operate an installation for waste disposal (especially building up a landfill site).

In his action the claimant alleged, in particular, an infringement of his fundamental right to access to an impartial court enshrined in Article 46 of the Slovak Constitution as well as Article 6 (1) of the European Convention on protection of Fundamental Human Rights, and his right to use a good environment guaranteed by Article 44 (1) of the Slovak Constitution as well as Article 8 of the European Convention (right to privacy and family life). It is important to underline that the challenging argumentation of Mr. K. did not involve at that time any provision of the Aarhus Convention. The claimant proposed to revoke the impugned decision and return the matter to the defendant for further proceedings.

The 7th Chamber of the Supreme Court acting at that time as a first-level court complied with claimant’s demand because it decided to revoke both the contested decision of the Ministry and the decision of a lower-level administrative body (District Authority) and returned the case to the Ministry for further proceedings and deliberation as well. Furthermore the Supreme Court in its binding legal opinion ordered that Mr. K. has become a participant “*ab initio*” in the administrative proceedings because the legal findings of acting court proved beyond all doubts that the proposed landfill site would seriously harm the health of residents who would live closely to site. Mr. K. resided on the suburbs of Pezinok in distance of approximately 1 kilometre from the proposed installation.

**The appeal procedure**:

The Ministry acting as a defendant challenged the above mentioned judgment of the Supreme Court and brought an appeal before the Appellate Chamber of Supreme Court. In its appeal the Ministry argued, in particular, that the previous approval to operate an installation for waste disposal had not been granted to the local residents of Pezinok but only to the Bricks Company. Hence the local residents cannot be directly affected in their rights and duties by the granting of the approval. If such an idea were admitted they might be affected only indirectly. The Ministry proposed to revoke the contested judgment and return the case to chamber in question for further judicial proceedings.

The Appellate Chamber did not take into account the constitutional right of the claimant to use the favourable environment so that the administrative authority could review whether the installation of the landfill site could negatively influence the future environmental development related to the locality in which the claimant has resided and whether the claimant could be directly affected by this negative influence. Subsequently the Appellate Chamber stated that there are no reasonable grounds for the confirmation of arguments presented by claimant in proceedings. It means that merely opening a landfill site near the town in which Mr. K. has lived is not itself capable to threaten any fundamental right of this individual. It further stressed in its conclusion that under Article 74 (4) of the Slovak Act on Waste a party to proceedings for the granting of approval to operate an installation for waste disposal is always (and only) the municipality in which the installation for waste disposal or the installation for waste recovery is situated or intended and this municipality represents the interests of all its citizens. Therefore the Appellate Chamber changed the contested judgment in so manner that it rejected the action of Mr. K. as a manifestly ill-founded.

From the already mentioned development of the case-law it is very clear that the Slovak courts have still adhered to the doctrine of protection of the substantial rights despite the CJ´s case-law. For example the Supreme Court through the judgment from January 2004 [[26]](#footnote-26) stressed that right to a favourable environment set out in the Slovak Constitution is granted only to natural persons not to corporations or legal persons. The ongoing Slovak development may be presented on the judgment of the Slovak Constitutional Court from 2008 [[27]](#footnote-27) as follows: “*Using logical means of an interpretation that legal norms are only addressed to people (omne ius hominum causa constitutum) the result that only a natural person is the addressee of the constitutional right to favourable environment is acceptable. Since the petitioner is a NGO the Constitutional Court rejects the petition as brought by a manifestly incompetent person“.*

The last judgment from this row is the Constitutional Court judgment: [[28]](#footnote-28) “*an administrative justice is not based on actio popularis claimant, which should allow anyone to bring an action contesting administrative decision. An infringement of claimant rights has to be argued and be manifestly founded through an action and potentially possible.*”

4. Public participation and standing of NGO after 2004:

The Slovak Republic became the Member state of the European Communities on 1st May 2004 (the date of accession) and accepted the doctrine of EU law supremacy. However some secondary EU law [[29]](#footnote-29) and other international texts [[30]](#footnote-30) which stipulate procedures on how to inform the public about environmental data and on citizen participation in the project development that are likely to impact the environment finally led to disputes which have not yet finished. It is obvious from the slow development of the case-law concerning the doctrine of special procedural status of "public concerned" or all or some NGOs established for environmental protection and *"having an public interest in that protection"* that they have been created in such a manner that this doctrine was contrary to other classical doctrines, e.g. the above mentioned doctrine of the protection of substantial rights. The above mentioned doctrine states that only a claimant who proved that he/she was directly affected in his rights grants the legal standing.

On the other hand the terms « **public concerned** » is used as a very foggy expression with a broad interpretation generating the great legal uncertainty and ambiguity because of the fact that an administrative authority is not un able to define all parties of the proceedings properly. The new definition “**likely to be affected by a project**” or "having an interest in a procedure to authorise a given project” in does not help the administrative authority or even the national court to determine parties, because the first cited definition (public concerned) is implicitly joined with the project or other execution of construction works or of other installations as well as schemes.

The status, obligations and duties of the parties to proceedings in Slovak administrative justice are governed in Part Five of the Code of Civil Procedure. [[31]](#footnote-31) The definition of the claimant is based on the above mentioned principle of direct or indirect affecting of law. **Firstly,** it means that a claimant is anyone (natural person or a legal person) who pronounces oneself a party to the administrative proceedings due to the facts that his/her rights were affected by the decision and/or procedure of the administrative body.

**Secondly,** the claimant can also be a natural person or a legal person who was not treated in the administrative proceedings as a party to the proceedings, although it should have been considered as a party to the proceedings. This definition tries to improve the lack of clearness of the term “likely to be affected” and “lets an open space” for anyone who would be affected in his/her rights. An extra procedural situation is created when several persons consider themselves persons whose rights were affected by a decision and procedure of the administrative body; then they can file a joint claim.

Associated persons play special procedural role. They have neither filed claim nor took into their consideration any information about the ongoing administrative procedure although their rights are closely linked with the claimant’s contested rights. These associated persons are always the parties to the proceedings because the decision of the court must also apply to them due to the inseparable body corporate of rights with the claimant.

It is very easy to designate a defendant in administrative justice proceedings. As for the final decision of the administrative authority issued within the administrative proceedings, the defendant is that administrative body which decided at the level of the last instance.

The Slovak procedural law permits to file a claim “in public interest” so called “*actio popularis* procedure”. Thus the party to the proceedings concerning a claim involving the prosecutor is also the prosecutor himself/herself as claimant besides above mentioned parties to the administrative proceedings.

From the point of view of Slovak court another criterion dominates – whether the person is directly or indirectly affected. Any person is directly affected if his/her rights are violated or harmed seriously and affected and the consequences last at time of judging of the rights. For example if a claimant is dissatisfied with a high level of noise during a construction of a bridge and the court finds out that they daily drive around the construction site, in that case e.g. the for the reasons of employment, the court will probably reject the claimant’s action on the grounds that their right for healthy environment has not been affected and therefore it is not granted to be a party to proceedings.

