

POSSIBILITIES AND APPROACHES OF THE EUROPEAN COURT OF HUMAN RIGHTS AND COURT OF JUSTICE OF THE EUROPEAN UNION IN FUNDAMENTAL RIGHTS PROTECTION IN THE CONTEXT OF ENVIRONMENTAL LITIGATION / Tímea Lazorčáková

JUDr. Tímea Lazorčáková, PhD.
Chief State Advisor
Government Office of the Slovak Republic
Lecturer
Trnava University, Faculty of Law
Hornopotočná 23
918 43 Trnava
Slovak Republic
timea.lazorcakova@gmail.com
ORCID: 0009-0002-2736-8756

The paper presents a partial output within the research project APVV-20-0576 entitled "Green Ambitions for Sustainable Development (European Green Deal in the Context of International and National Law)"

Abstract: *Two judicial bodies, but both without right to protect the environment established. This is also how the coexistence of the two important judicial bodies located in the European area could be briefly characterized. The European Court of Human Rights and the Court of Justice of the European Union were created for different purposes, but their jurisprudence in the area of environmental protection and the protection of people's lives and health from the negative consequences of climate change overlap more than it might seem at first sight. We find certain similarities in terms of ensuring a certain degree of protection of fundamental rights in the context of the environment. The European Court of Human Rights has a priority in terms of the protection of fundamental rights in Europe, but in the field of the environment it faces several problems. Especially when we are talking about the protection of rights for future generations, where there is no direct victim or direct violation of fundamental rights, only a very high risk of their violation. On the other hand, the Court of Justice of the European Union has a much greater assumption of effectiveness, which has the potential to change the legislation of the member states and thereby indirectly ensure the protection of people's lives and health. Recently, the activity of the European Commission has been increasing in the interest of achieving climate neutrality, and this also means greater pressure on the states in the interest of the complete and correct transposition of European regulations in the field of the environment. In case of deficiencies, the European Commission can intervene by filing a lawsuit according to Article 258 of the TFEU, and achieve the required remedy. Although, such a procedure is not primarily aimed at the protection of fundamental rights, the positive impact on their protection cannot be neglected.*

Key words: *European Court of Human Rights; Court of Justice of the European Union; Standards of the Environmental Protection; Environmental Litigation for Future Generations*

Suggested citation:

Lazorčáková, T. (2023). Possibilities and Approaches of European Court of Human Rights and Court of Justice of the European Union in Fundamental Rights Protection in the Context of Environmental Litigation. *Bratislava Law Review*, 7(2), 73-94. <https://doi.org/10.46282/blr.2023.7.2.391>

Submitted: 07 June 2023
Accepted: 28 September 2023
Published: 29 December 2023

1. INTRODUCTION

In the European area, there are two judicial institutions with a strong influence, a strong basis of functioning and a relatively extensive decision-making activity. In a relatively small space, two significant bodies for the protection of legality, European standards and human rights coexist, which are the European Court of Human Rights (hereinafter „ECHR“) and the Court of Justice of the European Union (hereinafter „CJEU“). These two judicial bodies have a different basis of functioning, they were created within two different organisations and with a relatively different focus of decision-making activity. Nevertheless, they can overlap in some areas.

These two judicial bodies work side by side and respect each other's positions. For stability and a high level of protection and enforceability of rights in Europe, it is important that their decision-making activities do not contradict each other, but they must mutually understand the peculiarities that their legal bases bring. At the same time, it is very important that they do not question their decision-making activity.

The ECHR cannot interpret the law of the European Union in the proceedings, even if the complainant invoked it. Although the ECHR can also use legally binding acts of the European Union, it does not approach their interpretation as such. Only the CJEU is responsible for the interpretation of treaties and acts of institutions or bodies of the European Union. Other judicial authorities, including the ECHR, would not have to perceive all the significance and nature that characterise the law of the European Union.

On the other hand, the CJEU takes into account the European Convention on Human Rights as a minimum standard for the protection of fundamental rights. Charter of Fundamental Rights of the European Union binding the meaning and scope of the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms shall be the same. This provision shall not prevent Union law providing more extensive protection.¹

It is therefore obvious that these judicial bodies function differently, but they respect each other. Their decision-making power should be the same, but practice shows that the effectiveness and enforceability of their decisions is different.

The research issue answered in this paper is the following: Which judicial authority in Europe represents a more appropriate and effective tool for the protection of fundamental rights in the context of the environment? This question can be answered by evaluating the approaches and possibilities of the CJEU and the ECHR in proceedings related to the environment and fundamental rights. The aim of the article is to gradually examine the existing jurisprudence and proceedings initiated in recent years at the CJEU and the ECHR and, based on them, reach conclusions on the limits and possibilities of effective protection of fundamental rights. A significant part of the article is the third chapter, which contains an overview of the jurisprudence of the CJEU and the ECHR from recent years in climate cases. The aim of this part is to define the approach of both judicial bodies to climate cases, how they deal with the fact that international legal documents aimed at the protection of fundamental rights do not include the right to protect the environment, and how such climate cases become the subject of proceedings. Examining these cases leads to an analysis of the approach of both judicial bodies to the possible resolution on climate cases. In the cases of the ECHR, it is particularly important to focus on the protection of the environment for the future and therefore to point out to the new climate cases that have been initiated at the court and are aimed at protecting the life and health of future generations. In the cases of the CJEU,

¹ Article 52 point 2 of Charter of Fundamental Rights of the European Union.

it is necessary to come to terms with the fact that its role is not primarily to protect fundamental rights. Another aim is the evaluation of how, through the activities of the European Commission and subsequently the CJEU, it is possible to achieve protection of the environment and, indirectly, the protection of the fundamental rights of persons, through proceedings according to Art. 258 TFEU. The essential part of the contribution is also an assessment of the limits brought by the practice in proceedings before the ECHR, as well as an examination of the limited possibilities of the CJEU in fundamental rights protection. By examining the existing and emerging jurisprudence, it is possible to compare the possibilities and approaches of both judicial bodies in the interest of the protection of fundamental rights in the context of the environment and to formulate conclusions about a more appropriate way of achieving environmental protection and the related protection of fundamental rights.

2. COMPARISON OF THE WORK OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION

The ECHR and the CJEU work on different basis with different aims. The ECHR was created by the Council of Europe in order to protect human rights in Europe. In contrast, the CJEU was created as a body of the European Union that would provide a basic framework for the interpretation of European Union law. The ECHR ensures the protection of fundamental rights set forth in the European Convention on Human Rights against their violation by the contracting states, and the CJEU ensures compliance with the law by interpreting founding treaties or other legally binding acts of the European Union.

European Convention on Human Rights (hereinafter „Convention“) represents a live document that develops under the influence of changes and thus adapt its interpretation to the needs of the time. At the same time, the Convention should clearly have the main and most important position in terms of the protection of fundamental rights.

The founding treaties, apart from the primary provisions that define the values on which the European Union is based,² do not contain explicit protection of fundamental rights. However, we cannot forget the Charter of Fundamental Rights of the European Union, which also has the status of primary law of the European Union and which contains a list of fundamental rights that require protection. The Charter was only adopted several decades later, which proves that the European Union was not created in the interest of protecting fundamental rights. However, progress and the importance of fundamental rights protection forced it to reflect on this change. The CJEU played an important role in the process of shaping the protection of fundamental rights in the European Union. Its jurisprudence preceded the formal enshrining of the protection of fundamental rights in the Charter. It dealt with the issue of fundamental rights for the first time in 1996 in the Stauder judgment.³ In his decision-making activity, several decisions can be found that at least confirm the need for the protection of fundamental rights and elevate them to a higher level. Despite this, the Charter is not often referred to in environmental cases, thus not fully exploiting its potential (van Zeven, 2022).

