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Efficient Collective Redress Mechanisms in Visegrad 4 Countries: **An Achievable Target?**



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with keynote by prof. Astrid Stadler

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15 Using collective redress mechanisms to protect the right to a healthy environment in Poland: An achievable goal in the near future?

Karolina Karpus

15.1 Introduction: methodology and scope of the assessment

The attempt to assess the legal possibilities of using injunctive and compensatory collective redress mechanisms in the Member States of the EU concerning violations of rights granted under EU law from the perspective of the environmental law should be based on three basic methodological assumptions.

First, it should be assumed that the analysis will in the first place include measures within civil law, whereas, the measures within administrative law (part of which is also environmental law) can mainly be referred to for comparative objectives. Moreover, the elaboration of civil law measures must be conducted with a breakdown per legal measure, strictly directed at environmental protection and general civil law measures, which can indirectly serve environmental protection.

Second, the solutions concerning the issue of legal liability within environmental law should be assessed by taking the existence and consequences of the general principle of environmental law into consideration – the preventive principle that “requires action to be taken at an early stage and, if possible, before damage has actually occurred”.³⁶⁶ Thus, injunctive collective redress mechanism thoroughly serves to fulfil the objectives of this principle above all. According to this principle, compensatory collective redress mechanisms

³⁶⁶ SANDS, P. *Principles of international environmental law*. Cambridge: Cambridge University Press, 2003, p. 247.

should be treated as a necessary solution but, due to its nature as being subsidiary to basic legal measures of environmental law. The preventive principle is, therefore, the most important criterion of the assessment of legal measures in the analysed scope and then the justification for demands *de lege ferenda*.

Third, the issues of “legal interest” as the condition for obtaining legal protection must be specified, taking the motivation of members of a society while making decisions on active involvement in environmental protection into consideration. Within this scope, B. Iwanska suggests a useful motivation classification, which can be presented in two groups: 1) egoistic motivations, 2) altruistic motivations. In the first case, the willingness of a given entity to obtain specific individual benefit may be at the same time connected with the aspiration to protect the environment as a common good. Here, the private (“egoistic”) interest connects with public (environmental protection) interest. According to B. Iwanska, the example of such a connection between legal interests is the area of human rights, directly dependent on the possibility of life in a high-quality environment. Whereas, in the second case, i.e. altruistic motivations, B. Iwanska points to the following legal instruments that enable the members of society to take actions within environmental protection: 1) *actio popularis*, 2) the actions of associations (e.g. environmental organisations) as a legal form of social activity, 3) institution of the environmental ombudsman.³⁶⁷

The above presented action motivation classification of individual entities will be used in this analysis while describing Polish legal regulations *de lege lata* and also in the description of proposed recommendations. It is also a good starting point for distinguishing the categories of possible civil proceedings. Hence, the following should be distinguished: 1) environmental cases: a) initiated by an entity seeking the protection of its own legal interest and at the same time of environmental protection (“egoistic motivation”); b) initiated by an entity exclusively seeking the protection of the environment (“altruistic motivation”/“purely environmental case”); and 2) non-environmental cases (initiated by an entity exclusively seeking the protection of private interests). The scope of this assessment is limited only to thus identified “environmental cases”.

From the formal point of view, the analysis of Polish provisions within the objectives of European Commission Recommendation 2013/396/EU³⁶⁸ should include the review of two groups of legal acts. In the first place, it will include adequate legal measures defined in the following normative acts: Act of 27 April 2001 on Environmental Law (hereinafter: ELA);³⁶⁹ Act of 13 April 2007 on prevention of and remedying environmental damage³⁷⁰ and Act of 3 October 2008 on access to environmental information, public participation in

³⁶⁷ IWAŃSKA, B. *Koncepcja „skargi zbiorowej” w prawie ochrony środowiska*. Warszawa: Wolters Kluwer, 2013, p. 190–191, and p. 262–263.

³⁶⁸ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), p. 60–65.

³⁶⁹ Journal of Laws of 2018 item 799 with amendments.

