

Right of Public Concerned to a Favourable Environment in the Slovak Republic¹

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Abstract: *The paper analyses changes and development in the field of legal status of the public within the environmental impact assessment. The Act No. 314/2014 Coll. amending and supplementing the Act No. 24/2006 Coll. on Environmental Impact Assessment and on amendments to certain laws, as amended, and amending and supplementing certain laws with the effect from January 1st, 2015, has introduced the definition of the public considered. The paper also reacts on changes in the sphere of case law and also in the field of legislation.*

Key Words: *Public; Right to Favourable Environment; Right to Judicial Protection; Proceedings; Environmental Impact Assessment; Constitution; the Slovak Republic.*

Introduction

The framers of the Constitution of the Slovak Republic had incorporated the right to a favourable environment to the Second Section of the Constitution of the Slovak Republic. According to the Article 44 (1) of the Constitution of the Slovak Republic, “Everyone has the right to a favourable environment.” This right is due to the scheme of the Constitution of the Slovak Republic included among the fundamental rights and freedoms. The Slovak case law has repeatedly stated that the right to a favourable environment is a fundamental right which is guaranteed by the Slovak Constitution to the individual. Therefore is that right according to the case law carried out by several pieces of legislation. Notable among these holds the Act No. 17/1992 Coll. on Environment (hereinafter referred to as the “Act No. 17/1992 Coll.”). This Act introduced the structural definition of environment in the Article 2. According to the mentioned provision, “The environment is everything that creates natural conditions for the

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existence of organisms, including humans. At the same time, it is a precondition for their further development. Its components are mainly the air, water, rocks, soil, organisms." The case law of the Supreme Court of the Slovak Republic has for the time been mainly characterized the right to a favourable environment in relation to private interests in the management of various human benefits.² The case law has therefore expressed the opinion to the general preventive obligation established by the Article 17 (1) of the Act No. 17/1992 Coll. According to this provision, *"Everyone is obliged, in particular with the measures at source, to forego the pollution or environmental damage and to minimize the adverse effects of his/her activities on environment."* In this provision the case law sees the reflection of the obligations under the Articles 44 (2), (3), and 20 (3) of the Constitution of the Slovak Republic expressed in the form of general prevention.

According to the Article 44 (2) of the Constitution of the Slovak Republic, *"Everyone is obliged to protect and to enhance the environment and cultural heritage."* In accordance with the Article 44 (3) of the Constitution of the Slovak Republic, *"No one shall threaten or damage the environment, natural resources, and cultural monuments above the limits laid down by the law."* In accordance with the Article 20 (3) of the Constitution of the Slovak Republic, *"The ownership is binding. It cannot be abused to the detriment of rights of others or in conflict with the general interests protected by law. The exercise of ownership must not harm the human health, nature, cultural sites, or the environment beyond the limits established by law."* The case law, therefore, interprets these provisions in a way that the public interest in protecting the environment exceeds the private interest based on the benefits achieved in handling the subject of property rights. At the same time, the consequences of these provisions are reflected in the fact that they allow the realization of universal remedies of environmental damage. The internal attitude of the individual in relation to those obligations has according to the case law no legal relevance. The legislature has not established the conditions that would justify the behaviour of an individual towards the environment and that would justify the actual negative consequences of individual behaviour to the environment. In this way, the Slovak legislation has created strict liability of an individual for the favourable status of environment, without

² See *Judgement of the Supreme Court of the Slovak Republic Ref. No. 5Sžp/106/2009* [2010-06-22].

admission of liberation reasons.³ Therefore, the Slovak case law explicitly declares that the individual is responsible for the favourable conditions of environment. However, in this connection it does not refer to an individually, constitutionally guaranteed right to a favourable environment, but it refers to the public interest in protecting the environment. The case law deduces the mentioned responsibility from the contents of the Article 44 of the Constitution of the Slovak Republic, in connection with the Article 17 (1) of the Act No. 17/1992 Coll. Therefore, the conclusion on opinion whether the Slovak case law considers the right to a favourable environment as an individually guaranteed constitutional right or as a constitutionally protected value that is able to “green” other constitutionally guaranteed rights is not clear. In addition to the fact that the Slovak case law declares increased attention to the Slovak legal order in relation to environment, the consideration of environmental protection is *anthropocentric*. The legal system continually considers the environment to be a value that itself should serve and provide the benefits for human existence. The legislation specifies the degree to which the society may burden the environment and pollute it. This fact means that there is a certain level of ecological damage that is permissible.⁴

The case law holds opinion that the public interest in protecting the environment – as a fundamental prerequisite for a human being – is extraordinary. Therefore, the legal system of the Slovak Republic addresses more attention to protection of this public interest. In case of a conflict of this public interest with the exercise of certain individual rights, the legislation allows the public or judicial authority to restrict the exercise of these rights. This fact is particularly evident in the case of conflict of the public interest on environmental protection and some private rights, which, for example, include the right to property. The contents of these

³ See *Judgement of the Supreme Court of the Slovak Republic Ref. No. 3 Sžp 1/2008* [2008-12-04].

