

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

Czech Republic

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

*Justice and Environment 2012*

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### 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:

<b>2006</b>	Multi-country case study collection on Aarhus Convention implementation Legal analysis of country findings Position paper
<b>2007</b>	Case study on Aarhus Convention implementation in Slovenia Slovenia legal analysis Position paper Study on the impacts of an access to justice directive
<b>2008</b>	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
<b>2009</b>	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

<b>2010</b>	Aarhus Convention toolkit for the public Access to justice report Access to justice position paper Seveso II and the Aarhus Convention
<b>2011</b>	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<sup>1</sup>. 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<sup>2</sup>. 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”<sup>3</sup> 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.

<sup>1</sup>

[http://europa.eu/legislation\\_summaries/environment/general\\_provisions/l28141\\_en.htm](http://europa.eu/legislation_summaries/environment/general_provisions/l28141_en.htm)

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

<sup>3</sup> <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<sup>4</sup> 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?*

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<sup>4</sup> <http://justiceandenvironment.org/files/file/2008/01/aarhus-atoj-tables-attachment.pdf>

## Answers to the questions

### Czech Republic

- 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?**

The definition of environmental law of the Draft Directive as such would, in our opinion, not have any direct impact on the environmental procedures in the Czech Republic. The scope of the definition is similar as the understanding of “environmental law” in Czech legal order and practice. In some areas, namely in the EIA procedure, also cultural heritage is considered to be part of the environment; but on the other hand, in other kind of administrative procedures, e.g. the noise protection (and some other aspects of the “human environment” related to health protection) are often considered as specific (not “environmental”) branches of law, for which the authorities subordinated to the Ministry of Health are responsible. Also water and forest protection and planning, and land use are considered as not “purely environmental”, but kind of “mixed” areas of laws, for which other departments of government (Ministry of Agriculture, Ministry of Regional Development) are co-responsible.

The definition could, however, have important indirect impact in the combination with the requirement of the Draft Directive to ensure the “qualified entities” with access to environmental proceedings (i.e. proceedings in all areas of environmental law, as defined by the Draft Directive) without having to prove a sufficient interest of impairment of the right. As discussed in detail in answers on the following questions, this requirement is not fully met in the Czech legal system. The definition in combination with the mentioned requirement could help to promote the interpretation that in all the areas of environmental law, as defined by the Draft Directive, full access to judicial review of the administrative decisions must be granted to (at least) NGOs meeting the requirements for “qualified entities”.

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

There is no explicit definition of the term “members of the public”, in the sense of the Aarhus Convention and the Draft Directive, in the Czech laws. Also, except one specific provision of the EIA Act, establishing a special kind of “*lawsuit in the public interest*” (described in more details below), there is no specific provision providing for legal standing of members the public (environmental NGOs).

Therefore, in general, legal standing of “members of the public” is regulated by the general standing provision for administrative judiciary, i. e. by article 65 of the Code of Administrative Judiciary (CAJ). This provision states that standing to sue the administrative decisions is granted to

- a) persons who assert that their rights have been infringed by the decision which “creates, changes, nullifies or authoritatively determines their rights or duties” and
- b) other parties to administrative proceedings for issuing the administrative decision, who assert that their rights have been infringed in these proceedings and this could cause illegality of the decision (standing to sue for the environmental organizations is derived from this provision).

It is clear that this provision is based on the concept of impairment of individual rights. The individuals can assert impairment of various kinds of their rights to get legal standing, including the right for favourable environment, which is granted by the Czech Constitution (however, in some kinds of procedures, namely concerning planning, land use and building permits, the courts tend to accept only impairment of rights related to real estate ownership as basis for legal standing).

The NGOs are not considered by the Czech courts to claim impairment of the right for favourable environment or other substantive rights. They only can claim impairment of their procedural rights in the decision-making procedures, which they are entitled to participate in. Therefore, the possibility to get legal standing of environmental NGOs depends on their previous participation in the administrative procedure for issuing an environmental permit with the status of the party (see also answer on question 3. below).

If the NGO meets the criteria for participating in the (environmental) administrative procedure, it can, after exhausting the administrative remedies ask for judicial review of the final decision (permit). The position of the NGOs before court is, however, strongly influenced and weakened by the above mentioned doctrine of “maintaining impairment of a right”, which the Czech courts apply. In accordance with this doctrine, NGOs can only successfully enforce court protection against intervention into their procedural rights in the decision-making procedure, as these are the only “subjective rights” they can have in the environmental procedures. If the doctrine is applied strictly by the court (which is not always the case, but often it happens), NGOs cannot successfully claim that the decision breaches the requirements of environmental laws (e.g. limits of emissions or provisions prohibiting some activities in protected areas), as this is not related to any of their “personal rights”.

