

SUNICOP



Working paper

SUNICOP 9/2012

Presented in Osijek, Croatia

**Contemporary legal challenges:
EU – Hungary – Croatia**

16-18 February 2012

This working paper is the draft version of the paper presented in the Conference.

Suggested reference of the working paper:

Attila Pánovics – Rajko Odoša: Environmental rights in the context of three legal systems – Stepping into the EU legislature's shoes? Working paper, SUNICOP 9/2012, <http://sunicop.eunicop.eu/publications.html>

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Environmental rights in the context of three legal systems – Stepping into the EU legislature’s shoes?

I. Introduction

In recent decades it has become a matter of common sense that protection of the environment and of natural resources represents a fundamental societal need. Environmental protection is a matter of public or common concern, environmental degradation and deterioration, and measures to counter it, has an impact not only on human health and well-being, but also on the general quality of life. Consequently, environmental policies and legal rules directly affect every individual, group and organisation.

Public participation is an important theme in contemporary environmental policy and law at all levels. Private persons (individuals, NGOs, etc.) acting in the public interest, such as in relation to the environment, contribute to increasing public awareness and improving participation by stakeholders. Agenda 21 stated that “one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making”.¹

Developed under the auspices of the United Nations Economic Commission for Europe (UNECE),² the Aarhus Convention is widely viewed as the foremost legally-binding instrument protecting the public’s environmental rights. It was adopted on 25th June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the ‘Environment for Europe’ process of UNECE governments.

The Convention is not only a multilateral environmental agreement (MEA), it is also a Convention about government accountability, transparency and responsiveness.³ The

¹ J. Cameron and R. MacKenzie, ‘Access to Environmental Justice and Procedural Rights in International Institutions’, in A. E. Boyle and M. R. Anderson, eds., *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1996) p. 151.

² UNECE was one of the first two regional economic commissions to be established by the Economic and Social Council (ECOSOC) of the United Nations in 1947. The main aims of the international organisation are to promote pan-European economic integration, bringing together 56 countries in the EU, non-EU Western and Eastern Europe, South-East Europe (SEE), Commonwealth of Independent States (CIS) and North America (USA and Canada). For more than 40 years, UNECE was the only instrument of economic dialogue and cooperation between East and West. UNECE also sets out norms, standards and conventions to facilitate international cooperation within and outside the region. Its concern with problems of the environment dates back at least to 1971, when the group of Senior Advisors to the UNECE governments on environmental issues was created which led into establishment the Committee on Environmental Policy (CEP).

³ <<http://www.unece.org/env/pp/welcome.html>>, (last accessed on 05.01.2012).

provisions of the Convention, although drafted in broad terms, are intended to ensure effective environmental protection. The experiences of the Aarhus Convention process provide guidance for other global, regional and national initiatives around the world. Though it focuses on public participation at the (sub)national level, it has also served as a catalyst for the democratisation of supranational and international decision-making processes.⁴

The Convention came into force on 30 October 2011; this was a major development for procedural rights relating to the environment. The main advantage of focusing on procedural rights is that it enables individuals and NGOs to enforce domestic environmental law and may help them shape domestic environmental policy.⁵

The Convention guarantees environmental rights by implementing Principle 10 of the Rio Declaration, establishing a number of closely connected procedural rights of individuals and their associations with regard to the environment. It is therefore that the Convention consists of three main ideas or ‘pillars’: access to environmental information, participation in environmental decision-making processes, access to justice in environmental matters. The access to justice pillar of the Convention is closely tied to the other two pillars.

Environmental NGOs having the status of ‘the public concerned’⁶ have both the right to be informed and to participate in the administrative stage and the right of access to the courts to challenge the decisions of the administrative authorities. Article 9(2) of the Aarhus Convention states that ‘Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (...) have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the *substantive and procedural legality* of any decision, act or omission subject to the provisions of (...) this Convention’.

