

“Waiting for Godot”

The Regulation of Access to Environmental Justice by the EU

Potential impacts of an upcoming EU directive on access to justice
in environmental matters on the legislation and practice of selected
European Union Member States

Justice and Environment 2012

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Comparative study

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.

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:

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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>

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

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?*

Individual country answers can be found on our website, so here we only present an overall impression on the answers to specific questions, draw a general conclusion and suggest a way forward from this situation.

Answers to the questions

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 Austria, the legal framework does not define the concept of environmental law. Legal scholars define environmental law as all legal provisions working directly or indirectly against the destruction of habitats and livelihood. The adaption of the definition of environmental law - as a general definition with an indicative list of possible areas - according to the draft directive would lead to considerable improvements with regard to access to justice in environmental matters in Austria.

In Croatia, there is no definition of environmental law in the Act on Environmental Protection which is the general act of environmental legislation in the country. The definition of environmental law of the draft directive would have a positive impact on the environmental procedures in Croatia.

In the Czech Republic, given that the scope of the definition is similar as the understanding of environmental law in the Czech legal order and practice, the definition of environmental law of the draft directive as such would not have any direct impact on the environmental procedures.

In Hungary, there is no statutory definition of environmental law. Practice of administrative agencies or courts has not developed the notion either. Consequently, the introduction of the 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.

In Romania, currently there is no legal definition of environmental law. A possible effect of adopting the directive would be that the definition of environment in Romania would be modified and restricted to the categories mentioned in the definition of the draft directive.

In Slovakia, legislation does not contain the definition of 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, applies.

In Spain, the definition of environmental law is the same as the one in the draft directive therefore the impact of the latter would be minimal.

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

In Austria, a neighbor is solely granted legal standing within particular environmental procedures if one of his/her subjective rights (right to property, to health, etc.) is endangered/infringed by the respective project – this means that no neighbor is entitled to base claims on the main fact that the environment is endangered and to enforce a so-called right to a clean, healthy, etc. environment. The Federal Minister of Agriculture and Forestry, Environment and Water Management decides by administrative order whether an environmental organization meets the necessary criteria to have legal standing and in which *Laender* the environmental organization is entitled to exercise the rights related to *locus standi*. Citizens’ groups do have legal standing solely in EIA proceedings, and within these procedures only in the “normal” procedure. The ombudsman for the environment has standing in environmentally relevant administrative procedures – they especially act within environmental conservation procedures. Furthermore they have party rights in EIA or waste management procedures.

In Croatia, 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 Czech Republic, there is no explicit definition of the term members of the public, in the sense of the Aarhus Convention and the draft directive. Standing to sue the administrative decisions is granted to

a) persons who assert that their rights have been infringed by the decision which “creates, changes, nullifies or authoritatively determines their rights or duties” and b) other parties to administrative proceedings for issuing the administrative decision, who assert that their rights have been infringed in these proceedings and this could cause illegality of the decision

(standing to sue for the environmental organizations is derived from this provision). The NGOs are not considered by the Czech courts to claim impairment of the right for favorable environment or other substantive rights. They only can claim impairment of their procedural rights in the decision-making procedures, which they are entitled to participate in.

In Hungary, individuals whose rights are affected and who own or legitimately use a piece of land in the impact zone of an activity have standing. In terms of environmental NGOs they have to be active in the impact zone of an activity in environmental administrative procedures to have *locus standi*.

In Romania, individuals have to justify a private legitimate interest while NGOs aiming to protect human rights including environmental protection according to their statutes have standing in court if they justify a public legitimate interest.

In Slovakia, a person, whose right is to be determined in the administrative proceedings or whose rights or legally protected interests may be directly affected by the administrative decision or a person claiming he/she may be adversely affected by the decision until the contrary is proven has legal standing. All NGOs whose right is being decided on, or which may be directly affected by the administrative decision also have legal standing. 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 also have legal standing.

In Spain, law 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. Other members of the public will have legal standing provided they meet the general criteria for standing as per above. There are additional criteria for situations and entities when *actio popularis* can be exercised.

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 Austria, the concept of qualified entity meets the concept of qualified entity drafted by the draft directive. The primary objective of the environmental organization needs to be the protection of the environment according to the association's statutes or the foundation's charter, the organization is to be non-profit oriented, and it has been in existence and has pursued the environmental objective for at least three years.

In Croatia, a civil society organization which promotes environmental protection has a sufficient legal interest in the procedures regulated by the Act on the Environmental Protection which provides for the participation of the public concerned.