On the other hand this legal situation would change if the claimant proved to live next to the construction site. The distance “next” means within the high noise area or other high level emissions. Everyday presence of noise obviously could affect his/her right for healthy environment and especially for its protection. Only for these reasons the Slovak court could accept individual application and deal with it.

**III. Slovak Brown Bear – Article 9 (3)**

1. – Fight for the nature of the Aarhus Convention – Standing:

**The facts:**

The case broadly known as the Slovak Brown Bear initiated an administrative proceedings and later judicial review proceedings between an NGO called: *Lesoochranárske zoskupenie VLK* (hereinafter “**the Wolf association**”), [[32]](#footnote-32) the Slovak environmental association (established in accordance with Slovak law whose objective is the protection of the environment), as the claimant, and the Ministry as the defendant.

Because the facts of preliminary procedure in the above mentioned case C-240/09 are notoriously known (at least I hope so) [[33]](#footnote-33) I will confine to the basic facts and thus try to avoid some unnecessary details.

By way of an appellate decision from June 2008 (hereinafter “**contested decision**”) the Ministry confirmed its 1st level decision insisting on the statement that the Wolf association did not have the status of a "party" [[34]](#footnote-34) but only the status of an „associate party". [[35]](#footnote-35) Moreover the Ministry argued that the Aarhus Convention was an international treaty that had to be implemented in national law before it could take effect. [[36]](#footnote-36) In spite of the fact, that the Ministry did not grant the right to bring the action to a court, the Wolf association brought a claim against the contested decision to the Bratislava Regional Court acting as a trial court. That court reviewed the contested decision, together with the administrative procedures that had preceded it, and rejected the Wolf’s claimant as a manifestly ill- founded. In reaching that opinion, the Regional Court held that a logical or grammatical interpretation of Article 9 (2) and (3) of the Aarhus Convention did not grant this claimant the right to participate both in administrative and judicial procedure with the status of a party to those proceedings.

The Wolf association appealed to the Supreme Court, which stayed the proceedings before it and referred preliminary questions about the interpretation of the Aarhus Convention to the Court of Justice of European Union (hereinafter “**Court of Justice**”).

**The legal context:**

The crucial problem which the Slovak judges faced at first was to determine whether the Aarhus Convention (especially Article 9) [[37]](#footnote-37) has a direct effect in domestic legal order due to the so called “*self-executing effect”*” of international treaties. The Wolf association argued that the Aarhus Convention has a direct effect. What we could mean by “self-executing” mechanism is that the Aarhus Convention and its subjective rights have automatic domestic effect upon ratification. Conversely, a “non-self-executing” treaty by itself does not give rise to domestically enforceable law.

Firstly, neither claimant nor defendant challenged the nature of the case; it means that the case concerns environmental matters. Secondly: neither claimant nor defendant required to interrupt proceedings and refer to the Court of Justice for preliminary ruling. Therefore the Supreme Court held the first half of cases in favour of the Ministry.

Considering Article 9 of the Aarhus Convention it is remarkable, that mainly its paragraph 3 indicates that an additional legal criteria could or shall [[38]](#footnote-38) enact by each Contracting Party to ensure that not all members of the public but only those who met these criteria laid down in the national law have access to administrative or judicial procedures to challenge acts or omissions by public authorities which contravene provisions of the national law relating to the environment. In this context the next provision, paragraph 4, is very important. It states that the procedures in the first three subparagraphs should provide adequate and effective remedies, and lays down certain standards with which such procedures should comply.

The reference to a preliminary ruling was initiated by the Chamber itself without any initiative of parties which were slightly surprised by this activity of the Supreme Court after it had decided one half of many identical cases in favour of the Ministry. Questions (especially the first one) in general concern the effect of the Article 9 of the Aarhus Convention (in particular its paragraph 3) and whether that article has a “self-executing effect” (in international meaning) within an EU Member state´s legal order in the sense to change the above mentioned classical approach to standing. It is obvious that the **first** question [[39]](#footnote-39) indirectly raises issues of competence because it concerns the allocation of jurisdiction to interpret provisions of mixed agreements as between the national courts of the Member States and the Court of Justice of the European Union. Out of this situation two questions arise “Who has the right to have access to justice?” and “Who decides who has access to justice?”

The **second** question is aimed to Community order. [[40]](#footnote-40) It means that the article has a “direct effect” or is “directly applicable” according to the CJ´s settled case-law. The core of the first two questions was whether environmental protection associations, if they challenge a decision to derogate from a system of environmental protection may derive the right to bring proceedings under EU law, having regarded, in particular, to the provisions of Article 9 (3) of the Aarhus Convention on direct effect.

The **third** question was designed for a situation of affirmative answers [[41]](#footnote-41) in respect of the first two questions and stressed the framework of the right of public access to judicial hearings.

The Supreme Court also proposed the accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure but this request was rejected and the case was allocated to the Grande Chamber of Court of Justice.

2. The first problem – Admissibility of preliminary questions and competence:

The message of the first question and also of the next questions was very clear – to interpret Article 9 concerning the right to access to justice – it means only a requirement for the interpretation of element of international legal order. Especially according to Article 4 (2) of the Treaty of functioning of the EU there is a shared competence in the area of environmental protection. It means that both the EU and Member States may legislate and adopt legally binding acts in that area. However, the Member States [[42]](#footnote-42) shall exercise their competence only to the extent when the Union has not already exercised its competence, or has decided to cease exercising it.

The Court of Justice noticed in its answer to those arguments (judgment C-240/09) that the questions referred to relate essentially only to Article 9 (3) of the Aarhus Convention, and do not concern the other subparagraphs of that article.

Since the Aarhus Convention belongs to the above mentioned group commonly called as mixed agreements the Court of Justice in accordance with the statement of the Commission to the Decision 2005/370 pointed out[[43]](#footnote-43):

“*that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations’*”

Who has then the jurisdiction to interpret the mixed treaty as the Aarhus Convention - a competent court of the Member State or the Court of Justice itself? Under the settled case-law the provisions of that Convention form an integral part of the legal order of the European Union and therefore within the framework of that legal order the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement. [[44]](#footnote-44)

3. The second problem – did NGOs become an “actio popularis” claimant?:

There was a “foggy” answer to the next judicial procedure before the national court. The Supreme Court asked the above mentioned three questions, concerning either the “self-executing effect” (from the international level perspective) or the “direct applicability or direct effect” (from the EU level perspective) but the Court of Justice focused on the core of the questions – on the environmental protection and set aside the rest concerning standing. However the main problem, resulting directly from the preliminary ruling procedure, was that it constituted the competence for national courts both to interpret objectives of the EU Law, especially the right for an effective remedy, and objectives of the concerned Article 9 of the Aarhus Convention.