Under Article 9(3) of the Convention environmental NGOs have the right not only to challenge acts and omissions by public authorities which contravene environmental law, but also acts or omissions of private persons that do so. This provision appears to be the most complicated element within the EU and other Parties of the Convention. Difficulties arise regarding the interpretation of the provision, and the diversity of systems where this provision is supposed to apply. According to the Implementation Guide to the Convention, Article 9(3) has been introduced to give citizens⁷ standing to go to court or another review body to enforce environmental law.⁸

⁴ M. Pallemaerts, ‘Introduction’, in M. Pallemaerts, ed., *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law, The Avosetta Series (9)* (Groningen, Europa Law Publishing, 2011) p. 5.

⁵ P. Birnie., A. Boyle and C. Redgwell, *International Law and the Environment* (Oxford University Press, 2009) p. 298.

⁶ The ‘public concerned’ is defined in Article 2(5) as ‘the public affected or likely to be affected by, or having an interest in, the environmental decision-making’. For the purposes of this definition, NGOs promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest. Such organisations therefore have an *automatic* right of access to justice.

⁷ The Convention grants environmental NGOs wider access to the courts than individuals. The distinct role for NGOs is perhaps the most significant innovation of the Convention. See M. Lee and C. Abbot, ‘The Usual Suspects? Public Participation Under the Aarhus Convention’, *The Modern Law Review* Vol. 66 (2003) p. 86.

⁸ UN ECE, *The Aarhus Convention. An Implementation Guide* (United Nations, New York and Geneva, 2000) p. 130.

Article 9(3) provides that ‘(...) each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public⁹ 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’. Such access is to be provided to members of the public ‘where they meet the criteria, if any, laid down in (...) national law.’ In other words, the issue of standing is primarily determined at national level, as is the question of whether the procedures are judicial or administrative.¹⁰ The CJEU has helped to clarify that the right of access to a review procedure does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law.¹¹

II. The Aarhus Convention and the EU

EU environmental policy is consistently rated by citizens as an area in which the European Union should be active, and widely considered to be one of the EU’s most successful policies. The European Union serves as a model for regional integration, and demonstrates at a global level that it is determined to assume its responsibility in environmental matters.

Basically the European Commission, as ‘the guardian of the Treaties’,¹² has the responsibility of ensuring that EU legislation is applied.¹³ The Commission exercises this responsibility mainly through bringing infringements proceeding against EU Member States under Article 258 of the Treaty on the Functioning of the EU (TFEU).

A very considerable part of environmental legislation in Europe is produced by the EU, and many economical financial and administrative decisions affecting the environment emanate from the EU institutions. The EU’s growth of significant competence in this policy area since the 1970s should be of help in addressing its legitimacy problem and the enforcement deficit of EU environmental rules at the same time. Often unsatisfactory enforcement can also be found in other fields of EU law but are particularly salient in EU environmental law. Problems of enforcement arise in all sectors in relation to which the EU has adopted

⁹ Incidentally, Article 9(2) refers to ‘members of the public concerned’, and Article 9(3) refers to ‘members of the public’.

¹⁰ J. Wates, ‘The Aarhus Convention: A New Instrument Promoting Environmental Democracy’, in M.-C. Cordonier Segger and Judge C. C. Weeramantry, eds., *Sustainable Justice – Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff Publishers 2005) pp. 401-402.

¹¹ Accordingly, the Court has emphasized that public participation in an environmental decision-making procedure is separate and has a different purpose from a legal review. Right of access to the courts does not derive from an earlier participation in the administrative stage. Thus, members of the public concerned must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views. See Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* [2009] ECR I-9967, paras. 38-39.

¹² EU Treaties consist of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), as they result from the amendments introduced by the Treaty of Lisbon, signed on 13 December 2007.

¹³ See Art. 17(1) TEU

environmental rules.¹⁴ Failures of effective implementation are likely to put at risk the credibility of the EU with its citizens. A Union based on the rule of law has to ensure that laws are respected and if necessary enforced.

