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Legal means of protection against abuse of the right of public participation in the decision-making process in environmental matters – current situation in the Slovak Republic

Summary

The Aarhus Convention guarantees several procedural rights which the concerned public can actively use as long as it is involved in the environmental impact assessment procedure. This international treaty assumes that the affected public uses its procedural rights with the intention of ensuring the protection of the environment. In practice, however, this may not be the case.

Using a specific example from Slovakia, the author points to a case where there was a suspicion that a non-governmental organization was using its subjective rights pursuing a goal other than it is required by the Aarhus Convention. The administrative authorities believed that such behavior could be an abuse of the procedural rights guaranteed by the Convention and therefore they sought legal tools within the administrative law, the use of which would not be in conflict with the Aarhus Convention.

This article addresses the issue of legal limits that prevent parties from restricting the procedural rights of the concerned public guaranteed by the Aarhus Convention.

Keywords: Aarhus Convention, procedural rights of the public, abuse of law

Introduction

Abuse of law, quite widespread in private law, has until recently seemed rather marginal, negligible phenomenon within public law. However, this has been changing over recent years.

The abuse of power by a public authority generally consists in its behavior that does not pay attention to the essence or meaning (purpose) of legal regulation.

It can be a situation when:

– action results in an illegitimate goal,
– the public body/entity achieves the legally established goal by illegitimate means of exercising authority.[1]

Judicial jurisprudence describes the illegitimate way of exercising the power of a public authority as "arbitrariness."

It must be culpable conduct on the part of the public administration body. The presence of *good faith* excludes the maliciousness of the action.

A malicious consequence in public administration is a *violation of public interest*, regardless of whether it was achieved by prioritizing private or public interest.

The requirement for the *legality* of the exercise of public authority is explicitly regulated in the legal order. The requirement for the *legitimacy* of the exercise of public power is explicitly regulated only exceptionally.[2] Otherwise, it can be derived by interpretation, since the *prohibition of abuse* of the exercise of public power for an improper purpose is a part of the essence of the rule of law.

The *prohibition of misuse* applies not only to the exercise of public power by public authorities, but also to *private individuals*. In practice, there are many cases where they abuse their rights and freedoms of a private and public law nature.

Abuse of public subjective rights and freedoms by the private persons as addressees of public administration is a *culpable act*, that is led by the *intention to cause harm* to the public or private interest protected by law. In practice, fundamental rights and freedoms guaranteed by the constitution or rights and freedoms guaranteed by an international treaty (regardless of whether they have a substantive or procedural nature) can become a tool of abuse.

This article deals with the actions of a specific Slovak non-governmental organization that, as part of the public/concerned public in Environmental Impact

[1] S. Košičiarová: *Zákaz zneužitia verejných subjektívnych práv a slobôd*. "Acta Universitatis Carolinae: Iuridica" 67, 4 (2021), pp. 77–91.

[2] For example, through the prohibition of abuse of power in limiting constitutional rights and freedoms.

Assessment procedure, used its procedural rights guaranteed by the Convention on Access to Information, Public Participation in the Decision-Making Process and Access to Justice in Environmental Matters (hereinafter referred to as the Aarhus Convention) in a way that provoked an expert discussion regarding the legal nature of abuse of public subjective rights and freedoms, the classification on forms of this type of prohibited behavior and also the legal means that should be available to the competent public authorities to protect the public and private interest affected by such malicious actions.

1. Procedural rights of the public/concerned public in the assessment of the effects of proposed activities

The Aarhus Convention has been created to empower the role of citizens and civil society organizations in environmental matters and is founded on the principles of participatory democracy. This international treaty establishes a number of rights granted to the individuals and NGOs with regard to the environment.

The Convention has three main "pillars": it gives people the right to access information about the environment. It also promotes public participation in decision-making and provides access to justice on environmental matters.