³⁷⁰ Journal of Laws of 2018 item 954 with amendments.

decision-making in environmental matters and EIA (hereinafter: 2008 Act).³⁷¹ The second group will include the Civil Code of 23 April 1964 (hereinafter: Civile Code),³⁷² and the Act of 17 December 2009 on class action lawsuits.³⁷³

It should also be pointed out that, from the point of view of environmental law, to correctly assess the issues included in EC Recommendation 2013/396/EU it is necessary to combine them in the context of the principle of sustainable development, above all with the Aarhus Convention,³⁷⁴ and, consequently, also with the EU law acts implementing the resolutions of the Convention (horizontal and sectoral).

15.2 Implementation of Article 9 (3) of the Aarhus Convention in Poland

15.2.1 Access to justice (III Aarhus pillar) and its challenges for the national legislator

The Polish legislator implemented the Aarhus Convention and the relevant EU laws into the Polish law by the 2008 Act. With regard to both substantive rights provided by the Convention – under Article 4 (access to environmental information) and Article 6 (public participation in decisions on specific activities) – access to justice indicated in Article 9 (1) and in Article 9 (2) is ensured on general principals, including the right to appeal to an administrative body of second instance and the right to make a complaint to an administrative court. However, by applying those solutions, the Polish legislator did not make an effort, either in administrative law or civil law, to implement Article 9 (3) at the same time in an independent and well-thought-out way. It should be indicated that, also at the level of the EU law, Article 9 (3) was not fully implemented.³⁷⁵ In 2017, the European Commission made an attempt to summarise the CJEU judicature and the experiences of the Member States in its “Notice on access to justice in environmental matters”, stating directly that the scope of this act “*is limited to access to justice in relation to decisions, acts and omissions by public*

³⁷¹ Journal of Laws of 2018 item 2081 with amendments.

³⁷² Journal of Laws of 2018 item 1025 with amendments.

³⁷³ Journal of Laws of 2018 item 573 with amendments.

³⁷⁴ UNECE Convention on Access to Information, Public Participation in Decision-Making and access to Justice in Environmental Matters (1998), Journal of Laws of 2003 No. 78, item 706.

³⁷⁵ See the European Commission’s unsuccessful Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, (COM/2003/0624 final – COD 2003/0246), available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2003:0624:FIN>>; EBBESSON, J. Access to justice at the National Level. Impact of the Aarhus Convention and European Union Law. In: PALLEMAERTS, M. (ed.). *The Aarhus Convention at ten: interactions and tensions between conventional international law and EU environmental law*. Groningen: Europa Law Publishing, 2011, p. 262–265; KNADE-PLASKACZ, A. Dostęp do wymiaru sprawiedliwości w sprawach dotyczących środowiska – transpozycja trzeciego filaru konwencji z Aarhus do prawa Unii Europejskiej. *Przegląd Prawa Ochrony Środowiska*. 2014, no. 1, p. 227–229.

authorities of the Member States. It does not address environmental litigation between private parties”.³⁷⁶

Two of the most important issues that would require amendments and consideration in the light of Article 9 (3) of the Aarhus Convention are “environmental damage” (damage to natural resources) and the right to a clean environment. They have, without doubt, fundamental meaning for collective redress mechanisms from the civil law perspective. It results from the basic fact that the main aim of collective redress mechanisms is to facilitate access to justice in “mass harm situations”, defined as “a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons”.³⁷⁷ Thus, in a situation when a given “mass harm situation” results from an incident being “environmental damage” then, at the same time, it results in a breach of the right to a clean environment, to which all exposed or harmed people are entitled. This case, assessed not only in the context that had already occurred but also in the situation of a direct threat of its occurrence, is a type of “environmental case”, in which the entities search for legal protection while being guided by egoistic motivation in relation to environmental protection.

There are no signs that the Polish legislator finds the need to review current civil law regulations to adapt them even minimally to Article 9 (3) of the Aarhus Convention. Obviously, the Polish legislator thinks that there is still no need to amend Article 415 of the Civil Code on account of the concept of “environmental damage”. Within “damage,” Article 415 of the Civil Code includes in principle “harm to property” and “harm to the person”, whereas “harm to the environment” as an independent structure still remains mainly as a postulate in the discussion on future law amendments.³⁷⁸ While, taking into consideration the protection postulated with regard to “mass harm situations” resulting from EC Recommendation 2013/396/EU, it should be added that, in the case of the Act of 17 December 2009 on class action lawsuits, it was indicated from the beginning that none of “*the private law forms of consumer interest protection guarantees the protection of the interests of many entities who suffered harm as a result of one incident*”.³⁷⁹ It may also be added in the context of the right to a clean environment as one of the human rights and included in Article 23 of the Civil Code’s types of “personal interests” of a human being, protected by civil law measures that, also in this context, the Polish legislator accepts that there is still no need to detail those

³⁷⁶ Commission Notice on access to justice in environmental matters (2017/C 275/01), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2017.275.01.0001.01.ENG>, p. 4.