Even where the rule of law exists, it can be inefficient.¹⁵ The need to protect the environment may be limited by several factors. Enforcement of EU environmental law, in contrast to other areas of EU law, mainly rests with public authorities of the Member States, and is dependent of their powers, resources and goodwill. It must also be recognized that infringement procedures are not particularly designed with environmental cases in mind. Lengthy and formal procedures are not always the best way to prevent environmental degradation or damages. For these reasons, EU environmental policy focuses on *participation*, helping present the EU as ‘more than a market’ and building participatory mechanisms in the NGO sector.¹⁶ Participatory mechanisms establish a reliable basis for making better decisions that benefit all stakeholders, and participatory democracy is a pre-requisite for the realisation of sustainable development.

The European Community, together with the fifteen Member States, signed the Aarhus Convention. EU Member States that are Parties to the Convention are bound to implement both the Convention itself and the EU acts intended to implement the Convention.¹⁷ The European Commission signed the Convention on behalf of the Community with a view to its ratification. As the Commission notes, the Convention is the first international instrument which applies to the Community institutions and calls it a “major political and legal development”.¹⁸ The signing of the Convention obliges the EU to align its legislation to the requirements of the Convention with a view to its conclusion by the EC.

The European Union, in accordance with the TFEU, and in particular Article 191 thereof, is competent for entering into international agreements, and for implementing the obligations resulting there from, which contribute to the pursuit of the objectives listed in the TFEU. The Convention was concluded by the European Community and its Member States under shared competence.

In accordance with case-law, mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence.¹⁹ Since the Convention creates rights and obligations in a field covered in large

¹⁴ Enforcement can be defined as all approaches of the competent authorities to encourage or compel others to comply with existing legislation (monitoring, sanctions, etc.) in order to improve the performance of environmental policy with the final goal of improving the overall quality of the environment. See Annex I of COM(96) 500 final (Implementing Community Environmental Law, Brussels, 22.10.1996)

¹⁵ *Giving Force to Environmental Laws: Court Innovations Around the World, Briefing Paper* (Pace Law School 2011) p. 21. Available at: <<http://www.pace.edu/school-of-law/sites/pace.edu.school-of-law/files/IJIEA/IJIEABriefingPaper.pdf>>, (last accessed on 05.01.2012).

¹⁶ A. Warleigh, *Democracy and the European Union – Theory, Practice and Reform* (SAGE Publications 2003) p. 93.

¹⁷ All EU Member States are Parties to the Convention, except Ireland.

¹⁸ European Commission press statement, 23 June 1998.

¹⁹ See Case 12/86 *Demirel* [1987] ECR 3719, para. 9.

measure by EU legislation, there is an EU interest in compliance by both the Union and its Member States with the commitments entered into under those instruments.

Since 1998 the EU has taken important steps to update existing legal provisions in order to meet the requirements of the Convention by means of legislation directed to the Member States, but also for its own institutions.²⁰ The Community (EU) has adopted secondary legislation with a view to implementing the Convention with respect to Community institutions and bodies (in the form of a regulation²¹), and with respect to Member States' authorities (in the form of directives). Other EU legislative acts have already been adopted in line with the requirements of the Convention.²² In 2003, as part of the "Aarhus package", the Commission has adopted a proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters.²³

The draft directive is complemented by other recent EC measures providing access to justice rights that are more specific in terms of sectoral coverage and/or context. The proposal is still pending before the EU legislature. The adoption would support the uniform enforcement of environmental law,²⁴ but the Member States still consider that access to justice at national level is their exclusive competence. The extent to which individuals and/or environmental NGOs can address national courts and claim there a breach of EU law is governed by national law.

The EC approved the Convention by Council Decision of 17 February 2005.²⁵ Article 19(5) of the Convention requires organisations, such as the European Community, to declare the extent of their competence with respect to the matters governed by the Convention. In its declaration of competence annexed to Decision 2005/370, the Commission stated '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'.