⁴ For example, according to the Article 11 of the *Act No. 17/1992 Coll. on Environment, as amended*, “The area must not be burdened by human activity over the carrying capacity.” According to the Article 12 of the *Act No. 17/1992 Coll. on Environment, as amended*, “(1) The special legislation shall establish the permissible values of the pollution; these values are determined in accordance with the achieved state of knowledge so the public health shall not be threatened and also so that the other organisms and the components of the environment would not be endangered. [...] (2) The permissible value of pollution shall be determined taking into account the possible cumulative actions or interaction of pollutants and activities.”

rights and their enhanced protection in the field of administrative justice are enshrined directly in the Constitution of the Slovak Republic.⁵

Unlawful intervention into the right of the person interested to a favourable environment

The Slovak case law has presented a special approach to the right to a favourable environment in the field of environmental impact assessment. The civic association “G. S.” has filed an action against unlawful intervention to the right to a favourable environment under the Article 44 of the Constitution of the Slovak Republic and under the Article 27 of the Act No. 24/2006 Coll. on Environmental Impact Assessment and on amendments to certain laws, as amended, and amending and supplementing certain laws (hereinafter referred to as “the Act No. 24/2006 Coll.”) to the Supreme Court of the Slovak Republic.⁶ In the opinion of the mentioned civic association, the essence of this intervention should lie in the fact that the Ministry of Environment of the Slovak Republic nominated biased, professionally qualified person to prepare the expertise of proposed activities in accordance with the Article 36 of the Act No. 24/2006 Coll.⁷

This biased person should have prepared an expertise for the proper examination of the facts in order to initiate further operation of the power plant M. On the contrary, the Ministry of Environment of the Slovak Republic argued that the Article 27 of the Act No. 24/2006 Coll. does not create an independent right to a favourable environment of the non-governmental organization promoting the environmental protection. This article establishes the state that allows real exercise of the procedural rights of the party of the administrative proceeding, respectively, the public concerned in the process according to the Act No. 24/2006

⁵ See *Judgement of the Supreme Court of the Slovak Republic Ref. No. 3 Sžp 2/2008* [2008-12-04].

⁶ See *Judgement of the Supreme Court of the Slovak Republic Ref. No. 8Sžz/1/2010* [2011-01-27].

⁷ According to the Article 36 (1) of the Act No. 24/2006 Coll. on Environmental Impact Assessment and on amendments to certain laws, as amended, and amending and supplementing certain laws, effective in year 2010, “Expertise on proposed activity may be prepared only by a natural or a legal person who is professionally qualified according to the Article 61 and designated competent authorities. A person who has participated in preparation of the plan or in the assessment report on the activity cannot take part in the process of preparation of the expertise. Other professionally qualified persons registered under special regulations may also participate in the process of preparation of the expertise if it arises from the nature of the impact of proposed activity on environment.”

Coll. The Ministry of Environment of the Slovak Republic considered the public participation in the process of determining the qualified person preparing the expertise to be an unauthorized interference with the competencies of the State administration authority responsible for the environmental impact assessment process. The Supreme Court of the Slovak Republic, therefore, considered the relation between the designated qualified person and the intervention to the right to a favourable environment, in the context of the Article 244 (5) and the Article 250v of the Act No. 99/1963 Coll. the Code of Civil Proceedings, as amended (hereinafter referred to as the “Act No. 99/1963 Coll.”).

The purpose of proceedings on protection against unlawful intervention caused by the public authority is to provide judicial protection to the natural or legal persons who claim to have been disadvantaged in their rights and legitimate interests through unlawful intervention of the public administration, which is not a decision, and, at the same time, this action was aimed against these natural or legal persons or it was enforced as a result against these persons. The necessary precondition is that the intervention or its consequences are still present or are at risk of recurrence. The judicial proceedings represent a guarantee that the court declaring the obligation of the public authority to discontinue the violations of the rights of a natural or legal person and declaring the order to restore, if it is possible, the status before the intervention will create a realistic assumption to eliminate the unlawful status that arose from unlawful conduct or from omission of the public administration body.

