JUSTICE AND ENVIRONMENT
European Network of Environmental Law Organizations

Impacts of an Access to Justice Directive on Environmental Justice in Selected Member States

Austria

based on the proposal COM(2003) 624 of the European Commission

Justice and Environment 2012

a Dvorakova 13, 602 00, Brno, CZ
t/f 36 1 3228462 / 36 1 4130300
e info@justiceandenvironment.org
w www.justiceandenvironment.org

Impacts of an Access to Justice Directive on Environmental Justice in Selected Member States

Austria

based on the proposal COM(2003) 624 of the European Commission

On J&E

Justice and Environment (J&E) is a European Network of Environmental Law Organizations.

J&E works in Europe and consists of NGOs from twelve different countries dealing with environmental law solely or as one of their activities. J&E aims for a better legislation and implementation of environmental law on the national and European Union (EU) level to protect the environment, people and nature. J&E does this by enhancing the enforcement of EU legislation through the use of European law and exchange of information on the national, cross-border and wider European level. All J&E activities are based on the expertise, knowledge and experience of its member organizations. The members contribute with their legal know-how to and are instrumental in the initiation, design and implementation of the J&E work program.

Introduction

J&E has always paid particular attention to the development of access rights in environmental matters. By access rights, we mean access to information, participation in decision-making and access to justice. J&E has a long list of analyses, studies, position papers relating to the implementation of access rights, and we even had initiated actual cases in this matter. Past outputs of J&E in this topic are the following:

2006	Multi-country case study collection on Aarhus Convention implementation Legal analysis of country findings Position paper
2007	Case study on Aarhus Convention implementation in Slovenia Slovenia legal analysis Position paper Study on the impacts of an access to justice directive
2008	Case study on Aarhus Convention implementation in Spain Spain legal analysis Position paper Position paper for Aarhus Convention MOP3 in Riga Study on the Aarhus Regulation EC 1367/2006
2009	Study on selected problems relating to the implementation of the Aarhus Convention Request for Internal Review in practice Multi-country analysis on the costs of access to environmental justice

2010	Aarhus Convention toolkit for the public Access to justice report Access to justice position paper Seveso II and the Aarhus Convention
2011	Multi-country analysis on the costs of access to environmental justice Case law of the Aarhus Convention Compliance Committee Environmental case law of the European Convention on Human Rights Public guide on the Request for Internal Review Monitoring reports on the Official Journal of the EU Seveso III and the Aarhus Convention Reports on the aftermath of two cases judged by the Court of Justice of the EU

The outputs of the year 2012 will be national studies on the potential impacts of the adoption of an access to environmental justice directive, a position paper thereon, and a communication to the Aarhus Convention Compliance Committee.

The legal environment

Certainly the most important reference point for our work in this field is the UNECE Aarhus Convention 1998. This piece of international legislation was signed and ratified to date by all 27 Member States of the EU. In addition, the EU itself as an international legal entity is a party to the Convention. For this reason, the EU has enacted legislative norms both for itself as a supranational body and for the Member States. The latter happened in the form of directives, however, the EU level legislative framework is not yet complete because the adoption of directives has not fully followed the classical three pillars of the Aarhus Convention. While there is an access to environmental information directive (2003/4/EC) and there is also a participation in environmental decision-making directive (2003/35/EC), there is not yet in force a directive on access to environmental justice.

The first time a formal proposal was prepared by the Commission for legislative adoption in the EU was 24 October 2003[1]. Nevertheless, the Council of Ministers never started to negotiate the text (for subsidiarity reasons) and there has not been much progress in this regard in the coming years either. So much so that the European Environmental Bureau has called five years later for renewed negotiations on the foregoing directive[2]. The process has not been a swift one to date but the Commission always kept the issue of the directive on the agenda and even mentioned it in its latest Communication called "Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness"[3] such as: "Defining at EU level the conditions for efficient as well as effective access to national courts in respect of all areas of EU environment law" is needed. Even now there is no such thing publicly available as the new draft text of the directive rumor says that both the draft text is ready and a study has been completed on the possible impacts of this piece of legislation on the legal systems of EU Member States.

[1] http://europa.eu/legislation_summaries/environment/general_provisions/l28141_en.htm

[2] http://www.eeb.org/index.cfm/news-events/news/eeb-calls-for-renewed-negotiations-on-access-to-justice-directive/

[3] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0095:FIN:EN:PDF

J&E's actions

J&E decided to contribute to this process with its own means. That was the reason behind our five-country survey on the impacts of such a directive in 2007[4] and this was the very same reason why we again asked legal experts, now from seven countries, to evaluate the impacts of an access to environmental justice directive on their respective national legal systems.

