

How can NGOs support the Access to Justice Directive of the EU?

Toolkit

Justice and Environment 2012

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Introduction

J&E is a **European Network of Environmental Law Organisations**, working in Europe and consisting of organisations from different countries dealing with environmental law solely or as one of their activities. J&E aims for **better legislation and implementation of environmental law** on the national and European Union (EU) stage 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 European level.

J&E is active in a number of issues, including access rights (**access to information, participation in decision-making and access to justice**) in environmental matters. We have been producing legal analyses and comparative studies, monitoring reports, country studies and case studies, position papers, legal guidance, newsletters and press releases in the issue of access to environmental justice in the recent years that are available under the following [link](#).

The idea of the following toolkit was born at the [Annual General Meeting of J&E](#) held between 24 and 28 September 2012 in Budapest and was later put into a proper format by legal experts of J&E. The toolkit presents the current situation and gives a few suggestions to civil society organizations in order to enable them to contribute to the adoption of the so-called Access to Justice Directive (A2J Directive).

Situation

The Aarhus Convention

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, usually known as the [Aarhus Convention](#), was signed on June 25, 1998 in the Danish city of Aarhus. It entered into force on 30 October 2001. It is not an environmental convention in a strict sense considering that it does not envisage the protection of the environment. Rather **it is a procedural convention prescribing the mode how public authorities are required to ensure the three access rights** (to information, to participation and to justice) to the public in environmental matters. This is also a new kind of convention because it has quite strong connections to civil society in many ways, such as

- in the making of the convention there was an intense civil society participation, even during the negotiations as observers
- in the bodies of the convention there are a number of civil society representatives, e.g. in the [Compliance Committee](#) or in the [Bureau](#)
- the ultimate users of the convention are from the civil society who are also entitled to induce the compliance mechanism of the convention

Since the convention is not a self-executing convention and requires the action of those countries and organizations that ratify it, it is therefore crucial for the civil society organizations and the public that the provisions of the Aarhus Convention be transposed into the internal legislative framework of its Parties¹.

¹ those who sign and ratify the convention

The Aarhus Convention and the EU

The EU as a regional (economic) integration organization has also joined the convention with its Council Decision of 17 February 2005 ([2005/370/EC](#)) by which the then-European Community undertook to apply the convention. However, the EC has also made a reservation on the competence of the Community institutions in relation to the competence of the Member States regarding Art. 9.3 of the Aarhus Convention. This article of the convention regulates access to justice and prescribes that **members of the public should have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment**. The EC declared in relation to the preceding that:

“Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.”

Well, the situation is that the EC (and the EU) has not yet adopted provisions on this matter; therefore there is no uniform legal framework that would regulate access to environmental justice in the foregoing circumstances and would harmonize the systems used by the 27 Member States.

Let us apply the Aarhus Convention directly!

Without going into further details on how the concept has developed and what its criteria are, suffice it to say that certain legislative acts adopted (including international treaties concluded) by the EU **can have a direct effect and can be directly applicable** without further, subordinate legislation on the Member State level.

Can the Aarhus Convention be applied like this? Can the NGOs and the public refer to the Aarhus Convention directly in the national legal system and claim that its Art. 9.3 on access to environmental justice be applied on the national level?

The question is not that easy and caused a headache also to judicial experts. Luckily, there was a judge in **a case in Slovakia** who thought that this is an issue that is worth disturbing the Court of Justice of the European Union (CJEU) with - so he asked for a so-called [preliminary ruling](#) in his case. Unluckily, however, the CJEU found that the Aarhus Convention Art. 9.3 has no direct effect, and said that:

“Article 9(3) of the Convention [...] does not have direct effect in European Union law. It is, however, for the [...] court to interpret, to the fullest extent possible, the procedural rules [...] in order to enable an environmental protection organization [...] to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.”

In our understanding, however, this statement – while favorable for a broad access to justice – is still not a firm foundation to base legal standing of NGOs in cases where national environmental law is breached, because it still depends on the approach of the judiciary – to interpret national law to the fullest extent possible in line with the Aarhus Convention.

The solution: An A2I Directive

It is therefore in the interest of the civil society and NGOs that **the EU do have a separate directive on Access to Justice** (in environmental matters). Many are afraid that such a directive would have enormous consequences. Well, not really.

