An inventory of EU Member States’ measures on access to justice on environmental matters

The Aarhus Convention: how are its access to justice provisions being implemented?
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The European Community signed the Aarhus Convention on 25 June 1998 and after adopting three legal instruments to align Community law with the Convention, it concluded it on 17 February 2005. The Commission was interested in obtaining a comprehensive overview of the different measures adopted or in place in the Member States to implement Article 9(3) of the Aarhus Convention. To this end, the Commission launched a study that was awarded to Milieu Ltd.

1. Objective and scope of the study

The objective of this study was to “produce an inventory of national measures implementing Article 9(3) of the Aarhus Convention and related provisions (Articles 2, 3 and 9(4)-(5)) and to assess for the 25 Member States the current situation and recent developments regarding legal measures to implement the requirements of Article 9(3) of the Aarhus Convention”.

The team was composed of legal analysts for each Member State with experience in the Aarhus Convention and in national legislation of the Member State for which they were carrying out the assessment. The team included legal practitioners, with experience at national level on environmental law suit, and academics. Some members of the team were drafters of the Convention or members of the compliance committee.

The management team was in charge of coordinating the work of the project, including creation of the methodological guidelines and quality review in cooperation with the DG ENV. Finally the senior adviser provided inputs to the methodology, to the quality review and to the final conclusions.

The study focused on the implementation of Article 9(3) of the Aarhus Convention which requires the Parties to grant access to justice in cases of actions and omissions by private persons and public authorities which contravene national law relating to the environment.

The study had a very precise scope:

- Focused on administrative and judicial procedures: therefore, other means for access to justice were not analysed in detail, with some exceptions (when those were important to understand the whole system or when they provided a genuine chance for access to justice)
- To challenge acts or omissions by public authorities: therefore procedures to challenge acts and omissions of private parties not within the scope of the study
- Did not consider procedures referred to in Article 9(1) and 9(2) of the Aarhus Convention: therefore procedures to challenge violations of the right to participate (e.g., transposing Directive
2004/35/EC) were not analysed, with some exceptions. For example, in Poland where access to justice in the EIA and IPPC areas is broader and covers aspects that could be considered as falling under Article 9(3) of the Aarhus Convention.

2. Methodological approach

The study was carried out within a six-month period (February – August 2007). During this period, 25 country reports were elaborated by national legal experts (see Annex). These national reports describe the systems in place in the different Member States to challenge acts and omissions by public authorities in accordance with Article 9(3) of the Aarhus Convention and related provisions.

The main challenge in achieving the objectives of the study was to develop a methodology for comparing 25 Member States with very different legal and judicial traditions. In order to ensure uniformity, templates with detailed outlines on the information required for each section were developed. In addition, the management team distributed an information package to the national legal experts with documentation on access to justice under the Aarhus Convention and an explanatory note on the interpretation of Article 9(3) and on the scope of the study.

The analysis is an independent legal analysis based on legislation, case-law and literature review available in July 2007. Contacts with MS authorities were only authorised by the Commission to collect information (e.g., statistics, legislation under preparation). Contacts with NGOs and Bar Associations were encouraged although the study was more focused on analysis of the legal system than on practical application.

A final workshop was held on 7 June 2007, in order to review the main findings for a selected number of Member States¹, and to identify the main obstacles for access to justice in the Member States and in the EU in general. This workshop was an opportunity to exchange information and experiences regarding access to justice and implementation of the Aarhus Convention amongst the Member States.

The assessment of the Member States systems was based on the evaluation of four elements:

1. Legal standing
   a. Which members of the public?
   b. Which criteria?
2. Effectiveness of remedies (conditions for injunctive relief)
3. Cost and length (including legal aid schemes)
4. Transparency: procedures in writing and publicly accessible

In addition, it includes a description of the procedures (administrative and judicial) and of acts and omissions covered.

Almost all countries have reported problems in at least one of the essential elements for the implementation of Article 9(3) of the Aarhus Convention and related provisions. However, in some cases, the analysis of these elements individually did not provide an accurate picture of overall effectiveness of the system for access to justice as a whole in a given country. For example, it can be that the legislation or the courts have granted broad rights for legal standing but the procedures are prohibitively costly, constituting an insurmountable obstacle for access to justice. It can also be that even if procedural costs are high in a given Member State, it has developed adequate legal aid schemes that eliminate barriers for access to justice.