³⁷⁷ Point 3 (b) of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

³⁷⁸ RAKOCZY, B. *Szkoda w środowisku a szkoda wyrządzona oddziaływaniem na środowisko*. In: RAKOCZY, B. – PCHAŁEK, M. (eds.). *Wybrane problemy prawa ochrony środowiska*. Warszawa: Wolters Kluwer, 2010, p. 330–338; CZECH, E. K. *Szkoda w obszarze środowiska i wina: jako determinanty odpowiedzialności administracyjnej za tę szkodę*. Białystok: Trans Humana, 2008; RADECKI, W. *Odpowiedzialność cywilna w ochronie środowiska. Studium prawnoporównawcze*. Wrocław: Ossolineum, 1987; LONGCHAMPS, M., *Odpowiedzialność za szkodę ekologiczną*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1986.

³⁷⁹ SIERADZKA, M. *Dochodzenie roszczeń w postępowaniu grupowym: komentarz*. Warszawa: Wolters Kluwer, 2015, p. 26.

provisions by taking recent developments in environmental law and human rights law into account.

15.2.2 Legal protection measures aimed at environmental protection – civil law

Within a short review of legal protection measures aiming at public interests, namely environmental protection, the following groups should be indicated. In the group of civil law measures directly aimed at environmental protection, including those that assume the possibility of using of a civil injunctive action, as well as action for damage, the following measures may be pointed out: 1) Article 323 (1) of the ELA³⁸⁰ and Article 57 (1) of the Act of 22 June 2001 on microorganisms and genetically modified organisms;³⁸¹ 2) Article 323 (2) of the ELA³⁸² and Article 57 (2) of the Act of 22 June 2001 on microorganisms and genetically modified organisms. In the group of civil law measures that may indirectly fulfil the aims of environmental protection, the following may be counted among the most important in the Civil Code: 1) Article 23 (Protection of personal interests) in conjunction with Article 24 (Means of protection) and Article 448 (Infringement of personal interests); 2) Article 144 (Immissions) in conjunction with Article 222 (2) (*Actio negatoria*); 3) Article 415 (Fault-based liability for delicts); 4) Article 417 (State Treasury liability for unlawful action or omission) and Article 417 (Damage arising from a legislative act); 5) Article 435 (Risk-based liability of person running an enterprise); and 6) Article 439 (Preventing damage).³⁸³

As already pointed out above, the Polish legislator has not so far proposed solutions adapting the civil structure of “damage” to challenges resulting from the need for efficient legal protection of the environment and in connection with collective redress mechanisms. It may be noticed in this context that, for instance, in the French law the issue underwent interesting changes that could be an inspiration for the Polish legislator. In *Nomenclature des préjudices liés au dommage environnemental*³⁸⁴ presented in 2012, the division of “environmental damage” into two categories, i.e. “harms to environment” and “harms to

³⁸⁰ “Every person who is directly threatened by damage or has suffered damage as a result of illegal impact on the environment may demand that the entity responsible for this threat or violation should restore the state complying with the law and take preventive measures, in particular by putting in place an installation or equipment to protect against the threat or violation; where this is impossible or too difficult, the person may demand that the activity causing the threat or disturbance be stopped”; (“egoistic motivation”).

³⁸¹ Journal of Laws of 2017 item 2134 with amendments.

³⁸² “Where the threat or violation affects the environment as a common good, the claim referred to in paragraph 1 may be brought by the State Treasury, a unit of local/regional administration as well as an environmental organisation”; (“altruistic motivation”).

³⁸³ Article 439 of the Civil Code: “Whoever is threatened by a direct damage resulting from the behaviour of another person, in particular from the absence of the due supervision over the enterprise or establishment run by that person or the condition of a building or other facilities possessed by that person, is threatened by a direct damage, may demand that person to undertake measures indispensable for averting the imminent danger, and if necessary also to give an appropriate security”.

