

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

Spain

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

*Justice and Environment 2012*

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

## Spain

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:

<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?*

---

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

## Answers to the questions

### Spain

- 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?**

In principle, the impact will be limited since Law 27/2006, of 18 July regulating the rights to access to information, public participation and access to justice in environmental matters – Aarhus Law- which implements the Aarhus Convention and transposes Directives 2003/4/EC (on access to information) and 2003/35/EC (on public participation) provides an almost identical list of areas covered by environmental law.

Article 22 of Law 27/2006<sup>5</sup> establishes a kind of *action popularis* in environmental matters for qualified entities to challenge through administrative and judicial procedures acts and omissions of public authorities contravening laws related to the protection of the environment listed in its Article 18.1. In addition to the areas listed in the definition of environmental law of the Draft Directive, this list includes those other areas established by Autonomous Communities legislation. Therefore, the definition of “environmental law” in Spanish law is the same as the one in the Draft Directive.

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

Article 23 of Law 27/2006 gives legal standing to NGOs meeting certain criteria. These entities are considered “qualified entities” that will not need to show the impairment of a right or a sufficient interest to contest actions and omissions by public authorities. The provision applies to both administrative procedures and administrative judicial procedures. Other members of the public will have legal standing provided they meet the general criteria for standing laid down in Article 31 of Law 30/1992 on the Administrative Procedure or for the judicial procedure Article 19 of Law 29/1998 on Administrative Judicial Procedure.

- The *actio popularis* in administrative matters

In coastal water, national parks and land-use planning, the actions to challenge the Administration’s act/omissions are public. Anybody (individuals, associations, ad-hoc platforms for the defence of some interests, NGOs, more generally legal persons) can use the various administrative remedies foreseen by the law, in particular those of Law 30/1992. These *actio popularis* is regulated in Land-use planning Law<sup>6</sup> (Article 48), the Coastal Law<sup>7</sup> (Article 109) and the National Parks Network Law<sup>8</sup> (Article 22).

---

5

6 Royal Legislative Decree 2/2008, of 28 June, approving the Consolidated Text of the Land Law (Real Decreto Legislativo 2/2008, de 20 de junio, por el que se aprueba el Texto Refundido de la Ley del Suelo)

7 Law 22/1988, of 28 July, on the Coasts (Ley 22/1988, de 28 de julio, de Costas).

8 Law 5/2007, of 3 April, on the National Parks Network (Ley 5/2007, de 3 de Abril de la Red de Parques Nacionales).

- a. Qualified entities: NGOs meeting criteria laid down in Article 23 of Law 27/2006

The Aarhus Law establishes specific standing rules for environmental associations to facilitate their access to justice, both for administrative appeal and administrative judicial appeal procedures. That Law recognizes that associations meeting certain criteria would be able to challenge actions and omissions by public authorities without showing an interest or the impairment of a right. Thus, for environmental associations to use *actio popularis* they must meet the following criteria:

- Their by-laws include as the association's goal the protection of the environment or of any of its elements
- The association must be legally constituted at least 2 years before the date in which the action is initiated; it must be active in achieving its goals
- A geographical connection (established in their by-laws) with the area affected by the act or omission.

In addition to Law 27/2006, Law 16/2002 on IPPC and Royal Legislative Decree 1/2008 approving the Consolidated Environmental Impact Assessment Law also consider NGOs meeting the referenced criteria as interested parties in the procedures to grant IPPC permits and in the EIA procedures.

- Concept of "interested person" under Article 31 of Law 30/92

Members of the public not meeting the criteria laid down in Article 23 of the Aarhus Law 27/2006 will have to show an interest in order to challenge acts and omissions by the administration. Article 31 of Law 30/1992 defines "interested person" in the context of the administrative procedure:

*1. Are considered as interested in the administrative procedure:*

- A) those that initiate the procedure as holders of individual or collective legitimate rights and interests.*
- B) Those that, even if they have not initiated the procedure, hold rights that could be affected by the decision that may be taken in the procedure.*
- C) Those whose individual or collective legitimate rights may be affected by the resolution and appear in the procedure provided the resolution is not definitive.*

*2. The associations and organisations representing economic and social interests, will be considered holders of legitimate collective interests according to the conditions established by law.*

- Legal standing in the administrative judicial procedure

To be able to lodge an appeal before the administrative judicial courts, procedural capacity (Article 18 Law 29/1998) and legal standing (Article 19 Law 29/1998) are required. Procedural capacity is determined according to the Law on Civil Procedure (age, mental soundness and so on). Groups of have procedural capacity if they have legal standing or in cases specifically foreseen by the law.