There is a certain gradation in the evaluation. The most important element for the overall evaluation of the system is legal standing, since if no legal standing is granted, members of the public can hardly

¹ Estonia, France, Germany, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Spain, Sweden and UK.
have access to justice. As a consequence, if a country limited legal standing (either establishing strict criteria or strictly interpreting the concept of "interest") to effectively bar all or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment, the overall assessment of the system was negative. However, when other obstacles for access to justice were identified and they were compensated by other elements in the system, it received a positive evaluation.

Other means for access to justice (e.g., ombudsmen, prosecutors) were not taken into account when evaluating the overall effectiveness of the system, since the study focused on judicial and administrative procedures.

Trends in Member States based on case law or new legislation available in July 2007 were taken into account to improve or downgrade the evaluation (e.g., Cyprus, Estonia). However, trends based on new or draft legislation that could not be checked by the date of submission of this report were discarded although they are mentioned where appropriate (e.g., Malta, Slovakia, Ireland).

The symbols used for evaluation are:

<table>
<thead>
<tr>
<th>Key</th>
<th>Description</th>
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<tbody>
<tr>
<td>--</td>
<td>unsatisfactory (obstacle)</td>
</tr>
<tr>
<td>+</td>
<td>could be better</td>
</tr>
<tr>
<td>++</td>
<td>satisfactory</td>
</tr>
<tr>
<td>+++</td>
<td>good</td>
</tr>
</tbody>
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3. Conclusions of the study

The majority of the Member States provide for administrative review procedures and judicial review procedures with some exceptions: Belgium, Ireland, Malta, Sweden, UK. In the other 20 Member States reviewed, both administrative and judicial remedies are available.

a. Administrative procedures vs Judicial procedures

Administrative procedures

In Denmark, a specific administrative system of Appeal Boards for environmental cases (the Environmental Appeal Board and the Nature Appeal Board) has been created. Similar systems, but for general purposes, exist in Lithuania (the Administrative Dispute Commissions), and, for self-govermental territorial units, in Poland (Self-governmental Appeal Boards).

Judicial procedures

In some countries, administrative remedies must be exhausted before contesting the decision in court. This is the case in Austria, Czech Republic, Finland, Germany, Latvia, Poland and Slovakia. Elsewhere, individuals and associations have the choice between administrative remedies (appeals before the authority who issued the decision and/or its hierarchical superior) or going directly to court.

Challenges before court are normally before the administrative courts or courts specialised in administrative matters. In Malta and Ireland, ordinary civil courts are competent to hear administrative disputes. In the UK, most cases of “public interest” litigation go to the Administrative Court established in 2000.

3 Ireland has a minor administrative procedure under its planning and development legislation. In the UK administrative remedies exist but only available for the addressees of the administrative decision.
In some countries specific cases may be taken to civil courts (e.g., Belgium, Portugal, Slovenia, Hungary and Lithuania). These cases normally relate to petitions, public interest submissions and the like, but the court’s capacity to annul the administration’s decision is limited.

In Spain, access to criminal courts is a significant means to challenge acts and omissions by public administration.

Citizens in Austria and Latvia can also contest administrative actions/omissions before the Constitutional Court through the procedure for the protection of fundamental rights (in this case a healthy environment, in Austria through the direct application of ECHR) – although in most cases, access to the Constitutional Court is only possible when other rights (e.g., life, property) have been affected.

**b. Legal standing**

The issue of legal standing is essential for access to justice. The criteria for standing are very different from Member State to Member State. Some countries have granted an *actio popularis* but in general, individuals need to show the impairment of a right (e.g., property, health, procedural rights) or that they have a sufficient interest (e.g., geographic vicinity) to be granted standing. In some cases, NGOs meeting certain criteria are considered “privileged applicants” and do not have to show an interest to challenge acts or omissions before administrative boards or courts. In other cases, associations and organisations (including NGOs) have to show the impairment of a right or an interest, as any other individual, the interpretations given by courts to the concept of “interest” differing from one Member States to another.4

Despite these differences, it is possible to group Member States depending on the main criterion established by law or used by the courts to recognise *locus standi*.