Firstly, the Court of Justice clearly declared that Article 9 (3) of the Aarhus Convention does not have direct effect on the EU law. [[45]](#footnote-45) However, this was not the final answer to the national court. Therefore the Slovak Supreme Court, as the referring internal court, received at compulsory guideline (or instructions) on how to interpret Article 9 paragraph 3 as well as domestic provisions, concerning *locus standi* (they were labelled by the Court of Justice as “the procedural rules relating to the conditions”) as follows:

* to **the fullest extent possible,**
* **in order** to bring administrative or judicial proceedings in accordance with
  + **the objectives of Article 9 (3)** of that Convention and
  + **the objective of effective judicial protection of rights** conferred by European Union law,
* **in order** to enable the organising of environmental protection organisation,
  + **to challenge** before a court a decision taken following administrative proceedings
  + liable to be **contrary to European Union environmental law.**

It is obvious that the Court of Justice broke the above mentioned classical doctrine of standing and the second part of its judgment caused a wave of strong criticism. [[46]](#footnote-46) Some authors even declared that this judgment constitutes a significant shift of powers from the legislative to the judicial branch. [[47]](#footnote-47) We could agree with this criticism because the second part of the judgment seems to be a sanction [[48]](#footnote-48) for failing in enacting appropriately the secondary legislation by both EU institutions and Member States.

What message and consequences result from this obligatory guideline for each Member States’ legal orders? Is this answer applicable only to paragraph 3 or is this statement valid for the whole Article 9 because that Article of the Aarhus Conventions concerns the access to justice?

In my opinion it is very important to discover the framework of objectives or goals of Article 9 (3) and to apply the same approach to EU environmental provisions. For due interpretation are very important the criteria which they will have to fulfil the principle of equivalence [[49]](#footnote-49) and principle of efficiency. [[50]](#footnote-50)

4. The third problem – Objectives of Article 9 (3):

The main goal of the Aarhus Convention is to protect and grant every person the right to live in an environment adequate to their health and well-being as well as supervise the duty to protect and improve the environment for the benefit of the present and future generations. It should be done by the Member States’ authorities, individually and in cooperation. In order to assert this right and observe their duty, people must also have access to justice in domestic environmental matters. This should be done without verifying the reason. However, it is necessary to acknowledge that citizens may need assistance in order to exercise their rights. As regards the right to access to justice, the Aarhus Convention stresses that effective judicial mechanisms should be accessible to the public, including organizations, so that their legitimate interests are protected and the law is enforced.

This aim of the Aarhus Convention is declared by its Art. 1. It declares an international obligation for any Party (Member State) **to guarantee** the right (*inter alia*) of access to justice in order to ensure the protection of the right of every person of the present and future generations to live in an environment adequate to his or her health and well-being.

It means to enforce many provisions of a domestic environmental law that were created in a lot of processes of transposition of international treaties concerning environment and its protection in the frame of the Convention´s standards - that is all; nothing more or less.

The criteria concerning the above mentioned justice are stated in Article 9 (4) as follows:

Justice (it means the procedures referred to in Art. 9 - paragraphs 1, 2 and 3) shall

1. provide adequate and effective remedies, including injunctive relief as appropriate, and
2. be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing.

The paragraph 4 sets general minimum standards to apply to all relevant review procedures, decisions or remedies. Although the Aarhus Convention is independent from other international human rights instruments there is a clear link between the Aarhus Convention approach to justice and the aims of Article 6 (1) of European Convention of Human Rights concerning the right to a fair trial or right to an effective remedy – Article 13.

As regards EU law position the Commentary of Charter of fundamental rights of the European Union from 2014 gives some important remarks to Article 47 – Right to an Effective Remedy and to a Fair Trial [[51]](#footnote-51) and to Article 37 – Environmental Protection.

The right to judicial review empowers individuals to challenge a measure affecting any right conferred to them by the law of the Union taken as a whole and not only in respect of the fundamental rights guaranteed in the Charter. In that respect the scope of Article 47 is wider than that of Article 6 (1) of the European Convention of Human Rights which is restricted to the determination of the civil rights and obligations of an applicant. The general rule is that rights and freedoms guaranteed by the law of the Union are to be exercised in accordance with national procedural rules.

5. The fourth problem – the surprising court management of cases:

I would like to return into the recent past. It was mentioned that the Wolf association was informed about a huge number of pending administrative proceedings. The Wolf association required being a party in any pending administrative proceedings with the same negative result. Like this our claimant lodged many administrative claims to the Bratislava Regional Court with the same effect – all claims were rejected.

Originally the Slovak Supreme Court decided in favour of the Ministry in the first group of appeals (half of the approximately one hundred of the above mentioned cases) because

* the arguments presented by the defendant and claimant were based only upon internal Slovak law and
* they underlined the problem of Slovak transposition of the international treaty into the Slovak legal order and
* the Aarhus Convention obviously should have no direct impact upon Slovak legal order as a presidential treaty.

In addition the parties did not mention EU law arguments and therefore they did not require the interruption of the proceedings and did not refer to the preliminary question (or questions) to the Court of Justice.

The Supreme Court made a deflection from the settled recent case-law (similar to the so called judicial jump) and the final deliberation changed under the strong influence of EU law trainings. Like this the first group of negative appellate judgments we as contested by the Wolf association and the Slovak Constitutional Court decided after having waited for 2 years that the Supreme Court is obliged to refund the attorney costs and fees because it should have made the right decision sooner.

As for the important question concerning only a partial protection of the environment it is necessary to stress that the Wolf Association is a NGO, based according to the Slovak law, and the main goal of that association is to protect the environment. However not in the general meaning of this word but only in the sphere of forest protection. This goal is also demonstrated through its name –the Forest Protection Association – Wolf.

6. The judgment of the Supreme Court in the case of Slovak Brown Bear:

The Supreme Court subsequently reflected the judgment of the Court of Justice and in the rest of the pending cases, concerning the challenged decisions on exclusion of the Wolf association from the relevant administrative proceedings, and it was annulled and remitted to the Ministry for new proceedings and deliberation. Obviously the judgments of the Supreme Court contravene previous “settled” case law that accepted many decisions of administrative authorities denying standing of environmental NGOs in administrative proceedings.

The Supreme Court first recognized these derogations to kill the brown bears (which are a protected species) which affect the fundamental rights of the individuals associated in the Wolf association, in particular the right to judicial protection and the right to a favourable environment. The only fact that an individual has become a member of an association does not cause that the individual is deprived of their rights to life, health or sustainable development of environment. According to the opinion of the Supreme Court, the fundamental criterion for arguing a participation in administrative proceedings is the impact of the procedure of the state authority or its decision on basic rights, which are ensured by the Slovak Constitution or an international treaty to an individual, regardless of the procedural status of this person in the proceedings. In addition according to the Supreme Court, it is clear that the individuals in the Wolf association are linked by the leading idea to be associated for the purpose of exercising their right to a favourable environment. It is also obvious from the Aarhus Convention preamble that each of the parties to the Convention has the obligation to protect and enhance the environment and also to ensure access to justice in environmental matters to the citizens.

