Access to Justice in Environmental Matters under the Aarhus Convention

Justice & Environment Position Paper

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1. Justice & Environment

Justice & Environment (J&E) is an European network of environmental law organisations. J&E is a non-profit association with a mission that aims for better legislation and implementation of environmental law on the national and EU level to protect the environment, people and nature.

J&E currently comprises six full-member organisations: Environmental Law Service, Czech Republic (EPS); Estonian Environmental Law Centre, Estonia (EELC); Environmental Management and Law Association, Hungary (EMLA); ÖKOBÜRO – Coordination Office of Austrian Environmental Organisations, Austria; Legal-Informational Centre for NGOs, Slovenia (PIC); and the Centre for Public Advocacy, Slovakia (VIA IURIS). J&E also has six associate members: Environmental Justice Association, Spain (AJA); Centre for Legal Resources, Romania (CRJ); Front 21/42 Citizens' Association, Macedonia (Front 21/42); MilieuKontakt International, the Netherlands (MKI); Independent Institute of Environmental Concerns, Germany (UfU); and Green Action – Friends of the Earth Croatia, Croatia (ZA).

2. Aarhus Convention and the J&E Activities

The Aarhus Convention – UNECE Convention on access to environmental information, public participation and access to justice in environmental matters (hereinafter also "Convention") - is a unique international legal instrument, which combines the subject of environmental protection with human rights and simultaneously with the responsibilities of public institutions and also individuals and their associations towards the environment.

The Convention has been a priority topic for J&E from its inception. All J&E members use it as a source of legal arguments in their work at the national level. In the years 2006-2008, J&E has undertaken a number of legal analyses and case studies concerning implementation of the Convention in their respective countries, developed comparative overviews, identified key gaps

of its implementation from the perspective of citizens and NGOs and formulated recommendations.[1] One of the general conclusions was that the most fundamental problems and also differences between the individual countries concern the application of the Convention's "3rd pillar" – access to justice in environmental matters.[2]. At the same time, effectiveness of the other two Convention "pillars" – access to environmental information and public participation in environmental decision-making – is fundamentally weakened without proper access to justice.

The recent J&E projects have therefore focused on analysing selected aspects of implementation of the Convention requirements, concerning access to justice in environmental matters, which, in our opinion, can be considered as crucial in relation to the practice of legal protection of the environment. The comparative international "Access to Justice Report" - main analytical outcome of the 2009/2010 "Aarhus" J&E projects - is based on the outcomes of ten national studies, which were developed partly by the method of coordinated use of the legal tools based on the provisions of the Convention. In addition to that, a specialized study deals with the problem of costs of legal procedures as barriers of environmental justice. Another paper analyses the implementation of Art. 9(3) of the Convention on the EU level by means of the "request for internal review procedure", established by the 1367/2006 "Aarhus Regulation".

The recommendations expressed in these materials concern namely the need for improvement and harmonization of the common standard of access to justice in environmental matters on the EU level and the measures which the EU institutions should in our opinion apply in that regard. It is a consequence of the conclusion that the status of implementation of the Convention requirements concerning access to justice in environmental matters is substantially diverse in individual countries. This leads to differing levels of enforcement of environmental law (mostly based on EU norms) and thus also, e.g., unequal conditions for investors, municipalities, NGOs and other stakeholders promoting their interests.

3. Findings and Conclusions of the Analyses

a) Report on Access to Justice

http://www.justiceandenvironment.org/_files/file/2010/05/JE-Aarhus-AtJ_Report_10-05-24.pdf

The study, as well as the following country reports, show that Art. 9 of the Convention is interpreted and applied very differently by the Parties (mostly EU Member States) and the terms for access to judicial protection in environmental matters are therefore substantially diverse.

The disunity is probably to the greatest extent manifested with respect to the scope of subjects (members of public) who have access to judicial protection in environmental

[1] The materials can be found at http://www.justiceandenvironment.org/je-international/aarhus/

[2] These J&E conclusions are compatible in this respect with the outcomes of other recently published studies on the Convention and also with the conclusions formulated by the Parties of the Convention themselves in "Strategic Plan 2009-2014", based on implementation reports of individual countries and adopted by the third Meeting of the Parties to the Convention, held in Riga on 11-13 June 2008.

matters. The restrictive attitude of national courts to this issue in many countries limits the scope of subjects having the right to initiate legal procedures which can lead to effective protection of the environment, beyond the minimal requirements of both paragraphs 2 and 3 of the Convention. In some countries (Austria, the Czech Republic) not all individuals falling into the scope of "public concerned" have access to review procedures according to Art. 9(2). In other countries (Slovenia, Germany), NGOs must meet very restrictive conditions to gain standing rights. Similar limits also apply with regard to implementation of Art. 9(3), whereas other restrictions are often imposed in that area.