We have taken as basis for evaluation the "old" text of the draft directive from 2003, however, we have added a few instructions into the questionnaire to be filled in by experts, based on second-hand information and hearsay about the possible changes in the draft text. We hope that our findings will be valid after the text of the "new" draft directive will have been publicly presented.

The survey

We have approached our staff members and legal experts of J&E member organizations from the following countries: Austria, Croatia, Czech Republic, Hungary, Romania, Slovakia, and Spain. We have asked the following standard questions from the legal experts:

1. *What kind of impact, if any, would the definition of environmental law of the Draft Directive have on the environmental procedures in your country? Is this definition narrower than the "environmental law" used in your national law or court practice?*
2. *How is the legal standing of "members of the public" regulated in your country?*
3. *Is the concept of qualified entity recognized in the national law of your country? If yes, are the criteria for recognition of qualified entities as set out in Article 8 of the Draft Directive more rigorous or more lenient than in your national law?*
4. *If the concept of qualified entity recognized in the national law of your country, in what procedure are these entities recognized as qualified?*
5. *Is request for internal review recognized in the national law of your country? Is it possible to initiate internal review for administrative act in breach of environmental law only, or for administrative omissions in breach of environmental law as well?*
6. *Following an unsuccessful internal review, is it possible for the applicant to institute an environmental proceeding (a proceeding that concludes with a legally binding decision) in the national law of your country as provided in Article 7 of the Draft Directive?*
7. *The Draft Directive provides a definition for prohibitive cost. According to your estimation, would this definition lower the cost of environmental procedures in your country?*
8. *Is mediation used in environmental procedures in the national law of your country? Would mediation provided by the Draft Directive considerably prolong the environmental procedure?*
9. *Is interim relief (or other form of preliminary protection) available for the applicant in your country? What kind of impact, if any, would mentioning of this institute as proposed in Article 4 of the Draft Directive, have on the situation in your country?*

[4] http://justiceandenvironment.org/_files/file/2008/01/aarhus-atoj-tables-attachment.pdf

Answers to the questions

Austria

1. What kind of impact, if any, would the definition of environmental law of the Draft Directive have on the environmental procedures in your country? Is this definition narrower than the "environmental law" used in your national law or court practice?

a) The Draft Directive on Access to Justice in Environmental Matters, COM (2003) 624 Final (A2J Draft Directive) defines environmental law in general terms. It takes account on the following aspects (cp. Art 2 A2J Draft Directive):

- The legislative objective must be one of the objectives taken up in Art 174 of the EC Treaty (Note: now Art 191 TFEU – protection of the environment)
- The definition must be consistent with the Åarhus Convention, taking up the main aspects of the environment. It seems inappropriate to draft an exhaustive list of what must be understood as "environmental law", as this concept is not defined in the Åarhus Convention. The constant evolution of environmental law requires an indicative list.
- The A2J Draft Directive understands environmental law as *"Community legislation and legislation adopted to implement Community legislation which have as their objective the protection or the improvement of the environment, including human health and the protection or the rational use of natural resources".* It provides for an **indicative list** of areas in which regulations are seen as environmental law.

b) As mentioned above the Aarhus Convention does not define the concept of environmental law, but a broad comprehension of environmental matters can be derived from its content (cp. introductory statements of the Aarhus Convention).

c) Globally spoken the Austrian legal framework does not define the concept of environmental law. Legal scholarship defines environmental law as all legal provisions working directly or indirectly against the destruction of habitats and livelihood (cp. Raschauer/Wessely Handbuch Umweltrecht. Wien 2010²: p. 17). This notion incorporates a broad range of legal matters and areas into the concept of environmental law. So as we can see the theoretical notion of environmental law in Austria is quite wide.

d) In Austria only some environmental matters are subject to public participation and only in some of these matters public access to justice is granted (since its accession Austria is in constant non compliance with the Aarhus Convention[5]). All these acts were public participation and access to justice are granted do not define themselves explicitly as environmental law. **The adaption of the definition of environmental law - as a general definition with an indicative list of possible areas - according to the A2J Draft Directive would lead to considerable improvements with regard to access to justice in environmental matters in Austria**.