The goal of the so-called second pillar of the Aarhus Convention is to introduce a system that would ensure the exercise of the *public's right to participate in the decision-making process* regarding specific activities and their changes with an impact on the environment. The public must be informed about all the relevant projects and it has to have the chance to participate during the decision-making and legislative processes. Decision makers can take advantage of people's knowledge and expertise; this contribution is a strong opportunity to improve the quality of the environmental decisions, outcomes, and to guarantee procedural legitimacy.[3]

The Aarhus Convention recognizes that better quality decisions are achieved by guaranteeing the public the opportunity to provide its suggestions and demanding from public authorities to take the said comments into account during the decision-making process.[4]

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[3] V. Rodenhoff: *The Aarhus Convention and its implications for the "Institutions" of the European Community.* "Review of European Community and International Environmental Law" 11, 3 (2003), p. 345.

[4] Á. Ryall: *Brave New World: The Aarhus Convention in Tempestuous Times.* "Journal of Environmental Law" 35, 1 (March 2023), p. 165.

The international treaty in question does not specify the details of public participation in the decision-making process. It is the task of the legislation of the individual parties to the Aarhus Convention.[5]

Within the second pillar, these provisions of Art. 6 of this international agreement are applicable, namely:

- paragraph 7 ("procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity");
- paragraph 8 ("each Party shall ensure that in the decision due account is taken of the outcome of the public participation").

Paragraph 7 implies the right of the public/concerned public to have national legal procedures within which the public will be able to submit comments ("procedures for submitting comments"). Every person has the right to submit comments, information, analysis or opinions *during the public participation process*.

Paragraph 7 gives the public *the right to submit in writing* any comments, information, analysis or opinions it considers relevant. However, no specific format or content of comments is prescribed.

The possibility of commenting by the public/concerned public should be available *during the entire comment period*, which – together with the possibility to inspect documents according to Art. 6 par. 6 – should coincide with the gathering of information at the decision-making stage of the authorities.[6]

According to Art. 6 par. 8 of the Aarhus Convention it is necessary to assure that the decisions of the authorities *take into account the participation of the public/concerned public* ("parties must ensure that decision takes due account

[5] It is interesting to get familiar with the substantial case law developed by the Committee of the Aarhus Convention. Since its establishment in 2002 by the First Meeting of the Parties of the Aarhus Convention, the Committee has dealt with numerous issues related to practical implementation of the Convention by the parties. In many cases, the Committee had to interpret and apply Convention's provisions to specific situations brought to its attention by the public and parties. For more information see A. Andrusevych, T. Alge, C. Konrad (eds.): *Case Law of the Aarhus Convention Compliance Committee (2004–2011)*. 2nd edn. Lviv: RACSE, 2011.

[6] The aforementioned requirement of the Aarhus Convention is regulated in more detail by Art. 6 par. 4 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment. According to it, the concerned public should have the *right to participate in decision-making* guaranteed by the national law of a member state of the European Union. In this context, the Directive guarantees to the concerned public:

- the right to be provided with "early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2)";
- the right for this purpose "to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken."

of public participation"). The interpretation of the relevant requirement of the international agreement expresses the obligation that:

- the authority dealt with every submitted comment,
- the authority took into account the comments of the public (it evaluated their importance with regard to the concerned public interest in a specific matter).

The Art. 6 par. 8 of the Aarhus Convention, which imposes the obligation to "take due account" of public comments, is closely related to the second sentence in Art. 6 par. 9, according to which: "Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based."

Dealing with the submitted comment therefore (from a procedural law point of view) means the authority's obligation to explicitly mention it in the justification of the decision as a basis for the decision.

The obligation *to consider the comment* does not mean that the authority must accept it. The authority has the option to disregard comments that are substantively incorrect. It will not take into account comments that are not enforceable.

The justification of why the body did not take the comment into account or explanation of why it took it into account only partially, must not be missing in the justification of the body's decision and has to be convincing (argumentatively based).

The Aarhus Convention: An Implementation Guide[7] emphasizes that Art. 6 par. 8 implies that "any failure to take into account the result of public participation is a procedural violation that can cause the decision to be invalid. In appropriate circumstances, a member of the public whose comments were not properly taken into account will be able to challenge the final decision in administrative proceedings or court proceedings on this basis pursuant to Art. 9 par. 2."