Another result of the different standards of implementing the access to justice requirements of the Convention is that the substantial scope of decisions, actions or proceedings with serious consequences on the environment are not subject to review in some countries. It is not in accordance with the Convention if the Parties specify overly strict criteria for access to justice in such cases that they cannot be satisfied by most members of the public and the acts therefore remain "de facto non-reviewable". This type of situation is connected with applying the restrictive conditions for standing e.g. in Austria, the Czech Republic or Slovakia. Similarly there are serious limits in possibilities to review administrative omissions (namely in a situation when the authority fails to start a procedure *ex officio,* when a law requires it to do so) e.g. in Austria, the Czech Republic or Hungary.

Court practice in some countries applying the "impairment of rights doctrine" also limit the scope in which the courts deal with the acts and decisions which are subject to judicial review. It can concern both the actions of affected individuals (Austria) and the NGOs (the Czech Republic, Hungary). This approach seems to be clearly contradicting the explicit wording of Art. 9(2) "*...both procedural and substantive legality...*", but does not seem to be in line with the intention of Art. 9(3) either.

With regard to the requirements of Art. 9(4) of the Convention, i.e. the effectiveness of the judicial review in environmental matters, the situation is not satisfactory in any of the studied countries. Despite that, here are also important differences concerning namely the accessibility of preliminary measures (injunctive relieves) and possible types of preliminary remedies the courts may issue. In some countries (the Czech Republic, Austria regarding infrastructure projects) injunctive relief is not accessible at all or only very rarely in environmental matters. In others (e.g. Spain) application of injunctive relieves are significantly limited by the risk of costs.

On the contrary, the studies also show that in countries where the "impairment of rights" doctrine is formally applied; it can be interpreted in a way that leads to broad and relatively efficient access to justice. The approach of e.g. the Estonian Supreme Court to the standing of NGOs, scope of the judicial review as well as to the possibility of preliminary measures, influenced by direct application of the provisions of the Convention, prove that. Hungarian courts often not only review the formal legality of an administrative decision, but also the scientific correctness of the supporting technical documentation, most prominently the environmental impact statement documentation. Also, the Polish Environmental Protection Act, according to which NGOs can take legal action in cases of risk or damage of the environment as "common welfare", is an example of good implementation of the Aarhus Convention principles.

The significant disunity in fulfilment of the requirements of the Convention by individual Parties is not consistent with the declared goals of the Convention. It is also not desirable from the aspect of the Convention's position as part of EU law, which should also indicate the requirement for a basic common standard of its application in all EU member states. **Proper and equal implementation of the Convention, and namely its Article 9 by the Member States is not only needed for better environmental protection and proper enforcement of the EU environmental law, but also for supporting equal terms on the common EU market.**

b) Price of Justice Report
http://www.justiceandenvironment.org/_files/file/2009/12/price-of-justice.pdf

Administrative procedural costs do not pose a serious hindrance to potential appellants, except in extreme situations. However, **evidence** costs may mean an obstacle to successful conduct in such processes.

Administrative judicial procedures are again not typically very expensive procedures if they do not involve extensive gathering of evidence and expert opinions. However, in case a significant issue must be proven by **technical expertise**, costs may rise so high as to be unbearable for members of the public.

The burden of applicants in **civil judicial procedures** grades higher than in administrative judicial procedures, and in some cases all such costs (especially those of the evidence) may reach a level of prohibitively high expenses.

The **loser pays" principle** prevails in all countries, in some under the control of judicial discretion.

The **limited use of legal** aid in environmental cases is a general phenomenon. However, this may be reasoned not necessarily by its characteristics. A more decisive factor in the hesitation of clients to use legal aid in the protection of the environment is rather the special legal expertise needed in such cases, whereas legal aid lawyers are not typically those who are highly sophisticated in this area.