**Actio popularis**

Some countries provide for an *actio popularis*. This is the case in Portugal, which is probably the country with the widest accessibility to administrative and judicial remedies. The Portuguese Constitution recognises an *actio popularis* in judicial procedures for the protection of diffuse interests including public health, consumers’ rights, quality of life, preservation of the environment and cultural heritage and so on.

In the UK, Ireland5 and Latvia, the broad interpretation given by the courts to the concept of “interest” has led to *de facto* recognition of an *actio popularis*.

In some countries an action popularis is possible for specific cases:

- In Spain, *actio popularis* exists for land use planning, coastal waters, national parks and criminal law;
- In Estonia, *actio popularis* exists for land use planning.
- In Slovenia, for civil law suits, the Environmental Protection Law also grants broad access to civil courts to citizens acting as individuals or through societies, associations and organisations.

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4 A summary of the conditions for standing can be found in Table 1 in the Appendix to the Report.

5 Although in Ireland ad-hoc groups as such do not have standing. In addition, a new act was reportedly passed in August 2007 that may limit the broad interpretation of interest by replacing the “sufficient interest” test by a less friendly “substantial interest” test in certain cases. However this information could not be confirmed at the time of submission of this study.
Impairment of a right and sufficient interest

In most countries, those challenging an action or omission of the administration in breach of environmental legislation have to show an interest.

- Strict interpretation

The countries where a strict interpretation of the concept of “interest” applies are Austria, Belgium, Germany and Malta. In Germany and Austria the claimant has to show that he or she is “directly concerned”, meaning that a “subjective right” has been affected by the decision. The interpretation is very strict in practice and, in Austria, for example, with some exceptions, members of the public can do little more than encourage the administration to change a decision.

In Belgium, the jurisprudence of the Supreme Court and the Council of State have reduced the scope of the concept of concerned person, making it difficult for NGOs to have access to justice. Neighbours and individuals, however, will more easily be granted standing.

In Malta, individuals will normally have access to court (because they can show the impairment of a right or be individually concerned due to geographical links and so on). The main problem for NGOs and citizens’ organisations is that one of the criteria for legal standing is to have legal personality. NGOs do not have legal personality in Malta and thus have no legal standing.

- Broad interpretation of interest: diffuse/collective interest, geographic connection, the objectives of the association

Countries where the concept of “interest” has been broadened to recognise “collective” and “diffuse” interests are the Netherlands, Lithuania, Italy and Spain. In some cases, the specific collective interest (in this case, protection of the environment or related) has to be spelled out in the statutes of the organisation. However, this is not a condition sine qua non in the Netherlands, Spain or Italy, which allow ad-hoc citizens’ associations or platforms to have legal standing.

In many cases a geographical criterion will also be needed to have standing or to be considered “individually concerned”. This criterion allows neighbours and municipalities to be granted standing in almost all countries (with the exception of cases where no appeal is possible or appeal is limited to the addressees of a decision). The geographical criterion will also play a significant role in the recognition of NGOs standing in some countries, alone or combined with the existence of a collective/diffuse interest (e.g., Greece, Cyprus, France and Hungary).

Finally, in some countries, the way the objectives and purposes of an association have been laid down in the statutes will be essential to be granted standing. In these cases, there must be a connection between the law governing the contested decision and the field of activities of the specific association (e.g., Denmark). In Denmark, NGOs will have standing in court provided there is a connection between the law governing the dispute (e.g., waste management act) and the specific objectives indicated by the NGO in its statutes (e.g., waste production prevention).

- Standing based on procedural rights

A significant group of countries is formed by those Member States where legal standing is based on participation or the existence of a right to participate in the decision making process. The broader the situations where public participation is possible, the broader the possibilities are for standing. Standing based on procedural rights is granted in Austria (for waste management), Czech Republic (for nature protection, EIA and IPPC), Finland (for waste and nature protection), Germany (for nature protection),

6 Although the existence of procedural rights may grant access to justice due to the impairment of a right, given its specificity it is treated here in a separate subsection.
and Poland (but mostly EIA and IPPC). In Greece, Italy and Spain participation in the proceedings may be considered a proof of “interest” but is not an unconditional requirement for standing.