According to the Slovak legal order, the "invalidity of the decision" means the "illegality" of the decision, which – as a consequence – must be annulled. However, not every failure causes the illegality of the issued decision. It would have to be a comment that is so important for the outcome of the entire procedure that not taking it into account would violate the basic rule that the decision of the public administration body must be based on a reliably ascertained state of affairs.

A system where public comments are routinely ignored or not accepted on their merits without proper explanation would not be in line with the Aarhus Convention.

[7] *The Aarhus Convention: An Implementation Guide*. United Nations Economic Commission for Europe. Second edition, 2014. https://unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf [access: 5.08.2023].

However, the right to submit comments is not the only public subjective right of natural and legal persons, their organizations and groups of a procedural nature guaranteed by the Aarhus Convention. According to Act No. 24/2006 Coll., among other subjective rights of the public/concerned public, which are connected with the procedure of competent authorities in assessing the effects of proposed activities and their changes on the environment, valid procedural law includes the right:

– to be a party to the procedures (legal regulation in Slovakia even guaranteed the right to participate in the proceedings additionally, i.e., in the appeals phase until March 30, 2024);
– to use all procedural rights as a participant in administrative procedures, including the right to file a legal action against a valid decision of a public administration body.

2. Procedural rights of the public/concerned public in environmental impact assessment procedures as a tool of abuse?

In the Slovak legal literature there has been a discussion carried out concerning the abuse of public subjective rights in connection with the growing evidence of the actions of a specific non-governmental organization in Environmental Impact Assessment procedure.

Some public administration bodies suspected this non-governmental organization not to be concerned with environmental protection or mitigating the effects of the assessed activity on the environment, but only with delaying the validity of the permissions relating to the activities carried out by the real-estate commercial developers or exerting pressure on them in order to obtain property profit from them.

The situations in which, according to them, there was an abuse of the right concerned projects financed from the funds of the European Union, which must be carried out within the specified deadline, otherwise it is not possible to draw the financial funds of the European Union. Specifically, the non-governmental organization actively used:

– the right to submit opinions (these contained many different points and requirements, in the same or a similar wording submitted for almost every project in the entire territory of Slovakia, while it was obvious that the author did not study the matter and some comments contained in the opinion were meaningless);

– the right to file an appeal with the aim of becoming the additional party to the procedures, as if the non-governmental organization had not had time for it in the first-instance procedures.

In this way, the civic association could extend the permitting process by several months, in some cases even by more than a year.[8]

Based on complaints from developers, the Ministry of Economy of the Slovak Republic filed a criminal complaint for suspicion of a criminal act. If the conduct of a non-governmental organization could not be legally qualified as criminal one, it remained an open question as to what means of administrative law could be used to deal with such behavior by the relevant public administration body in the EIA procedures. Lawyers sought answers to the following questions:

– whether the application of prohibition of abuse of rights is possible,
– what can be the legal consequences of "abuse of law" according to the administrative law, and
– whether and in what way such behavior of the concerned public can be prohibited by law.

3. Was it possible to qualify the actions of the non-governmental organization as vexation?

Vexation is behavior that appears to be formally compliant with the law. Therefore, if it is not proven that it has a negative impact on the interest protected by the law, measures designed to eliminate such behavior cannot be used. The fact that the behavior has a negative impact on an interest protected by law has to be reliably proven in each specific case. The public authority bears the burden of proof in any such a case.[9] It was also the fundamental moment in the attempt to solve the problem of a non-governmental organization behaving abnormally as a part of the concerned public according to Act No. 24/2006 Coll.

The Aarhus Convention assumes that the subjective rights will be implemented by persons *in bona fide*, in order to ensure the *protection of the environment*. For this purpose, the text of this international agreement does not take into account, whether the use of procedural rights of the public/concerned public burdens the public administration in terms of the number of actions performed

[8] In more details on that P. Wilfling, in: I. Vozár et al.: *Analýza vybraných aspektov fungovania a výkonu štátnej správy starostlivosti o životné prostredie*. Pezinok: Via Iuris, 2020, pp. 119 ff.