The Supreme Court of the Slovak Republic considered the action brought to it especially from a procedural point of view. Therefore, it focused on the fact whether the civic association was entitled to bring an action against unlawful intervention to the Supreme Court of the Slovak Republic. The Supreme Court of the Slovak Republic concluded that the civic association has demanded protection of individual rights against unlawful intervention by the public administration in proceedings according to the Act No. 24/2006 Coll. At the mentioned time, the mentioned Act has regulated the participation of the public concerned which is having an interest or may have an interest in environmental decision-making in accordance with the Articles 24 – 27. However, according to § 64 of the Act No. 24/2006 Coll., the proceeding under this Act was not covered by the Act No. 71/1967 Coll. on Administrative Proceedings (the Administrative Proceeding Act), except for proceedings under § 59 (2) of the Act No. 24/2006 Coll. The case law has taken a cautious approach in

this case. It based on the fact that the object of the dispute was the assessment of operation of a nuclear power plant. That is why the Supreme Court of the Slovak Republic did not exclude that individual acts may, according to the Act No. 24/2006 Coll., have had an impact on fundamental rights and freedoms of natural persons and, in particular, on their right to life or the right to property that are the rights which are ultimately reflected in every citizen's right to a favourable environment under the Article 44 of the Constitution of the Slovak Republic. The eligibility of nuclear facility to intervene to the right to a favourable environment declares also the jurisprudence.⁸ The object of activities of the mentioned civic association was the environmental protection. The civic association brought together individuals whose premise was the protection of public subjective rights – the right to a favourable environment and protection of other fundamental rights guaranteed by the Constitution – the right to life and the right to property. In this case, the civic association has met conditions of the Article 27 of the Act No. 24/2006 Coll.⁹ The case law stated in this case that the civic association helps the individuals those are brought together to perform their right to a favourable environment. Therefore, it has concluded that the civic association was entitled to bring an action for the protection against unlawful intervention by the public authority. However, the key issue was to assess whether the designation of the objected qualified person filled up the characteristics of unlawful intervention under the Article 250v of the Act No. 99/1963 Coll. The case law considers the intervention to be unlawful, respectively, in

⁸ See e.g. NOVOTNÁ, M. and P. VARGA. Vplyv únieového práva na medzinárodný rámec právnej úpravy zodpovednostných vzťahov jadrového práva [Influence of EU Law on the International Framework of Legal Regulation of the Liability Relations in Nuclear Law]. *Právny obzor*. 2015, roč. 98, č. 2, pp. 128-147. ISSN 0032-6984; and NOVOTNÁ, M. and P. VARGA. Limits of the Civil Nuclear Liability Regime and the State Interventions Resulting Therefrom. *Forum iuris europaeum*. 2015, roč. 3, č. 1, pp. 5-22. ISSN 1339-4401.

⁹ According to the Article 27 of the Act No. 24/2006 Coll. on *Environmental Impact Assessment and on amendments to certain laws, as amended, and amending and supplementing certain laws*, effective in 2010, "The non-governmental organization promoting the environmental protection, which submits a written statement to the intention of proposed activity listed in Annex No. 8 according to the Article 23 (4) has within the integrated licensing, proceedings under the Road Act, Building Act, Aviation Act, Water Act, Railway Act, Forests Act, Nature and Landscape Protection Act and the Authorization of Mining Activity Act the status of a party. Such non-governmental organization is considered to be a subject whose right to a favourable environment may be affected by the decision. Proof of registration shall the non-governmental organization promoting environmental protection submit to competent authority and to permitting authority together with submission of written observations on proposed action plan."

a broader sense, as the attack of public authorities to the subjective public rights of natural or legal persons, which is prohibited by law and which is consisting in practice of the public authority, including its activities, actions, guidelines, or inactivity. It must be a direct intervention with subjective public rights – e.g. violation of the right to life, violation of the personal liberty, violation of the right to property, violation of the right to inviolability of the home, and the like. Such intervention by the public administration may not be revoked by the court. However, the court can prohibit the public administration to continue the violation of the right in question and, if possible, the court may order the public administration to restore the status before the intervention.

In respect of alleged intervention to the right to a favourable environment, the Supreme Court of the Slovak Republic has declared that the civic association did not support by any evidence the opinion of partiality of the qualified person. The civic association did also not show a causal link between the claimed partiality and the environmental impact assessment process. The Supreme Court of the Slovak Republic also noted that the expertise is just one of the documents for a statement as a final act of environmental impact assessment. The Supreme Court of the Slovak Republic has compared the expertise to an expert opinion; since its purpose is to clarify the facts the assessment of which is dependent on the expert knowledge and experience. Therefore, the Supreme Court of the Slovak Republic did not grant the action of the civic association in this case.