However, there is also a difference in how such proceedings are initiated. An individual, a group of individuals or a non-governmental organisation may apply directly to the ECHR for a violation of the rights established by the Convention. Since the ECHR

² Article 3 of Consolidated version of the Treaty on European Union.

³ CJEU, judgment of 12 November 1969, Erich Stauder v. Stadt Ulm – Sozialamt, C-29-69, ECLI:EU:C:1969:57.

was created to protect fundamental rights, it is important that potential victims of fundamental rights violations have direct access to it. In contrast, the path for an individual to the CJEU is more complicated. Acting in the interests of the interpretation of European Union law opens the way mainly for states and their judicial authorities to initiate preliminary proceedings. It is not very common for an individual to appeal to the CJEU, and these proceedings do not have that much weight in Europe. Proceedings at the ECHR, which is addressed by a large number of complainants and which has a broad decision-making activity, have much greater meaning. It is obvious that the victim of a violation of the fundamental right will turn to the ECHR after exhausting national remedies. There can be no doubt about the importance of its action in the interest of protecting the fundamental rights contained in the Convention. But what about the protection of rights that the Convention does not contain? It is the area of environmental protection that is newly developing, in which the CJEU also finds its place. The basis of the actions of any of these judicial bodies does not include the right to protect the environment. Despite this, proceedings aimed at improving the state of the environment, as well as protecting people's lives and health, are ongoing at both judicial bodies.

3. CASE LAW IN THE CONTEXT OF ENVIRONMENTAL PROTECTION

Considering the current climate change, the level of the state of the environment and their impact on people's lives, it can be concluded that there is a tangible basis for the application of requirements for states to fulfil their obligations in the field of the environmental protection, precisely through the jurisprudence of judicial authorities. For a long time, there were mostly procedural rights in the context of the environment, i.e., so that individuals or non-governmental organisations could participate in lawsuits against states on national authorities for insufficient measures to protect the environment or to take measures against excessive environmental pollution. However, it is much more important to talk about material rights, such as the right to a favourable environment, or the right to protect life and health from the adverse consequences of the environment. The protection of such material rights brings concrete results.

Although international documents aimed at the protection of fundamental rights do not contain the right to environmental protection itself, such a right is applied in the context of fundamental rights that already have their international legal anchoring.

3.1 *Case-Law of ECHR*

Despite the fact that the Convention does not include the right to environmental protection, the ECHR has created a relatively extensive and sophisticated case-law in this area over the decades. The first proceedings did not concern the direct impact of the negative consequences of climate change on people's lives and health. Rather, they were aimed at protection against noise or air pollution. Gradually the decision-making activity grew on actions against health damage due to the bad state of the environment and the inaction of the states. In recent year, case-law even aims to protect future generations.

The Convention does not contain the right to environmental protection; therefore, the ECHR interprets the environmental obligations of states in the light of international law and European law, which uses as an aid to fill the gaps in Convention. At the same time, it connects them to the fundamental rights that the Convention already contain. During the proceedings, the ECHR fulfil the lack of a right to a healthy environment by relying on other rights, such as the right to life (Article 2 of the Convention), the right to a fair trial (Article 6 of the Convention), or the right to respect for private and family life (Article 8 of the Convention).

For the first time, the ECHR linked the unfavourable condition of the environment with the impact on human rights in the 1994 decision *López Ostra v. Spain*. The case concerned the impact of a waste-treatment plant on the lives of people in its vicinity. ECHR noted that environmental pollution ultimately affects the private and family life of the affected individuals and thus linked it to the right to private and family life. During the proceedings the Commission noted, *inter alia*, that hydrogen sulphide emissions from the plant exceeded the permitted limit and could endanger the health of those living nearby and that there could be a causal link between those emissions and the applicant's daughter's ailments.⁴ However, ECHR stated that naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. Whether the question is analysed in terms of a positive duty on the State - to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8.⁵ Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life.⁶ That's why the ECHR decided that there has been a breach of Article 8 of the Convention.

Ten years later, the bad condition of the environment was linked with the right to life. It is the case of *Öneriyıldız v. Turkey*, where the applicants sought a declaration that the Turkish government's inaction had violated the right to life as well as the right to property and an effective remedy. The case involved the destruction of a slum built on a waste dump that exploded due to a build-up of methane. Several homes burned down and 39 people died. ECHR stated that it was impossible for the administrative and municipal departments responsible for supervising and managing the tip not to have known of the risks inherent in methanogens or of the necessary preventive measures, particularly as there were specific regulations on the matter. Furthermore, the Court likewise regards it as established that various authorities were also aware of those risks, at least by 27 May 1991. It follows that the Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ümraniye municipal rubbish tip. They consequently had a positive obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals.⁷ The government accepted the creation of illegal dwellings on the waste dump, created a policy of non-integration and did not take measures to evict people from there. The government did not inform people about the risks associated with inhabiting these areas and did not take any practical measures such as closing the waste dump to avoid methanogens. Several people died directly as a result of this state inaction. The government of Turkey has not taken adequate measures and a causal link can be established between inaction in the area of environmental protection (waste disposal) and the death of persons. Consequently, the ECHR stated, that there has been a violation of Article 2 of the Convention in its substantive aspect, on account of the lack of appropriate steps to prevent the accidental death of nine of the applicant's close relatives and also a violation of Article 2 of the Convention in its procedural aspect, on account of the lack of adequate

⁴ ECHR, *López Ostra v. Spain*, app. no. 16798/90, 9 December 1994, para. 47.

⁵ *Ibid.*, para. 51.

⁶ *Ibid.*, para. 58.

⁷ ECHR, *Öneriyıldız v. Turkey*, app. no. 48939/99, 30 November 2004, paras. 101-102.

protection by law safeguarding the right to life.⁸ This case is important in the way of link between state inaction and right to life affection, which was breached at the end.

The common denominator of both cases is the fact that they deal with the already existing negative impact of the bad conditions of the environment on people's lives and health, and therefore only after the death of persons or the disruption of private and family life, the victim's relatives deal with compensation for the resulting loss. However, they do not address the protection of people's life and health from the negative consequences of a poor environmental condition as such through precautionary measures.

The newly filed complaints before ECHR open a completely new dimension of the protection of fundamental rights in terms of predictability and protection necessary for the future generations. They do not provide a protection only after a specific violation of fundamental rights. Since 2020, the complainants claim that the defendant states have failed to fulfil their obligations to protect rights under the Convention, interpreted in the light of the obligations enshrined in the Paris Agreement from 2015. Several complaints are directed against specific states after exhaustion of national remedies for problems concerning particular persons due to inaction of States. However, the cases directed against several member states of the Council of Europe, due to non-fulfilment of obligations aimed at mitigating the negative consequences of climate change, have become much more important in protecting the environment for future generations. Since 2020, 12 climate complaints have been filed before ECHR.

For example, complain of Müllner, Austrian citizen with a temperature-dependent form of multiple sclerosis, against the Austrian government for violations of his human rights for failing to set effective climate measures to reduce GHG emission and ultimately contrast the effect of climate change. High temperature has negative effect on persons with multiple sclerosis and due to inactivity of the government, there is a violation of his right to family and private life and threat of life.⁹ Other complaint was filed by the association of senior women arguing that the Swiss government failed to protect the Applicants' rights to life and private life under Arts. 2 and 8 ECHR, by failing to adopt the necessary legislative and administrative framework to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels.¹⁰ Other two complains have been filed against Norway. One by non-governmental organisation Greenpeace and the other by the Norwegian Grandparents' Climate Campaign. The Norwegian government in issuing new licenses for oil and gas exploration in the Arctic (Barents Sea) that will allow new fossil fuels to market from 2035 and beyond, violated plaintiff's right to life and right to respect for private life and family life.¹¹ Two complains have been also filed against United Kingdom. By Plan B. Earth and Humane Being due to systematically failing to take practical and effective measures to address the threat from man-made climate breakdown, future pandemics and antibiotic resistance created by

⁸ *Ibid.*, decision.