²⁰ For an overview of EC activities taking place to allow ratification of the Convention by the EC, see: <<http://ec.europa.eu/environment/aarhus>> (last accessed on 05.01.2012).

²¹ In 2006 the European Parliament and the Council have adopted Regulation 1367/2006 on the applications of the provisions of the Aarhus Convention to Community institutions and bodies (OJ 2006 L 264, 25.09.2006, p. 13); it shall apply from 28 June 2007.

²² See Directive 2000/60/EC establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1), or Directive 2001/42/EC on the assessment of the effects certain plans and programmes on the environment (OJ L 197, 21.07.2001, p. 30).

²³ COM (2003) 624; the chance for the directive to be adopted is rather limited.

²⁴ Widespread fears of public interest actions are not well-founded in that such actions will not lead to a collapse of the judicial system and carry little lack of abuse. On the other hand, the proposal had some aspects, which could be seen as the lowest common denominator with regard to public interest actions. See M. Dross. 'Access to Justice in EU Member States', 1 *Journal for European Environmental & Planning Law (JEEPL)* Vol. 2 (January 2005) p. 30.

²⁵ See Council Decision 2005/370/EC (OJ 2005 L 124, 17.05.2005, p. 1.). The up-to-date ratification is described at: <<http://www.unece.org/env/pp/ratification.htm>> (last accessed on 05.01.2012).

III. Facts of the case

The reference has been made in proceedings between a Slovak environmental NGO (*Lesoochránárske zoskupenie VLK*), and the Ministry of the Environment of the Slovak Republic (*Ministerstvo životného prostredia Slovenskej republiky*). The appeal pending before the referring court concerned the Habitats Directive, which listed the brown bear as a protected species.²⁶ The preliminary ruling procedure concerned the interpretation of Article 9(3) of the Convention, in particular, whether that article had direct effect within a Member State's legal order.

EU Member States belong to different traditions with some of them granting a broad access to justice (including *action popularis* that gives the possibility to everybody to act in favour of the environment), others have a more limited approach. The majority of Member States continue to require an 'interest' of the applicant for seeking judicial redress.

The Slovak NGO concerned had legal personality and it was established in accordance with national law. The main objective of the association is nature conservation by creating a network of private reserves, in which plants and animals have the possibility to evolve their environment towards maximum stability without any human intervention.²⁷ Prior to 30 November 2007, the second sentence of Article 83, paragraph 3, of Law No 543/2002 gave the status of 'parties to the proceedings' to environmental associations who made a written request to be allowed to participate, and who did so by a set deadline. Such associations also had the opportunity to contest before the national courts, in accordance with Article 250, paragraph 2, of the Civil Procedure Code, any decisions taken.

Law No 543/2002 was amended by Law No 554/2007, with effect from 1 December 2007. As a consequence, environmental associations have become '*interested parties*' instead of 'parties to the proceedings', being precluded from directly initiating proceedings to review the legality of decisions. The amendment changed the status of the applicant before the referring court, which requested the defendant (the Ministry of the Environment of the Slovak Republic) to inform it of any administrative decision-making procedure which might potentially affect the environment, or which concerned granting derogations to the protection of certain species or areas.

In 2008, the Ministry of the Environment informed the association of a number of pending administrative proceedings brought by, inter alia, various hunting associations. By decision of 21 April 2008, the Ministry granted an application for permission to derogate from the protective conditions accorded to the brown bear (*ursus arctos*).

The association sought recognition of its status as a party to the administrative proceedings, and asserted that the proceedings in question directly affected its rights and legally-protected interests arising from the Aarhus Convention.²⁸ The Ministry further stated that NGOs could not appeal against its decision without the status of a party to the proceedings. The association

²⁶ See Annex IV to the Habitats Directive.