On the other hand, the Supreme Court of the Slovak Republic found another important fact, which is that the legal person – a civic association bringing together the individuals – may be entitled to bring an action against unlawful intervention of public authority to the right to a favourable environment under the Article 44 of the Constitution of the Slovak Republic. The condition is that the public authority must intervene to the rights of individuals who are associated in the civic associations. The Supreme Court of the Slovak Republic saw in this case the connection to the right to a favourable environment of the civic association with the intervention to the right to life or with the intervention to the right to property of individuals united in the civic association. The Supreme Court of the Slovak Republic expressed the eligibility of the civic association to bring action to administrative court under the provisions of the Act No. 99/1963 Coll. From our point of view, doing so the Supreme Court of the Slovak Republic also admitted the possibility to protect the right to a fa-

vourable environment also for legal entities, because the Supreme Court of the Slovak Republic accepted the opinion that the legal person is also eligible to claim the judicial protection in the matter of the right to a favourable environment.

Therefore, the case law in this case accepted that the public concerned as a civic association may be holder of the right to a favourable environment. However, in such case, the case law of the Supreme Court of the Slovak Republic principally diverges from conclusions of the Constitutional Court of the Slovak Republic.

Several complaints and decisions of the Constitutional Court of the Slovak Republic are linked to the issue of the “right-holders” of the right to a favourable environment. The case law of the Constitutional Court of the Slovak Republic denies the fact that the legal person could be holder of the right to a favourable environment and, therefore, also its entity. In its decisions the Constitutional Court of the Slovak Republic strictly maintains the view that “right-holder”, respectively the entity to the right to a favourable environment is always and exclusively natural person. Legal person may never be the subject of this right, because it does not have the capacity to be holder of the right to a favourable environment.¹⁰ The purpose of the Article 44 (1) of the Constitution of the Slovak Republic is to guarantee a favourable environment. The Constitutional Court of the Slovak Republic considers this right to be an individual right of a public nature. Each individual is for that reason entitled to claim the right to a favourable environment to the State. That right is inseparably linked with the requirements to the scientific and technological development and the requirements to the dignified human life. Therefore, the Constitutional Court of the Slovak Republic has created a doctrine according to which the legal norms are made up by the people. Given that the people create legal norms, the holder of the right to a favourable environment is therefore always a natural person, and never a legal person, also because the state and level of the environment determine the quality of human life and, therefore, not the quality of existence of legal persons.¹¹ It shall be noted that the very Constitution of the Slovak Republic “guides” a little to this point of view, because according to the Article 2 (1) of the Constitution of the Slovak Republic, “*State power comes from the citizens, who*

¹⁰ See *Resolution of the Constitutional Court of the Slovak Republic Ref. No. III. ÚS 93/08-31* [2008-04-01].

¹¹ See *Resolution of the Constitutional Court of the Slovak Republic Ref. No. III. ÚS 100/08-32* [2008-04-01].

exercise it through their elected representatives or directly". On the other hand, in the context of the Article 1 (1) of the Constitution of the Slovak Republic this doctrine does not reflect the content of the Article 18 (2) point a) of Act No. 40/1964 Coll. Civil Code, as amended, according to which *"the legal persons are [...] a) associations of natural or legal persons..."*. The rule of law does not represent the status in which the laws contradict themselves. The legal system ruled by law is solid and compact. However, if a legal entity is made up of natural persons connected with common interest, right to property in certain location or residence, the doctrine derived from the Article 2 (1) of the Constitution of the Slovak Republic is not integrated, at least in the context of the Finding of the Constitutional Court of the Czech Republic No. I. US 59/14 of May 30th, 2014. This decision admitted in some limited extent the capacity of the civic associations and municipalities as legal entities being holders of the right to a favourable environment if they exercise that right in the territory of residence of individuals who are brought together in them. As for the civic associations, the Constitutional Court of the Czech Republic has also declared condition that the civic associations must express environmental protection as a goal of their legal existence in their founding documents, for example in the statutes. Nevertheless, the Constitutional Court of the Slovak Republic holds the line according to which the holder of the right to a favourable environment is exclusively the natural person. The positive obligation of the State to ensure that everyone has a favourable environment also means a duty to prosecute unlawful conduct harmful to the environment. However, this commitment binds only to natural persons.¹² The Constitutional Court of the Slovak Republic came to the same conclusion in the case of a complaint of a legal person connected with participation on preparation of the concept material. The Constitutional Court of the Slovak Republic rejected in this case the complaint, because the complaint was filed by legal entity which is not subject to the right to a favourable environment.¹³

The Constitutional Court of the Slovak Republic did not depart the mentioned line even in cases of the complaints of municipalities. In year 2011 the village V. complained the infringement of the right to a favourable environment in an integrated permit issuance for performance of

¹² See *Resolution of the Constitutional Court of the Slovak Republic Ref. No. III. ÚS 95/08-29* [2008-04-01].