[5] cp. ACCC/C/2010-48

2. How is the legal standing of “members of the public” regulated in your country?

a) The concept only exists implicitly in EIA, IPPC and ELD procedures (there is no definition of “members of the public” or the “public). Within the before mentioned procedures only certain entities is guaranteed legal standing by explicit quotation by the respective procedural provisions.

b) Basically legal standing is conceded to:

- **Neighbours**

The concept of neighbours is defined within the Austrian EIA-Act:
„Neighbours shall be persons who might be threatened or disturbed or whose rights in rem might be harmed at home or abroad by the construction, operation or existence of the project as well as the owners of facilities in which persons stay temporarily on a regular basis with regard to the protection of such persons; neighbours shall not be persons who stay temporarily in the vicinity of the project and do not have rights in rem; with regard to neighbours abroad, the principle of reciprocity shall apply to states not parties to the Agreement on the European Economic Area; (Art 19/1 EIA-Act)”

So a neighbour is solely granted legal standing within particular environmental procedures if one of his/her subjective rights (right to property, to health etc.) are endangered/infringed by the respective project – this means that no neighbour is entitled to to base claims on the main fact that the environment is endangered and to enforce a so called right to a clean, healthy etc. environment.

- **NGOs**

The concept of NGOs is defined within the Austrian EIA-Act:
“An environmental organisation is an association or a foundation:
1. whose primary objective is the protection of the environment according to the association’s statutes or the foundation’s charter,
2. that is non-profit oriented under the terms of Articles 35 and 36 Bundesabgabenordnung—BAO (Federal Fiscal Code), BGBl. No. 194/1961, and
3. that has been in existence and has pursued the objective identified in number 1 for at least three years before submitting the application pursuant to paragraph 7. (Art 19/6 EIA-Act).”

The Federal Minister of Agriculture and Forestry, Environment and Water Management decides by administrative order whether an environmental organisation meets the above stated criteria and in which Laender the environmental organisation is entitled to exercise the rights related to locus standi (cp. Art 19/7 EIA-Act).

- **Citizen's groups**

If a written comment on the project and on the environmental impact statement *"is supported by 200 persons or more who have the right to vote in municipal elections in the host municipality or in a directly adjoining municipality at the time of expressing their support, this group of persons (citizens' group) shall have locus standi in the development consent procedure for the project […]. Citizens' groups having locus standi shall be entitled to claim the observance of environmental provisions as a subjective right in the procedure (cp. Art 19/4 EIA-Act)."*

Citizen's groups do have legal standing solely in EIA proceedings, and within these procedures only in the normal procedure – within the simplified procedure they do not have locus standi. (cp. Art 19/4 EIA-Act). Further sectoral legislation does not foresee any party rights for citizen's groups.

- **The ombudsman for the environment**

The ombudsman for the environment does have party rights in environmentally relevant administrative procedures – they especially act within environmental conservation procedures. Furthermore they have party rights in EIA or Waste Management procedures. Their task is, to claim the observance of objective environmental law. They are a formal/official party to the procedure *(Formalpartei).*

"The ombudsman for the environment […] shall have locus standi in the development consent procedure and in the procedure according to Article 20. They shall be entitled ***to claim the observance of legal provisions that serve to protect the environment or the public interests in their competence as a subjective right in the procedure*** *[…] (Art 19/3 EIA – Act)."*

The rights of the ombudsman for the environment are explicitly declared as a subjective right in the procedure. According to the Constitutional Court these rights cannot be seen as "real" subjective rights due to the fact that the ombudsperson for the environment is a public organ – he formally exercises a right with regard to contents he exercises competences (cp. VfSlg 17.220/2004).

3. Is the concept of qualified entity recognized in the national law of your country? If yes, are the criteria for recognition of qualified entities as set out in Article 8 of the Draft Directive more rigorous or more lenient than in your national law?

a) According to the A2J Draft Directive the concept of qualified entity means any association, organisation or group whose objective is protecting the environment and which is recognised according to the procedure fixed in Article 9 of the same Directive. To be recognised, the qualified entities have to meet certain conditions.

b) The A2J Draft Directive provides for the possibility of advance recognition and an "ad hoc" recognition (cp. Art 9 A2J Draft Directive). The conditions to be met by those organizations are the following according to Art 8 A2J Draft Directive:

- To operate on a **non-profit basis** and in the **general interest of the environment**
- To have **legal personality** and an **organizational structure** sufficient to ensure the adequate pursuit of their statutory purpose to protect the environment
- **Active pursuit of environmental protection** for a period fixed by the member states but **not longer than 3 years**.

c) In Austria this concept only exists in EIA, IPPC, ELD procedures (no explicit referral to "qualified entity"). The definition of "recognized environmental organization" is stated within the EIA – Act (Art 19). The Industrial Code (IPPC-procedures) and the ELD – Act refer to this definition.

d) The concept of qualified entity (in Austria: "environmental organization") within the above mentioned procedures meets the concept of qualified entity drafted by the A2J Draft Directive:
   - The **primary objective** of the environmental organization needs to be the **protection of the environment** according to the association's statutes or the foundation's charter
   - The organization is to be **non-profit oriented**, and
   - has been in existence and has pursued the environmental objective **for at least three years.**
     (cp. Art 19/6 EIA-Act).

