

Price of Justice

Opinion based on the Comparative Analyses on
Costs of Administrative and Judicial Remedies

Position Paper

Justice and Environment 2011

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Introduction

Justice and Environment (J&E) is an association of public interest environmental law organizations based in Europe. J&E aims to use law to protect people, the environment and nature. Our primary goal is to ensure the implementation and enforcement of the EU legislation through the use of European law and exchange of information.

The Aarhus Convention has been a priority topic for J&E from its inception. This is because proper implementation of this treaty results in the proper implementation of many EU directives and possibilities for NGOs to exercise their rights under these directives. After having discovered the discrepancies as presented above, J&E decided to prepare a comparative research on the practical implementation of the Aarhus Convention with special regard to national regimes of costs in administrative and judicial proceedings.

As usual, J&E research has been based on a unified template and national legal analyses that served as background for the present comparative analysis. For an easier overview of the national assessment results, a comparative matrix has been produced with the major findings on the national level. In the following, the research results are detailed, explained and evaluated.

The 2011 Research

J&E has already investigated the status of access rights' implementation in terms of costs of administrative and judicial remedies in 2009. That study (available under the following link) has first of all gave a rationale to the research, broadly presented the legislative framework of the topic set by the Aarhus Convention and introduced the research template in which the national inputs from 9 countries were based.

Back in 2009, research covered Austria, Croatia, the Czech Republic, Estonia, Hungary, Romania, Slovakia, Slovenia and Spain.

In this current 2011 study, the starting point as well as the legal background are the same as in 2009, and the research template has only undergone a slight modification. The following questions were introduced into the template:

- ***Who can provide legal aid (e.g. can NGOs be legal aid providers)?***
- ***Is legal aid frequently used in environmental cases?***

These 2 questions were inserted into the template in order to focus more on mechanisms that are supposed to overcome barriers of effective access to justice. While the first one concentrates on regulation, the second is about actual practice of legal aid in environmental matters.

In 2011, the number of countries covered slightly changed. While the updating of the previous research happened in Austria, the Czech Republic, Estonia, Hungary, Romania and Slovakia, neither Croatia, nor Slovenia, nor Spain participated in the 2011 exercise. However, as an addition, in 2011 Germany was fully covered by the research.

The 2011 Findings

We asked our country experts to update their 2009 studies (with the exception of Germany where a full research had to be completed) and highlight the changes that happened in that 2-year time span. We have found the following phenomena in those countries where the research was updated:

Country information

- the GDP and the HDI of the affected countries slightly decreased (CZ, EE, HU, RO, SK) with the exception of Austria where although the GDP increased, the HDI decreased, again insignificantly

Administrative procedural costs

- the costs to be paid for EIA procedures and experts who oversee the EIA studies increased in CZ

Judicial procedural costs

- new fees were introduced in CZ (an EUR 41 fee for requesting an injunctive relief in administrative cases which has been free of charge before)
- in some cases, procedural costs significantly increased in CZ (for a cassation request against the administrative court decisions)
- fee waivers were made more available for NGOs in CZ (for those NGOs that have no sufficient financial resources)
- fees for cases with pecuniary value has risen (in CZ almost doubled) and in some cases became more complex (in AT they got higher but also value categories were adjusted)

The 2011 Findings for Germany

Germany has the second highest GDP among the examined countries, after Austria. However, its HDI is the highest, being the 10th country on the list of countries evaluated by this index globally.

Due to the regulation that administrative matters can be taken to superior authorities only in a limited number of cases, and the regular way of remedy is to address the courts, the amount of administrative procedural fees is not a relevant indicator.

In judicial cases, the court defines the “value of the case” according to which the court fees to be paid are proportionate. This latter “value” varies significantly in Germany, however, a short statistics: between 2002 and 2006, in environmental matters the amount in dispute was set between 2.000 EUR and 260.000 (!) EUR in the extremes so the amount ranges between 20.000 EUR and 25.000 EUR average, with a significant dispersion.

Counting with the average value, the fee to be paid for starting a judicial procedure is appr. 5.000 EUR, while the amount for an appeal against the first instance judgment can be even slightly higher, with no system of waivers in place for environmental cases or organizations.

Costs of evidence are to be borne by the party initiating the evidence, and this cost category is not covered by the loser pays principle, which otherwise applies in judicial procedures in Germany.

These rules apply in both the administrative and the civil judicial procedures.

Legal aid is available for both individuals and NGOs. Individual must show that they lack resources and the case will be a prospective win, while NGOs have to show lack of resources and that the case is in the public interest. However, the latter is quite theoretical because the courts do not consider NGOs as lacking resources therefore they do not grant legal aid to NGOs.

As a general evaluation, costs of procedures are very high in Germany and in fact have an inhibiting impact on the enforcement of environmental law before the courts except for the most intolerable cases of breaching environmental law.

The Legal Aid Findings of 2011

Based on the answers given by the country researchers to the two additional questions on legal aid we found the following in the examined seven countries:

Who can provide legal aid (e.g. can NGOs be legal aid providers)?

What we call official legal aid is a privilege of licensed attorneys in many countries (Austria, Estonia, Germany until 2008, Romania, Slovakia). This, however, does not prevent NGOs from giving legal support especially in issues of their specialization but this is not considered legal aid *stricto sensu* (Austria). In some countries, NGOs can also provide official legal aid (Estonia, Germany since 2008, Hungary). In Hungary, even universities providing legal education can give legal aid.

Is legal aid frequently used in environmental cases?

Generally, the situation in all examined countries shows that legal aid is hardly used in environmental cases at all. It may stem from the fact that generally there are very few environmental cases (Austria), there is no data on legal aid in environmental cases (Estonia, Slovakia), legal aid has no tradition in environmental cases (Germany), or there are no specialized environmental lawyers providing legal aid (Hungary). The only contrary example is the Czech Republic where the use of legal aid in environmental cases is steadily increasing.

Again a general impression in the examined countries is that there is almost no information on the use of legal aid in environmental cases available for the public (especially Austria, Hungary).

Conclusions

In Austria, there were no significant changes compared with the findings of the 2009 study.

In the Czech Republic, court fees grew, sometimes considerably, but this was complemented by a case law that applies fee waivers to insufficiently resourced NGOs more frequently.

In Estonia, there were no significant changes compared with the findings of the 2009 study. Nevertheless, it may be worth noting that recent case law produced a case where an NGO had to pay a quite prohibitive amount of court fee based on the loser pays principle to an administrative authority.

In Hungary, there were no significant changes compared with the findings of the 2009 study.

In Romania, there were no significant changes compared with the findings of the 2009 study.

In Slovakia, there were no significant changes compared with the findings of the 2009 study.

Recommendations

Based on the above (updated) findings, we have the following recommendations in order to guarantee a practice of access to justice not prohibitively expensive:

- administrative and judicial proceedings in the protection of environment shall be made free of charge or significantly inexpensive;
- such inexpensive nature of the proceedings should also cover the costs of evidence that are frequently the highest components in a process;
- a system of waivers and allowances for court fees has to be applied in order not to discourage members of the public and NGOs to sue in the public interest;
- the loser pays principle has to be applied with strong restrictions in such cases, e.g. using a cap on certain costs or excluding certain parties from those who are eligible for cost recovery (e.g. government bodies);
- legal aid shall be available for NGOs and in environmental cases as well, covering the full amount of costs that incur in public interest litigation, and should be allowed to be provided by specialized environmental legal NGOs in environmental cases.

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