⁹ Information available at: Müllner v. Austria (2021). In: *Climate Change Litigation Databases*. Available at: <http://climatecasechart.com/non-us-case/mex-m-v-austria/> (accessed on 31.10.2023).

¹⁰ More information at: KlimaSeniorinnen v Switzerland (2020). In: *Climate Change Litigation Databases*. Available at: <http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/> (accessed on 31.10.2023).

¹¹ More information at: Greenpeace Nordic and Others v. Norway (2021). In: *Climate Change Litigation Databases*. Available at: <http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-v-ministry-of-petroleum-and-energy-ecthr/> (accessed on 31.10.2023); and The Norwegian Grandparents' Climate Campaign and others v. Norway (2021). In: *Climate Change Litigation Databases*. Available at: <http://climatecasechart.com/non-us-case/the-norwegian-grandparents-climate-campaign-and-others-v-norway/> (accessed on 31.10.2023).

factory farming. Case pending by Human Being has been already declared inadmissible due to insufficiency affected by the alleged breach of the Convention.¹² For now, the last case is *Engels and Others against Germany*, in which they object to insufficient legislation to achieve the goals of COP21.¹³

As mentioned before, there are also few important complaints filed against several member states. The first one, *Duarte Agostinho*, have been filed by six Portuguese children against thirty three member states of Council of Europe, due to their failure to comply with their commitments in Paris Agreement in order to limit climate change. The complaint alleges a violation of Articles 2, 8 and 14 of the Convention. They point to the fact that non-fulfilment of obligations contributes to global warming and results, among other things, in heat waves that affect the living conditions and health of the complainants. They emphasise the absolute urgency of taking action in favour of the climate and consider that, in this context, it is crucial that the Court recognise the States' shared responsibility and exempt the applicants from the obligation to exhaust the domestic remedies in each member state.¹⁴ Currently, the matter has been referred to the Grand Chamber for a decision, as it raises a serious question regarding the interpretation of the Convention. Numerous important entities entered the case as *amicus curiae*, such as Amnesty International, Save the Children, and European Commissioner for Human Rights, Climate Action Network Europe or special rapporteurs of the United Nations. Also, the case *Carême against France*, wants to follow up, due to authorities' failure to act that constitutes a violation of their obligation to protect the right to private and family life, within the meaning of Article 8 and to guarantee the right to life, within the meaning of article 2. Complainant asked the Council of State to cancel the Government's refusal to take additional measures to meet the Paris Agreement objective of reducing GHG emissions by 40% by 2030.¹⁵ Due to inactivity there is a threat of negative consequences of climate change. Complainant wants to connect the case with *Agostinho*.

Apart from this procedure, two other complaints have been filed in relation to thirty-two member states of the Council of Europe, with the Italian complainant as their common denominator. In the first case, the complainant complains that he suffers from allergies and psychological problems due to fear for the future, as he lives in the flood zone of Matera, which is more prone to floods due to climate change. In second case, citizen of Dolomite region complains that global warming showed its effects in her living area through "Storm Vaia," an unusually severe wind and rainstorm that felled around 20 million trees. Both cases are based on the fact, that States as parties to the Convention which are also parties to the 2015 Paris Agreement, have not taken sufficient measures to implement their obligations. Complaints contain violation of the positive obligations of States under Articles 2 and 8 to protect the environment; of Article 14, since the harmful

¹² More information at: *Humane Being v. the United Kingdom* (2022). In: *Climate Change Litigation Databases*. Available at: <http://climatecasechart.com/non-us-case/factory-farming-v-uk/> (accessed on 31.10.2023); and *Plan B.Earth and Others v United Kingdom* (2022). In: *Climate Change Litigation Databases*. Available at: <http://climatecasechart.com/non-us-case/plan-bearth-and-others-v-united-kingdom/> (accessed on 31.10.2023).

¹³ More information at: *Engels and Others v. Germany* (2022). In: *Climate Change Litigation Databases*. Available at: <http://climatecasechart.com/non-us-case/engels-and-others-v-germany/> (accessed on 31.10.2023).

¹⁴ Information available at: *ECHR, Duarte Agostinho and Others v. Portugal and Others*, no. 39371/20, December 2020 (Information Note on the Court's case-law 246).

¹⁵ Information available at: *Carême v. France* (2021). In: *Climate Change Litigation Databases*. Available at: <http://climatecasechart.com/non-us-case/careme-v-france/> (accessed on 31.10.2023).

effects of global warming would hit the younger generations harder; of article 13, alleging that the domestic remedies would not be effective since she would be forced to lodge a complaint in the courts of 33 States.¹⁶ These cases are similar to the Agostinho case, but the complaints were filed later. Therefore, it is assumed that the decision in the Agostinho case will be issued earlier, and this will set the framework for other complaints filed in the interest of environmental protection.

3.2 Case Law of the CJEU

Although a large part of the proceedings before the CJEU are preliminary, it is important to think also about the proceedings that the European Commission can initiate against individual member state for the violation of obligations arising from the founding treaties. Access to justice in the field of the environment is limited for individuals before the CJEU, but the competences of the European Commission are increasingly being used to initiate proceedings against a member state in the field of the environment as well. The European Commission can issue a reasoned opinion for a member state's non-fulfilment of the obligations set out in the founding treaty after allowing that state to submit comments. If the given state does not comply with the opinion within the period determined by the European Commission, the European Commission may submit the matter to the CJEU. If it submits the matter to the CJEU because it considers that the member state has breached its obligation to notify the measure by which it adopted a directive in accordance with the legislative procedure, it may, if it considers it appropriate, specify the amount of a lump sum or penalty that the member state has to pay. If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.¹⁷

Founding treaty gives the European Commission the possibility to initiate proceedings against member states for incorrect, incomplete transposition of European Union law, as a result of insufficient transposition measures that have been notified, or even in situations where member states have not notified the transposition measures at all. The initiation of proceedings related to bad application practice, which can reach the CJEU, is no exception. Such activities initiated by the European Commission, whether in the form of formal announcements, reasoned opinions or even proceedings before the CJEU, represent an important element in the protection of the environment in the member states and, in that context, the protection of fundamental rights.

The environment is an area in which the European Union is becoming increasingly active. For several years now, it has been issuing several legally binding acts aimed at protecting the environment - air, water, or soil. Within the adoption of the European Green Deal, these activities have increased even more. However, the member states face several problems of correct and complete transposition of obligations arising from the European environmental law. When we look at the period of the last seven years, we find that the European Commission started more than 2,600 infringements against member states for shortcomings in the transposition in the field of environment and

¹⁶ Information available at: *Uricchio v. Italy and 32 other States (2021)*. In: *Climate Change Litigation Databases*. Available at: <http://climatecasechart.com/non-us-case/urichio-v-italy-and-32-other-states/> (accessed on 31.10.2023); and *De Conto v. Italy and 32 other States (2021)*. In: *Climate Change Litigation Databases*. Available at: <http://climatecasechart.com/non-us-case/de-conto-v-italy-and-32-other-states/> (accessed on 31.10.2023).

¹⁷ Article 260 par. 3 of the Treaty on the Functioning of the European Union.

climate area.¹⁸ In this way, the European Commission is putting pressure on the member states in order to change their legislation and to correct and complete the transposition of the EU environmental directives. That can stable the basis for the Europe as a climate-neutral continent and the European Green Deal can become a reality.

Despite the considerably high number of infringements, only about 70 proceedings initiated by the European Commission for non-fulfilment of environmental obligations by member states have been brought before the CJEU so far. Since the introduction of the European Green Deal project, dozens of lawsuits have been filed by the European Commission for non-fulfilment of obligations under Article 258 of the Treaty on the Functioning of the European Union. The CJEU has already decided 10 of them.