¹³ See *Resolution of the Constitutional Court of the Slovak Republic Ref. No. III. ÚS 102/08-34* [2008-04-10].

non-hazardous waste landfills. The Constitutional Court of the Slovak Republic stated in this case that the municipality as a legal person is not entitled to file a complaint concerning the violation of the Article 44 (1) of the Constitution of the Slovak Republic.¹⁴

Nevertheless, this argument is at least controversial in the context of the Czech case law, because, according to the Article 64a of the Constitution of the Slovak Republic, *“The municipalities and higher territorial units are independent territorial and administrative units of the Slovak Republic, bringing together persons who are in their territory of residence. Details shall be established by law.”* Similarly, under the Article 1 (1) of the Act No. 369/1990 Coll. on Municipalities, *“The municipality is an independent territorial, autonomous, and administrative unit of the Slovak Republic; it brings together persons who have their permanent residence on its territory. The municipality is a legal person that, under the conditions provided by law, independently manages its own property and its own income.”* Under the Article 1 (2) of the Act No. 369/1990 Coll. on Municipalities, *“The basic role of the municipality in performance of self-government is the comprehensive development of its territory and the needs of its inhabitants. The municipality in the exercise of self-government may impose obligations and restrictions only by law and under international treaty.”* The Constitutional Court of the Slovak Republic decided similarly also in year 2012 by its Resolution No. III. ÚS 288/2012-17 of June 26th, 2012. In this case, the municipality filed a complaint for violation of the right to privacy and for violation of the right to a favourable environment. These violations were supposed to be connected with the decision on gravel mining. However, the Constitutional Court of the Slovak Republic again repeated the opinion that the municipality is not entitled to file a complaint for violation of the Article 44 (1) of the Constitution of the Slovak Republic.

Question of capable intervention into the right to a favourable environment in the case law of the Constitutional Court of the Slovak Republic

The Constitutional Court of the Slovak Republic assessed the right to a favourable environment in several cases. In these decisions, the Constitutional Court of the Slovak Republic focused on the issue of eligible intervention into the right to a favourable environment.

¹⁴ See *Resolution of the Constitutional Court of the Slovak Republic Ref. No. IV. ÚS 2/2011-41* [2011-01-20].

Usually, in those complaints the civic associations allege denial of legally significant involvement in certain procedures. This denial shall also be liable to affect the right to a favourable environment. In year 2008, the Constitutional Court of the Slovak Republic responded to the procedure of environmental impact assessment. It concluded that the final statement under the Act No. 24/2006 Coll. is not capable to affect the right under the Article 44 (1) of the Constitution of the Slovak Republic, because it was considered to be only internal administrative act and it was believed only to create the groundwork for other administrative proceedings. In such case, the civic association should have applied a petition or a complaint within the field of public administration and it should not have filed the complaint to the Constitutional Court of the Slovak Republic, because in the opinion of the Constitutional Court of the Slovak Republic it did not have the competence to decide on such matter. In point of view of this decision, the final statement had only explanatory value for the addressees of the right to a favourable environment and the intervention (decision) of the Constitutional Court of the Slovak Republic to the discretion of public authority would be preventive. Such a procedure is prohibited, because it breaks the limits of competence.¹⁵

However, this decision would not be applicable nowadays. The currently valid Act No. 24/2006 Coll. regulates the essentials of the final statement in the same extent as of the decision.

Under the Article 20a of the Act No. 24/2006 Coll., “*Decision issued in the screening proceeding and the final statement include besides the general essentials [...] a) the reasoning of decision issued in the screening proceeding according to the Article 29 (13) [...] or b) the reasoning of final statement including the fact how the competent authority has dealt with various opinions received during the environmental impact assessment as well as expert opinion according to the Article 36 and the reasons for approval or disapproval of proposed activity according to the Article 37 (5) and Annex 12 Part VII and [...] c) any other details mentioned in the Annex 12.*” In addition to these facts, the Article 3 points r)¹⁶ and s)¹⁷ of the

¹⁵ See *Resolution of the Constitutional Court of the Slovak Republic Ref. No. IV. ÚS 137/08-284 [2008-04-17]*.

¹⁶ According to the Article 3 point r) of the Act No. 24/2006 Coll. on *Environmental Impact Assessment and on amendments to certain laws, as amended, and amending and supplementing certain laws*, “*The public is one natural person, legal person, or more natural persons or legal persons, their organization or groups...*”.