³⁸⁴ NEYRET, L. – MARTIN, G. J., (eds.). *Nomenclature des préjudices environnementaux*. Paris: LGDJ Lextenso éditions, 2012, p. 15–22.

humans” was suggested. Within the second one, “collective harms” and “individual harms”, suffered by a human due to a harm to the environment, were distinguished. From this perspective, “collective harms” were defined as “the breach of human interests which exceed the total of individual interests and have an impact on the collective benefits of the environment or environmental protection in its various aspects”. It was also explicitly noted that the environment is the source of ecosystem services,³⁸⁵ the beneficiary of which are humans. In the context of such understood “collective harms” and taking the category of ecosystem services into consideration,³⁸⁶ one may see the chance to develop legal regulations that will make it easier to gain legal protection in “environmental cases”, also within collective redress mechanisms.³⁸⁷

Within the scope of the above review, the relationship between “personal interests of a human being” and right to a clean environment³⁸⁸ should be pointed out. Article 23 of the Civil Code, among the “personal interests of a human being,” enumerates “health, freedom, dignity, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of their home, and scientific, artistic, inventive or improvement achievements”. It is only a sample catalogue of values protected in civil law. “Clean environment” may be connected in this aspect as an element included in such “personal interests” as “health” or “freedom” and “dignity”. However, the question if it is high time to indicate directly in Article 23 an independent type of “personal interest” which is “good quality environment” arises. The problem in this scope is that, in principle, “environment” is classified as a “public good” or “common good”, whereas the aim of Article 23 of the Civil Code is to protect “personal interests”, i.e. “individual goods”. Even so, one can see a new legal argumentation in the example of civil cases concerning air quality due to the threat resulting from smog, which gives a chance to amend the interpretation of law in this context.

³⁸⁵ In France, Article 1247 of the French Civil Code has indicated since 2016 that “*le préjudice écologique consistant en une atteinte non négligeable aux éléments ou aux fonctions des écosystèmes ou aux bénéfices collectifs tirés par l’homme de l’environnement*”; available at: <<https://www.legifrance.gouv.fr>>.

³⁸⁶ See SALZMAN, J. – THOMPSON, B. H. – DAILY, G. C. Protecting Ecosystem Services: Science, Economics, and Law. *Stanford Environ. Law J.* 2001, n. 2, p. 309–332; MONTEDURO, M. Environmental Law and Agroecology. Transdisciplinary Approach to Public Ecosystem Services as a New Challenge for Environmental Legal Doctrine. *European Energy and Environmental Law Review.* 2013, n. 1, p. 2–11; STĘPNIEWSKA, M. – ZWIERSZCHOWSKA, I. – MIZGAJSKI, A. Capability of the Polish legal system to introduce the ecosystem services approach into environmental management. *Ecosystem Services.* 2018, vol. 29, p. 271–281.

³⁸⁷ NEYRET, L. *Le préjudice collectif né du dommage environnemental*. In: NEYRET, L. – MARTIN, G. J., (eds.). *Nomenclature des préjudices environnementaux*. Paris: LGDJ Lextenso éditions, 2012, p. 195–196, p. 215–217.

³⁸⁸ URBAŃSKA, K. *Prawo podmiotowe do dobrego środowiska w prawie międzynarodowym i polskim*. Poznań: Ars boni et aequi, 2015, p. 200–221; WEREŚNIAK-MASRI, I. Prawo do czystego środowiska i prawo do czystego powietrza jako dobra osobiste. *Monitor Prawniczy.* 2018, no. 18, p. 937–945.

15.3 Air pollution (“smog”) and the right to breathe clean air – recent developments

15.3.1 “Air quality plans” before the administrative courts

The Polish Supreme Audit Office directly states that the results of the audit concerning air protection in Poland presented in the report of 2014,³⁸⁹ as well as, in the 2018 report “*clearly show that the actions taken were not sufficient for the scale and the gravity of the problems connected to inadequate air quality in Poland*”.³⁹⁰ The data of the Chief Inspectorate of Environmental Protection for 2010-2016 show that the most common cause of exceeding permissible levels of particulate matter PM₁₀ (24-hour average) was the emission connected to individual heating of buildings (the cause was indicated in 82.2% to 94.0% of all reported cases of excess). With regard to benzopyrene, the results were between 94.1% and 100%.

