

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

Slovakia

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

Slovakia

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?

Slovak legislation does not contain definition of “environmental law”. Right to review act or omission of public authority depends solely on whether one is a party to administrative proceedings (and not whether claimed violation is act or omission which is in conflict with “environmental law”). According to Slovak laws only party to administrative proceedings has right to seek court review of decision resulting from such proceedings. Some environmental laws explicitly stipulate that environmental NGOs may be parties in administrative proceedings and consequently have right to request court to review decisions issued in proceedings according to those laws. Such legal position is granted to NGOs only by the Nature Protection Act, Act on EIA, Act on IPPC, some decisions issued in accordance with the Act on Prevention and Restoration of Environmental Damage and Act on GMO. Other important environmental legislation, such as Construction Code, Air Protection Act, Water Protection Act, Forest Protection Act, Mining Act or Waste Management Act, does not contain right of NGOs (or any other “qualified entities”) to participate in related decision making proceedings, hence they have no right to ask court to review decisions issued according to mentioned environmental laws. In cases when environmental NGOs seek to review decision issued according to other environmental laws (those which do not specifically stipulate right of environmental NGOs to participate) they base their arguments on Art. 9.3 of the Aarhus Convention, quoting decision of the Court of Justice of EU in the Forest Protection Movement VLK vs. Ministry of Environment, C-240/09. In those cases, however, environmental NGOs must prove that law in question is an “environmental law”. Hence defining “environmental law” would be helpful in defining for which cases the right of environmental NGOs or other “qualified entities” to review acts and omissions of public authorities, apply.

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

Legal standing before the court:

A right to file a court petition against act or omission of the public authority is granted to a person, who claims his/her right has been denied by a decision of public authority.

If a decision has been issued within administrative proceedings, all its parties are entitled to file a court petition if the decision deny or infringe their rights.

A court petition can be filed also by the person who was not a party to the administrative proceedings, but should have been.

The above implies that a person has “legal standing before the court” based on the fact whether or not a person has been party in administrative proceedings preceding issuance of administrative decision.

Slovak law determines following persons as parties to administrative proceedings:

Individuals:

A person, whose right is to be determined in the administrative proceedings, a person, whose rights or legally protected interests may be directly affected by the administrative decision (e.g. property rights) or a person claiming he/she may be adversely affected by the decision until the contrary is proven.

In proceedings on permission of activities subject to EIA procedure, a natural person who submits comments to the intended activity in the EIA procedure and from this his/her interest in the final decision is evident, becomes party to the proceedings

NGOs:

All NGOs whose right is being decided on, or which may be directly affected by the administrative decision.

Concerning the activities that are subject to EIA procedure, environmental NGOs, which submitted comments to the intended activity in writing within the EIA procedure, become parties to the consequent administrative permit proceeding.

Environmental NGOs or civic associations with at least 250 members older than 18 years (at least 150 of them must have permanent residence in the municipality, where the IPPC activity is to be permitted), become parties to the IPPC permit procedure, if they submit their application for participation in writing.

Environmental NGOs can also become parties to administrative permit procedure concerning the activities that fall within the scope of the Nature Conservation Act, if they exist for at least a year and notify the public authority of its interest to be a party to the specific administrative proceeding.

Other legal entities:

All legal entities, whose rights are being determined or may be directly affected by the administrative decision.

Legal persons may become parties to administrative permit proceedings concerning the activities that are subject to EIA procedure, if they submit their comments within the EIA procedure, from which their interest in the final decision is evident.

Municipalities, in which the concerned activity is to be held, can become parties to the administrative permit proceedings according to the Building Act or IPPC Act.

Ad hoc groups:

In the permit proceedings concerning the EIA activities, citizens' groups with at least 250 members (natural persons older than 18 years), which submit collective comments to the intended activity within the EIA procedure and their interest in the final decision is evident.

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?

“Qualified entities” according to Slovak legislation are environmental NGOs, which meet criteria set out by particular laws. Each of several particular laws recognizing the concept of qualified entity sets out slightly different criteria. Environmental NGOs meeting criteria set by particular laws (e.g. Nature Protection Act, or Act on GMO) have a position of party to administrative proceedings in proceedings according to that law as mentioned in the point 2., above.

Generally NGO must be set up in accordance with the national law, its primary subject of activity must be protection of environment and such NGO must become a party to administrative proceedings. Nature Protection Act in addition determines that NGO must exist for at least a year and ad hoc notify the public authority of its interest to be a part in particular administrative proceeding.

Such NGOs thus do not have a direct access to court – in order to have standing to sue they must first participate in preceding administrative proceeding after which they gain legal standing before the court.