The first case in 2020 was against the Kingdom of Sweden for failure to fulfil the obligations set out in Council Directive 91/271/EEC of 21 May 1991 on the treatment of municipal waste water in its Articles 4, 5, 10 and 15. Sweden did not provide secondary or equivalent treatment of municipal wastewater originating from the agglomerations of Lycksele, Malå, Mockfjärd, Pajala, Robertsfors and Tännadalen, thereby failing to fulfil its obligations arising from Article 4 of this Directive in conjunction with its Articles 10 and 15. Sweden did not provide more demanding treatment of municipal wastewater originating from the agglomerations of Borås, Skoghall, Habo and Töreboda, thus failing to fulfil its obligations arising from Article 5 of this directive in conjunction with its Articles 10 and 15. And at the same time, it failed to fulfil the obligation to inform the European Commission of the fulfilment of the requirements established by the directive. The CJEU stated that a distinction must be made between the obligations to achieve the result that member states derive from Articles 4 and 5 of Directive 91/271, with the aim of verifying the compliance of wastewater discharges from municipal wastewater treatment plants with the requirements of Annex I, point B of this Directive, and permanent the obligation that member states have under Article 15 of this Directive to ensure that this discharge meets the quality conditions required over time from the commissioning of the treatment plant. It follows that Article 15 of Directive 91/271 has an autonomous scope and a different objective than its Articles 4 and 5. A possible violation of the control obligations arising from this Article 15 does not automatically mean a violation of the requirements laid down in the aforementioned Articles 4 and 5.¹⁹ The existence of non-fulfilment of the obligation must be assessed according to the situation in the member state on the deadline set in the reasoned opinion. The Sweden did not ensure that the wastewater originating from the agglomerations of Lycksele, Malå and Pajala underwent secondary treatment or equivalent treatment before discharge, thereby failing to fulfil its obligations under Article 4 of Directive 91/271 in conjunction with Article 10 of this Directive and, at the same time, did not provide the necessary information to European Commission. Thereby Sweden failed to fulfil its obligations arising from Article 4 par. 3 of the Treaty of European Union.

The second case is directed against the Slovak Republic. The European Commission requests CJEU to determine that the Slovak Republic, by not developing

¹⁸ Information available through database "European Commission at work", https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&nonco m=0&r_dossier=&decision_date_from=01%2F01%2F2015&decision_date_to=&DG=CLIMA&DG=ENV&title=&submit=Search

¹⁹ CJEU, judgment of 2 September 2021, European Commission against Kingdom of Sweden, C-22/20, ECLI:EU:C:2021:669, paras. 50-51.

action plans²⁰ and not notifying the European Commission of the summaries of the action plans for larger road sections and larger railway sections listed in the annex to this judgment, has not fulfilled its obligations of Article 8 par. 2 and Article 10 par. 2 of the Directive 2002/49/EC of the European Parliament and of the Council of June 25, 2002, which concerns the assessment and management of environmental noise in conjunction with Annex VI of this directive.²¹ The Slovak Republic did not fulfil this obligation within the specified period, therefore the CJEU found a violation of the relevant articles of the directive. At the same time, reiterated that a member state cannot justify failure to fulfil its obligations arising from the Treaty on the Functioning of the European Union by pointing out that other member states have also violated their obligations.

Another case was related to noise, when the European Commission filed a lawsuit against Portugal, for not drawing up strategic noise maps concerning five main roads, not drawing up action plans for the agglomerations of Amadora and Porto, 236 main roads and 55 main railway axes, and not fulfilling the obligations to notify these facts as transposition measures to the European Commission. In this way, Portugal has not fulfilled its obligations arising from Article 7 paragraph 2 first subparagraph, Article 8 paragraph 2 and Article 10 paragraph 2 of Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 on the assessment and management of environmental noise (hereinafter "Environmental Noise Directive").²² Member States have the obligation to draw up action plans based on the results of the noise maps with regard to the prevention and reduction of environmental noise, if necessary and in particular if exposure levels may cause harmful effects to human health.²³ The fact that there are currently no people in affected area does not entitle the member states to neglect the fulfilment of this obligation, as the implementation of action plans should also have a preventive effect in the future. The CJEU stated that the Environmental Noise Directive does not establish any exception for member states to not develop action plans for the main railway axes located on their territory. Article 3 letter o) of the Environmental Noise Directive, contains this obligation for railway lines on which more than 30,000 train crossings are recorded per year.²⁴ Thus, Portugal has not fulfilled the obligations set out in Article 7 paragraph 2 the first subparagraph, Article 8 paragraph 2 and Article 10 paragraph 2 of the Environmental Noise Directive, once it did not develop strategic noise maps, action plans and did not notify the European Commission by the necessary measures. The CJEU decision thus indirectly protected people from noise in the affected areas of Portugal, not only nowadays but also in the future, despite the fact that proceedings were not initiated for the violation of fundamental rights. At the same time, fundamental rights have not yet been violated in this case. Such action appears all the more important from the point of view of preventive protection of fundamental rights,

²⁰ Action plans are drawn up in particular to determine the priorities that may be identified by exceeding any relevant limit value or other criteria chosen by the member states for agglomerations and for major roads as well as major railway lines within their territories, including their updating.

²¹ CJEU, judgment of 13 January 2022, European Commission against Slovak republic, C-683/20, ECLI:EU:C:2022:22.

²² Environmental Noise Directive is aimed to protect people from environmental noise mainly in construction areas, in public parks or other quiet areas in the agglomeration, in quiet areas in the open country, near schools, hospitals and other buildings and areas sensitive to noise. Article 2 of the Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise (Ú. v. ES L 189, 18.7.2002).

²³ *Ibid.*, Article 1.

²⁴ CJEU, judgement of 31 March 2022, Commission européenne contre République portugaise, C-687/20, ECLI:EU:C:2022:244.

aimed at fulfilling obligations and ensuring the correct and complete transposition of legally binding acts of the European Union.

Another case was filed by the European Commission against Bulgaria on the grounds that Bulgaria did not carry out a review and update of the initial assessment of the current environmental status of the relevant waters and the environmental impact of human activities on them, did not establish what constitutes good environmental status, did not establish environmental targets and related indicators, and did not send updates of these matters to the European Commission, thereby failing to fulfil the obligations arising from Article 5 par. 2 letters a) points i), ii) and iii), as well as Article 17 par. 2 and 3 of Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).²⁵ Marine Strategy Framework Directive sets out the obligations of member states to develop environmental objectives, to ensure the updating of marine strategies and to cooperate in the field of marine regions and sub regions. The first determination of marine strategies was to be carried out in 2012, and subsequently updated every 6 years. For non-fulfilment of this condition, the European Commission initiated proceedings in relation to Bulgaria in the form of a reasoned opinion with a deadline of December 2019. Bulgaria has undertaken to review and update its maritime strategies, as well as to notify these updates by June 30, 2020. Specifically, the obligation of the member state to take all measures necessary to achieve the result set by the Directive is a binding obligation imposed by Article 288, third paragraph of the TFEU and by this Directive itself. This obligation to take all necessary measures of a general or specific nature applies to all the authorities of the member states. In addition, Marine Strategy Framework Directive does not provide any exemption from the obligations of member states arising from its Article 17 paragraph 2 and 3. Article 14 of this Directive refers only to those exceptions in which the member state can identify cases where the environmental objectives and good environmental status cannot be achieved in every respect, but that wasn't relevant in this case.²⁶ Bulgaria adopted first organizational measures to fulfil the obligations imposed according to Article 17 par. 2 letters a) and b), as well as Article 17 par. 3 of the Marine Strategy Framework Directive on July 16, 2018. That is one day later than it was set by the directive. In addition, the agreement was concluded on March 16, 2021 in order to implement the measures necessary for the Bulgaria to fulfil its obligations. According to the settled jurisprudence of the CJEU stated above, the existence of non-fulfilment of the obligation should be evaluated in relation to the situation of the member state as the date of the deadline set in the reasoned opinion, while later changes cannot be taken into account.²⁷ In connection with that, the CJEU judged that the action by the European Commission is justified and found a violation of the obligations arising for the member states from Article 17, paragraph 2 letters a) and b), as well as Article 17 par. 3 of the Marine Strategy Framework Directive.