   Regarding the duration of environmental actions of the entity, the Austrian provision requires quite long durations **with a minimum of 3 years.**

4. If the concept of qualified entity recognized in the national law of your country, in what procedure are these entities recognized as qualified?

   As stated above qualified entities are recognized solely in EIA, IPPC and ELD procedures.
   There is no such concept established by other national legislation.

5. Is request for internal review recognized in the national law of your country? Is it possible to initiate internal review for administrative act in breach of environmental law only, or for administrative omissions in breach of environmental law as well?

   There is no such right in Austria. For this reason the ACCC found Austria in non compliance with Article 9 par 3 of the Convention (ACCC/C/2010/48 (Austria)[6])

6. Following an unsuccessful internal review, is it possible for the applicant to institute an environmental proceeding (a proceeding that concludes with a legally binding decision) in the national law of your country as provided in Article 7 of the Draft Directive?

   See above Point 5.

[6] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-48/Findings/ece_mp.pp_c.1_2012_4_eng.pdf

7. The Draft Directive provides a definition for prohibitive cost. According to your estimation, would this definition lower the cost of environmental procedures in your country?

a) Since there are no such procedures, there is no experience. But of course the provision would help for future procedures after Austria implements Art 9 par 3.

b) Cost problems occur in EIA-procedures due to the need for technical expertise. Such a provision would therefore be important for EIA directive.

8. Is mediation used in environmental procedures in the national law of your country? Would mediation provided by the Draft Directive considerably prolong the environmental procedure?

a) Art 16/2 EIA-Act states the possibility to interrupt the EIA procedure for a mediation procedure upon request of the project applicant if major conflicts of interest between the project applicant and the other parties involved or affected are revealed in the course of the procedure. "The results of the mediation procedure may be forwarded to and considered by the authority, within the limits of statutory possibilities, in the rest of the development consent procedure and in the decision. Further agreements between the project applicant and the parties involved or affected may be documented in the administrative order. The project applicant may submit a request on the continuation of the development consent procedure at any time (Art 16/2 EIA-Act).

b) Mediation is indeed used for conflict settlement in Austria. An empirical investigation on practical experiences in environmental mediation in Austria expressed that mediation procedures are used in environmental matters and that these procedures can have quite productive outcomes.[7]

9. Is interim relief (or other form of preliminary protection) available for the applicant in your country? What kind of impact, if any, would mentioning of this institute as proposed in Article 4 of the Draft Directive, have on the situation in your country?

a) The general rule within administrative procedures is that appeals filed in due time have suspensive effect. The authority may exclude the suspensive effect only if early enforcement is in the interest of a party or for the common good because of imminent danger (cp. Art 64 General Administrative Procedure Act).

b) An exception are EIA proceedings regarding national roads and railway high-speed lines – as the Transport Minister is competent in the first instance, the appellate body is the Administrative Court, and before the Administrative Court no suspensive effect is granted. The project can be initiated due to a procedure before the Administrative Court. This is not applicable if the Administrative Court explicitly grants the suspensive effect within the appeal procedure.

[7] http://www.oegut.at/downloads/pdf/media_oesterr.pdf

c) In general remedies with the supreme courts (=Constituational and Administrative Court) do not have suspensive effect – this effect may be explicitly granted by the before mentioned courts, as long as there are no opposing public interests and if it is necessary to prevent a disproportional disadvantage for the claimant.

d) In July 2012 the Austrian EIA-Act was amended, beneath others providing for the right to a **request for review ("Antrag auf Überprüfung")** against EIA screening decisions for certain environmental organizations. This request for review will not be evaluated according to the general administrative rules which are valid for ordinary appeals – the introduction of this new kind of remedy for NGOs not to be evaluated in accordance with the general administrative provisions for appeals impedes the application of a suspensive effect for such a request for review. Eventual projects could be already started during the review procedure.

e) Therefore the establishment of a legal obligation for interim relief measures granted within administrative or judicial review proceedings would be an advisable step to prevent the evasion of essential procedural rights and guarantees for the public concerned in environmental matters.

Contact information:

name: **Birgit Schmidhuber**
organization: **J&E**
address: **Volksgartenstraße 1, A-1010 Wien**
tel/fax: **43 1 5249377/fax DW 20**
e-mail: **info@justiceandenvironment.org**
web: **www.justiceandenvironment.org**

The Work Plan of J&E has received funding from the European Union through its LIFE+ funding scheme. The sole responsibility for the present document lies with the author and the European Commission is not responsible for any use that may be made of the information contained therein.