[9] S. Košičiarová, in: I. Vozár et al.: *Analýza vybraných aspektov...*, p. 111.

or the length of the procedure. It does not protect the public interest in the proper and effective performance of public administration. It does not limit or condition the possibility of the public/concerned public to use procedural rights. The public/concerned public can therefore participate in an unlimited number of procedures for the purpose of protecting the environment, without limitation in terms of quantity, determination of content or requirements for the content quality of submissions.

Based on this, the lawyers argued that the reason for the application of the prohibition of abuse of rights should not in practice be either the number of submissions by the same subject, or the territorial distance of the place of the proposed activity from the seat or residence of this subject, since it is not possible to conclude from these circumstances alone that the purpose of the submissions is not to protect the environment. According to Wilfling's opinion, "If a specific member of the concerned public always submits the same comments on various proposed activities, even such a situation cannot *a priori* be considered an abuse of the law, provided that these comments are aimed at protecting the environment or mitigating the negative effects of the proposed activity on the environment."[10]

One can agree with his atitude. The international treaty in question does not establish any legal limits for the public/concerned public. If it proceeds in accordance with the rules provided for by the Aarhus Convention, it is not allowed to consider limiting its rights by pointing out the maliciousness of the action towards other persons (developers) in a situation where such behavior does not affect the public interest in environmental protection, or the goal of Environmental Impact Assessment – to professionally and publicly assess the impact of the project and its changes on the environment.

4. Legal means of protection against the abuse of public subjective rights and the possibilities of national public law regulation

When a public subjective right/freedom is abused the subject acts against an interest protected by law but in a way that is not foreseen by the legal norm, and therefore often not even explicitly prohibited. Abuse of a public subjective right/freedom by a person is not an offence. Therefore the person is not the subject of administrative liability.

[10] P. Wilfling, in: I. Vozár et al.: *Analýza vybraných aspektov...*, p. 131.

If the abuse of public subjective right/freedom causes a *malicious consequence in public administration*, this negative effect should be removed. In such a cases, national law establishes the power of public administration body not to recognize the effects of the submitted application without making a decision on it, to withdraw the granted advantage, to reject the application, to cancel the issued decision, etc.

In this case the Slovak parliament was looking for a solution that would not conflict with the Aarhus Convention. Amendment to Act No. 24/2006 Coll. (Act No. 69/2023 Coll.) in § 20 added the text for this purpose: "(4) […] an obviously unjustified comment is not taken into account. A comment is obviously unjustified if it clearly does not concern the proposed activity, change of the proposed activity or its effects on the environment. In the reasoning of the decision, the administrative body shall state the reasons for which it did not take into account the comments of the public."

Even if the above quoted act instructs the public authority not to deal with a certain group of public comments, it does not mean that it limits the right of the public/concerned public to submit comments. The obligation of the public administration body to explain the facts on the basis of which it evaluated the submitted comment as obviously unjustified avoid the possibility to consider a comment as clearly unfounded when it is not the case.

Conclusions

In the article I pointed out how narrow the legislative leeway is for administrative legislation that incurs the obligations arising from the Aarhus Convention regarding the procedural rights of the public/concerned public, if the legislator should intend to limit them.

Using a specific example, I have shown how the Slovak parliament reacted to the purposeful behavior of a non-governmental organization as part of the public/concerned public, raising suspicions of abuse of its procedural rights in relation to another party to the Environmental Impact Assessment procedure (the developer).

What was evidently difficult to prove in the analyzed case was that the intention of the non-governmental organization was not to protect the environment or mitigate negative effects on the environment. The application of the tools of *administrative law* was out of the question, as the laws do not provide for them.

For these reasons, only the means of criminal law and civil law could have been used to protect developers from the abuse of Environmental Impact Assessment procedural rights (if the material legal conditions had been met).