²⁷ <<http://www.wolf.sk/en/who-we-are/what-have-we-done>>, (last accessed on 05.01.2012).

²⁸ The Slovak Republic's National Council agreed to accede to the Convention on 23 September 2005. The Convention entered into force in the Slovak Republic on 5 March 2006.

lodged an action against the contested decision, but the national court (the Bratislava Regional Court) dismissed the application.

Finally, the association appealed to the Slovak Supreme Court, which decided to stay the proceedings and refer the following questions to the CJEU for a preliminary ruling:

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 classic definition 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 circumstances in which 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?
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?
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 which contravene provisions of its national law relating to the environment?'

In general, it is hard to exaggerate the importance of preliminary rulings procedure, though the answers given by the Court of Justice often leave the national court in little doubt about how the case before it to be resolved. These procedures ensured that the Court was asked to resolve a host of fundamental questions to the functioning of the legal order which might not otherwise have been brought before it.²⁹

The preliminary rulings procedure is of particular importance for the enforcement of EU environmental law,³⁰ as the enforcement of environmental law mostly raises questions of interpretation.³¹ In order to provide a satisfactory answer to a national court which has referred a question to it, the Court may also deem it necessary to consider provisions of EU law to which the national court has not referred in the text of its question.³²

IV. Judgment of the Court

²⁹ A. Arnall, *The European Union and its Court of Justice, Second Edition* (Oxford University Press 2006) pp. 96-97.

³⁰ For an overview of the impact of the preliminary ruling procedures in an environmental context, see H. Somsen, 'The private enforcement of Member State compliance with EC environmental law: an unfulfilled promise?', *Yearbook of European Environmental Law* Vol. 1 (Oxford University Press 2000) pp. 311-360.

³¹ However, questions of a regulation's or directive's validity may also occur. See J. Kokott, *The experience of the Court of Justice of the European Communities in enforcing Environmental Law*, p. 291. Available at: <http://www.isprambiente.gov.it/site/_contentfiles/00010300/10340_icef2011.pdf> (last accessed on 05.01.2012)

³² See Case 35/85 *Tissier* [1986] ECR 1207, para. 9.

In its judgment the Court's major argument has been that Article 9(3) is a provision which lies in a sphere in which the EU has legislated. In the field covered by Article 9(3) of the Convention, the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it.

In its case-law on the effects of international agreements the Court has consistently held that, from the moment they enter into force, the provisions of international agreements concluded by the EU form an essential ('integral') part of the legal order of the European Union. By virtue of Article 216(2) TFEU, where international agreements are concluded by the EU, they are binding upon its institutions and, consequently, they prevail over acts of the Union.³³ The effects which the agreement produces may differ, depending on the nature of the agreement and on its provisions.

The most complex questions concerning the Court's jurisdiction to interpret provisions of an international agreement arise as regards '*mixed agreements*'.³⁴ The Court has on several occasions stressed that the protection of the environment constitutes one of the essential objectives of the EU.³⁵ The EU, in accordance with the Treaty, and in particular Article 192(1) thereof, is competent, together with its Member States, for entering into international agreements, and for implementing the obligations resulting therefrom, which contribute to the pursuit of the objectives listed in Article 191 TFEU.

It is clear from the provisions of the Treaty,³⁶ and from the practice, that EU competence in environmental matters is wide and inclusive, yet shared with the Member States. The EU's external powers in environmental matters are not confined to the arrangements referred to in Article 191(4) TFEU, but extend to all other areas of EU environmental law-making.³⁷ When concluded an agreement, the Council of the EU may elect to what extent it is exercising the EU's external competences in matters of environmental protection.³⁸

According to settled case-law, the provisions of the Aarhus Convention also form an integral part of the EU legal order,³⁹ rendering its implementation at the domestic level justiciable by the Court. The Court has confirmed that a specific issue which has not yet been the subject of EU legislation is part of EU law, where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it.⁴⁰ Before the referring court, the Slovak NGO has sought to rely only on Article 9(2) and (3) of the Aarhus Convention. The Court pointed out that Article 9(2) has been incorporated fully

³³ Case C-308/06 *Intertanko* [2008] ECR I-4057, para. 42.; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v Council and Commission* [2008] ECR I-6351, para. 307.