The following two cases relate to the daily limit value valid for concentrations of micro particles (PM10) in the sense 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 „Ambient Air Quality Directive“) in conjunction with its Annex XI. Submissions were filed against France and Slovakia, for failure to fulfil the obligations arising from Article 13 paragraph 1 regarding the limit values of PM10 particles in the air and Article 23 paragraph 1 second subparagraph for not developing air quality plans for the zone of

²⁵ CJEU, judgment of 28 April 2022, European Commission against Bulgaria, C-510/20, ECLI:EU:C:2022:324.

²⁶ *Ibid.*, paras. 44-45.

²⁷ *Ibid.*, para. 39.

Paris and Martinique as far as France is concerned, and for the zone of Banská Bystrica and Košice Region as far as Slovakia is concerned, in order to achieve the limit value for the protection of human health set in Annex XI. The European Commission objected that it was a systematic and continuous failure to meet the requirements for compliance with the limit values of PM10 concentrations. Exceeding the limit value of PM10 in the ambient air is in itself sufficient to establish a violation of the provisions of the Ambient Air Quality Directive, even in a situation where they show a structural downward trend.²⁸ If the limit values are exceeded, member states have the obligation to establish appropriate measures to ensure that the period for exceeding these limit values is as short as possible and may include special additional measures to protect vulnerable groups of the population, especially children.²⁹ Exceeding the limit values of PM10 undoubtedly has harmful effects on human health and the quality of the environment. Topographical and climatic peculiarities, which are particularly unfavourable for the dispersion of pollutants and occur in the affected areas, especially in the Banskobystrický region, cannot exempt the Slovak Republic from responsibility for exceeding the PM10 limit values. On the contrary, these particularities represent elements which, as follows from Annex XV, section A, point 2 letter c) and d) of Ambient Air Quality Directive must be taken into account within the air quality plans that this member state is obliged to draw up according to Article 23 of this Directive.³⁰ France additionally prepared plans to improve air quality, but did not take appropriate measures in time to ensure that the period of exceeding the limit values for PM10 was as short as possible. Exceedances of the daily limit value set for PM10 therefore have been systematic and persisted for more than nine and six years after the deadline when member state was obliged to take all appropriate and effective measures to comply with the requirement that the period of exceedance of these values must be as short as possible.³¹ As a result, he found a violation of the relevant provisions of the directive. The Slovak authorities also announced several additional measures aimed at ensuring good air quality, as well as compliance with PM10 limit values, which were related to household heating, transport and soft measures. However, the European Commission believed that these additional measures are not effective enough to lead to a significant improvement of the situation in the affected regions and agglomerations in the short term. The CJEU pointed to the systematic and persistent exceeding of limit values in the concerned areas for nine years, despite the exemption granted in 2010 to 2011 and continuously for eight years since the expiry of that exemption.³² CJEU reiterated what it has already been stated that non-compliance can be systematic and persistent despite a possible partial downward trend resulting from the collected data, which did not lead to this member state complying with the limit values. Therefore, in this case too, CJEU found a violation of the relevant provisions of the Ambient Air Quality Directive.

Another case also concerns the Slovak Republic, in the context of caring for forests, creating care programs, regulating logging, and taking measures to prevent threats to forests and eliminate the consequences of damage caused by natural

²⁸ CJEU, judgment of 28 April 2022, European Commission against French republic, C-286/21, ECLI:EU:C:2022:319, para. 46.

²⁹ *Ibid.*, para. 63.

³⁰ CJEU, judgment of 9 February 2023, European Commission against Slovakia, C- 342/21, ECLI:EU:C:2023:87, para. 68.

³¹ CJEU, judgment of 28 April 2022, European Commission against French republic, C-286/21, ECLI:EU:C:2022:319, para. 77.

³² CJEU, judgment of 9 February 2023, European Commission against Slovakia, C- 342/21, ECLI:EU:C:2023:87, para. 136.

disasters. Specifically, it is a failure to fulfil the obligations arising from Article 6 par. 2 and 3 and article 7 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (hereinafter "Habitats Directive") in conjunction with article 4 par. 1 of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (hereinafter "Bird Directive").³³ The aim of the directives is to preserve or possibly restore natural habitats and species of wild fauna and flora, which are important for the European Union, in order to achieve the more general objective of the directive, which is to ensure a high level of environmental protection. If a plan or project, which is not directly related to or necessary for the management of the site, may threaten its objectives, must be considered as having a significant impact on the site. The assessment of that risk have to consider the characteristics and environmental conditions typical for the related location.³⁴ On the one hand, the protection of the special areas of conservation must not be limited to measures to prevent external interference and disturbance caused by human, but must also include positive measures to protect and improve the condition of the site. Member state by approving the Rescue Program, has shown that it is aware of the decline of the habitat and population of these species and that it wants to correct this situation, under the individual decisions taken by the nature protection authorities until June 20, 2020, with the aim of limiting or prohibiting forestry activity in the territories of the habitats of the mountain hornbill (*Tetrao urogallus*). However, these measures are incomplete, if they do not represent protective measures systematically developed to meet the ecological requirements of this species and each of the habitat types found in the twelve special areas of conservation declared for its protection.³⁵ At the same time, the Slovak Republic has not adopted special protective measures regarding the habitats of the mountain deaf. Slovakia developed protection plans in individual areas, but these were neither completed nor implemented at the time of submitting the reasoned opinion. Therefore, the CJEU found a violation of the relevant articles of the directives.

Two other cases concerning the exceeding of limit values for nitrogen dioxide (NO₂) were filed against Spain and Greece. It is also a case of non-fulfilment of obligations arising from Ambient Air Quality Directive, specifically articles 13 par. 1 and 23 par. 1 in conjunction with Annex XI.³⁶ The reservation based on the violation of the aforementioned Article 13 must be taking into account the established jurisprudence of the CJEU, according to which the procedure regulated in Article 258 of the Treaty on the Functioning of the European Union is based on an objective finding of non-compliance by the member state and the obligations imposed by the Treaty on the Functioning of the

³³ In terms of the Habitats Directive, member states shall take appropriate steps to prevent damage to natural habitats and habitats of species in specially protected areas, as well as prevent from disturbance of species in areas designated as protected. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. Article 6 of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Ú. v. ES L 206, 1992, s. 7; Spec. ed. 15/002).

³⁴ CJEU, judgment of 22 June 2022, European Commission against Slovak republic, C-661/20, ECLI:EU:C:2022:496, para. 59.

³⁵ *Ibid.*, paras. 100, 106-107.

³⁶ Ambient Air Quality Directive lays down measures aimed at defining and setting objectives relating to ambient air quality in order to prevent or reduce harmful effects on human health and the environment. In this context, Article 13 par. 1 of the Ambient Air Quality Directive stipulates that the member states ensure that in all their zones and agglomerations the levels, especially NO₂ in the ambient air, do not exceed the specified limit values set in Annex XI. 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.

