

## 1. Background

Justice & Environment (J&E) is an association of public interest environmental law organizations based in the EU member states. J&E aims to use law to protect people, the environment and nature. Our primary goal is to ensure the implementation and enforcement of the EU legislation through the use of European law and exchange of information.

The Aarhus Convention (AC) has been a priority topic for Justice and Environment from its inception. This is because proper implementation of the treaty results in the proper implementation of many EU directives and possibilities for NGOs to exercise their rights under these directives. Furthermore, in 2008 the Convention celebrated its 10<sup>th</sup> anniversary.

The comparative research on the transposition and implementation of the AC was expanded with a Spanish legal analysis and a case study. Still, the results we got are very similar to those already identified in the previous years.

The Meeting of the Parties of the Aarhus Convention in June 2008 in Latvia was a unique opportunity to call the attention of decision-makers to shortcomings of implementation and problems of exercising access rights. For this purpose J&E organised a well visited side-event and through participation on their conference and coordination meetings co-operated with EEB throughout the MOP3.

J&E also issued a study paper that discusses how adoption of the Aarhus Regulation<sup>1</sup> has changed – or could change – the possibilities of NGOs and other private applicants to challenge acts of EC institutions having impacts on the environment at the European Court of Justice (ECJ).

## 2. Current Activities

In 2008 J&E strived to demonstrate challenges that are opened at the 10<sup>th</sup> anniversary of the AC and together with other AC experts make recommendations and argue access of European environmental NGOs before the ECJ. In the 2008 Annual Workplan J&E included the following activities:

- a) a legal analysis of and a case study illustrating the transposition of the Aarhus Convention into the legal system of Spain,
- b) monitoring of EC “Aarhus legislation” implementation, identification of possible cases, analysis of key points for strategic litigation and submission of a strategic complaint to the competent EU body,
- c) organization of a side event at Riga MOP3 with the aim of presentation of the most problematic issues of Access to Justice under Aarhus Convention.

Due to the lack of appropriate case for strategic litigation activity b) was changed to developing a paper on the standing of NGOs/public concerned before the ECJ in environmental cases.

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<sup>1</sup> Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

### 3. Findings and Conclusions

a)

#### Legal analysis of and a case study illustrating the transposition of the Aarhus Convention into the legal system of Spain

The **Aarhus Convention** was ratified by Spain on 29 December 2004, and came into force on 29 March 2005. The Convention became part of Spanish law and is therefore enforceable. Since its entry into force, existing regulations for so-called ‘Aarhus rights’ were automatically amended. To create a legal framework for the Aarhus Convention and respective EC Directives, Act 27/2006 was passed and fully entered into force in October 2006.

Despite enjoying a legal system that can be seen as progressive (i.e., recognition of *actio popularis* for environmental crimes and under certain sectoral legislation related to specific areas of the environment, such as coasts and land use planning; opportunities for obtaining free legal aid; and the adoption of precautionary measures) barriers to access to justice on environmental matters in Spain persist and impede an effective legal protection of Aarhus rights. These barriers include the following:

- Excessive length of judicial processes,
- Prohibitive costs involved, i.e. experts’ fees, surety bonds, bonds to exercise *actio popularis* in criminal cases, loser-pays principle, etc.,
- limited scope of the public concerned (in comparison to the wide access before Act 27/2006 was passed),
- Difficulties in obtaining precautionary measures to suspend/stop an activity while the final court decision is made,
- Burden of proof and difficulties in obtaining independent experts to provide evidence,
- Judges, prosecutors, lawyers and solicitors lack appropriate training or skills for dealing with environmental cases,
- Poor enforcement of judgments and court decisions,
- Public lacks information on access to administrative and judicial review procedures.

The case study from Spain (Senda de Granada case – development of a residential area to construct houses for young families) illustrates the above listed problems in practice. The case addresses an urbanization project that was approved through complicated and lengthy procedure covering two major issues: land and urbanization (construction). In 2004, the neighbours of Senda de Granada, who were living and working in an agricultural and protected landscape, learned that the city plan would be changed to build a large urbanization for young people. The decision to change the classification of land from protected and non-residential to urban, was taken without taking into account the EIA and was based on false facts, such as the alleged non-exploitation of the agricultural land.

The neighbours, with the help of the Spanish public interest environmental law NGO, Asociación para la Justicia Ambiental (AJA), tried to access the environmental information and to participate in the decision-making despite the haste of the public proceedings. There were not any specific environmental decision-making procedures applied to the project approval and there were not enough environmental information and public participation under the Aarhus Convention standards for neighbours.

In our evaluation, Spain has extensive and in some aspects also progressive regulation. However, this regulation does not result in improvements in practice. This is mostly due to the fact that the legislation is not accompanied with practical implementation measures and thus, access to justice is somewhat ineffective (violation of paragraph 9/II and III of the Aarhus Convention). Moreover, the case study shows that problems with implementation of paragraph 4 and 5 of the Aarhus Convention.

b)

A paper on the standing of NGOs/public concerned before the ECJ in environmental cases

Before the adoption of the Aarhus regulation, there were no special provisions on access to judicial review of EC institutions' acts related to the environment in EC law. The possibility of such legal steps was therefore regulated by general provisions of the EC Treaty, namely its Article 230. This provision gives ECJ competence to review legally binding acts, adopted by other EC bodies. The review procedure can be started by actions brought by two groups of applicants: privileged applicants (without any standing restrictions) and non-privileged applicants (the act in question has to be explicitly addressed to the applicant or is of direct and individual concern to the applicant).