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Soňa Košičiarová

Prawne środki ochrony przed nadużywaniem prawa do udziału społeczeństwa w procesie decyzyjnym w sprawach środowiskowych – obecna sytuacja w Republice Słowackiej

Streszczenie

Konwencja z Aarhus gwarantuje kilka praw proceduralnych, z których zainteresowana społeczność może aktywnie korzystać tak długo, jak jest zaangażowana w procedurę oceny oddziaływania na środowisko. Ten międzynarodowy traktat zakłada, że zainteresowana społeczność korzysta ze swoich praw proceduralnych z zamiarem zapewnienia ochrony środowiska. W praktyce może być jednak inaczej.

Posługując się konkretnym przykładem ze Słowacji, autorka wskazuje na przypadek, w którym istniało podejrzenie, że organizacja pozarządowa wykorzystuje swoje prawa podmio-

towe w celu innym niż wymaga tego Konwencja z Aarhus. Władze administracyjne uważały, że takie zachowanie może stanowić nadużycie praw proceduralnych gwarantowanych przez Konwencję, dlatego poszukiwały narzędzi prawnych w ramach prawa administracyjnego, których wykorzystanie nie byłoby sprzeczne z Konwencją z Aarhus.

Niniejszy artykuł porusza kwestię ograniczeń prawnych, które uniemożliwiają stronom ograniczanie praw proceduralnych zainteresowanej społeczności gwarantowanych przez Konwencję z Aarhus.

Słowa kluczowe: nadużycie prawa, Konwencja z Aarhus, prawa proceduralne członków społeczeństwa

Соня Кошичарова

Правовые средства защиты от злоупотребления правом на участие общественности в принятии решений по экологическим вопросам – текущая ситуация в Словацкой Республике

Резюме

Орхусская конвенция гарантирует ряд процедурных прав, которыми может активно пользоваться заинтересованная общественность, до тех пор, пока она участвует в процедуре оценки воздействия на окружающую среду. Данный международный договор предусматривает, что заинтересованная общественность осуществляет свои процедурные права с целью обеспечения защиты окружающей среды. Но на практике может быть по-другому.

Используя конкретный пример Словакии, авторка указывает на случай, когда возникло подозрение, что неправительственная организация использовала свои субъективные права в целях, отличных от предусмотренных Орхусской конвенцией. Административные органы считали, что такие действия могут представлять собой злоупотребление процедурными правами, гарантированными Конвенцией, и поэтому искали правовые инструменты в соответствии с административным правом, использование которых не противоречило бы Орхусской конвенции.

В данной статье рассматривается вопрос правовых ограничений, которые не позволяют сторонам ограничивать процедурные права заинтересованной общественности, гарантированные Орхусской конвенцией.

Ключевые слова: злоупотребление правом, Орхусская конвенция, процедурные права членов общества

Soňa Košičiarová

Tutele legali contro l'abuso del diritto alla partecipazione del pubblico ai processi decisionali in materia ambientale – la situazione attuale nella Repubblica Slovacca

Sommario

La Convenzione di Aarhus garantisce diversi diritti procedurali che il pubblico interessato può esercitare attivamente finché è coinvolto nella procedura di valutazione dell'impatto ambientale. Questo trattato internazionale presuppone che il pubblico interessato eserciti i propri diritti procedurali con l'intento di garantire la protezione dell'ambiente. Nella pratica, tuttavia, questo potrebbe non essere il caso.

Utilizzando un esempio specifico della Slovacchia, l'autore segnala un caso in cui si sospettava che una ONG usasse i propri diritti soggettivi per uno scopo diverso da quello richiesto dalla Convenzione di Aarhus. Le autorità amministrative hanno ritenuto che tale comportamento potesse costituire un abuso dei diritti procedurali garantiti dalla Convenzione e hanno quindi cercato strumenti legali nell'ambito del diritto amministrativo, il cui uso non sarebbe stato contrario alla Convenzione di Aarhus.

Questo articolo affronta i vincoli legali che impediscono alle parti di limitare i diritti procedurali del pubblico interessato garantiti dalla Convenzione di Aarhus.

Parole chiave: abuso di diritto, Convenzione di Aarhus, diritti procedurali dei membri del pubblico