Summarizing the above mentioned results the Supreme Court declared an opinion that a constitutionally confirmed guarantee of the right to favourable environment [[52]](#footnote-52) allows to resign from the doctrine of protection substantial rights because their impacts interfere with the classical concept of the active legitimacy of the individuals in the proceeding in front of the administrative bodies by the recognition of the status of a party to the proceeding also to the public.

According to the above mentioned principle of equivalence and the principle of efficiency the Supreme Court drew, that national provisions which ensure the access to the court under the provisions of Article 9 (3) of the Aarhus Convention, shall not be less favourable than other procedural conditions regarding the parallel action brought by Slovak legal order. Furthermore those national provisions shall not really enable or unduly interfere the realization of the rights which are recognised by the EU law.

7. The last words of the Slovak Courts towards Slovak Brown Bear case:

The Minister of Environment brought a proposal for the unification procedure of different judgments concerning the application of the Slovak Brown Bear cases in November 2013. The judges of the 1st Chamber proposed to focus the arguments on the Aarhus Convention during a meeting of the Administrative Department. The majority of justices denied that proposal with explanation that the Aarhus Convention does not influence the Slovak procedural law. The objections, that a requirement for a judicial review in situation of time limited administrative decisions [[53]](#footnote-53) is “*a priory*” and objectively unsuccessful after an exhaustion of that short time limit, were also denied.

Subsequently the Administrative Department of the Supreme Court adopted the interpretative position [[54]](#footnote-54) from June 2014 concerning the consequences of invalidity of judicial proceedings of the consent to kill a protected species. It stated that the invalidity of granting derogations to the protection of certain spices (e.g. killing a brown bear) caused by the expiration of time for which those granting derogations were limited which resulted in removing the procedural obstacle as the derogations expired and therefore they did not exist anymore. Hence an administrative authority can or will have to cease the derogation proceedings regardless of the procedural stage.

In respect to the further development of the case law, it is important to stress that the Slovak Constitutional Court [[55]](#footnote-55) through its judgment from December 2014 declared that administrative justice is not based on *actio popularis* claimant, which should allow anyone to bring an action contesting the administrative decision. According to that judgment an intervention in claimant rights has to be argued for and manifestly founded through an action and has to be potentially possible. Subsequently the Constitutional Court accepted the above mentioned interpretative position from June 2014 as a core of its reasoning of judgment. This is an obvious shift from the above mentioned CJ´s judgment C-240/09.

**IV. Mr. Krizan case – Article 9 (2, 4)**

1. The town of Pezinok for the 2nd time – Mr. Krizan and others residents [[56]](#footnote-56):

**The Facts**

For a long time most of the discussion concerning the Article 9 of the Aarhus Convention focussed on access to justice under its paragraph 2. Mr. Krizan case belongs to that group. This case is a strange follow- up of Mr. K. case because the above mentioned Bricks Company initiated the permit procedure for the establishment of a landfill in a new hole. The procedure started in 1997, thus prior to the accession of Slovakia to the EU. The competent authorities in Slovakia took decision about the location of the landfill at the New Hole in 1997; an environmental impact assessment procedure was made by the Ministry in 1999. Meanwhile the municipality council changed the urban plans of the town many times and these changes were reviewed by the Slovak Constitutional Court.

In 2007, the company Ekologická skládka, a.s. (hereinafter “**E-Company**”) as a successor of the Bricks Company [[57]](#footnote-57) asked for an integrated permit to build up and carry on the landfill. On October 2007 the application was published and the Environment Inspection set out a period of 30 days for the submission of observations particularly by the public, however without information on the exact location of the landfill next to the town of Pezinok (that is to say the New Hole site), [[58]](#footnote-58) since the applicant argued that this information was confidential. By order of April 2009 the Supreme Court suspended the operation of the integrated permit. Subsequently the decision of 2008 was quashed by the Supreme Court, because the provisions on the participation of the public had not been respected. [[59]](#footnote-59)

However, the Slovak Constitutional Court held [[60]](#footnote-60) that this Supreme Court decision infringed the applicant’s constitutional right to property and the Supreme Court had not taken account of all the applicable principles governing both administrative and judicial procedure. The Slovak Constitutional Court also underlined that the Supreme Court is bound in the next proceedings and deliberations by the judgment of the Slovak Constitutional Court.

**The Legal context**:

The Supreme Court then asked the Court of Justice for a preliminary ruling containing five different questions. The content of the first question [[61]](#footnote-61) is a logical consequence of the relationship between the Supreme Court and the Slovak Constitutional Court because the Supreme Court noted that it still has doubts about the compatibility of the contested decisions with the Union Law. The next questions result from [[62]](#footnote-62) that framework of problems:

* derogation of standing for the residents of the town,
* extension of the validity concerning an old EIA procedure,
* who is a real applicant for the authorisation to operate ?
* protection of a trade secret,
* conflict between ownership and environmental protection.

As regards the first question the Court of Justice held that the Supreme Court was entitled - and even obliged - to put preliminary questions to the EU Court of Justice on the interpretation of EU law, even though the Constitutional Court had instructed it to interpret the law in a specific way. The obligation to ask for a preliminary decision derived from the fact that there was no judicial remedy against a decision of the Supreme Court. The procedure before the Constitutional Court did not constitute a judicial remedy in the sense of Article 267 TFEU.

2. The commercial confidentiality and an urban planning decision – Article 4 (4): [[63]](#footnote-63)

As regards the second question it is founded on the incompleteness of the application of the E –Company. The Environmental Inspection refused to disclose the urban planning decision with that explanation that it may be justified by reliance on commercial confidentiality which protects the Information contained in that decision. Article 6 (6) of the Aarhus Convention provides for the participation of the public concerned in the procedure for the issuing of permits for new installations including in particular landfill sites receiving more than 10 ton of waste per day or with a total capacity exceeding 25 000 ton of waste. That article requires that the competent public authorities give all information relevant to the decision without prejudice to the right of the Parties to refuse to disclose certain information.

In substance, the Court of Justice ruled that under EU Law the public was entitled to all relevant information including the urban planning decision on the location of the installation at issue in the main proceedings because it constitutes one of the measures on the basis of which the final decision whether or not to authorise that installation will be taken. The Court of Justice declared that the referring court should determine whether, **first**, in the context of the administrative procedure at second instance, all options and solutions remain possible for the purposes of Article 15(1) of Directive 96/61, interpreted in the light of Article 6(4) of the Aarhus Convention, and, **second**, regularisation at that stage of the procedure by making available to the public concerned relevant documents still allows that public effectively to influence the outcome of the decision-making process.