Act No. 24/2006 Coll. regulate the legal position of the public and the public concerned. The mentioned case is not solitary and isolated in environmental practice in the Slovak Republic. The Constitutional Court of the Slovak Republic has assessed similar complaints and it has also issued similar decisions – e.g. in case of the dam plan assessment or in case of the zoning intention of the Tatra National Park declaration.¹⁸

The Constitutional Court of the Slovak Republic has similarly responded on complaint connected with adoption of the conceptual material – the proposition of legislative measures, institutional and economic measures for the mitigation and follow-stop bark beetle calamity in the spruce forests in Slovakia. The absence of a contradiction procedure in this case did not infringe the right to a favourable environment under the Article 44 (1) of the Constitution of the Slovak Republic, because the absence of a causal link between the failure to make a contradiction procedure and the damage to the right to a favourable environment disqualifies the intervention to the right to a favourable environment as capable.¹⁹

The last group of cases concerning the capable intervention to the right to a favourable environment and concerning the causal link between the intervention and the damage to the right to a favourable environment are complaints connected with participation on procedure of drafting the law. The civic associations present in these cases the effort to declare violation of the right to a favourable environment through violation of the rights of participating public in the procedure of drafting the law. According to the Constitutional Court of the Slovak Republic, the

¹⁷ According to the Article 3 point s) of the Act No. 24/2006 Coll. on Environmental Impact Assessment and on amendments to certain laws, as amended, and amending and supplementing certain laws, "The public concerned means the public affected or likely to be affected by the proceeding touched with the environment, or having an interest in such proceeding; the rule shall apply under condition that a non-governmental organization promoting the environmental protection and meeting the requirements laid down in this Act has an interest on mentioned proceeding...".

¹⁸ See Resolution of the Constitutional Court of the Slovak Republic Ref. No. II. ÚS 858/2014-28 [2014-12-11]; Resolution of the Constitutional Court of the Slovak Republic Ref. No. III. ÚS 222/2014-21 [2014-03-25]; and Resolution of the Constitutional Court of the Slovak Republic Ref. No. IV. ÚS 368/2014-52 [2014-07-01].

¹⁹ See Resolution of the Constitutional Court of the Slovak Republic Ref. No. I. ÚS 287/09-133 [2009-10-14]; Resolution of the Constitutional Court of the Slovak Republic Ref. No. II. ÚS 175/09-27 [2009-05-05]; Resolution of the Constitutional Court of the Slovak Republic Ref. No. III. ÚS 246/09-129 [2009-09-02]; and Resolution of the Constitutional Court of the Slovak Republic Ref. No. IV. ÚS 178/09 [2009-05-28].

State has obligation to take measures to protect the rights, but it has no obligation to achieve results that citizens are asking from him to achieve. The violation of the Article 44 (1) of the Constitution of the Slovak Republic can occur [...] a) through the legislation itself or b) through the application of legislation.²⁰

Adoption of the Act No. 314/2014 Coll. amending and supplementing the Act No. 24/2006 Coll. on Environmental Impact Assessment and on amendments to certain laws, as amended, and amending and supplementing certain laws

The Government of the Slovak Republic with its resolution No. 330/2014 of July 2nd, 2014, approved a draft law amending and supplementing the Act No. 24/2006 Coll. The Prime Minister of the Slovak Republic submitted the draft law to the National Council of the Slovak Republic on July 16th, 2014. After the third reading was this governmental proposition on the 39th Meeting of the National Council of the Slovak Republic forwarded for editing by its Resolution No. 1364 of October 14th, 2014. On November 6th, 2014, the National Council of the Slovak Republic sent the above-mentioned Act to the Collection of Laws of the Slovak Republic where it came out on November 21st, 2014, in the Section No. 97 and under the Number 314/2014.

The mentioned governmental proposition amending and supplementing the Act No. 24/2006 Coll. (hereinafter “the government bill”) brought, according to its Explanatory Memorandum, changes and amendments made within the applicable Act No. 24/2006 Coll. This amendment represents the reaction of the Slovak Republic responding to the allegations of the European Commission in the framework of the so-called “*infringement proceeding*” according to the Article 258 of the Treaty on the Functioning of the European Union. The breach of the obligation to apply the European law was formally notified to the Slovak Republic by the European Commission on March 21st, 2013, through the Letter No. C(2013) 1558.