However there are other particular environmental laws, for example Forest Protection Act, Air Protection Act, Water Protection Act, Mining Act and other, which do not recognize a concept of “qualified entity”.

Criteria for recognition of qualified entities as set out in Article 5 and Article 8 of the Draft Directive are more rigorous than presently set by the Slovak national law (the above mentioned several specific laws).

Requirement that a qualified entity must have its annual statement of accounts certified by a registered auditor for a period to be fixed by each Member State would be too limiting for Slovak NGOs.

Requirement that qualified entity must „work actively for environmental protection“ is more rigorous, since according to Slovak laws suffices if NGO „supports protection of environment“ or if „subject of NGO activity is protection of nature and landscape“ – without determining that it must be an „active work“.

Also requirement that qualified entity has access to environmental proceeding, „if the matter of review in respect of which an action is brought is covered specifically by the statutory activities of the qualified entity and the review falls within the specific geographical area of activities of that entity“ is more rigorous compared to requirements set by the Slovak law. According to the Slovak law it is sufficient that NGO has a generally outlined objective to protect the environment.

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

There is no special procedure to determine whether or not an NGO meets set criteria. Such criteria are assessed by administrative authority or court ad hoc within particular court or administrative proceeding.

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?

For environmental NGOs to be able to initiate court review of administrative decision, such subjects must first be parties to administrative proceeding and file an appeal against decision of administrative authority. Superior authority decides on filed request for appeal. The appeal has to be submitted first to the first instance authority who will then forward the file together with the appeal to the superior authority. During this process, the first instance authority may fully comply with appeal and make a new decision. Request for appeal must be filed 15 days from the delivery of decision, which is a shorter time compared to 4 weeks minimum as stipulated in Art. 6, Sec. 1 of the Draft Directive. Regarding omissions, internal review may be initiated for example by complaint on delays of administrative proceedings (according to Act on Complaints).

Again we must reiterate that the above applies only to a limited number of cases – since only certain environmental legislation grants environmental NGOs right to become parties to administrative proceedings (see point 2. above). Other environmental legislation does not provide qualified entities access to court, or right for internal review.

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?

Yes, if superior (appellate) administrative authority denies request for appeal, party to administrative proceeding may file legal action against decision of administrative authority (within “administrative judiciary”). Initiated court proceeding meets requirements set by the Draft Directive for “environmental proceeding”.

Mentioned however concerns only limited scope of cases, since only certain legislation mentioned in point 2 above, grants rights for environmental NGOs to become parties to administrative 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?

No, current Slovak legislation provides that costs related to administrative judiciary are not prohibitively expensive. Cost to file a legal action against the administrative decision to the court is EUR 66. For an appeal against the court decision within the administrative judiciary a fee of EUR 66 has to be paid. According to the Act on Court Fees, ecological organizations are exempted from court fees. Ecological organizations shall prove their mission by submitting their statutes. According to the Act on Court Fees, proceedings in matters concerning inactivity of public authority are relieved of a court fee. In administrative justice, the 'loser pays principle' does not apply and the public authority is not entitled to reimbursement of the costs even when it was successful.

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?

According to our information mediation is not used in environmental procedures in Slovakia. It is not clear how could mediation be used for example in cases of review of legality of administrative decision. Decision in those cases has already been issued, is enforceable and Slovak law does not allow issuing authority to change or revoke issued decision. It is our opinion that use mediation would indeed prolong 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?

Yes, together with the court petition against the administrative decision, a plaintiff may also file an application for preliminary injunction. Based on this and prior to the trial, a court may suspend execution of the administrative decision to be reviewed. According to the Civil Proceedings Code "Upon the request of a party to the proceedings, the presiding judge may suspend by a resolution the enforcement of the decision, should there be a threat of a serious damage if the decision challenged was promptly enforced."

If the Directive stipulated that proceedings to issue interim relief as well as interim relief itself must be adequate, effective and expeditious it would indeed have a positive impact on the situation in Slovakia. Current national legislation does not provide for such conditions. Set criteria are too vague; the court only "may" suspend execution of the administrative decision; and court does not issue decision on application for preliminary injunction, which means there is no review. Moreover court is not obligated by law to provide reasons if it does not grant request for interim relief. Common practice in Slovakia is that courts send only a letter announcing denial of request.

Besides suspending effects of administrative decision, interim relief should also have effects on other persons – those who, based on issued administrative decision, carry on certain activity. Interim relief issued by court should have power to order those persons to do something, to abstain from doing something or to suffer something to be done. Slovak legislation does not meet even these requirements.

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