Because of this, the Court of Justice stated that the applicant was not entitled to invoke commercial confidentiality of that information and the public concerned have access to an urban planning decision from the beginning of the authorisation procedure.

Afterwards the Supreme Court found out from the building application of E-Company that the applicant had lodged building plans with an exact drawing of the landfill site in a terrain without any requirement for its confidentiality.

3. Ratione temporis question

Apparently the aim of Article 6 of the Aarhus Convention and subsequent EU law is primarily designed to cover large-scale projects which will most often require a long time to complete. It would therefore not be appropriate for the relevant procedures, which are already complex at national level, to be made even more cumbersome and time-consuming by the specific requirements imposed by that legal means and for situations already established to be affected by it. The E- Company lodged an application for an environmental impact assessment in respect of that project on December 1998 that to say before the accession of the Slovak Republic to the European Communities. The subsequent steps taken in the procedure, and in particular, the issue of the construction permit, are based on that environmental impact assessment completed in 1999.

It follows from the foregoing considerations of the Court of Justice that the application for a permit for the landfill project was formally lodged before the date of the expiry of the period set for transposition of Directive 85/337 and the obligations arising from that directive therefore do not apply to that project.

4. The Right to bring an action – Article 6 and 9:

The question is whether Articles 6 read in conjunction Article 9 of the Aarhus Convention must be interpreted as meaning that members of the public concerned must be able to ask the court to order interim measures of a nature temporarily to suspend the application of a permit. It is important to underline that by virtue of their procedural autonomy, the Member States have discretion in implementing Article 9 of the Aarhus Convention subject to compliance with the principles of equivalence and effectiveness. It is for them, in particular, to determine

* which court of law is to have jurisdiction in respect of the review procedure referred to in those provisions and
* what procedural rules are applicable.

However, the access to justice including an exercise of the right to bring an action provided for by Article 9 (3, 4) of the Aarhus Convention would not make possible effective prevention of that pollution if it were impossible to prevent an installation which may have benefited from a permit awarded in infringement of that directive from continuing to function pending a definitive decision on the lawfulness of that permit. Subsequently the Court of Justice added that the guarantee of effectiveness of the right to bring an action provided for in Article 11 of the EIA Directive requires that the members of the public concerned have the right to ask the court to order interim measures e.g. to prevent pollution, including, where necessary, a temporary suspension of a disputed permit pending the final decision.

Neither could owner have invoked his right to property, since that right was not an absolute right, but “must be viewed in relation to its social function. Consequently, its exercise may be restricted”. Directive 96/61 itself restricts the right to property and strikes a balance between the interests of the applicant of a permit and the general interest of environmental protection. Therefore, the right of property does not prevail over the right of the public to effectively participate in the permit procedure and have access to all relevant information.

**V. White Stream case**

1. The Wolf association for the 2nd time – the Article 9 (4) right to fair justice and White Stream: [[64]](#footnote-64)

The case between the Wolf association and a local administrative body (hereinafter “**White Stream case**”) is the latest case from the Supreme Court and the referring for the preliminary ruling was lodged on 27th May 2015. This case is primarily based on a conflict between slow judicial review and swift administrative proceedings.

**The facts**:

The White Stream case started as a very neutral and uninteresting case, as well as all of the above mentioned cases. A state authority also informed the Wolf association of an application to enlarge the game reserve (so called a game park too) by way of building-up a fence in the special protected area (NATURA 2000). [[65]](#footnote-65) The Wolf association applied for a standing in the pending administrative proceedings but the 1st level administrative authority rejected its procedural application.[[66]](#footnote-66)

Hence the Wolf association lodged an administrative appeal (position 5) arguing that provisions of the Aarhus Convention support obviously its standing. The 2nd level administrative authority also rejected the NGO´s requirement for standing. Meanwhile the main administrative proceedings was interrupted because of a waiting for procedural administrative result. When final negative decision had been made (position 7) the main administrative proceedings continued regardless of the initiation of or possibility to start the judicial review of that decision.

Meanwhile the some chambers of the Supreme Court adopted the settled case-law during 2014 on the grounds that the finalisation of the main administrative proceedings with granting derogations is a real important procedural result and the pending judicial review cannot continue for reason of its non-effectiveness. The Wolf association on the other hand argues that it has supported an idea to continue the judicial review regardless of the some consequences of the final administrative decision.

The Wolf association brought an action against 2nd level decision (position 8a) in time and the judicial procedure lasted more than 2 years. A regional court twice declared that Wolf association is a party to proceedings and it stressed the CJ´s case-law. However the Supreme Court repeatedly annulled the judgments of regional court because the challenged legal question concerning an object (the fence has been built yet) has been solved yet. Hence the Supreme Court obliged the regional court to suspend pending proceedings for reason of its non-effectiveness.

ANNEX II.

Classical Timing Scheme of proceedings and its results concerning the problem of standing

10. 11.

8a.

5. 7.

1. 2. 3. 4. 9. 12. Fair trial???

6. 8b. 9a.

1 or 2 weeks

1 or 2 years

1. Initiation of the main administrative proceedings by bringing an application concerning environmental matters; the starting point of proceedings which usually involves only one party – it means an applicant (especially enterprise or entrepreneur) who brought an application for the grant of derogation to the system of protection for species, plants, countryside etc.; an authorisation of or consent with activities directly or indirectly affecting the environment in negative manner;

2. Information sent to a NGO on initiation of administrative proceedings;

3. Application of NGO filled to the administrative authority requiring being a party to the administrative proceedings with support of Article 9;

4. 1st level authority decision rejects the NGO´s application;

5. Administrative appeal brought by NGO against that rejection; initiation of separated appeal procedure;

6. Meanwhile the main administrative proceedings is interrupted;

7. 2nd level authority decision rejects the NGO´s administrative appeal as an ill-founded;

8a. Bringing a claim by the NGO against administrative authority decision (contested decision) before the regional court;

8b. Usually a very quick finalisation of the main “one party” administrative procedure by granting consent, authorisation etc. without using any appeal or other remedies; approximately 1 or 2 weeks period;

9. Final 1st level authority decision granting consent, derogation, authorisation etc. for required activity

9a. Swift realisation of the object of proceedings e.g. building the installation, killing a protected species or mining activities in countryside with high level of protection;

10. Long lasting judicial review of the contested decision sometimes before a regional court, the Supreme Court, the Constitutional court or the Court of Justice;

11. Usually a surprising judgment (approximately 2 or 3 years after number 8b) by which the court stops judicial review because of the procedural aim (object) of the main administrative proceedings had already been reached a long time ago;

12. If we compare the position of a private applicant to the proceedings before an administrative authority and the position (it means the possibility to apply the right to fair trial) the question of fairness arises