In Poland, the transposition of the provisions of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (hereinafter: CAFE Directive or Directive 2008/50/EC),³⁹¹ took place by amending the ELA in 2012.³⁹² The preparation and implementation of “air quality plans”, indicated in Article 23 (1) of the Directive, may be recognised as one of the most important obligations of the Member States. According to the CJEU, the “air quality plans” adopted by a Member State under this Article, whether at national or regional level, should include an express reference to the requirement that those plans have to make it possible to limit exceedances of limit values to the shortest possible period.³⁹³

At the same time, in the context of individual entities’ rights correlated with “air quality plans,” in case C-404/13394 the CJEU expressly stated that

“the natural or legal persons directly concerned by the limit values being exceeded after 1 January 2010 must be in a position to require the competent authorities, if necessary by bringing an action before the courts having jurisdiction, to establish an air quality plan

³⁸⁹ Najwyższa Izba Kontroli [The Supreme Audit Office]. *Informacja o wynikach kontroli – ochrona powietrza przed zanieczyszczeniami*. Warszawa: NIK, 2014, available at: <<https://www.nik.gov.pl/plik/id,7764,vp,9732.pdf>>.

³⁹⁰ Najwyższa Izba Kontroli [The Supreme Audit Office]. *Informacja o wynikach kontroli – ochrona powietrza przed zanieczyszczeniami*. Warszawa: NIK, 2018, p. 29; available at: <<https://www.nik.gov.pl/kontrolne/wyniki-kontroli-nik/kontrolne,18513.html>>.

³⁹¹ Available at: <<http://data.europa.eu/eli/dir/2008/50/oj>>, p. 1–44.

³⁹² Act of 13 April 2012 on the revision of ELA and certain other Acts, Journal of Laws of 2012 item 460.

³⁹³ Judgment of the Court of Justice of 22 February 2018, *European Commission v Republic of Poland* (C-336/16 ECLI:EU:C:2018:94, paragraph 122); see also: Judgment of the Court of Justice of 5 April 2017 *European Commission v Republic of Bulgaria* (C-488/15 ECLI:EU:C:2017:267).

³⁹⁴ Judgment of the Court of Justice of 19 November 2014, *The Queen, on the application of: ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs* (C-404/13 ECLI:EU:C:2014:2382, paragraph 56); Judgment of the Court of Justice of 25 July 2008 *Dieter Janecek v Freistaat Bayern* (C-237/07 ECLI:EU:C:2008:447, paragraph 39).

which complies with the second subparagraph of Article 23 (1) of Directive 2008/50/EC, where a Member State has failed to secure compliance with the requirements of the second subparagraph of Article 13 (1) of Directive 2008/50/EC and has not applied for a postponement of the deadline as provided for by Article 22 of the directive”.

The issues of “air quality plans”, implemented as resolutions of voivodship sejmiks, have already occupied the attention of Polish administrative courts. However, the available judicature is not very extensive. The legal nature of those programmes and, consequently, the admissible level of specifying the solutions (tasks and obligations) included in the act were the prime legal issues assessed in those cases. The litigation in this context was conducted from the opposing directions by two groups of entities, 1) those thinking that a given plan interferes too much with their rights and obligations;³⁹⁵ 2) those believing that the plan does not guarantee the appropriate level of environmental protection.

The second group consists of individual entities who want the “air quality plans” to be a really effective legal instrument, which will quickly result in the improvement of air quality in a given area. In this basic sense, the plan should be an instrument fulfilling the right to live in a high-quality environment.³⁹⁶ In the administrative proceedings, individual entities usually use the complaint resulting from Article 90 (1) of the Act on voivodship self-government³⁹⁷ for the purpose of challenging “air quality plans”:

“Anyone, whose legal interest or right was breached by the local legal act, issued in the case within public administration, may appeal against the provision to the administrative court”.