Article 19 of Law 29/1998 on Administrative Judicial Procedure establishes that:

*1. In the administrative judicial procedure shall have standing:*

- a. Physical and legal persons holding a right or a legitimate interest*
- b. Corporations, associations, trade unions and entities referred to in Article 18 that are affected or are legally allowed to defend rights and collective legitimate interests.*
- c. (...)*
- d. (...)*

- e. The local entities, to challenge acts and provisions by the State administration or the CCAA administration as well as the entities with legal personality linked to any of these administrations, that affect the scope of their autonomy
  - f. The Prosecutor to intervene in the cases provided for by the law [basically cases where the public action is used]
  - g. (...)
  - h. Any citizen, using a public action, in the case expressly provided for by the law.
  - i. (...)
2. (...)
3. Actions by neighbours in the name and interest of local entities shall be subject to the conditions laid down in the legislation on the local regime.

Article 29(1)(h) of Law 29/1998 allows *actio popularis* in cases specifically foreseen by the law. The cases where *actio popularis* is possible under the administrative judicial procedure are the same as in the case of the administrative remedies, i.e., Coast Waters Act, Land-use Planning Act (including the environmental legality) and the Nature Protection Act (only for national parks). Thus, in these cases, anybody can contest an action or omission by public authorities without needing to show an interest on the basis of a violation of the obligations laid down in those acts. In the cases where the *actio popularis* is used, the Prosecutor will intervene in the proceedings.

In addition, qualified entities by Article 23 of the Aarhus Law can exercise *actio popularis* in administrative judicial procedures.

- 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?**

Yes, as explained above. The Aarhus Law establishes lenient requirements to become a qualified entity than the Draft Directive. See above the requirements.

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

The qualified entities have that recognition for administrative and administrative judicial review procedures.

- 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?**

Law 30/92 on Administrative Procedure does not provide for internal review but directly provides for administrative review procedures.

**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?**

As there is not internal review, applicants can institute an environmental proceeding when their application is refused, wrongfully/inadequately answered. Thus, it is possible to file a “hierarchical appeal” (*recurso de alzada*) if the administrative decision was issued by an authority having a hierarchical superior and the resolution does not end the administrative route. Otherwise, if an authority without a hierarchical superior issued the resolution there is the possibility of a “voluntary reposition appeal” (*recurso potestativo de reposición*). This appeal is always possible when the resolution or act ends the administrative route.

**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?**

Mediation is not used in environmental procedures in Spain.

**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?**

In Spain, administrative decisions can be immediately executed irrespective of an appeal or court action. The conditions to grant injunctive relief in administrative procedures are:

- The execution of the decision or act would cause an irreparable damage or a damage difficult to repair
- The appeal contests the legality of the act to declare it void.

If there is no express resolution after 30 days from the date on which the request was registered, the resolution will be deemed suspended. The suspension may be accompanied by the adoption of specific interim measures (ie.: seizure, withdrawal of the activity). If the suspension of the decision, act or omission can cause a prejudice, regardless of its nature, relief can only be granted after submission of a guarantee as a cross-undertaking in damages sufficient to compensate those prejudices. Relief may be extended during the judicial administrative procedure. If relief granted may affect a group of people, it must be published.

A party can request the adoption of injunctive relief and other interim measures (Art. 129 Law on Administrative Judicial Review Procedure). The adoption of interim measures requires the audience of the parties, except in cases of extreme urgency.

The current interim relief procedure in the Spanish legislation is not adapted to the specific needs and characteristics of environmental cases. However, the proposed interim relief is very general and I consider it won't have any impact in Spain.

## Contact information:

**name:** Ana Barreira  
**organization:** J&E  
**address:** Dvořákova 13, 60200 Brno  
**tel/fax:** 420 575 229/420 542 213373  
**e-mail:** [info@justiceandenvironment.org](mailto:info@justiceandenvironment.org)  
**web:** [www.justiceandenvironment.org](http://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.