1. For the purposes of this contribution it stands for the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998. [↑](#footnote-ref-1)
2. For the purposes of this article it stands for the Ministry of the Environment of the Slovak Republic. [↑](#footnote-ref-2)
3. The brown bear (in Latin *Ursus arctos)* is the biggest predator living in the wild Slovak territory and is the most widely distributed ursid. It presently occupies approximately 5,000,000 km² of the north-western portion of North America, 800.000 km² of Europe (excluding Russia), and much of northern Asia. The largest numbers exist in Russia, U.S.A. (especially Alaska), and Canada. Many populations in Europe are small and isolated. Brown bears need good living conditions with range territory for their migration. The total world population of brown bears is estimated to exceed 200.000 pieces. Russia has the largest number of brown bears, believed to exceed 100,000, while estimates in the Europe (excluding Russia) are around 14,000 bears. The total number of the Slovak bears is nowadays approximately up to less than 700 pieces but it has been still increasing. [↑](#footnote-ref-3)
4. Firstly it is the highest court of appeal then it is ordinary court of appeal or trial court in extraordinary judicial situations (especially political issues like the Presidential election). [↑](#footnote-ref-4)
5. They are Bratislava, Trnava, Nitra, Trenčín, Banská Bystrica, Žilina, Prešov and Košice. [↑](#footnote-ref-5)
6. The Special Criminal Court was created in 2009 as a successor to the Special Court which was annulated by the Slovak Constitutional Court as an illegal element of judicial system. The Special Criminal Court rules as a court of the first instance positioned at the same level as regional courts on criminal matters e.g. first degree murder, duress and undue influence in relation to public procurement and public auctions, forgery and counterfeiting of currency and securities, misfeasance in public office or receiving a bribe. [↑](#footnote-ref-6)
7. It stands the first instance courts of general jurisdiction where evidence and testimony are first introduced, received, and considered. Findings of fact and law are made in the district court, and the findings of law may be appealed to a regional (higher) court that has the power of review. A district court may hear any civil or criminal case unless otherwise stipulated by rules governing court procedure; e.g. administrative justice is exclusively within the jurisdiction of a higher Slovak court. [↑](#footnote-ref-7)
8. Regional courts are usually competent to examine whether the district court made the correct, fair and due legal determinations and also to evaluate evidence and determine what the facts of the case were. A regional court's judgment provides the final directive of the courts of appeal as to the matter appealed, setting out with specificity the court's determination that the action appealed should be affirmed, reversed, remanded or modified. [↑](#footnote-ref-8)
9. It stands the Administrative Division of Supreme Court as an appeal level that contains approximately 30 justices. [↑](#footnote-ref-9)
10. Under Article 250i of the Slovak Code of Civil Procedure when examining the lawfulness of the decision, those facts are decisive for the court that existed at the time when the appealed against decision was issued. [↑](#footnote-ref-10)
11. Lapsed time limit for the filing of an action, action filed by an unauthorised person, impossibility of judicial review, filing of an action by a person who is not legally represented by a lawyer, the claimant failed to remedy in time the defects of the action ordered by the court, failure to pay the court fee of 70 € and/or the action was filed by an incompetent court. [↑](#footnote-ref-11)
12. For the purposes of this contribution the expression „interim relief“ is defined as a grant of something to give provisional help, or an order by the court before a full trial to preserve the current situation until the trial. Standard example of an interim relief is a suspension of order to pay a fine or other sanction until the final judgment. [↑](#footnote-ref-12)
13. It stands for the ordinary people living in various states of the world with different legal systems that create different approaches to international law application. [↑](#footnote-ref-13)
14. According to the 5th preambular paragraph of the Slovak Constitution “*In the interest of continuous peaceful cooperation with other democratic countries [was adopted this Constitution],* ”. [↑](#footnote-ref-14)
15. Article 7 (5) of the Slovak Constitution. [↑](#footnote-ref-15)
16. Article 102 (a) of the Slovak Constitution. [↑](#footnote-ref-16)
17. Article 86 letter b) of the Slovak Constitution stipulates that the powers of the National Council of the Slovak Republic shall be, particularly before ratification, to approve international treaties on human rights and fundamental freedoms, international political treaties, international treaties of military nature, international treaties from which arises the membership of the Slovak Republic in international organizations, international economic treaties of general nature, international treaties the exercising of which requires the adoption of a law, and international treaties which directly confer rights or impose duties on natural persons or legal persons, and at the same time decide about whether they are international treaties according to Article 7 paragraph 5. [↑](#footnote-ref-17)
18. According to Article 31 (1) of the Vienna Convention a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose. [↑](#footnote-ref-18)
19. International Judicial Conference, May 20-22, 2015, Antalya, Turkey. [↑](#footnote-ref-19)
20. Honourable Justice Abdul Karim Pharaon from the United Arab Emirates stressed the idea, that the international developments in information technology and communication revolution and other technical developments has created a steady increase in the size of interest in each of the international and domestic legal orders i.e. issues relating to human rights, fundamental freedoms, environmental legislations, development issues, fight against terrorism and illegal violence etc. This element makes the international law involved in various matters that were for long decades described as included in the domestic legal orders. [↑](#footnote-ref-20)
21. The principle of locus standi is a very old principle that forms the basis of any action in a court of law. Locus standi is a Latin phrase meaning “a place to stand”. It refers to whether or not someone has the right to be heard in court. It means the right to bring an action, to be heard in court, or to address the Court on a matter before it. Locus standi is the ability of a party to demonstrate to the court a sufficient connection to and harm from the law or action challenged to support that party’s participation in the case. [↑](#footnote-ref-21)
22. According to the Article 250 paragraph 2 of the Slovak Code of Court Procedure “The claimant is a natural person or a legal person that claims about oneself that to this person as a party to the administrative proceedings its rights were curtailed by the decision and procedure of the administrative body. The claimant can be also a natural person or a legal person who was not treated in the administrative proceedings as a party to the proceedings, although it should have been considered a party to the proceedings”. Also pursuant to the Article 42 paragraph 2 of the German Code of Administrative Court Procedure “unless otherwise provided by law, (an) action shall only be admissible if the claimant shall argue that his/her rights have been violated (...)”. [↑](#footnote-ref-22)
23. It means by the words of the Aarhus Convention „members of public“. [↑](#footnote-ref-23)
24. It is an action that is brought by a member of the public in the interest of public order. [↑](#footnote-ref-24)
25. On 26 June 1997 the town of Pezinok adopted General Regulation No 2/1997 on urban planning, which provided, *inter alia*, for the location of a landfill site in a mining hole called a new hole (Nová jama). [↑](#footnote-ref-25)
26. Judgment of the Supreme Court No. 7 Sž 103/03 from 19 February 2004. [↑](#footnote-ref-26)
27. Judgment of the Slovak Constitutional Court No. III. ÚS 108/08 from 1 April 2008. [↑](#footnote-ref-27)
28. Judgment of the Slovak Constitutional Court No. I. ÚS 783/2014 from 17 December 2014. [↑](#footnote-ref-28)
29. 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; and Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment as later amended. [↑](#footnote-ref-29)
30. Mainly the Aarhus Convention or the Article 8 of the European Convention for the protection of Human Rights and Fundamental Freedoms. [↑](#footnote-ref-30)
31. Under Article 250 of that Act parties to the proceedings are the claimant, the defendant as well as joined party of previous administrative proceeding unless their rights will not be affected if the contested decision will be annulled. [↑](#footnote-ref-31)
32. It can be translated in English literally as the Forest Protection Association – the Wolf. [↑](#footnote-ref-32)
33. The claimant before the Slovak court, the Wolf association requested the Ministry to inform it about any administrative decision-making procedures which might potentially affect the protection of the en­vironment, or which concerned granting derogations to the protection of certain species or areas. The year 2008 is a very interesting one for our case because at the beginning of this year, the Wolf Association was informed by the Ministry about a huge number of pending administrative proceedings (more than 100) brought by various hunting clubs or other as­sociations for granting a permission to derogate from the protective conditions accorded to brown bears. In April 2008 the Ministry took permission and denied the Wolf ´s status as a “party”. In the course of that procedure the Wolf association notified the Ministry that it wished to participate, seeking recognition of its status as a “party” to the administrative proceedings and not to be only an “associate party” without the possibility to bring an action before the court. In particular, the Wolf association asserted that the proceedings in question directly affected its rights and legally protected in­terests arising from the Aarhus Convention. It also considered the fact that the Convention was supposed to have a direct effect. [↑](#footnote-ref-33)
34. Prior to the 30 of November 2007, the Slovak law gave the status of “parties to the proceedings” to associations (NGOs) whose objective was the protection of the environment. These associations had the opportunity to contest any decisions taken before the Slovak court. However, that law was amended with effect from the 1st of December 2007. The effect of that amendment is that environmental associ­ations are now classified as “associated parties” rather than as “parties to the pro­ceedings”. In practice, the change of the status precludes those associations from directly initiating proceedings themselves to review the legality of decisions. Instead, they must request a public attorney to act on their behalf. [↑](#footnote-ref-34)
35. Pursuant to Art. **82 (3)** of Law No 543/2002 Coll. on the protection of nature and the countryside (as amended), an association having legal personality is to be regarded as an “associated party” in administrative proceedings, within the meaning of that provision, if, for at least one year, it has had the object of protecting the nature and the countryside, and it has given a written notice of its participation in those proceedings within the period prescribed in the article. Pursuant to Art. **82 (6)** the status of an “associated party” confers on it the right to be informed of all pending administrative proceedings relating to the protection of the nature and the countryside. In accordance with Art. **15a (2)** of the Code of Administrative Procedure an “associated party” is entitled to be informed about initiation of the administrative proceedings, to have access to the files submitted by the parties to the administrative proceedings, to attend hearings and on-the-spot inspections, and to produce evidence and other information on the basis of which the decision will be taken (it means- without the right to access to justice). [↑](#footnote-ref-35)
36. In its view, the Slovak Republic is the addressee of Article 9 (2) and (3) of the Aarhus Convention; and those provisions, in themselves, do not contain any unequivocally drafted fundamental rights or freedoms which would be directly applicable, in the sense of the “self-executing” theory used in public international law, towards public authorities. [↑](#footnote-ref-36)
37. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, when they meet the criteria, if any, laid down in its national law, the 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. [↑](#footnote-ref-37)
38. As we know the main of problem of the Court of Justice was with direct applicability of the Article 9 (3). It intends the words „**if any**“solved in favour of the idea of no direct effect. [↑](#footnote-ref-38)
39. 1. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention, given that the principal objective pursued by that international treaty is to change the classical concept of *locus standi* by according the status of a party to proceedings to the public, or the public concerned, as having the direct effect of an **international treaty** (“**self-executing effect**”) in a situation where the European Union acceded to that international treaty on 17 February 2005 but to date has not adopted Community legislation in order to transpose the treaty concerned into Community law? [↑](#footnote-ref-39)
40. 2. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention, which has become a part of Community law, as having the direct applicability or **direct effect of Community law** within the meaning of the settled case-law of the Court of Justice? [↑](#footnote-ref-40)
41. 3. If the answer to the first or the second question is in the affirmative, is it then possible to interpret Article 9(3) of the Aarhus Convention, given the principal objective pursued by that international treaty, as meaning that it is necessary also to include within the concept “act of a public authority” an act consisting in the delivery of decisions, that is to say, that the right of public access to judicial hearings intrinsically also includes the right to challenge the decision of an administrative body, the unlawfulness of which lies in its effect on the environment? [↑](#footnote-ref-41)
42. The Member States (e.g. Polish Government and United Kingdom Government) raised in their observations the question of admissibility. They consider that the sense of the questions referred to relates only to Article 9 (3) and suggest that the Court of Justice should therefore declare the reference inadmissible only if it relates to the other parts of Article 9 of the Aarhus Convention. [↑](#footnote-ref-42)
43. Point 39 of the CJ´s judgment. [↑](#footnote-ref-43)
44. The main rule was declared by the case C‑431/05 *Merck Genéricos – Produtos Farmacêuticos* and it is: “*where a case is brought before the Court of Justice in accordance with the Article 267 (latter 234 TEC), the Court of Justice has jurisdiction to define the obligations which the Community has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention”.* [↑](#footnote-ref-44)
45. It is obvious that the Court of Justice (points 44 and 45) made statement that Article 9 paragraph 3 of the Aarhus Convention does not contain “any clear and precise obligation capable of directly regulating the legal position of individuals. Since only ‘members of the public who meet the criteria, **if any**, laid down by national law are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure”. This judicial opinion was slightly different from prevailing opinion of Chamber´s Slovak judges because wording “**if any**” we can interpret that it itself does not present strict precondition to adopt a national subsequent measure. [↑](#footnote-ref-45)
46. Jans, J.H.: Who is the referee? Access to justice in a Globalised Legal Order; in: Review of European Administrative Law; VOL. 4, NR. 1, 87-99, PARIS LEGAL PUBLISHERS © 2011. [↑](#footnote-ref-46)
47. Schwerdtfeger, A.: When the Courts Throw the Legislator to the Brown Bears; contribution presented at the international conference, Torino, July 2014. [↑](#footnote-ref-47)
48. This idea is partly supported by the text incorporated in 39 point of the CJ´s judgment. [↑](#footnote-ref-48)
49. Principal of equivalence means that the detailed procedural rules governing actions for safeguarding an individual’s rights under EU law must be no less favourable than those governing similar domestic actions. [↑](#footnote-ref-49)
50. Principle of effectiveness means that the detailed procedural rules governing actions for safeguarding an individual’s rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law. [↑](#footnote-ref-50)
51. 1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.

