

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

Romania

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

Romania

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?

Currently there is no legal definition of environmental law in Romanian legislation. There is a definition of “environment” that includes more factors than the one mentioned by the directive. According to the Romanian law environment includes: “all conditions and natural elements of the Earth: air, water, soil, underground, landscape, all atmospheric layers, organic and anorganic organisms, living beings, interacting natural systems of the elements mentioned previously, including some material and spiritual values, the quality of life and the conditions that can influence wellbeing and health of the humans.” A possible effect would be that this definition will be modified and restricted to the categories mentioned in the definition from the Draft Directive.

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

Any person has standing in court according to the environmental protection law, Governmental Ordinance 195/2005 art 5 letter d, regardless of any prejudice.

Legitimate interest in administrative procedure can be private or public. The NGOs aiming to protect human rights including the environmental protection according to their statutes, have standing in court if they justify a public legitimate interest.

The individuals have to justify a private legitimate interest. According to art 8 para 1¹ of Law no 554/2004 regarding the procedure in administrative courts the individuals and legal entities can invoke a public legitimate interest only in subsidiary, if the violation of such interest would logically devolve out of the subjective right or private legitimate interest.

According to art 2 letter p, the private legitimate interest is defined by law as the possibility to ask for a certain behavior in consideration of the future and foreseeable subjective right or private legitimate interest.

According to art 2 letter r, the public legitimate interest is defined as the interest that regards the rule of law and constitutional democracy, the guarantee of the fundamental rights, liberties and duties of the citizens, the fulfillment of the community needs, and the achievement of the public authorities’ competences.

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?

In Romania there is no such definition as the one provided by the Draft Directive. In the administrative procedural Law no 554/2004 there is a definition of interested social organisms, in art. 2 letter s: nongovernmental structures, trade unions, associations, foundations etc, that have as object of activity the protection of different categories of citizens or the good functioning of the administrative public services.

Any organization has access to justice, as this is a fundamental right according to the Romanian Constitution, art 21. The only restrictions when it comes to a legal entity (regardless if NGOs or companies) are: to be legally established and the objectives of the legal entity to be in accordance with the lawsuit started.

The requirements from the Draft Directive I believe would violate the access to justice as fundamental right, as they are excessive. Such provision in a directive would definitely narrow the possibility of NGOs and other to access to courts.

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 mentioned provisions of the Law are applied in Administrative courts.

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?

Regarding the internal review, this is possible for the review of administrative act and for administrative omissions, according to the provisions of the Law 554/2004. Against the decision of the authority whose acts or omissions are the object of the complaint, an appeal can be submitted to the superior authority, if such authority exists from hierarchical point of view. However it is sometimes difficult to obtain a positive decision for the courts in certain situation given the confuse formulation of the text of the Law no 554/2004. For ex we recently had a case where the court said that our request to oblige the authority to reject an environmental agreement is inadmissible. The decision is not final yet. From this point of view, the text of the directive will be helpful and would lead to a clarification of the Law.

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?

The applicant can act in administrative courts against the authorities, if the internal review was not successful, according to Law no 554/2004 regarding the procedure in administrative courts.

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?

The procedure in administrative courts is not expensive. The court fee varies between 1 eur and 100 eur (depending on the value of the euro). In civil courts however, the fees are usually following the value of the case and the court's fee can increase up to 3000 eur or more.

The experts fees in environmental proceedings are also very high, can be up to 3000, 4000 eur or more.

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 Romania almost at all. It would probably prolong the cases but it could also shorten them if the mediation procedure would be successful.

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 Romania an interim relief is regulated both by the administrative procedural Law 554/2004 and by the civil procedural code. However, in environmental matters it is very difficult to obtain such decision. There are to be proved: a case well justified – that the arguments brought are creating a sufficient legal basis, and an imminent prejudice – the immediate risk of suffering serious and irreparable damage. Until now, the practice of the court was that such risk can't be proved in relation with an environmental permit because this does not lead directly to damages of the environment. The damages are directly provoked in courts opinion by the development consent, such as a building permit.

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