In the Czech Republic, laws concerning the legal standing of members of the public do not fulfill the general requirement of the draft directive. The concept of qualified entities is

applied in a different way in the Czech legal system, than the draft directive presumes. The criteria for the NGOs to be able to participate in the administrative procedures and subsequently to have access to courts are more lenient, than the criteria for recognition of qualified entities as set out in the draft directive.

In Hungary, there is no concept of qualified entity recognized in national law, or at least not in the meaning of the draft directive. The respective conditions applicable in Hungary are more lenient than those set by the draft directive.

In Romania, there is no such definition as the one provided by the draft directive. The incorporation of requirements from the draft directive into national law would definitely narrow the possibility of NGOs and others for accessing courts.

In Slovakia, qualified entities are environmental NGOs, which meet criteria set out by particular laws. Criteria for recognition of qualified entities as set out in the draft directive are more rigorous than presently set by the Slovak national law.

In Spain, the local law on the Aarhus Convention establishes more lenient requirements for becoming a qualified entity than 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?*

In Austria qualified entities are recognized solely in EIA, IPPC and ELD procedures. There is no such concept established by other national legislation.

In Croatia, qualified entities are recognized only in the procedures that are regulated under the Environmental Protection Act i.e. EIA and IPPC procedures.

In the Czech Republic, as the concept of qualified entities is substantially different in the legal system, there is no procedure of their recognition corresponding to what is presumed in the draft directive.

In Slovakia, 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. However only few environmental acts recognize the concept of "qualified entities". Vast majority of environmental acts does not contain right of NGOs (or any other "qualified entity") to participate in related decision making proceedings, hence they have no right to ask court to review decisions issued according to those acts. In most proceedings NGOs must argue their standing position *ad hoc* in each proceeding.

In Spain, 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*

In Austria, there is no such right and request for internal review is not recognized in the national law.

In Croatia, request for internal review is not specifically recognized in law. When an official finds that there are no conditions to initiate proceedings, he/she shall inform the petitioner accordingly. In this case, the petitioner has the right to file a complaint to the public authority. The head (individual in charge) of the public authority decides on the complaint.

In the Czech Republic, it is possible for all parties to the administrative procedure to file an appeal against administrative decisions to a superior administrative body. Exhausting this review instrument is a precondition for a possibility to contest the administrative decision at court. Therefore, it can be said that the administrative appeal has a character of request for internal review in the sense of the draft directive.

In Hungary, while running an appeal process, the first instance authority may notice unlawfulness in its appealed decision and 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. Administrative omissions are not possible to be subject of an appeal; therefore the *de facto* internal review cannot work for them either.

In Romania, internal review is possible for the review of administrative act and for administrative omissions. Nevertheless, the text of the draft directive will be helpful and would lead to a clarification of the law.

In Slovakia, for environmental NGOs to be able to initiate court review of administrative decisions they must first be parties to the administrative proceeding and file an appeal against the decision of the administrative authority. During this process, the first instance authority may fully comply with the appeal and make a new decision.

In Spain, law 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?

In Croatia, 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.

In the Czech Republic, after an unsuccessful administrative appeal, it is possible to the applicant, who can assert that the decision impaired his rights, to file a lawsuit to the administrative court. This possibility as such is fully in compliance with the requirement of

the draft directive to provide the applicant with the possibility to institute an environmental proceeding.

In Romania, the applicant can act in administrative courts against the authorities if the internal review was not successful.

In Slovakia, if the superior (appellate) administrative authority denies a request for appeal, party to the administrative proceeding may file legal action against the decision of administrative authority (within administrative judiciary).

In Spain, as there is no internal review, applicants can institute an environmental proceeding when their application is refused, wrongfully/inadequately answered.

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?*

In Austria, cost problems occur in EIA-procedures due to the need for technical expertise. Such a provision would therefore be important for the implementation of the EIA Directive.

In Croatia, legislation does not contain any provision which would ensure that the costs of environmental procedures are not prohibitive.

In the Czech Republic, it is not probable that the cost of environmental (court) procedures would in general get lower if the draft directive, including the definition for prohibitive cost, would be adopted. However, the existence of the definition in the draft directive might improve the situation in some individual cases, as the courts might be more willing to grant waivers in the environmental proceedings.

In Hungary, the introduction of the requirement of not prohibitively expensive would have a real impact on some cost categories, mostly on expert fees, because the rest either entails not prohibitive costs even now or apply to project developers only who are not supposed to be the beneficiaries of the draft directive.

In Romania, procedures in administrative courts are inexpensive so the question has no relevance now.

In Slovakia, current legislation provides that costs related to administrative judiciary are not prohibitively expensive.