    2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. [↑](#footnote-ref-51)
52. Under the Article 44 of the Slovak Constitution everyone shall have the right to favourable environment. Everyone shall have the duty to protect and improve the environment and to promote the cultural heritage. No one shall imperil or damage the environment, natural resources and cultural heritage beyond the limits laid down by the law. The State shall care for economical exploitation of the natural resources, for the ecological balance and for effective environmental policy, and shall secure the protection of determined sorts of wild plants and wild animals. Details regarding the above said rights and duties shall be laid down by the law. [↑](#footnote-ref-52)
53. The Ministry´s decisions granting the approval for killing the brown bears were limited on the hunting (or the so called shooting) season which lasts from September to December each year. It was surprising that the Ministry did not prolong the approval for more hunting seasons due to the reasons of expected judicial proceedings. [↑](#footnote-ref-53)
54. Primarily each Department of the Supreme Court adopts interpretative positions (of informative but authoritative nature) on the basis of initiatives from individuals or lower-level courts on the harmonisation of the interpretation of laws and other generally binding legal regulations in cases held by its different chambers. Another source of harmonisation of the decision-making process are the discussions of the Plenum of the Supreme Court of the Slovak Republic on reports on the application of laws and other generally binding legal regulations, which are used as a basis for proposals for new or modification of existing regulations submitted to the Minister of Justice. One of the basic activities of the Supreme Court of the Slovak Republic is the harmonisation of the interpretation and application of laws and other generally binding legal regulations through the publication of judgments of the Supreme Court of the Slovak Republic of fundamental importance and by taking positions on the harmonisation of interpretation of laws and other generally binding legal regulations. [↑](#footnote-ref-54)
55. This legal opinion is cited from the judgment of the Slovak Constitutional Court from 17th December 2014 No. I. ÚS 783/2014-17. [↑](#footnote-ref-55)
56. Case of the Court of Justice No. C-416/10 from 15 January 2013 concerns the main proceedings between Mr. Križan and 43 other residents of Pezinok on one hand and the Slovak Environment inspection on the other. [↑](#footnote-ref-56)
57. Despite that fact it was very difficult during the judicial review to determine who is the real addressee of the building licence and of the authorisation for carrying out of waste activities and regional court had to change parties to proceedings in that position twice. [↑](#footnote-ref-57)
58. It is important to stress that the town of Pezinok as a first level building authority had no information about the Regional building authority of Bratislava decided regarding the localisation of the landfill site. [↑](#footnote-ref-58)
59. A very important fact is that Mr. Krizan and the others had invoked the incomplete nature of that application submitted by the E – Company. On 27th December the E – Company submitted the urban planning decision and indicated that it was covered by the commercial secret. Despite the fact that appellate authority allowed to publish the urban planning decision the residents did not make any submissions under the Slovak law. [↑](#footnote-ref-59)
60. 27th May 2010. [↑](#footnote-ref-60)
61. 1. Does [European Union] law (specifically Article 267 TFEU) require or enable the supreme court of a Member State, of its own motion, to refer a question to the [Court of Justice] for a preliminary ruling even at a stage of proceedings where the constitutional court has annulled a judgment of the supreme court based in particular on the application of the [European Union legal] framework on environmental protection and imposed the obligation to abide by the constitutional court’s legal opinions based on breaches of the procedural and substantive constitutional rights of a person involved in judicial proceedings, irrespective of the [European Union law] dimension of the case concerned, that is, where in those proceedings the constitutional court, as the court of last instance, has not concluded that there is a need to refer a question to the [Court of Justice] for a preliminary ruling and has provisionally excluded the application of the right to an acceptable environment and the protection thereof in the case concerned? [↑](#footnote-ref-61)
62. 2. Is it possible to fulfil the basic objective of integrated prevention as defined, in particular, in recitals 8, 9 and 23 in the preamble to and Articles 1 and 15 of Directive [96/61], and, in general, in the [European Union legal] framework on the environment, that is, pollution prevention and control involving the public in order to achieve a high level of environmental protection as a whole, by means of a procedure where, on commencement of an integrated prevention procedure, the public concerned is not guaranteed access to all relevant documents (Article 6 in conjunction with Article 15 of Directive [96/61]), especially the decision on the location of a structure (landfill site), and where, subsequently, at first instance, the missing document is submitted by the applicant on condition that it is not disclosed to other parties to the proceedings in view of the fact that it constitutes trade secrets: can it reasonably be assumed that the location decision (in particular its statement of reasons) will significantly affect the submission of suggestions, observations or the other comments?