In order to satisfy this requirement, the entity claims that its right to a clean environment is breached because the “air quality plan” is environmentally inadequate in the light of Directive 2008/50/EC. However, in such cases so far, the administrative courts have usually questioned the right to appear in court (*locus standi*) of the suing entity under Article 90 (1) and accordingly rejected the complaints.³⁹⁸

Polish administrative courts, in principle, think that complaints resulting from Article 90 (1) of the Act have no nature of *actio popularis*; therefore, there are no grounds to try to use this complaint as *actio popularis* in cases concerning general questioning of the environmental effectiveness of “air quality plans”. In its ruling of 2018, the Supreme Administrative Court explicitly stated that

³⁹⁵ The group does not only consists of entrepreneurs, but also of e.g. gminas (communes) – the litigation between the city of Poznan of Wielkopolskie Voivodship (the judgment of the Voivodship Administrative Court in Poznan of 29 November 2019, the case II SA/Po 660/13, CBOSA).

³⁹⁶ KARSKI, L. Prawa człowieka i środowisko. *Studia Ecologiae et Bioethicae*. 2006, no. 4, p. 309–310; GIORGETTA, S. The Right to a Healthy Environment, Human Rights and Sustainable Development. *International Environmental Agreements: Politics, Law and Economics*. 2002, no. 2, p. 177–181.

³⁹⁷ The Act of 5 June 1998 on voivodship self-government, Journal of Laws of 2019, item 512 with amendments.

³⁹⁸ The Judgment of the Voivodship Administrative Court in Szczecin of 1 February 2012, case II SA/Sz 1298/11, CBOSA; Resolution of the Voivodship Administrative Court in Krakow of 6 July 2016, case II SA/Kr 573/16, CBOSA; Resolution of the Voivodship Administrative Court in Gliwice of 15 September 2017, case II SA/Gl 639/17, CBOSA.

“the content of the CAFE Directive does not result in the obligation of the Member State to give the possibility of appeal against air quality plans by every inhabitant of the area under the plan. The CJEU sees indirectly the usefulness of such a solution in its ruling cited in the appeal against sentence, which, however (...) may not be the ground for an inadmissible extension of the scope of applying Article 90 (1) of the Act on voivodship self-government”.³⁹⁹

15.3.2 Air quality (right to a clean environment) and Article 23 of the Civil Code (protection of personal interests)

To illustrate the issue of assessing the usefulness of Article 23 of the Civil Code for the objectives of legal environmental protection, including collective redress mechanisms, two cases that have recently caught public attention in Poland, should be pointed out. They were of a similar factual situation (“Rybnik case” and “Grazyna Wolszczak case”) and adjudicated in two District Courts but the verdicts were completely different.

In October 2015, the plaintiff (an inhabitant of the town of Rybnik) sued the State Treasury (represented by the Minister of the Environment and the Minister of Energy) to award PLN 50,000 in compensation for the breach of his personal interests (case no. II C 1295/15). The plaintiff claimed, referring to the obligations of the Polish state resulting from Directive 2008/50/EC and the adequate Polish law, that the responsibility of the state for the results of unlawful negligence of fulfilling binding air quality standards, i.e. for the damage resulting from the breach of the plaintiff’s personal interests is justified. The plaintiff also claimed that the breach of personal interests to his person had taken place for many years and had not changed. This situation had an unfavourable impact on everyday life, especially in winter months and has resulted in a justified strong fear for his own health and life. Because of significant air pollution in the town, the plaintiff found that he experienced serious limitations in using his house for its intended purpose, had limited freedom of movement and also his rights, to live in a clean environment and to a particularly protected personal interest, i.e. health, have been breached.

In its judgment of 30 May 2018, the District Court in Rybnik in case II C 1259/15⁴⁰⁰ dismissed the plaint, finding that

“the compensation resulting from Article 488 of the Civil Code in conjunction with Article 24 (1) of the Civil Code is due only in the situation of the breach of personal interest, i.e. in the case of bodily injury or health disorder; it is not due [however] with regard

³⁹⁹ The order of the Supreme Administrative Court of 23 January 2018 case II OSK 3218/17, CBOSA.

⁴⁰⁰ The Judgment of the District Court in Rybnik of 30 May 2018, Case II C 1259/15, available at: <<https://www.saos.org.pl/judgments/content/361462>>.

to a threat of a breach of the interest. Therefore, there are no grounds to claim as a personal interest (...) some unclearly defined damage not connected to [real] bodily injury or health disorder. In the meantime, the plaintiff did not show a bodily injury, health disorder or anything else being the result of smog”.