European Union or a secondary legal act.³⁷ There is no "de minimis" threshold for the number of areas in which the limit values set by Ambient Air Quality Directive may be exceeded, or the number of sampling points in a given area in which such limits are exceeded.³⁸ Under the examination of the first reservation, the Kingdom of Spain has systematically and consistently failed to fulfil its obligations under the combined provisions of Article 13 para. 1 and Annex XI of limit values set for NO₂ in area of Barcelona and Madrid in the period from 2010 to 2018 and in area Vallès – Baix Llobregat, from 2010 to 2017.³⁹ At the time of the lawsuit, there was no national plan to improve air quality. The Kingdom of Spain apparently did not take adequate measures in time to ensure that the period during which the values were exceeded was as short as possible in the areas covered by this measure. Exceeding these limit values therefore remains systematic and persistent for at least eight years.⁴⁰ Spain argued that exceeding the limit values is because of the high number of diesel vehicles. Spanish argument, that the economic costs associated with the policy changes on diesel vehicles justify the need of longer period for the implementation and effectiveness of the measures to be taken, cannot be a reason of exceptionally long period for ending the exceeding the limit values set for NO₂ by Ambient Air Quality Directive, such as those assumed in this case.⁴¹ The development of air protection plans is possible only on the basis of a balance between the goal of reducing the risk of pollution and the various public and private interests.⁴² Greece did not take appropriate measures in time to ensure that the period of exceeding the annual limit value set for NO₂ was as short as possible in the Athens area. Exceeding this annual limit value therefore remained systematic and persistent in this agglomeration for at least ten years.⁴³ In both cases, therefore, a violation of the relevant articles of the Ambient Air Quality Directive was established.

For now, the last proceedings before the CJEU are held against Poland, in connection with forestry. Poland has not fulfilled its obligations arising from Article 6 par. 1, Article 6, paragraph 2, Article 12 paragraph 1 letter a) to d), Article 13 paragraph 1 letter a) and d) and Article 16 par. 1 of the Habitats Directive, as well as Article 4 par. 1, Article 5 letter a), b) and d) and Article 16 par. 1 of the Birds Directive. Poland should have taken protective measures containing the appropriate management plans, specially designed for the given sites or incorporated into other development plans, and appropriate statutory, administrative or contractual measures that correspond to the ecological requirements of the types of natural habitats listed in the Annex I and species listed in Annex II, occurring in these locations. Poland also should have taken appropriate steps to prevent damage to natural habitats and habitats of species in specially protected areas, as well as disturbance of species for which the areas have been designated as protected, if such disturbance would be substantial in relation to the objectives of this Directive. Even more, measures should be taken to create a system of strict protection of animal species and plant species, including prohibitions and exceptions related to them, measures to create a general system of bird protection; as well as ensuring special attention to species at risk of extinction, species sensitive to specific changes in habitats,

³⁷ CJEU, judgment of 22 December 2022, European Commission against Spain, C-125/20, ECLI:EU:C:2022:1025, para. 68.

³⁸ *Ibid.*, para. 88.

³⁹ *Ibid.*, para. 158.

⁴⁰ *Ibid.*, para. 176.

⁴¹ *Ibid.*, para. 182.

⁴² CJEU, judgment of 16 February 2023, European Commission against Greece, C-633/21, ECLI:EU:C:2023:112, para. 58.

⁴³ *Ibid.*, para. 68.

species that are considered rare due to their small number or limited distribution in a given area, and other species that require special attention due to the specific nature of their habitats. At the same time, Poland did not fulfil its obligations arising from Article 6 par. 3 of the directive on biotopes, in conjunction with Article 6 par. 1 letter b) and Article 9 par. 2 of the Convention on Access to Information, Public Participation in the Decision-Making Process and Access to Justice in Environmental Matters by excluding the possibility for environmental organizations to challenge forest management plans with an action to review the legality of the substantive and procedural aspects of forest management plans. The CJEU emphasized that endangered habitats and species are part of the natural heritage of the European Union, so the adoption of protective measures belongs to all member states due to the common responsibility. The member states are particularly obliged to ensure that their legislation intended to ensure the transposition of the directives be clear and precise.⁴⁴ By adopting Article 14b par. 3 of the Act on Forests in national legislation, which stipulates that forest management carried out in accordance with the requirements of administrative procedures in the field of forest management does not violate provisions relating to the protection of special natural resources, groupings and elements, violated the obligations arising from Article 6 paragraph 1 and 2 of the Habitats Directive, as well as Article 4 par. 1 of the Birds Directive.⁴⁵ Although the Aarhus Convention, and especially its article 6 par. 1 letter b) leaves the contracting states with a certain amount of discretion when it comes to examining the significant impact of the activity on the environment, this does not change the fact that, in view of the jurisprudence mentioned in points 172 and 173 of CJEU judgment, the Habitats Directive specifies the requirements that must be formulated due to the importance of the impact on the environment in the field of European nature protection. Negative impacts on the protection objectives of European protected areas should in principle be considered significant within the meaning of this provision of the Aarhus Convention, and therefore environmental protection organizations are entitled to demand that the competent authorities verify in each individual case whether the proposed activities can have such a significant influence.⁴⁶ Poland was obliged to ensure that environmental protection organizations had the opportunity to submit to the court a proposal for an effective review of the legality of the substantive and procedural aspects of forest management plans in accordance with the provisions of the Forest Act, as long as these plans fall within the scope of Article 6 para. 3 of Habitats Directive.⁴⁷

4. NEW CLIMATE CASES ISSUES

In the cases of direct damage to health due to states' inaction in connection with the unfavourable state of the environment, it is possible to reach a conclusion about the violation of a fundamental right by a specific state in relation to specific persons, impose a sanction for this and call on the state, to avoid such further action. However, this solves individual situations when the violation has already occurred. Such decision-making activity usually does not have any impact on political and legislative changes, or application changes in individual member states. Only actions aimed at future

⁴⁴ CJEU, judgment of 2 March 2023, European Commission against Poland, C-432/21, ECLI:EU:C:2023:139, para. 72.

⁴⁵ *Ibid.*, para. 113.

⁴⁶ *Ibid.*, para. 175.

⁴⁷ *Ibid.*, para. 176.

generations could have such impact, assuming that the ECHR would decide on them in a way that there is a violation of fundamental rights due to the inaction of states.

There is no doubt that the ECHR played an important role in the early jurisprudence on human rights-based environmental protection. The ECHR works with the European Convention on Human Rights as a live document and tries to adapt it to the times. It faces new and innovative human rights issues and it is extremely important to have other mechanisms for dealing with situations. New problems may require new methods. The necessary element of development of the international human rights in any context and by any actors, is the interpretation in the light of present-day conditions and requiring the increasingly high standard in the area of the protection of human rights and fundamental liberties correspondingly (Viljanen, 2009).

However, these procedures face several problems, and that's why I think that ECHR will not change the approach and consequences of his decision-making activity. However, there can be no doubt about the importance of these cases and the fact that whatever the ECHR decides, it will be an important precedent at least due to expressed thoughts and argumentation.

Their first limit is the fact that the ECHR is not interested in making political decisions in the 'difficult social and technical sphere' of environment. Its goal is to supervise and deal with violations of fundamental rights, and not to proactively and preliminarily deal with a potential problem that has not yet arisen with respect to human rights.

Another limit is that ECHR can easily dismiss a complaint for non-exhaustion of national remedies. It is impossible to exhaust all national remedies in all states, especially in the new recent climate cases before the ECHR, which are directed against all member states. Several entities that file complaints before the ECHR file them without exhausting them, with the argument that the complaint is directed against several states and that exhausting them is unrealistic. From the available information, it appears that the ECHR at least accepts these complaints for further proceedings. Therefore, it seems that a failure to exhaust national remedies should not be a reason for rejecting these complaints as inadmissible. However, the problem may be how to deal with the extraterritoriality of these cases. So far, the ECHR has not ruled cross-border environmental damages in any of the environmental cases. A decision that would state a violation of fundamental rights by the state against persons located in the territory of another state would be very progressive and would mean a change in the way of fulfilling the obligations by any member state of the Council of Europe. Residents of Slovakia could complain before the ECHR for environmental damage caused, for example, by inaction of Greece. And this is hardly imaginable.