According to the opinion of the European Commission, the main shortcoming of the previously valid Act No. 24/2006 Coll. was the insuf-

²⁰ See *Resolution of the Constitutional Court of the Slovak Republic Ref. No. I. ÚS 73/2014-280* [2014-03-05]; *Resolution of the Constitutional Court of the Slovak Republic Ref. No. I. ÚS 112/2014-182* [2014-03-19]; and *Resolution of the Constitutional Court of the Slovak Republic Ref. No. II. ÚS 818/2014-26* [2014-11-26].

ficient connection of the process of environmental impact assessment of the proposed activities with subsequent proceedings of permission. The mentioned legal status should have in the opinion of the author of the draft law created the space for the disrespect of the results of the environmental impact assessment process. This fact, in its essence, could not guarantee full provision of the rights of the public concerned participating in this proceeding, respectively having an interest in the outcome of decision-making in environmental matters. The objections of the European Commission have therefore opened the issue of implementation of those requirements of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of June 25th, 1998, (the “Aarhus Convention”) into the Slovak legislation which the Directive of the European Parliament and the Council No. 2011/92/EC of December 13th, 2011, on the Assessment of the Effects of Certain Public and Private Projects on the Environment (hereinafter referred to as the “EIA Directive”) implements.²¹

The European Commission criticized the Slovak Republic for the lack of implementation of the Articles 6, 7, and 9 of the EIA Directive. The above-mentioned Directive provides in the Article 6 the obligation of the Member States to take the necessary measures to ensure that the institutions to which powers in environmental field the project can relate, shall express their statement on information supplied by the developer and the application for permission. This article of the EIA Directive also established the obligation to inform the public early in the environmental decision-making and at the latest as soon as it can reasonably provide information either by public notices or other appropriate means, such as electronic media where available, on the decision-making matters defined by this provision of the EIA Directive. At the same time, this provision requires from the Member States to ensure the access of the public concerned to the mentioned group of information in due time. Article 7 of the EIA Directive governs the cases in which the assessed project could most likely have significant impact on environment of another Member State. Article 9 of the EIA Directive lays down conditions and extent of

²¹ See Vládný návrh zákona [č. 314/2014 Z.z.], ktorým sa mení a dopĺňa zákon č. 24/2006 Z.z. o posudzovaní vplyvov na životné prostredie a o zmene a doplnení niektorých zákonov v znení neskorších predpisov a ktorým sa menia a dopĺňajú niektoré zákony: Dôvodová správa – všeobecná časť. In: *Národná rada Slovenskej republiky* [online]. 2015 [cit. 2015-11-20]. Available at: <http://www.nrsr.sk/web/Dynamic/Download.aspx?DocID=402508>.

providing the information to public about the granting or refusal of permission.

It shall be noted that the EIA Directive is an important tool that enables to enforce the requirements of environmental protection into the design of construction projects. The meaning the process of environmental impact assessment lies in the opinion of the European Commission in the fact that this procedure ensures that the consequences on environment of construction projects, e.g. dams, highways, airports, factories, and energy projects, shall be assessed and taken into account before a competent authority of a Member State shall issue a decision permitting the project. The purpose of the EIA Directive includes the effort to ensure that projects likely to have significant impact on environment shall be properly assessed prior to the permission. Therefore, the EIA Directive established prior to any decision which will allow continuation of such a project the obligation of the Member State to survey and to assess its potential impact on environment.

The applicants may then after that assessment of the projects modify them in order to minimize the adverse impacts of the projects on environment before these adverse effects shall actually occur. Therefore, the EIA Directive also allows the competent authorities to eventually incorporate measures to mitigate adverse impacts on environment in the process of permitting the projects. It is believed within the European Commission that the EIA Directive provides for timely public participation in the environmental decision-making processes. That is why during the assessment of the project period the public shall be informed and it shall have possibility to give the opinion on proposed project. Thanks to this fact the competent authorities and the applicants can make decisions based on good information.²²

Public participation in proceedings according to the Act No. 24/2006 Coll., effective from January 1st, 2015

The participation of the public and the public concerned in the proceedings has the legislator regulated with effect of January 1st, 2015, in the Articles 24 and 25 of the Act No. 24/2006 Coll. Section 1 of the Article 24

²² See Životné prostredie: posudzovanie vplyvov na životné prostredie je v súčasnosti priehládnejšie. In: *European Commission* [online]. 2015-10-22 [cit. 2015-11-20]. Available at: http://europa.eu/rapid/press-release_IP-12-145_sk.htm.

defines the obligation of competent authority to inform the public about the facts established by law.

Subsequently, Section 2 of the Article 24 of the Act No. 24/2006 Coll. regulates with the effect of January 1st, 2015, the position of the participant of the public concerned in the proceedings established in the Third Part of the Act No. 24/2006 Coll. and, consequently, it regulates the position of the participant of the public concerned in the proceeding on permission of proposed activity or its change if it applies the procedure under the Sections 3 or 4 if its participation in the proceedings does not already arise from special regulations.