At the same time the, District Court in Rybnik questioned the concept of placing the right to live in a clean environment in the personal interest catalogue in Article 23 of the Civil Code. Assessing the argument on breaching his right to health, the District Court in Rybnik found that the plaintiff did not show sufficient evidence confirming the impact of smog on his health and additionally stated that *“the plaintiff and his family have been living in Rybnik of their own free will. If he does not agree with the state of affairs, he may change his place of residence”.*

The inhabitant of Rybnik made an appeal against the sentence to the Regional Court in Gliwice (case no. III Ca 1548/18, still pending). In November 2018, the Polish Commissioner for Human Rights joined the proceedings,⁴⁰¹ having found all the arguments of the inhabitant of Rybnik indicated in the appeal legitimate, including above all those implying a breach of the right to respect for private and family life and living, as well as the right to freedom of movement, on account of air pollution. Simultaneously, the Commissioner for Human Rights criticised in particular the position of the District Court in Rybnik, which questioned the right to live in an unspoilt environment as a category of personal interests.

The new interpretation of Article 23 of the Civil Code took place in the sentence of 24 January 2019 of the District Court in Warsaw in case VI C 1043/18.⁴⁰² In the case, the plaintiff (a Polish actress Grazyna Wolszczak⁴⁰³) filed to adjudge for the breach of her personal interests from the defendants: the city of Warsaw and the State Treasury (represented by the Minister of the Environment and the Minister of Energy) PLN 5,000 plus statutory interest for an organisation chosen by her. The actress, having cited *inter alia* the CJEU judgment in case C-336/16 and the Polish Supreme Audit Office report of 2014, indicated that public authorities despite legal obligations regarding good quality air in Poland had been ineffective and had either not taken adequate action or they did so with a delay, which led to the situation that, for many years in Poland (including Warsaw), the quality of air had been bad and harmful to the health and life of people. Having indicated Article 23 of the Civil Code (protection of personal interests) as the legal basis for her claim, the actress justified that because of poor air quality in Poland she could not pursue her passions and interests, as she often felt mental and emotional discomfort. As a result, the negligence of the Polish public authorities had led to the breach of her personal interests, such as the possibility to use the attributes of an unspoiled environment, the right to protect her personal life and the right to freedom, privacy and respect for her place of residence. The arguments of the

⁴⁰¹ Polish Commissioner for Human Rights – Pleading of 30 November 2018 on joining the case, the case III Ca 1548/18, available at: <<https://www.rpo.gov.pl/sites/default/files/pismo%20procesowe%20RPO%20ws%20smogu%20w%20Rybniku%2C%2030.11.2018.pdf>>.

⁴⁰² The Judgment of the District Court for Warsaw-Śródmieście in Warsaw of 24 January 2019, Case VI C 1043/18, available at: <<https://www.saos.org.pl/judgments/371572>>.

⁴⁰³ *Rzeczpospolita* (24.01.2019), available at: <<https://www.rp.pl/Dobra-osobiste/301249966-Sad-smog-narusza-dobra-osobiste-Wyrok-z-powodztwa-aktorki-Grazyny-Wolszczak.html>>.

remaining part of her claim were based on the case law of the European Court of Human Rights concerning, in particular, the right to life and right to respect for one's private and family life and home.

In the justification for the sentence in favour of the actress, the District Court assessed that:

“There is no doubt that for years the state of environmental pollution and the lack of effective actions on the side of public authorities have had an unfavourable impact on people's health and life, including the plaintiff's. This state may lead to the breach of personal interests, which happened in the case of the plaintiff”.

In response to the statement of the State Treasury that there is no such category of personal interests as *“the right to use the attributes of an unspoiled environment,”* the District Court pointed out that

“the plaintiff does not cite in the proceedings the breach of her right to use the attributes of unspoiled environment in the sense defined by the State Treasury, i.e. an environment completely free of any pollution. The plaintiff cites, however, the breach of her right to live in an environment and use of air fulfilling at least the norms and values defined in the EU legislation (permissible norms limiting the negative impact of a polluted environment on health), that is the air quality standard (...)”.

Confirming in this way the existence of the category of “environmental” personal interest, the District Court stated that

“serious environmental pollution is a breach of the right to respect for home and the right to privacy due to the negligence of public authorities in the issue of undertaking preventive actions”.