Another limit is the question of how the ECHR will respond to the condition of a victim status of a fundamental rights violation. Complainants in these cases are not directly affected on their rights in real time. The fear of the threat of fundamental rights due to climate change and poor environmental quality is directed more towards the future. How the ECHR approaches the condition of the victim status in these cases will say a lot about how it will approach the solution of complex and urgent proceedings of today's times, which can have a significant impact on the protection of fundamental rights. In the *Cordella v. Italy* judgment, the Court stated that individuals are 'personally affected' by the measure complained of if they find themselves in a situation 'of high environmental risk', in which the environmental threat 'becomes potentially dangerous for the health and well-being of those who are exposed to it' (Schmid, 2022). This could provide the basis for the same approach in new climate cases, and the condition of victim status could be fulfilled this way. Especially, when we consider Articles 2 and 8 of the

European Convention on Human Rights, which are the most frequently used in the context of climate cases. However, Corina Heri, for example, points to the possible connection of new climate cases to Article 3 of the European Convention on Human Rights, which has largely been ignored in climate litigation so far and could play a meaningful role, including in capturing experiences of climate anxiety. This is particularly the case when the vulnerability of specific groups and individuals, can facilitate access to justice and underscore the *raison d'être* not only of states' positive obligations but also of the convention itself (Heri, 2022).

However, the greatest difficulty in these cases will be to demonstrate that there is a causal connection between the inaction of the state in the field of environmental protection and the impact of such inaction on fundamental rights. In several cases before ECHR, we could see the connection between the inaction of the state and the violation of fundamental rights. States have a positive obligation to protect persons under their jurisdiction, and such protection must be effective, timely and expedient. If this does not happen, we can talk about the direct impact of states' inaction on the fundamental rights of individuals. So far, however, this has only been done in relation to a specific violation of a fundamental right. In the case of *Tătar v. Romania* the ECHR ruled that governments have a positive duty to introduce regulatory initiatives governing the licensing, commissioning, operation and control of hazardous activities and that these administrative and regulatory regimes must include appropriate provisions to allow the public to assess the risks. It also established that the above requirements apply to risks arising from natural disasters (e.g., *Budayeva et al. v. Russia* in relation to landslides and *Kolyadenko et al. v. Russia* in relation to flash floods). In these cases, ECHR formulated conclusions about the need of states to take preventive measures to prevent natural disasters. However, the difference in the new climate cases is that this risk was very real and it is only a matter of time before a landslide would occur and directly threaten people's lives.

No violation has yet been established in the new climate disputes, but it is very likely that one will occur. However, it is not clear whether it will be in 5, 10 or 15 years. Although the risk exists, it is difficult to predict when a fundamental right will be violated. So, there is not a direct threat to life. However, is it possible to abstractly formulate the premise of declaring the violation of a fundamental right only on an abstract basis and without the possibility to clearly determine when it will occur and whether the negative consequence will still not be averted by the states? In my opinion, this is the reason, why the ECHR will not find a violation of the fundamental right of persons in such new climate cases. On the other hand, even if there is no violation of the right to life or the right to health, the expression of a legal opinion in the decision itself is not excluded. The ECHR can come to a certain opinion and point out the need to act by individual states. Well, here we come to the problem of enforceability. Only the statement in the decision, which contains the rejection of the complaint, is not legally enforceable and the states will not accept it. It will be just another text in black and white about what states should be doing but are not doing. In addition, any of the Grand Chamber cases is likely to encourage litigants to continue to file ever more human rights-based cases both in Europe and beyond. Especially in the context of a special regulation adopted for the sake of environmental protection at the EU level. It is assumed that the number of cases related to environmental protection in the context of air protection, greenhouse gas limitation, forest protection, or agriculture will grow. This is also the view of the Grantham Research Institute and the European Union Forum of Judges for the Environment (see Setzer, Narulla, Higham and Bradeen, 2022). Therefore, it will be particularly important what

position the ECHR will take in new climate cases, and its first decision will be undoubtedly significant for further developments.

On the other side, the CJEU was not originally created in the interest of protecting fundamental rights. Even the European Commission activities against member states due to non-fulfilment of environmental obligations are not aimed at protecting of fundamental rights. At the same time, the number of climate cases before CJEU is not large. However, with the adoption of the European Green Agreement in 2019, the European Union became much more involved in environmental protection and put pressure on member states to achieve climate neutrality.

In recent years, there has been an increase in legislative activities at the level of the European Union, which concern the creation of new secondary legal acts in the field of air, water or energy, as well as the revision of already existing legal acts to make them more effective and responded to the needs of the time. Although lawsuits under Article 258 of the Treaty on the Functioning of the European Union are not aimed at the protection of fundamental rights, it is impossible to ignore the clear benefit of ensuring compliance with obligations by states in terms of protecting the life and health of persons under the jurisdiction of the European Union. Although these environmental obligations are not a priori aimed at the protection of fundamental rights, their observance will undoubtedly ensure the protection of human lives and health. The area of environmental protection, which is being created at the level of the European Union and which is being completed by the jurisprudence of the CJEU, is different from the system represented by the Council of Europe. Nevertheless, its importance and significance cannot be neglected. Determining the limit values of substances in the air, controlling waste water management, or emissions trading will undoubtedly have a significant impact on the lives and health of millions of people. Even the CJEU itself in its decisions, especially those related to compliance with limit values of substances in the air, points out the need to comply with them, as their systematic exceeding has a negative impact on the health of people and especially children.

Also, for example, the Professor De Schutter talks about the importance of the operation of the European Commission in the interests of the enforcement and protection of fundamental rights. He explores a number of new practices that could be introduced to strengthen the use of infringement proceedings as a fundamental rights enforcement tool, including the status of the complainant who brings an alleged violation of EU law to the attention of the Commission (De Schutter, 2017).

From the cases outlined in this study, it can be concluded that the CJEU does not interfere in the protection of fundamental rights and tries to avoid any statements regarding the need to protect people's lives and health when formulating its legal opinions and conclusions in judgments. CJEU focuses its attention exclusively on the fulfilment of obligations by states, which result from individual directives aimed at protecting individual areas of the environment. In principle, the statement that exceeding the limit values has a negative impact on the health of people and especially children, is the only statement in which the need to observe the limit values is noted as the need of their protection. Nevertheless, decision-making activity in this area, as well as the activity of the European Commission itself, has an undoubted and undeniable importance from the point of view of protecting people's life and health, and thus fundamental rights.

In addition, with effective application of Art. 260 par. 3 of the TFEU, we can also talk about more effective enforcement of transposition obligations by member states. Since the decision C-543/17 Commission against Belgium, Court for the first time formulated an extensive interpretation of the notification obligation covering not only 'non-communication', but 'partial communication' of transposition measures as well. As

Ramírez-Cárdenas Díaz stated, this rule practically allows to impose a financial sanction on an EU Member State already at the conclusion of the first infringement procedure (Article 258 TFEU), in a case of failure to notify the transposition measures of a directive. The threat of sanctions already in the conclusion of the first infringement procedure serves a suitable preventive mechanism for the fulfilment of the environmental obligations arising from EU law and, in this context, for the protection of human life and health (Ramírez-Cárdenas Díaz, 2020).

5. CONCLUSION

Of the mentioned judicial bodies, the European Court of Human Rights is the judicial body that has been given jurisdiction in the area of fundamental rights protection. However, the current proceedings before the European Court of Human Rights are not aimed at the protection of individual rights, as is usual, but also at the protection of fundamental rights of future generations. Taking into account the complexity of the disputes presented, the uncertainty that these proceedings bring and the very abstract understanding of the violation of fundamental rights in the represented cases, it is very likely to express that the European Court of Human Rights will not follow the path of preliminary caution and will not find a violation of the fundamental right in them. When we generalize the legal statements that can be brought by the decision of the European Court of Human Rights, we can come to the conclusion that it probably only expresses the general obligation of states to comply with international standards and obligations to which they have committed themselves, including the implementation of measures to protect people's lives and health from climate change. However, such conclusions are very general and basically meaningless. They are not enforceable and will not bring the desired change. However, the adoption of an additional protocol to the European Convention, which would enshrine the right to a healthy environment, as recommended by the Parliamentary Assembly in 2021, could bring a change in the perception of threats to fundamental rights due to climate change and environmental damage. Such an anchoring would mean a completely different approach of the European Court of Human Rights. It would no longer have to supplement the protection of fundamental rights with international documents, but would have support directly in its basis. Subsequently, there would be no doubt about the relevance of the decisions and creation of stable jurisprudence of the European Court of Human Rights also in the field of climate disputes. Until then, it is necessary to state, that the European Commission is more effective.