    3. Are the objectives of [Directive 85/337] met, especially in terms of the [European Union legal] framework on the environment, specifically the condition referred to in Article 2 that, before consent is given, certain projects will be assessed in the light of their environmental impact, if the original position of the Ministerstvo životného prostredia (Ministry of the Environment) issued in 1999 and terminating a past environmental impact assessment (EIA) procedure is prolonged several years later by a simple decision without a repeat EIA procedure; in other words, can it be said that a decision under [Directive 85/337], once issued, is valid indefinitely?

    4. Does the requirement arising generally under Directive [96/61] (in particular the preamble and Articles 1 and 15a) for Member States to engage in the prevention and control of pollution by providing the public with fair, equitable and timely administrative or judicial proceedings in conjunction with Article 10a of Directive [85/337] and Articles 6 and 9(2) and (4) of the Aarhus Convention apply to the possibility for the public to seek the imposition of an administrative or judicial measure which is preliminary in nature in accordance with national law (for example, an order for the judicial suspension of enforcement of an integrated permit) and allows for the temporary suspension, until a final decision in the case, of the construction of an installation for which a permit has been requested?

    5. Is it possible, by means of a judicial decision meeting the requirements of Directive [96/61] or Directive [85/337] or Article 9(2) and (4) of the Aarhus Convention, in the application of the public right contained therein to fair judicial protection within the meaning of Article 191(1) and (2) [TFEU], concerning European Union policy on the environment, to interfere unlawfully with an operator’s right of property in an installation as guaranteed, for example, in Article 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, for example by revoking an applicant’s valid integrated permit for a new installation in judicial proceedings? [↑](#footnote-ref-62)
63. A request for environmental information may be refused if the disclosure would adversely affect: (a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law. [↑](#footnote-ref-63)
64. It stands the case No. C-243/15 in progress between Lesoochranárske zoskupenie VLK v. Obvodný úrad Trenčín with the intervener Biely potok, a.s. [↑](#footnote-ref-64)
65. NATURA 2000 is an EU wide network of nature protection areas established under the 1992 Habitat s Directive. The aim of the network is to assure the long-term survival of Europe's most valuable and threatened species and habitats. It is comprised of Special Areas of Conservation (SAC) designated by Member States under the Habitats Directive, and also incorporates Special Protection Areas (SPAs) which they designate under the 1979 Bird Directive. [↑](#footnote-ref-65)
66. It is important to differentiate between procedural and substantive application. [↑](#footnote-ref-66)