The Aarhus Regulation has established relatively clear rules of the “preliminary review procedure before an administrative authority“ in the sense of Article 9(2) of the Aarhus Convention (the last paragraph) with regard to the decisions, acts and omissions of EC institutions under environmental law. On the contrary, the Regulation is not very clear as concerns the conditions for access to judicial review (i.e. ECJ) for environmental NGOs. There's little guidance on whether the entry into force of the Aarhus regulation means that NGO's access to judicial review remains limited by the existing rules of Article 230 and the jurisdiction of ECJ, or whether it requires the Court of Justice to relax its standing requirements.

There are a few legal reasons and indications that the Aarhus Regulation indeed opens a way for NGOs to challenge acts of EC Institutions:

- Article 12 (1) of the Aarhus Regulation shall apply in the situation when the NGO's request for internal review has been unsuccessful (see Article 10 (2) – EC institution fails to deal with the request for internal review and entitles the NGO to institute the proceedings before ECJ).
- Article 12 (1) of the Aarhus regulation gives standing before ECJ to NGOs which made the request for internal review. It would have no sense to have such a provision in the Regulation unless it is interpreted in a way that all other issues except standing are regulated by the Treaty.
- The NGO to which the written reply in the internal review procedure was or should have been addressed can argue that this reply as such shall be considered as “a decision addressed to that person” in the sense of Article 230(4) of the Treaty.
- In one previous case the ECJ has already expressed its position towards possible standing of environmental NGOs, based on Article 12 of the Aarhus Regulation.

In our opinion, there are serious gaps concerning access of the public concerned to the ECJ.

Firstly, the Aarhus Regulation does not grant any rights (with regard to the internal review procedure, and therefore also concerning access to the ECJ) to private persons, affected by the acts or omissions of EC institutions. The regulation therefore fails to grant the rights resulting from Article 9 of the Aarhus Convention to all subjects falling under the scope of “public concerned”, as defined by Article 2(5) of the Convention.

Secondly, the Aarhus Regulation is applicable only to “measures of individual scope”. Article 230(4) of the Treaty does not limit the scope of acts which can be subject to review before ECJ in this way; instead, it states that the lawsuit can be filed also against “a decision” (obviously in a material sense) “although in the form of a regulation”.

c)

Side event at Riga MOP3: Access to Justice – The naked truth

The aim of the side event was to develop recommendations to overcome the most pressing issues identified by J&E legal experts, who discussed concrete cases and practical experience about the state of access to justice on both national and European levels.

We presented cases from Austria, Estonia, Spain, Czech Republic and other countries of the European Union. Cases resulted in a discussion about the existing problems that seem to be similar all over Europe. Participants tried to be constructive and they put together a list of recommendations on how to use existing mechanisms to improve access to justice (see below).

#### **4. Recommendations**

a)

Legal analysis of and a case study illustrating the transposition of the Aarhus Convention into the legal system of Spain

**Regarding the public:**

- Financial support for capacity building and training programmes for promoting the exercise of Aarhus rights among environmental NGOs and other citizens' organisations,
- Financial support for citizens and NGOs that bring environmental cases before the courts to protect the environment (i.e., direct funding, reimbursement of costs when the court finds out that the authority/ies fail(s) to comply with their legal obligations, etc.),
- Access to environmental court decisions and administrative decisions in environment related issues (i.e., free of charge access to on-line databases).

**Regarding the judiciary and the administration of justice:**

- Appropriate budgets to provide sufficient means and personnel for the courts to manage environmental suits without excessive delays and for enforcing court decisions, whenever this is needed,
- Capacity building for the judiciary, including raising awareness and training programmes on Aarhus Convention and environmental law,
- Appointment of independent experts to help judges correctly assess or properly balance technical evidence submitted by the parties and to provide support, specifically on decisions related to the adoption of precautionary measures,
- Raising awareness campaigns and training programmes for judicial administrative staff,
- Capacity building and training programmes for environmental prosecutors,
- Training programmes on the environment for pro bono lawyers (lawyers appointed under free legal aid).

b)

A paper on the standing of NGOs/public concerned before the ECJ in environmental cases

- the existing legal instruments provided by the Aarhus Regulation should be used in an extensive way,

- the boundaries of access to the courts including the ECJ must constantly be tried in order to achieve what the Aarhus Convention envisages in its Article 9: wide access to justice<sup>2</sup>.

c)

Side event at Riga MOP3: Access to Justice – The naked truth

- NGOs should approach, use and challenge the UNECE Aarhus Convention Task force on access to justice more,
- Use the opportunities implied in the new Strategic plan 2009-2014 for the Aarhus Convention,
- Select strategic cases and approach the World Bank for funds.

## **5. Acknowledgements**

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<sup>2</sup> However, the first ever case brought before the ECJ in order to see how the Aarhus Regulation can be applied in practice must be cleverly selected and carefully prepared. The possible interpretations favourable for the environmental NGOs must be worked out in details, and the arguments in the merit of the case must also be based on firm foundations. Thus, the convincing reasoning regarding legal standing as well as the persuasive arguments in the substance of the case together will result in a broadened standing for NGOs in environmental matters before the ECJ.