European Commission continuously puts pressure on the member states for correct and complete transposition of obligations in the area of the environment. The European Commission and subsequently the Court of Justice of the European Union point to specific shortcomings of transposition, specific problems faced by the legislation or the application practice of the states and repeatedly call on the states to correct them. Extensive communication and consistent monitoring of the fulfilment of the obligations in their submission therefore appear to be more effective than blindly submitting complaints to the European Court of Human Rights. It is true that the European Court of Human Rights is a very important body in human rights protection, and it is used by an innumerable number of complainants in order to protect current and future rights. However, in the area of the environment, it appears to be not efficient and effective enough. The protection of the environment and the related protection of fundamental rights represent the rights of a new generation, which were not known at the time of the adoption of the Convention. The need to protect something like that was not considered. Therefore, the activity of the European Union and its bodies appears to be more effective

and progressive. We can already state, following the outlined decisions, that the protection that the Court of Justice of the European Union can provide is not only consequential but also preventive. The activity of the European Commission thus represents a way to achieve the fulfilment of obligations by the member states and thus avert the harmful consequences of climate change, to have a preventive effect in the interest of maintaining a stable level of the environment and, last but not least, to ensure the timely protection of fundamental rights that is directly affected or endangered by the negative consequences of climate change.

BIBLIOGRAPHY:

- Carême v. France (2021). In: Climate Change Litigation Databases. Available at: <http://climatecasechart.com/non-us-case/careme-v-france/> (accessed on 31.10.2023).
- De Conto v. Italy and 32 other States (2021). In: Climate Change Litigation Databases. Available at: <http://climatecasechart.com/non-us-case/de-conto-v-italy-and-32-other-states/> (accessed on 31.10.2023).
- De Schutter, O. (2017). *Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union*. Brussel: Open Society European Policy Institute. Available at: <https://www.opensocietyfoundations.org/uploads/f637765b-ee20-4e6e-9cda-b74151f9a369/infringement-proceedings-as-tool-for-enforcement-of-fundamental-rights-in-eu-20171214.pdf> (accessed on 31.10.2023).
- Engels and Others v. Germany (2022). In: Climate Change Litigation Databases. Available at: <http://climatecasechart.com/non-us-case/engels-and-others-v-germany/> (accessed on 31.10.2023).
- Greenpeace Nordic and Others v. Norway (2021). In: Climate Change Litigation Databases. Available at: <http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-v-ministry-of-petroleum-and-energy-ecthr/> (accessed on 31.10.2023).
- Heri, C. (2022). Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability. *European Journal of International Law*, 33(3), 925–951, <https://doi.org/10.1093/ejil/chac047>
- Humane Being v. the United Kingdom (2022). In: Climate Change Litigation Databases. Available at: <http://climatecasechart.com/non-us-case/factory-farming-v-uk/> (accessed on 31.10.2023).
- KlimaSeniorinnen v Switzerland (2020). In: Climate Change Litigation Databases. Available at: <http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/> (accessed on 31.10.2023).
- Müllner v. Austria (2021). In: Climate Change Litigation Databases. Available at: <http://climatecasechart.com/non-us-case/mex-m-v-austria/> (accessed on 31.10.2023).
- Plan B.Earth and Others v United Kingdom (2022). In: Climate Change Litigation Databases. Available at: <http://climatecasechart.com/non-us-case/plan-bearth-and-others-v-united-kingdom/> (accessed on 31.10.2023).
- Ramírez-Cárdenas Díaz, J. D. (2020). *Sharpening the Teeth of the Infringement Procedure*. In: European Institute of Public Administration, publish on August,

2020. Available at: <https://www.eipa.eu/publications/briefing/sharpening-the-teeth-of-the-infringement-procedure/> (accessed on 31.10.2023).
- Schmid, E. (2022). Victim Status before the ECtHR in Cases of Alleged Omissions: The Swiss Climate Case. In: Blog of the European Journal of International Law, published on April 30, 2022. Available at: <https://www.ejiltalk.org/victim-status-before-the-ecthr-in-cases-of-alleged-omissions-the-swiss-climate-case/> (accessed on 31.10.2023).
- Setzer, J., Narulla, H., Higham, C. and Bradeen, E. (2022). Climate litigation in Europe: A summary report for the European Union Forum of Judges for the Environment. London and Brussels: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science and the European Union Forum of Judges for the Environment.
- The Norwegian Grandparents' Climate Campaign and others v. Norway (2021). In: Climate Change Litigation Databases. Available at: <http://climatecasechart.com/non-us-case/the-norwegian-grandparents-climate-campaign-and-others-v-norway/> (accessed on 31.10.2023).
- Uricchio v. Italy and 32 other States (2021). In: Climate Change Litigation Databases. Available at: <http://climatecasechart.com/non-us-case/uricchio-v-italy-and-32-other-states/> (accessed on 31.10.2023).
- van Zeven, J. (2021). The Role of the EU Charter of Fundamental Rights in Climate Litigation. *German Law Journal*, 22(8), 1499-1510, doi:10.1017/glj.2021.78
- Viljanen, J. (2009). The Role of the European Court of Human Rights as a Developer of International Human Rights Law. In: Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol n° 62/63. Available at: <https://www.corteidh.or.cr/tablas/r26759.pdf> (accessed on 31.10.2023).
- CJEU, judgment of 12 November 1969, Erich Stauder v. Stadt Ulm – Sozialamt, C-29-69, ECLI:EU:C:1969:57.
- CJEU, judgment of 2 September 2021, European Commission against Kingdom of Sweden, C-22/20, ECLI:EU:C:2021:669.
- CJEU, judgment of 13 January 2022, European Commission against Slovak republic, C-683/20, ECLI:EU:C:2022:22.
- CJEU, judgement of 31 March 2022, Commission européenne contre République portugaise, C-687/20, ECLI:EU:C:2022:244.
- CJEU, judgment of 28 April 2022, European Commission against Bulgaria, C-510/20, ECLI:EU:C:2022:324.
- CJEU, judgment of 28 April 2022, European Commission against French republic, C-286/21, ECLI:EU:C:2022:319.
- CJEU, judgment of 22 June 2022, European Commission against Slovak republic, C-661/20, ECLI:EU:C:2022:496.
- CJEU, judgment of 22 December 2022, European Commission against Spain, C-125/20, ECLI:EU:C:2022:1025.
- CJEU, judgment of 9 February 2023, European Commission against Slovakia, C-342/21, ECLI:EU:C:2023:87.
- CJEU, judgment of 16 February 2023, European Commission against Greece, C-633/21, ECLI:EU:C:2023:112.
- CJEU, judgment of 2 March 2023, European Commission against Poland, C-432/21, ECLI:EU:C:2023:139.
- Charter of Fundamental Rights of the European Union.

Consolidated version of the Treaty on European Union.

Consolidated version of the Treaty on the Functioning of the European Union.

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Ú. v. ES L 206, 1992, s. 7; Spec. ed. 15/002)

Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise (Ú. v. ES L 189, 18.7.2002)

ECHR, López Ostra v. Spain, app. no. 16798/90, 9 December 1994.

ECHR, Öneriyıldız v. Turkey, app. no. 48939/99, 30 November 2004.

ECHR, Duarte Agostinho and Others v. Portugal and Others, no. 39371/20, December 2020 (Information Note on the Court's case-law 246).

Recommendation 2211 (2021) Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, available at: <https://pace.coe.int/en/files/29501/html>