The sentences in the “Rybnik case” and “Grazyna Wolszczak case” show the following divergences. In the first case, the District Court in Rybnik only allowed the possibility to realise the legal interest in the context of protecting personal interests within compensatory action (a personal injury claim), whereas the District Court in Warsaw, in the second case, accepted the fact that the protection of legal interests may be sought at an earlier stage, coming nearer in its preventive essence to claims for injunctive orders.

However, it should not be forgotten that both judgments were reached in cases settled in the first instance by District Courts, which means they have not yet been subject to the final decisions of higher instance courts. Even so, after the sentence in the Grazyna Wolszczak case, the legal firm⁴⁰⁴ representing the actress initiated together with a group of “ambassadors”

⁴⁰⁴ The firm (available at: <<http://gorski-radcaprawny.pl>>) conducts parallel activities concerning the initiation of group proceedings against the State Treasury on settling the liability of the State Treasury for harm suffered by borrowers on account of concluding an agreement connected to foreign exchange rates (“credits nominated in CHF”); available at: <<http://zjednoczenikredytobiorcy.pl/>>.

(famous Polish artists) the campaign “pozywamsmog”.⁴⁰⁵ Generally speaking, it (currently at an early stage, admitting entries from people interested in participating in the project until 31 March 2019) aims to submit a collective redress action against the Polish State Treasury on the subject of “establishing the liability of the State Treasury for the harm and damage of the group participants (already suffered or which may occur in the future) and resulting from negligence by organisational units of the State Treasury while exercising public authority. The lawsuit is based on the assumption that the State Treasury did not fulfil the obligation to adjust the quality of air in Poland to the norms resulting from the legal provisions and therefore is liable to the group participants (the State Treasury tort)”. It is difficult to assess those declarations explicitly, but it seems that the aim of the project is to initiate, within the battle against smog in Poland, proceedings classified as “compensatory collective redress”.

15.4 Conclusions and recommendations

The methodology of this assessment was based on the following general assumptions. Within its scope, applying Article 9 (3) of the Aarhus Convention, a group of cases could be designated, classified as “environmental cases”. Then, in comparison with this group, the civil law measures could be assessed, paying special attention to the motivation of entities making claims (altruistic and egoistic motivations). The conclusions formulated as a result of this overview in the reality of the Polish civil law with regard to individual claims reflect at the same time the reality of the effectiveness of using collective redress mechanisms as proceedings enabling access to justice in environmental matters. The example cases concerning the quality of air and the threat of smog show the existing barriers to access to justice, both in the administrative cases (“air quality plans”) and in civil cases (Article 23 of the Civil Code and the right to a clean environment).

Taking the above observations into account, the most important recommendations for the Polish legislator are:

1. to modernise the civil concept of “damage” in a way that directly and explicitly considers the existence of harm to the environment next to harm to persons and harm to property, including a broader reflection of the notion of “ecosystem services” and its usefulness for the definition of damage;
2. to implement the concept of ecosystem services into the Polish legal system to provide grounds for a more environment-friendly interpretation of “legal interest” as a condition for assessing the right to make a claim for legal protection in “environmental cases” in which an entity is guided by egoistic motivation (the combination of individual interest with public interest, i.e. environmental protection);
3. to align the civil law concept of the protection of personal interests (Article 23 of the Civil Code) with the achievements of human rights law and environmental law with regard to

⁴⁰⁵ See, available at: <<https://pozywamsmog.eu>> [“wesuetesmog”].

the right to a clean environment, and subsequently to introduce the outcome of such an alignment in a proposal for legislative action.

The chances by the Polish legislator using a legal measure such as *actio popularis* (assuming the “altruistic” motivation of the plaintiff) to ensure access to justice in environmental matters remain minimal. Because of that, the main direction of change must concern the new notion of “legal interest” of an entity searching for legal protection. In this regard, greater attention should be paid to the concept of “environmental damage” and the perception of the environment as both a “public good” and as a source of personal benefits (“ecosystem services”) from the perspective of individual rights (right to a clean environment). Only those changes will allow the usefulness of collective redress mechanisms (injunctive and compensatory) to be assessed more broadly in future in the interest of access to justice in environmental matters.