In cases where the NGOs (and other members of the public) are not entitled to obtain status of the party to an administrative procedure related to the environment (this happens with respect to some special environmental permits, e.g. “noise exceptions” or permits according to the Nuclear Act, where law declares the applicant as the only party to the procedure), there is, in general, also no possibility for the NGOs to get legal standing to sue these kinds of permits.

As mentioned above, there is a specific kind of standing for a “*lawsuit in the public interest*”, established (since December 2009) by Art. 23 of the Czech the EIA Act. According to this provision, environmental NGOs and municipalities, which submitted comments in the EIA process, shall have standing to sue the development consent approving a project, for which the relevant EIA took place. Theoretically, the concept of impairment of right (see above)

shall not apply on them in this case and the NGOs should therefore be able challenge also the substantive legality of the contested decision. NGOs should also have standing to sue the permits which they otherwise cannot (see previous paragraph). We are, however, not aware of any practical experience with this specific possibility.

It can be added that some aspects of the legal regulation and court practice concerning the legal standing of “members of the public” in the Czech Republic will probably be found not in compliance with the requirements of the Aarhus Convention by the Compliance Committee.<sup>5</sup>

**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?**

As follows from the previous answer, Czech laws concerning the legal standing of “members of the public” do not fulfill the general requirement of the Draft Directive Article 5 to grant (ensure) access of the “qualified entities” (NGOs meeting criteria of Article 8 of the Draft Directive) to environmental proceedings in general, **without having to prove a sufficient interest of impairment of the right**. Only Article 23 of the EIA Act is consistent with the requirement that proving sufficient interest of impairment of the right shall not determine access to environmental proceedings (judicial review). This provision, however, is not applicable on all kinds of environmental proceedings (in the whole area of environmental law - see above answer on question 1), but only in cases where (full) EIA procedure takes place.

In (many, not all) other kinds of administrative procedures, environmental NGOs can get status of the party to the procedure. This possibility alone, however, does not fulfill the requirements of Draft Directive Article 5, as participation in the decision making procedure as such does not ensure access to a review proceedings before a court or other independent body established by law. As described in the previous answer, NGOs participating in the administrative environmental proceedings generally have access to courts, but only upon when proving that their subjective (i.e. procedural) rights were impaired (violated) in the administrative procedure. This requirement also limits the scope of the court review (see above).

On the other hand, the criteria for the environmental NGOs to have access to the administrative procedures related to the environment, and by that means, to get the (limited, as describe) access to courts are substantially more lenient, than the criteria for recognition of qualified entities as set out in Article 8 of the Draft Directive. The only requirements which must be met are that the NGO must have legal personality (i.e., it must be officially registered – in practice, it also means that it must consist of at least 3 people) and that, according to its status (bylaws), its main goal is protection of the environment or nature. The same easy- to-meet criteria apply also for obtaining standing for the special kind of lawsuit according to Article 23 of the EIA Act (see above).

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<sup>5</sup> See the Draft Findings of the Aarhus Convention Compliance Committee concerning this issue at <http://www.unece.org/env/pp/compliance/Compliancecommittee/50TableCz.html>

It can be therefore concluded that the concept of “qualified entities” is applied in a different way in the Czech legal system, than the Draft Directive presumes. The criteria for the NGOs to be able to participate in the administrative procedures and subsequently to have access to courts are more lenient, than the criteria for recognition of qualified entities as set out in Draft Directive. But on the other hand, even the access of the NGOs which would meet all the criteria set out by the Draft Directive to the court review is more limited (by the requirement of impairment of the subjective rights) than the Draft Directive would require.

**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 the concept of “qualified entities” is substantially different in the Czech legal system (see above), there is no procedure of their recognition corresponding to what is presumed in Article 9 of the Draft Directive. The only necessary general procedure for recognition of the NGO as “qualified” to participate in the administrative procedures and subsequently to get legal standing is procedure of their registration as a legal entity (Ministry of Interior is responsible for this procedure). Next to that, on ad hoc basis, the respective administrative authorities decide on ad hoc basis, if other conditions for granting an NGO with a status of the party are met. These conditions, except the statutory goals (which are fully “in hands” of the NGO) concern the circumstances of the relevant procedure (if it is related to the environment) not the NGO and its characteristic. Therefore, the decision of the administrative authority does not have the nature of the “ad hoc recognition” of the NGO as a “qualified entity”.

**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?**

As a general principle, it is possible in the scope of the Czech law for all parties to the administrative procedure to file an appeal against administrative decision to a superior administrative body. This principle applies to vast majority of administrative decisions, with the exception of specific acts which are not issued in the regular form of an administrative decision (e.g. the “certificates of the authorized inspectors, which, under some conditions, can substitute the building permits; administrative appeal is also not possible against decisions on adoption of the land use plans and other kinds of “acts of general nature”).

Exhausting this review instrument (administrative appeal – if it is available) is a precondition for a possibility to contest the administrative decision at court. Therefore, it can be said that the administrative appeal has a character of “request for internal review” in the sense of Article 6 of the Draft Directive. If administrative appeal is not available, the persons asserting their rights have been impaired by the administrative act can challenge it directly at court.