³⁴ P. Koutrakos, 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure'. 7 *European Foreign Affairs Review* (2002), p. 25.

³⁵ See Case 240/83 *ADBHU* [1985] ECR 531, para. 13.; Case C-302/86 *Commission v Denmark* [1988] ECR 4607, para. 8.; and Case C-213/96 *Outokumpu* [1998] ECR I-1777, para. 32.

³⁶ Articles 191-193 TFEU

³⁷ P. Eeckhout, *EU External Relations Law, Second Edition* (Oxford University Press 2011) pp. 141-144.

³⁸ Case C-459/03 *Commission v Ireland* [2006] ECR I-4635.

³⁹ See, by analogy, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, para. 36.

⁴⁰ See, by analogy, Case C-239/03 *Commission v France* [2004] ECR I-9325, paras. 29-31.

into EU law. The questions referred relate essentially only to Article 9(3) of the Convention which covers all other infringements of EU environmental law.⁴¹

Since there were no national rules that ensured access to justice under Article 9(3) of the Convention, it was necessary to claim the direct effect of this provision. It has already been acknowledged by the Court that provisions of international treaties concluded by the EU with a non-member country ‘must be regarded as being directly effective when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure’.⁴² Each Convention provision on which it is sought to rely must meet the well-established, clear and unconditional criteria if there is to be any possibility to direct effect.

Environmental agreements can contain provisions on which any interested party is entitled to rely before the courts.⁴³ 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) of the Aarhus Convention, that provision does not contain any clear and precise obligation capable of directly regulating the legal position of individuals.⁴⁴

However, the Court did not end its interpretation here, and went on to state that the aim of Article 9(3) is the effective protection of the environment. One of the most intriguing aspects of the decentralized enforcement of EU law is the extent to which Member States may impose restrictions on access to the courts without breaching the principle of *effective judicial protection*.⁴⁵ Under the principle of sincere cooperation laid down in the second subparagraph of Article 4(3) TEU, it is for the Member States’ courts to ensure judicial protection of an individual’s rights under European Union law.⁴⁶ According to settled case-law, the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁴⁷ and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.⁴⁸

Under EU law – as in the majority of domestic legal systems – individuals generally enjoy legal protection in so far as it is necessary to safeguard their guaranteed rights or freedoms.⁴⁹ The Court pointed out that Article 9(3) of the Aarhus Convention has to be interpreted in such

⁴¹ Paras. 26-27.; the Court briefly declared that there are no grounds for the Court to rule that the questions referred are partially inadmissible because they concern provisions other than those in Article 9(3) of the Convention.

⁴² See Case 12/86 *Demirel* [1987] ECR 3719, para. 14., Case C-265/03 *Simutenkov* [2005] ECR I-2579, para. 21.

⁴³ Case C-213/03 *Pêcheurs de l’étang de Berre* [2004] ECR I-7357, particularly para. 47.

⁴⁴ Para. 45.

⁴⁵ Á. Ryall, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland* (Hart Publishing 2009) p. 263.

⁴⁶ See, to that effect, Case 33/76 *Rewe*, [1976] ECR 1989, para. 5.; Case 45/76 *Comet* [1976] ECR 2043, para. 12.; Case 106/77 *Simmenthal* [1978] ECR 629, paras. 21-22.; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, para. 19.; and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para. 12.

⁴⁷ See Case 222/84 *Johnston* [1986] ECR 1651, paras. 18-19.; Case 222/86 *Heylens and Others* [1987] ECR 4097, para. 14.; Case C-424/99 *Commission v Austria* [2001] ECR I-9285, para. 45.; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para. 39.; and *Unibet* [2007] ECR I-2271, para. 37.