The impact of such a directive is estimated to be **overwhelmingly positive** and will broaden public participation and access to environmental justice in general. In cases where there is a negative impact (lessening the current level of access) foreseen, this can be prevented by a so-called “stand still clause” in the directive, i.e. a rule that prohibits the weakening of existing national legislative frameworks as a consequence of the transposition of the new directive if the provisions of the latter would ensure a lower level of access to environmental justice than the existing national law. Such impacts were identified and assessed by J&E in [2007](#) and [2012](#) as well, and summarized lately in a [position paper](#). Individual studies detailing the impact of the A2J Directive on a few Member States ([Austria](#), [Croatia](#), [Czech Republic](#), [Hungary](#), [Romania](#), [Slovakia](#), [Spain](#)) can be found under the above links.

So what is happening now with [the directive draft](#)? Well, it was finalized by the Commission in 2003 and its advance to become a binding EU norm has been halted by the European Council since then.

But what can happen now, that the issue is on the agenda again? The Commission has identified **4 possible scenarios that would improve the situation of access to environmental justice**, and the question which one will prevail will depend largely on the situation in Brussels, i.e. how the Commission, the Parliament and the Council can work together in this critical issue. So the Commission has enlisted the following 4 possible scenarios whereby it can promote access to justice in environmental matters. It is needed because in the current situation the legal uncertainty stemming from diverging implementation and Member State practice falling short of the expectations of both the Aarhus Convention and the EU law starts to contravene the basic logic of the Union i.e. to ensure a level playing field throughout the EU. In such situation, when the Member States risk a negative judgment by the CJEU, they are even reluctant to regulate the issue domestically. The scenarios are:

- a) **the Status Quo version:** in this scenario, the Commission would put more emphasis on the promotion of proper implementation by the Member States, by issuing soft law documents such as guidelines, communications, initiate training sessions for law enforcers and the judiciary, etc.
- b) **the Infringement version:** in this scenario the Commission would start a number of infringement cases (which by-the-way necessitate a lot of evidence) but that at the end would result in favorable judgments by the CJEU – that in turn would develop case law and jurisprudence
- c) **the Old Directive version:** in this scenario, the Commission would try to resubmit the old (2003 version) directive draft, however, this would most probably face the same kind of opposition as before
- d) **the Rewritten Directive version:** in this scenario, the Commission would try to submit a rewritten directive draft, hoping for a new and constructive round of negotiations that would eventually result in the adoption of the A2J Directive

Which one would prevail? We have no idea as of now, but strongly hope that scenario d) will be the winner. Rumor says that this entire process will probably happen not earlier than the first half of 2013, i.e. under [the Irish Presidency of the EU](#).

What is happening now “behind the curtains”?

Well, the quotation marks are quite valid because the process of preparing for the A2J Directive are not hidden from the public eye at all, following the usually very transparent and inclusive process of the EU in a number of matters, so actually a lot of things happen before the curtain. The most important developments in this regard are the following:

1. The Maastricht University (the Netherlands) researchers led by Professor Jan Darpö from the Uppsala University (Sweden) have completed a [legal analysis on the situation of implementation of Art. 9.3 of the Aarhus Convention in 17 Member States](#).
2. The same team also completed a [research on the economic implications of access to environmental justice](#) (e.g. would the broadening of access rights lead to a millions of court cases that would eventually flood the courts?).

Comments to the studies can be sent until 15 January 2013 to the following [email address](#).

3. There are also relevant [meetings](#) taking place that discuss the findings of these studies, both for competent national authorities and for national judges.

While these meetings cannot be attended by members of the public, its outputs can be accessed online and can serve as a point of orientation and enable the public to make comments to the foregoing studies.

4. Last but not least, other initiatives are also underway, such as the one of DG Justice: the so-called [eJustice Portal](#). This portal will soon (in the middle of 2013) host **27 national fact sheets each of which will detail the current system of access to environmental justice in the Member States**. This is supposed to be a source of public information and guidance in order to facilitate the exercise of access to justice in environmental matters.

So what can NGOs do now?

We at J&E believe that every comment, every opinion, every support counts. Therefore we suggest the following for NGOs interested in promoting access to environmental justice with their own means:

- > **Visit** the [website of the Commission](#) and check the studies on access to justice!
- > **Visit** the [website of J&E](#) and check our evaluation on the impacts of an A2J Directive!
- > **Write** a [comment](#) to the studies if you have something to say about the findings!
- > **Write** an [email](#) in which you suggest the Commission that the A2J Directive should be officially submitted into the EU legislative process!

If you need further help, please do not hesitate to contact us!

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