

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

Croatia

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

### Croatia

- 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?**

There is no definition of “environmental law” in the Croatian Act on Environmental Protection which is the general Act of environmental legislation in the country. Also, there is poor court practice regarding environmental cases although it is in progress for the past 5 years. For that reason it is hard to give an opinion on what impact would the definition of environmental law of the Draft Directive have on the environmental procedures in Croatia. However, the Act on Environmental Protection (O.G. No. 110/07, Article 149) determines that “Pursuant to this Act, court proceedings on all legal actions instigated in the field of environmental protection shall be deemed urgent”. This in practice means that only court procedures initiated according to the Act on Environmental Protection will be considered as urgent procedures so in that way, only those procedures are considered as procedures “in the field of environmental protection”. In that way it is even possible that legal action initiated for violation of Act on Waste or Act on waters would not be considered as procedures “in the field of environmental protection”. It is likely that courts will just follow the aforementioned rule determined by the Act and not support a wider interpretation. For that reason, we believe that definition of environmental law of the Draft Directive would have a positive impact on the environmental procedures in Croatia.

It is important to mention that, in the other hand, Croatian legal scholars support pretty wide definition of environmental law in comparison to which definition of the draft directive is narrower. According to the authors of the literature used by law students (Environmental law, 2003) – it can be said that environmental law encompasses all legal norms in the substantive law relating to environmental protection, rational environmental management, restoring and planning of all proceedings and actions in connection with the environment aiming to balance the nature and artificial elements in their environment interconnectedness, and thereby prevent adverse impacts on the nature (i.e. its individual living and nonliving elements).

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

Legal standing of “members of the public” is set by the Act on the Environmental Protection, Article 144, paragraph 1 (O.G. No. 110/07) which determines that “any natural or legal person which can, in conformity with the law, prove a permanent violation of a right, due to the location of the project and/or the nature and impact of the project, shall be considered to have a justifiable legal interest in the procedures regulated by this Act in which the participation of the public concerned is provided for”.

**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?**

Concept of qualified entity is recognized in the national law by the Act on the Environmental Protection, Article 144, Paragraph 2 (O.G. No. 110/07). It is understood that a civil society organisation which promotes environmental protection has a sufficient legal interest in the procedures regulated by the Act on the Environmental Protection which provide for the participation of the public concerned, if it fulfils the following requirements:

1. if it is registered in accordance with special regulations governing organisations and if environmental protection and advancement, including protection of human health and protection or rational use of natural assets, is set out as a goal in its Statute,
2. if it has been registered within the meaning of item 1 of this paragraph for at least two years prior to the initiation of the public authority's procedure on the request in relation to which it is expressing its legal interest, and if it can prove that in that period it actively participated in activities related to environmental protection on the territory of the city or municipality where it has a registered seat in accordance with its Statute.

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

Qualified entities are recognized only in the procedures that are regulated under the Environmental Protection Act i.e. EIA and IPPC procedures. Pursuant to Article 145, Paragraph 1 of the Environmental Protection Act they are entitled to instigate a legal action against a certain administrative act of a public authority if they participated in the procedures regulated under this Act as the public concerned.

**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?**

Request for internal review is not specifically recognized in the Croatian law. However, certain provisions of the Act on the General Administrative Procedure (O.G. No. 47/09) may be used as a procedure that is similar to the internal review.

According to the new provision of the Act on the General Administrative Procedure (Article 42), the public authority is obliged to respond to the petition or information of an individual suggesting that there is a need to initiate an administrative procedure ex officio in order to protect public interest. In the environmental domain, this will primarily pertain to petitions of citizens or NGOs informing competent authorities that there is a danger for people's health and the environment and that an inspection procedure should be ordered. Before the new Act on the General Administrative Procedure came into effect individuals and

associations had no legal protection in case an inspector did nothing on the basis of their charge or in case they were dissatisfied with what the inspection had done.

According to the provision of Article 42, Paragraph 3 of the Act on the General Administrative Procedure, when an official finds that there are no conditions to initiate proceedings, he or she shall inform the petitioning party accordingly and as soon as possible, at the latest within 30 days from the date of the petition. In this case, the petitioner has the right to file a complaint to the public authority from which he or she has received the information rejecting the motion to initiate proceedings, within eight days from the date of receipt of the information, and also in case he or she has not been given answer to the petition in the given time-frame (Article 42, Paragraphs 2-4). The head (individual in charge) of the public authority decides on the complaint within eight days from the day in which the complaint was made.

**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?**

One can appeal against the decision on the complaint in the first instance, and one can initiate an administrative dispute before the administrative court against such decision in the second instance. If there is no second instance authority, an administrative dispute can be initiated against the decision of the first instance authority (Article 122, Paragraphs 3 and 4 of the Act on the General Administrative Procedure). This way individuals and NGOs are given the right of access to the judiciary in case they are dissatisfied with the work of inspections. However, if a public authority decides to initiate an administrative procedure ex officio, based on a petition or denunciatory information, the petitioner shall not get the status of a party and shall not participate in further proceedings.

**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?**

Croatian legislation does not contain any provision which would ensure that the costs of environmental procedures are not prohibitive. The general rule which applies to costs of the court procedure is that the party which loses in a dispute shall bear the costs of the dispute in full unless otherwise prescribed by the law. Unfortunately, Environmental Protection Act has not provided any rules regarding the costs nor it has established appropriate assistance mechanisms to remove or reduce financial barriers to access to justice. The fact that the public interest is at stake in environmental matters is not accounted for in allocating costs. Free legal aid is available only to low-income natural person when such need arises from the specific circumstances of the applicant and members of his household. Environmental

organisations are excluded from obtaining the legal aid, since legal persons are not eligible pursuant to the Act on Free Legal Aid (O.G. No. 62/08, 41/11 and 81/11).

**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 Croatia. Environmental procedures in Croatia are already very lengthy. If mediation, provided by the Draft Directive, would not be implemented successfully, it would considerably additionally prolong the environmental procedures.

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