In some cases, additional criteria have to be met to be able to participate and trigger the right to access to justice (e.g., in Finland, Germany and Poland, NGOs will have to meet certain criteria to be able to participate in the administrative decision making process, which will afterwards give them the right to challenge the decision).

- Countries with a system granting “privileged” status to environmental NGOs

In addition, some Member States have acknowledged the specificity of environmental claims carried out by NGOs and have widely recognised their legal standing to challenge action/omissions by the administration, either in general or only for certain claims. This approach is similar to the “qualified entities” recognised in the proposal for a Directive on access to justice.\(^7\)

In Greece, France, Italy and Spain NGOs meeting the criteria laid down by the law will have legal standing to challenge actions and omissions by the administration without having to show an interest.

In some countries (LU, PT, SL, SE), this privileged status is only for specific cases.

The criteria differ from country to country but in general it is required:
- some years of existence (3 or 5)
- the protection of the environment as the main purpose laid down in their statutes.
- Others:
  - In some cases democratic rules
  - Membership (number of members).

**Conclusions**

Legal standing seems to be a significant obstacle for individuals and associations to challenge actions/omissions by the administration in Austria, Belgium, Germany and Malta, although in Malta the situation is expected to change soon.

Sometimes limits to access to justice stem from attempts by the administration to limit the cases where participation in the decision-making process is required or by limiting the concept of “participant”. This is the case in the Czech Republic, Hungary and Slovakia. In these countries, the administration has tried to limit actions by members of the public by restricting public participation in cases where previously this participation was required.

In some countries, specific acts have been exempted from any challenge. This is the case in the Netherlands, where “negative lists” of acts that cannot be contested have been created (e.g. decisions on the Schipol airport). Similarly in Poland, certain decisions on building and emissions permits can only be contested by the addressees, excluding any other appellant.

In other cases, problems with respect to standing derive from the strict conditions that organisations have to meet to be considered “privileged applicants”, i.e., “NGOs acting in public interest”. This problem has been reported in Sweden and Slovenia, in the latter case only for administrative remedies, judicial remedies remaining accessible.

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\(^7\) Regarding the criteria that have to be met by NGOs in Austria, Germany and Poland, see above. These countries have not been included here since the criteria for access to justice only applies in very specific cases (e.g., nature protection in Germany).
In Lithuania, legal uncertainty regarding the interpretation of interest has been identified as a potential obstacle for access to justice.

Finally, access to justice is limited to very specific cases in Germany and Finland (especially for members of the public).

c. Effective remedies

Injunctive relief is an important instrument for effective justice in actions against violations of law, especially in environmental matters, where the execution of a decision very often produces irreparable damages.

In Belgium a specific injunctive relief procedure was conceived for environmental protection and for challenging actions and omissions by the administration. It is one of the most important means for access to justice available for NGOs in that country. To be granted relief, the act must be a “manifest violation or a serious threat of violation of environmental legislation”. The main problem is to demonstrate that the violation is “manifest”.

In the remaining countries, the possibilities of obtaining interim relief and interim measures will depend on whether the appeal has a suspensive effect. In general, administrative review procedure has suspensive effective whereas judicial review procedures do not have suspensive effects with some exceptions (FI, DE, EL, SE).

In general the conditions to be granted relief are similar in all Member States

- *Periculum in mora*: the danger that the execution of the decision may produce irreparable damages or would make the final judgement difficult to enforce (HU, IE, LV, PL, PT, SL, DK, AT)
- *and fumus boni iuris*: it is a reasonably well founded case (BE, FR, IT, LU, ES)

In Spain and the UK, interim relief can be granted upon request but, even when *periculum in mora* and *fumus boni iuris* are present, the party requesting the relief may be required to provide a cross-undertaking in damages caused to the other party. The sum deposited will be reimbursed at the end of the procedure if the party that requested the relief wins the case. In Spain, the judge will decide whether the guarantee is needed and if so its amount, although in some cases a specific act may indicate that the appeal has a suspensive effect. In certain cases (e.g., contestation of land-planning decisions) interim relief may require the deposit of a significant sum.