Financial barriers (including costs of evidence and the danger resulting from the "loser pays" principle) represent one of the major obstacles with regard to access to justice namely in Spain, but to some extent also in other analyzed countries. Such a deterrent effect has multiple impacts on procedures and the development of environmental law at large. *Prima facie* it results in fewer procedures which means a lesser burden for the state administration, fewer cases for the judiciary, and an altogether saving for the state budget. However, it also means fewer cases against maladministration of environmental issues by the government and against unlawful conduct by polluters that cause major direct and indirect costs for the government and society respectively. It may also convey the false message that the law as adopted in a given country is functioning properly, and the lack of cases may result in the stagnation of legal development in the long run.

c) The EU-Aarhus Regulation: Request for Internal Review in Practice
http://www.justiceandenvironment.org/_files/old-uploads-wordpress/2009/12/rir-in-practice.pdf

The legal instrument "Request for Internal Review established by the 1367/2006 "Aarhus Regulation" for providing access to justice as to decisions of **EU institutions** has not fulfilled the expectations. Even the simplest statistics show that very few requests were filed and even fewer accepted as eligible.

The administrative acts conforming to the criteria of the Aarhus Regulation are rare or are not easily accessible for the potential applicants. **Refusal of applications by the DGs is common practice**, and notions like "individual", "external" or "binding" are construed quite restrictively.

This conveys a message from the Commission to the public that utmost care should be applied when making a submission; otherwise the applicant risks a swift and simple refusal for procedural reasons. It also means that only a fragment of the legal issues raised by the NGOs was in fact analyzed by the Commission on merit, whereas in most of the cases the easiest available refusal for procedural reasons was applied.

4. Recommendations for the EU institutions

EU institutions should use their powers to enforce correct application of the Aarhus Convention, as a part of the EU law, by the Member states.

With regard to the requirements of Art. 9(3) and Art. 9(4) of the Convention, the **Directive on Access to Justice in Environmental Matters, specifying minimum common rules for transposition of these provisions by Member states, should be adopted**. As a first step, discussions about the Commission proposal of 2003 (including its possible improvements) should be re-started.

As it is not likely that the directive will be adopted soon, the **Commission should start a conformity - checking procedure concerning implementation of the Convention provisions which have not been transposed to the EU secondary legislation – i.e. Art. 9(3) and Art. 9(4) - by the Member States.** [3] In our opinion, it should namely concern the following issues

- scope of subjects with standing in environmental matters (and conditions for gaining it),
- scope of the review of acts and omissions in environmental matters (both with regard to which act and omissions can be subject to review and if the admissibility arguments of the applicants are somehow limited) and
- the efficiency of the judicial review, namely access to the injunctive relief and other preliminary measures; also the problem of costs as barriers to the access to justice in environmental matters should be considered.

[3] In fact, the Commission has already made steps of that nature, though preliminary ones, at least in one case – towards Slovakia.

The Commission should review the application of the request for internal review procedure according to the Aarhus Regulation, namely the criteria applied for the admissibility of the requests. Especially criteria set in Art. 2.1.g) of this Regulation, concerning the characteristics and act taken by the EU institution or body must be a subject of the review procedure (i.e. "binding and external effect) and should be interpreted in a non-restrictive, lenient manner so as to ensure wider access to the merits of the cases. Whenever the environment is influenced by an act of the Commission, the act should be issued in the form of a formal decision, to avoid non-standard forms of decision-making to the utmost extent. The Commission should also consider creating a platform for accessing all such decisions, i.e. creating an internet website under the Commission's webpage for environmental administrative acts.

T**he ECJ should, within the limits of its judicial prerogatives, interpret the provisions of the EC Treaty and of the Aarhus Regulation in a manner consistent with the EU obligations established by the Convention.** If, however the ECJ will also in the future confirm its traditional case-law on the standing for non-privileged applicants, it will be up to the EU as a whole and the Member States (also as Parties to the Aarhus Convention) to extend access to the Community judicature. A special amendment of the current wording of the Treaty (Art. 263) would be one of the possibilities in this respect. An alternative solution would be using the possibility anticipated in Art. 257 (former Art. 225a) of the Treaty, which empowers the European Parliament and Council to create, by means of adopting a regulation, "specialised judicial courts to hear and determine at first instance certain classes of action or proceeding brought in specific areas". Such a regulation could set up rules concerning the jurisdiction of the specialised courts differently from the Treaty, which would then apply only as "*lex generalis*". On this basis**, it would be possible to establish a special court for environmental disputes to provide judicial review of acts and omissions of EU institutions and bodies which contravene EC environmental law and which jurisdiction (namely conditions for standing) would be in accordance with the requirements of the Aarhus Convention**.

5. Acknowledgements

Editor-in-Chief Pavel Černý
Contributions from J&E Team

Official address:
Justice and Environment
European Association of Environmental Law Organisations
Dvorakova 13, 60200 Brno, Czech Republic
Tel: + 420 454 575 229
E-mail: info@justiceandenvironment.org
Website: www.justiceandenvironment.org

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