According to this provision, *“The public concerned has the status of a party in the proceedings referred to in the Third Part and, subsequently, the status of the participant in the proceeding on permission of proposed activity or its change if it applies the procedure under the Sections 3 or 4 if its participation in the proceedings does not already arise from special regulations. Right of the public to a favourable environment, which has shown the interest in proposed activity or its change through the procedure under the Sections 3 or 4, may be directly affected by permission of proposed activity or its change or by subsequent performance of proposed activity or its change.”*

The public may show interest in proposed activity through the procedure under the Article 24 (3) of the Act No. 24/2006 Coll. If it does so, it automatically gains position of the participant to the proceeding.

According to the Article 24 (3) of the Act No. 24/2006 Coll., effective from January 1st, 2015, *“The public shows the interest in proposed activity or its amendment and in the proceeding of permission, when filing*

- a) *a reasoned written opinion on the plan in accordance with the Article 23 (4);*
- b) *a reasoned comments on the scope of the assessment of proposed activity or its amendment according to the Article 30 (6);*
- c) *a reasoned written opinion on the assessment report according to the Article 35 (2);*
- d) *a reasoned written opinion on the notification of amendment according to the Article 29 (9).”*

The legal position of the participant to the proceedings guarantees for the public several special procedural rights under the Article 24 (4) of the Act No. 24/2006 Coll., effective from January 1st, 2015. According to

this provision, *“The public has a right to appeal against the decision on whether the proposed activity or its amendment shall be assessed under this Act (hereinafter referred to as “the decision issued in the screening proceeding”), or appeal against the final statement even if it was not a participant to screening proceeding or to the proceedings on issuance of the final statement or amendments to it. The date of receipt of the decision when making such an appeal shall be the fifteenth day of publication of the decision issued in the screening proceeding according to the Article 29 (15) or the fifteenth day of publication of a final statement by competent authority according to the Article 37 (7). The public shall by filing the appeal also show the interest on proposed activity and on proceeding permitting it.”*

Conclusions

The legislator has since January 1st, 2015, included to the Article 24 (2) of the Act No. 24/2006 Coll. the legal position of the participant to the public concerned in the proceedings referred to in the Third Part of the Act No. 24/2006 Coll. and, consequently, included this position in the proceeding on permission of proposed activity or its amendment if it applies the procedure under the Sections 3 or 4 and if its participation in these proceedings does not already arise from special regulations. This provision lays down the relation to the right of the public to a favourable environment under the Article 44 of the Constitution of the Slovak Republic. According to the Article 24 (2) of the Act No. 24/2006 Coll., effective of January 1st, 2015, *“Right of the public to a favourable environment, which has shown the interest in proposed activity or its change through the procedure under the Sections 3 or 4, may be directly affected by permission of proposed activity or its change or by subsequent performance of proposed activity or its change.”*

In our opinion, this expression brings positive in the sense that it allows the public to sue decisions issued under the provisions of the Act No. 24/2006 Coll., effective of January 1st, 2015. The Slovak legislator has through this way ensured the transposition of conditions of the Article 46 (2) of the Constitution of the Slovak Republic according to which *“Who claims to have been deprived of his/her rights by decisions of public authority, may apply to the court to examine the legality of such a decision, unless the law stipulates otherwise. From the jurisdiction of the court the examination of decisions concerning fundamental rights and freedoms may not be excluded.”* It can be said that in such case the right to a favourable en-

vironment under the Article 44 of the Constitution of the Slovak Republic has in some way “greened” the right to judicial protection under the Article 46 (2) of the Constitution of the Slovak Republic. The public concerned is in this way put in position, in which it is actively entitled to protect the right to a favourable environment. If the legislator presumes direct connection between the intentions and proposed activities on the one hand and the right to a favourable environment on the another one, then it has also established the entitlement of the public concerned to file a constitutional complaint under the Article 127 as well. The legislation directly assumes connection between the actions assessed under the Act No. 24/2006 Coll. and the constitutionally guaranteed right to a favourable environment. Some may also say that in this way the legislator has made the rights of the public concerned absolute and this legislative change shall be considered disproportionate. However, it is necessary to note that the rights of the public concerned are of significant importance within the process of environmental importance. On the other hand, the status in which they would be absolute is not desirable at all. Therefore, it will be interesting to analyse in the future the reaction of the case law. Finally, from this point of view it can be said that the public concerned has in such case become the holder of the “greened” right to a judicial protection under the Article 46 (2) of the Constitution of the Slovak Republic.

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