There is also a kind of internal review procedure for the situation of administrative omissions in breach of (environmental) law. A superior administrative authority is obliged to take measures against illegal omission of the inferior authority either *ex officio*, any time it learns

about such situation, of upon request of the party to the procedure, or upon a notice of any other person.

**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?**

After unsuccessful administrative appeal, it is possible to the applicant, who can assert that the decision impaired his rights, to file a lawsuit to the administrative court.

This possibility as such is fully in compliance with the requirement of the Draft directive to provide the applicant with the possibility to institute an environmental proceeding. The court issues a legally binding decision, which can abolish (in some specific cases also substitute) the decision of the administrative authority. The courts shall review both the substantive and procedural legality of administrative decisions subject to an administrative lawsuit. The scope of the court review of the administrative decisions is, however, in practice limited by the doctrine of infringement of rights. This is influencing namely the possibilities of the NGOs to be successful with their lawsuits against administrative decisions related to the environment (see answer on question 2 above for more details).

An applicant who has exhausted the administrative measures for the protection against illegal omission of an administrative authority (see previous answer), can ask the court to order the administrative authority “to issue a decision on the merits of the matter”. There is, however, a significant “gap” in this regulation (as interpreted by the Czech administrative courts), which leads to the conclusion that it is not possible to ask court to order the authority to start the procedure itself (*ex officio*), when it is obliged by law to do so (for example, if there is a project built or operated without the necessary permits). The courts repeatedly refused the lawsuits of affected neighbors in such cases. There is also no regulation concerning standing of the environmental NGOs to sue administrative authorities in case of illegal omissions. It should be possible to use another kind of administrative action – so called “action against other illegal interventions of the administrative authorities” – in such cases.

**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?**

We do not think that the cost of environmental (court) procedures would in general get lower due if the Directive, including the definition for prohibitive cost, would be adopted. Generally, the costs for court procedures are not of prohibitive character for most litigants. It is also possible for the courts to mitigate the costs of the proceedings by granting the waiver of the court fees when the applicant proves the need. There is also a fixed case law of administrative courts, that the costs of the legal representation (attorney’s fees) are not eligible costs for the administrative authority, as they shall have their own employees –

lawyers, who can represent them at the dispute.<sup>6</sup> Despite of that, the existence of the definition in the EU directive might improve the situation in some individual cases, as the courts might be more willing to grant waivers in the environmental proceedings.

**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?**

Mediation, in the meaning of a formal procedure regulated by law, is practically never used in environmental matters in the Czech Republic. The general Mediation Act has been approved only recently (May 2012) and is yet not in force.

Informal mediation (discussions about compromise solutions which would satisfy all interested parties) take place in some environmental cases. It is hard to estimate the percentage and to present any general conclusions concerning such situations, as they considerably differ case by case.

**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?**

An administrative appeal (see above answer on question 5.) has a suspensive effect. Only in rare cases, and generally not in the environmental matters, the appeal does not have a suspensive effect and may be preliminarily executed.

Submission of a lawsuit against a decision of an administrative authority generally does not have a suspensive effect. The court may acknowledge it in accordance with article 73 paragraph 2 of the Code of Administrative Judiciary upon the request of the claimant, under following conditions

- executing the decision would cause the applicant a harm "incomparably more serious" that which could be caused to other persons by granting the injunctive relief (till the end of 2011, there was a condition of "irreparable harm") and at the same time
- issuing injunctive relief would not be contrary to and important public interest.

Next to the suspensive effect, the applicant can also ask the court for issuing a preliminary injunction if there is threat of "serious" harm, and it necessarily mustn't be the claimant who is under this threat. The court may, under these conditions, order the parties of the dispute, or even any third person "if it is just to do so", to make something, abstain from something or endure something.

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<sup>6</sup> For more details, see the Price of Justice Report for the Czech Republic at [http://justiceandenvironment.org/\\_files/file/2011%20poj%20CZ.pdf](http://justiceandenvironment.org/_files/file/2011%20poj%20CZ.pdf)

In practice, administrative courts have been quite reluctant to acknowledge suspensive effects of administrative lawsuits or to issue preliminary injunctions, namely upon requests of the NGOs, who are generally considered as not being capable to prove impairment of their “substantive” rights by administrative decisions. Next to that, Article 23 of the EIA Act, establishing the specific “public interest lawsuits” of the environmental NGOs (see answer on question 2 for more details) explicitly (and quite illogically) states that this kind of lawsuit can never have suspensive effect.

For these reasons, we would consider even a brief note about the possibility of interim relief in relation to environmental proceedings, as defined by the Draft directive, to have potentially positive aspect on the efficiency of the court review of administrative decisions related to environment in the Czech Republic, as it could help promoting the idea that preliminary measures shall be accessible not only for protection of endangered subjective rights, but also public interests, i.e. the environment as such.

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