⁴⁸ OJ 2010 C 83, pp. 389-403. The Charter has the same legal value as the EU Treaties since the entry into force of the Treaty of Lisbon; see Article 6(1) TEU.

⁴⁹ See the Opinion delivered by AG Kokott in Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-0000, point 73.

a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

The Slovak Republic has a duty to ensure that the Habitats Directive is implemented effectively, but the Habitats Directive does not itself provide *locus standi* for a party to challenge an administrative procedure.⁵⁰ While the Habitats Directive contains only substantive regulations, the procedural protection of the substantive rights resulting from the Directive is provided through the Aarhus Convention. In general, each component of the environment should, besides the substantive legislation adopted at EU level, also encompass the procedural protections that correspond to the requirements of Article 9(3).⁵¹

Notwithstanding the opinion of the Advocate General, the Court finally invited national courts to interpret Article 9(3) broadly:

‘It is, however, for the referring court ’to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organization (...) to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law’.⁵²

The judgment means in practice that in each individual case, applicants will have to persuade national courts of the wording, the objective and the spirit of Article 9(3), in order to obtain standing.⁵³

V. Conclusion

The growing urgency for remediating environmental problems cuts across all legal systems, and is found in international, EU and national laws. Sustainability fails without effective environmental protection. The involvement of the public in environmental decision-making can enhance respect for environmental rules and reduce the enforcement deficit with regard to environmental law. Environmental legislation typically does not confer rights on private persons, and the legal procedures and remedies for enforcement of EU law in national and EU courts are consequently less accessible to them compared with other areas of EU law.⁵⁴

As mentioned above, EU environmental legislation confers more discretion on national authorities than in many other areas of EU law.⁵⁵ The shortcomings of Commission enforcement on compliance suggest an indispensable complementary role for private persons. In response to the infringements of EU environmental law cases can be brought before the

⁵⁰ Opinion of AG Sharpston in Case C-240/09, point 71.

⁵¹ Justice and Environment, *Legal Analysis of the VLK Case* (2011) p. 5. Available at: <http://www.justiceandenvironment.org/_files/file/2011%20ECJ%20SK.pdf>, (last accessed on 05.01.2012).

⁵² Para. 52.

⁵³ L. Krämer, *EU Environmental Law* (Sweet and Maxwell 2011) p. 147.

⁵⁴ P. Wennerås, *The Enforcement of EC Environmental Law* (Oxford University Press 2007) p. 3.

⁵⁵ However, most EU legislation in the field of environment comes in the form of directives which must be transposed into national laws, giving EU Member States the freedom to enact transposing legislation in the form most appropriate to their national conditions.

CJEU by individuals and/or environmental NGOs – either through preliminary reference procedures or in direct action before the EU courts.

The European Union undoubtedly legislated in the field of environmental protection, for instance by adopting the Habitats Directive. This is, however, not the field of application of Article 9(3) of the Aarhus Convention. Environmental law covers a vast range of topics; the Habitats Directive specifies *substantial* issues whereas the Convention imposes *procedural* obligations.⁵⁶ The case before the national court concerned the grant of derogations to the system of protection for species such as the brown bear. The fact that the brown bear is included on the list of species protected by the Habitats Directive is *not relevant* for the purposes of determining whether Article 9(3) of the Convention lies within a sphere falling within the scope of EU law.⁵⁷ This means that the Court made a mistake: it looked at access to justice in environmental matters as being auxiliary to the substantive standards of the Habitats Directive.⁵⁸

The EU has not adopted a directive implementing the obligations which derive from Article 9(3) of the Convention with respect to national administrative or judicial proceedings. In the absence of EU legislation in this respect, the issue remains outside the scope of EU law and fully within the legal framework of the Member States.