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?*

In Austria, mediation is indeed used for conflict settlement. An empirical investigation on practical experiences in environmental mediation in Austria expressed that mediation procedures are used in environmental matters and that these procedures can have quite productive outcomes.

In Croatia, mediation is not used in environmental procedures and because environmental procedures are already very lengthy, if mediation was not implemented successfully, it would considerably additionally prolong the environmental procedures.

In the Czech Republic, mediation in the meaning of a formal procedure regulated by law is practically never used in environmental matters.

In Hungary, mediation is hardly used at all in environmental procedures, 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.

In Romania, mediation is not used almost at all and it would probably prolong the cases but it could also shorten them if the mediation procedure were successful.

In Slovakia, mediation is not used in environmental procedures and the use thereof would indeed prolong environmental procedures.

In Spain, mediation is not used in environmental procedures.

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 Austria, remedies with the supreme courts do not have suspensive effect – this effect may be explicitly granted by the before mentioned courts, as long as there are no opposing public interest and if it is necessary to prevent a disproportional disadvantage for the claimant. The establishment of a legal obligation for interim relief measures granted within administrative or judicial review proceedings would be an advisable step to prevent the evasion of essential procedural rights and guarantees for the public concerned in environmental matters.

In the Czech Republic, an administrative appeal has a suspensive effect. Only in rare cases, and generally not in the environmental matters, the appeal does not have a suspensive effect and may be preliminarily executed. In practice, administrative courts have been quite reluctant to acknowledge suspensive effects of administrative lawsuits or to issue preliminary injunctions, namely upon requests of the NGOs, who are generally considered as not being capable to prove impairment of their substantive rights by administrative decisions. For these reasons, even a brief note about the possibility of interim relief in relation to environmental proceedings, as defined by the draft directive, would have potentially positive aspect on the efficiency of the court review of administrative decisions related to environment in the Czech Republic.

In Hungary, the application of interim relief in environmental procedures is quite rare, due to its conditions (*periculum in mora, fumus boni iuris, prima facie* case) and the interests involved in the legal dispute. The simple mention of this legal institution would not make a significant difference in Hungarian law or practice.

In Romania, an interim relief is regulated both by the administrative procedural and by the civil procedural code. However, in environmental matters it is very difficult to obtain such decision.

In Slovakia, current national legislation does not provide for easy conditions and the set criteria are too vague; the court only “may” suspend execution of the administrative decision; and the court does not issue a decision on the application for preliminary injunction, which means there is no review. If the draft directive stipulates 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.

In Spain, a party can request the adoption of injunctive relief and other interim measures the adoption of which 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 in the draft directive is very general and it will probably have no impact in Spain.

Conclusions

There is no need for an extensive analysis of the foregoing evaluations by national experts. The adoption of an access to justice directive by the EU would enhance access to environmental justice in the Member States, and with only a few exceptions, would bring progress into the domestic legal systems. In addition, the uniform or at least harmonized rules of environmental access to justice would bring clarity, predictable legal interpretation and make possible the development of a European level case law (via e.g. preliminary rulings) on the issue. That would be an improvement compared with the current situation of strong fragmentation that prevails now.

For an easier understanding of how our national legal experts evaluate the changes that the draft directive would bring into their respective legal systems, here is a small matrix for visualizing the potential improvements/drawbacks⁵.

Countries	Austria	Croatia	Czech Rep.	Hungary	Romania	Slovakia	Spain
Issues							
Definition of “environmental law”	Green	Green	Yellow	Green	Red	Green	Yellow
Notion of “qualified entity”	Yellow	Red	Red	Red	Red	Red	Red
Definition of “prohibitive cost”	Green	Green	Yellow	Green	Yellow	Yellow	Grey
Reference to	Green	Grey	Green	Green	Green	Green	Yellow

⁵ Green is progress, yellow is no significant change, red is regress, grey is no data.

Our conclusion, in unison with what has been written and also illustrated by this matrix above, is that the adoption of the access to justice directive would bring positive development into the legal systems of the Member States in a number of regulated issues, with the clear and striking exception of the definition of qualified entities.

Recommendations

J&E believes in agreement with many other stakeholders in the area of access rights implementation that the adoption of the new directive would be a reasonable, desired and progressive move from the EU and thus

- › we urge the Council to **make steps in order to accelerate the process of adoption**, under the Cyprus and the latest during the Ireland presidencies.
- › we ask however the Commission to think over the way the legal status (including legal standing) of non-governmental organizations is regulated in the current draft directive, and **make it more open and inclusive** so that civil society can enjoy access to justice in environmental matters fully and without unnecessary constraints currently established by the draft directive.

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