

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

Hungary

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:

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 2003¹. 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 directive². 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 2007⁴ 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

Hungary

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 Hungary, there is no statutory definition of environmental law. Practice of administrative agencies or courts have not developed the notion. The Supreme Court has defined first in 2004, then in 2010 what constitutes and environmental administrative procedure. According to the Administrative Law Unification Decision No. 4 of 2010 of the Supreme Court, all procedures are environmental administrative procedures that involve the environmental agency either as a decision-making authority or as a co-decision authority. Therefore the approach of the Hungarian law is more focused on form (who is applying the law) than on content (what is applied). The definition set by the Draft Directive is that "environmental law" means 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, in areas such as: [...]. It is therefore primarily focused on content. Consequently, the introduction of this notion into the legal system of Hungary would bring a) a new approach to environmental law and b) a clearly new definition into the implementation of environmental law. This new notion would possibly have an impact on environmental procedures both ways: some procedures where the environmental agency participates but are not environmental per se would fall out of the category of environmental administrative procedures, while others would be incorporated, contrary to not involving the environmental agency therein.

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

Members of the public can be either natural persons or legal persons. Legal standing differs in terms of these two categories. The criteria of legal standing are the following:

Legal Standing	Administrative Procedure	Judicial Procedure
Individuals	whose rights are affected and who owns or legitimately uses a piece of land in the impact zone of an activity	whose rights are affected and who were parties to the administrative dispute
NGOs	environmental NGOs active in the impact zone of an activity in environmental administrative procedures	environmental NGOs active in the impact zone of an activity in environmental administrative procedures
Any other	NGOs not active in the impact zone have a right of commenting in the procedure	no legal standing

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?

There is no concept of qualified entity recognized in Hungarian national law, or at least not in the meaning of the Draft Directive. The criteria for recognition of qualified entities foreseen by the Draft Directive are much more rigorous than the current regulation and practice in Hungary. The latter only require that an NGO be created for the protection of environmental interests, not be a political party of a trade union, and operate on the impact zone of the activity that is under deliberation by the environmental agency. Apart from that, the NGO has to meet the general requirements prevailing for NGOs, i.e. it has to have at least 10 members, has to be formally created by the founders and has to be registered at the court in an appropriate process. These conditions are obviously more lenient than those set by the Draft Directive.

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

Not relevant (see answer to Question 3).

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?

The regular remedy in the administrative phase of a procedure is the appeal which is examined by the superior authority. However, the appeal has to be submitted first to the decision-maker first instance authority who will then forward the file together with the appeal to the superior authority. During this process, in case the first instance authority notices unlawfulness in its appealed decision can itself modify or withdraw the appealed decision and make a new decision. Therefore, although there is no legal possibility to explicitly request an internal review, it is existing in the Hungarian administrative law.

The appeal can be limited to the breach of environmental law, therefore the above described de facto internal review can also focus on breaches of environmental law, however, according to the Act on Administrative Procedure of Hungary, neither the internal review (before forwarding the file to the superior authority) nor the decision-making process of the superior authority is confined to the arguments contained in the appeal. Rather, both forms of remedy are supposed to reinvestigate the matter of the procedure fully.

Administrative omissions are not possible to be subject of an appeal; therefore the de facto internal review cannot work for them either. Apart from that, the Act on Administrative Procedure of Hungary makes it possible for the superior authority to instruct the first instance authority to proceed with a case in case of omission, or appoint another first instance authority with the same portfolio in case of repeated omissions.

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 was explained above, there is no formal legal possibility to request an internal review; however, there are still legal possibilities available for those seeking remedies:

- if the administrative authority has reconsidered its decision on the first instance and has made a new (modified) decision, the deadline for appeal again opens for this new decision
 - if the first instance administrative authority forwards the file to the superior authority and the latter makes a decision, there is a possibility to file a lawsuit at the court against this decision
 - alternatively, if no lawsuit was filed, the reopening of the case can be requested within 6 months from the date when the decision became final if new evidence not being available during but existing before the decision-making would significantly modify the decision
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?

Environmental administrative procedural costs fall into three major categories in Hungary. In a few environmentally relevant procedures only a stamp duty has to be paid which is minor and does not follow the value of the case. These may vary from 50 to 200 euros approximately. In another category of procedures the fee to be paid for the process of the environmental authorities is proportionate to the value of the case, i.e. the complexity of the matter to be decided. This can vary from 500 to 2.000 euros. And lastly, appeal against such procedures entails the payment of similarly high fees except for individuals and NGOs not being applicants in the case, who have to pay only 1% of the regular fees.

Judicial procedures require the payment of a stamp duty that varies from 50 to 200 euros in average. In judicial proceedings those are the costs of experts that can be prohibitively high, ranging from 500 to 4.000 euros.

Therefore the introduction of the requirement of “not prohibitively expensive” would have a real impact on the last cost category mostly, because the rest either entails not prohibitive costs even now (see the rule of 1% appeal fee for NGOs) or apply to project developers who are not supposed to be the beneficiaries of the Draft 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?

Mediation is hardly used at all in environmental procedures in Hungary, partly due to its unknown nature for the lay public but partly because the low level of willingness to compromise in environmentally significant cases on both sides of the legal dispute. Environmental procedures would not be considerably prolonged by the introduction of an obligation to try mediation, because environmental cases involving conflicts last quite long even currently. An increase of the total

duration of procedures (administrative phase and judicial phase) with an approximate time of 6 months devoted to mediation would not mean a significant difference.

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?

Application of interim relief in environmental procedures is quite rare, due to its conditions (periculum in mora, fumes boni iuris, prima facie case) and the interests involved in the legal dispute. Administrative court procedures involve the proof that the interest to be protected by the interim relief is superior to the one against which the relief would be applied. Civil court procedures usually require a cross-undertaking in damages which is prohibitively expensive.

The simple mention of this legal institution would not make a significant difference in Hungarian law or practice. Only if the Draft Directive had set liberal conditions for interim reliefs, to be implemented in the Member States, would make an impact on the situation in Hungary.

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