Directive 2003/35⁵⁹ covers Article 9(2) of the Convention, but the provisions of Article 9(3) have not yet become part of EU law. Regulation No 1367/2006, which is also intended to implement the provisions of Article 9(3) of the Convention, only concerns EU institutions and bodies. Advocate General *Sharpston* also emphasises in her Opinion that it is of crucial importance that the EU legislature has intentionally chosen not to act. Consequently, Article 9(3) does not lie within a sphere that falls within the scope of Community (EU) law. By ignoring the absence of relevant EU legislation, the *Court stepped into the legislature's shoes*.⁶⁰ Moreover, it seems that the Court applies a *dual standard* here. On the one hand, the Court obliges national courts to grant standing to NGOs in national procedures. On the other hand, environmental NGOs generally do not have legal standing in front of the EU courts themselves.⁶¹

⁵⁶ K. Hamenstädt – T. Ehnert, 'Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011', 3 *Maastricht Journal of European and Comparative Law* Vol. 18 (2011) p. 363.

⁵⁷ See in this respect Opinion of AG Sharpston in Case C-240/09, point 68.

⁵⁸ J. H. Jans, *Who is the Referee? Access to Justice in a Globalised Legal Order: A Case Analysis of ECJ Judgment C-240/09 Lesoochranárske Zoskupenie of 8 March 2011*, p. 5. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1834102>, (last accessed on 05.01.2012).

⁵⁹ 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 2003 L 156, p. 17).

⁶⁰ Opinion of AG Sharpston in Case C-240/09, points 77-79.

⁶¹ See, for instance, B. Dette, 'Access to Justice in Environmental Matters; A Fundamental Democratic Right', in M. Onida, ed., *Europe and the Environment. Legal Essays in Honour of Ludwig Krämer* (Groningen, Europa Law Publishing 2004) p. 3.; A. Pánovics, 'The Paraquat Cases – Why is Article 230 Interpreted against European Environment Protection Organisations?', 2 *JURA* Vol. 13 (2007), p. 122.

Nevertheless, the ruling of the Court in this case confirmed again that the integration of the Aarhus Convention into EU environmental law is currently one of the most interesting legal developments. Over the last few years, the CJEU has ruled on important questions concerning the interpretation of provisions of EU directives adopted to implement the Aarhus Convention. Several more cases are still pending before the EU courts, and an increasing number of requests for preliminary rulings on all three pillars of the Convention are referred to the CJEU by national courts in the Member States.⁶²

International and European law on access to justice not only matters because it may oblige the states concerned to expand existing rights to access to justice. Indeed, it also serves to *prevent* these states from restricting the rights to access to justice in environmental matters. This is highly important in the current EU context, since public participation, access to justice and other procedural elements may be perceived as obstructive hurdles to economic growth and corporate interests.⁶³

Indisputably, EU Member States as Parties to the Convention retain certain discretion in designing the requirements of access to justice, but this does not amount to an unlimited leeway. Although the Council of the EU did not act on the proposal by the Commission for a specific directive, EU law can clearly limit the discretion of the Member States in ensuring access to justice in environmental matters.

Courts have a significant role to play to ensure the observance of environmental laws. Hopefully, the preliminary ruling of the Court in Case C-240/09 will have far-reaching implications for the standing criteria of the public concerned in the EU Member States, enabling national courts to become more effective in their own environmental adjudications.⁶⁴

⁶² M. Pallemarts, loc. cit. n. 4, at p. 10.

⁶³ J. Ebbesson, 'Access to Justice at the National Level. Impact of the Aarhus Convention and European Union Law', in M. Pallemarts, ed., *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law, The Avosetta Series (9)* (Groningen, Europa Law Publishing 2011) pp. 249-250.

⁶⁴ Based on the Court's judgment, the Supreme Court of the Slovak Republic cancelled the decision of the Ministry of Environment (see decision No. 3Sžp/30/2009 of the third senate on 2 June 2011, and decision No. 5Sžp/41/2009 of the fifth senate on 12 April 2011).