Problems to obtain injunctive relief have been reported as a major obstacle for effective justice:

- in CY and CR due to the difficulties to prove the danger; and
- in ES and UK due to the amount of the deposit.

Good practices have also been identified:

- Suspensive effect of the appeal: FI, DE, EL, SE
- It is easy to obtain relief: LT, EE, PT

d. Costs and length

In general administrative review is not expensive because no fees need to be paid and procedural costs are insignificant – no lawyers are required at this stage and in general the “losing party pays” principle does not apply. However, when legal counsel or an expert’s opinion is needed to substantiate the action against the contested act, costs may increase.
Contrary to administrative remedies, judicial procedures are expensive. On the one hand, court fees will generally have to be paid to lodge an appeal, but in general court fees are not significant, although in some cases they can be up to 200€ in the first instance and 600-800€ in the final instance.

Instead, it is lawyers’ and experts’ fees which render judicial procedures expensive. Lawyers’ and experts’ fees were considered a significant cost in almost all countries but specially high in DK, IT, UK In addition, in those Member States where the “losing party pays” principle applies, the overall cost of court proceedings may become a real obstacle to access to justice. The principle apply in all countries with the exception of BE and SE. It is normally applied at the court’s discretion, although in the UK, for example, only in exceptional cases have courts exempted the losing party from that burden it is normally applied. In some countries, the negative impacts of the principle have been limited by the legislation. For example, in NL or ES is only applied when the party made an unreasonable use of the appeal. In DE, thresholds have been established to limit the principle.

Having regard to the costs of the judicial proceedings, and in some cases administrative procedures, almost all Member States have established legal aid schemes. Legal aid is easily accessible in PT, SK and ES. In addition pro bono assistance has been reported in HU, FR, IT, ES, and UK. No or very limited legal aid schemes have been identified in CY, EL, and IE. In some countries legal aid schemes do not cover NGOs (FI, NL, LU, MT, UK) or they do only in exceptional cases (FR, IT, BE).

Conclusions

Length does not seem to be a problem with exceptions (IT) – but it needs to be combined with effective interim relief. Costs were considered as a real obstacle for access to justice in HU, IE, IT, LV, and UK.

e. Transparency

Almost all countries were positively evaluated on this criterion. However, some countries (AT, HU, IE, IT, LV, LT) were rated “negatively” or “could be better” due to oral notifications, problems regarding publicity of decisions, or lack of information regarding possibilities to access to justice.

f. Overall assessment

After assessing all the different elements of the system and taking into account compensating factors:

- 10 MS systems were evaluated as “good” or “satisfactory” (DK, EE, FR, DE, IT, LT, LU, PT, SK, SL)
- 10 MS systems were evaluated as “could be better” (BE, CY, CR, FI, IE, LV, NL, PL, ES, SE)
- 5 MS systems were evaluated negatively (AT, DE, HU, MT, UK)

The evaluation is based on the assessment carried out by the national legal experts who developed the country studies.

4. Final remarks

After reviewing the systems to implement Article 9(3) in the Member States (with the exception of Romania and Bulgaria), it can be concluded that there is a wide variation of systems among MS. Despite this wide variation, judicial review is the main procedure to challenge an administration’s action/omission. The majority of MS continue to require an “interest” for seeking judicial redress although in some cases is too narrowly interpreted (e.g., as subjective right). Environmental groups are generally given specific status although they have to meet certain criteria, which sometimes may create obstacles to have access to a court. In addition, access to justice is in some cases limited to very specific aspects (nature conservation).
Almost no MS have adopted measures with regard to effectiveness of remedies and cost of litigation. Environmental complaints seem to require a specific treatment due to their characteristics.

The combined effects of different elements may prevent effective access to justice on environmental matters. It is to be highlighted that countries, such as Portugal, which have recognised the protection of the environment in their constitutions have provided wider access to justice.

Better access to court increases the relevance of environmental protection in day-to-day discussions and policy, trust in the administration and thus democracy.