



Maastricht University

*Leading
in Learning!*

Effective Justice?

Implementation of 9.3 and 9.4 Aarhus
'Synthesis report' by Jan Darpö


Brussels, 12-11-12

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Background

- **Non-implementation of Art. 9.3**
- **Case law CJEU**
(Trianel, Slovak Brown Bears, Irish Costs, Mellor, DLV, Boxus
+ pending cases Edwards, C-260/11; Altrip, C-72/12...and Janecek)
- **Other recent studies:**
 - Faure e.a. 2012 (EC): socio economic implications
 - Backes e.a. 2012 (EP): Standing in adm., civil and criminal law

Aim

- **Status quo implementation Art. 9.3 and 9.4 Aarhus**
-  **Should EU take (legislative) measures? (no criteria provided beforehand)**

Scope, method, disclaimer

- 17 countries (all except A, Ru, Bu, Gr, SI, Est, Lith, Fin, Lux, Ma)
- Questionnaire
- Comments on draft synthesis report
- Disclaimer

Main results implementation 9.3 and 9.4

Aarhus



Main results implementation 9.3 and 9.4 Aarhus

- **‘Diverging, random and inconsistent’**
- **Compared with Milieu Ltd 2007:
sometimes more lenient, sometimes
more strict**
- **No ‘level playing field’**
- **Many obstacles and barriers**
- **Differences depending on area of
(community) law**

Standing for individuals (Art. 9.2 and 9.3 Aarhus)

- **Huge variety: from Actio popularis (P) to Schutznorm (G)**
- **Some right based, most interest based**
- **Preclusion in some countries**
- **Application by courts differs**

Standing for ENGOs I

- Less differences (except G, UK, P)
- Statutes: how precise should they be?
- Regional (and local) ENGOs sometimes discriminated (I)
- Sometimes limited to appeal against certain decisions (9.2 Aarhus), often not
- Preclusion in some countries

Standing for ENGOs II

Prerequisites:

- Non profit: often
- Registration: often
- Minimum duration: often (1-5 years)
- Minimum number members: rarely
- Democratic structure: rarely

Scope and remedies

- **Scope and intensity:** 'the wider the entrance, the smaller the room'?? – not always true!!
- **Review of infringement of rights, interests or full legality**
- **Remedies:** quashing only (UK) or supervisory measures (F, Sw)?

Costs I

- **Court fees:** between 100,- and 8.000,-
- **Costs for own representation:** between 0,- and 80.000,-
- **Costs for experts:** up to 500.000,- in an EIA-case
- **Cost distribution:** all models (loser pays, PCOs (UK, AG C-260/11, 18-10-2012), one way cost shifting (NI, PI, SI), security payments (bonds, if injunction is asked for, B: 105.000,-)

Costs II

- **Legal aid:**
 - Conditions vary
 - Often only for the very poor
 - Often not possible for ENGOs
 - Sometimes underfunded
-
- **→ significant barrier to A2J, effective judicial protection not ensured????**

Effectiveness of A2J

- **Duration!** (with rare positive exceptions)
- **Usually no suspensive effect**
- **Injunction often difficult to obtain** ('major barrier', partly because of security deposits)

Action required?

Some (well known?) starting points

- **(Procedural) Autonomy MS**
- **Effectiveness and effective judicial protection**
- **No general competence EU**

Possible reasons for EU legal action

- Need to implement art. 9.3 Aarhus
- Need to strengthen implementation 9.2 Aarhus
- General principles (effectiveness, effective judicial protection...)
- Political reasons (again effectiveness, 'level playing field'...)

Legal need to implement 9.3 Aarhus?

- CJEU Slovak Brown Bear case (C-240/09): access depending on wording of national law and national doctrine of treaty conform interpretation
- → huge differences
- → application not ensured?

Current debate EC

Four models:

- **Business as usual (guidances, soft law)**
- **Enforcement (258 TFEU)**
- **Proposal for new Directive**
- **Original proposal (COM(2003)624)**

Synthesis report:

Advocating for new directive:

- Level Playing field
- Legal certainty
- Predictability
- Other solutions are ineffective, time consuming and too piecemeal

Content of a new directive (1)

- Objective: all (env.) Union legislation
- Access for public (likely to be) affected, avoiding double standard of Dir. 2003/35
- Scope of review should be broader than “no infringement of public rights”
- No registration requirement for ENGOs
- No auditing requirement for ENGOs
- No time criterion for ENGOs
- Anti-discrimination clause required

Content of a new directive (2)

- Preclusion clauses forbidden
- Full legality control
- Ex officio investigation of legality of all invoked aspects
- Challenging of omissions must be possible

Content of a new directive – costs (3)

- Flatrate for courts fees
- Objective test (or combined with subjective, with the aim of having a clear and transparent framework) of prohibitive costs
- One way cost shifting obligatory
- Legal aid should take public interest into account
- Stronger rules for “mischief-makers and busy bodies”

Content of a new directive IV - effectiveness

- **Importance of injunctive relief should be stressed**
- **Arguments to refuse injunctive relief should be defined**
- **Prohibition of bond and security payments**
- **Ensurance of timeliness**

Some concluding remarks



JUST SAY NO TO
HARMONIZATION ?

Concluding remarks II

- **Art. 9 (3) Aarhus should be transposed into EU law**
- **Some aspects of Art. 9 (2) Aarhus may be clarified in EU law**
- **Intensive dialogue on procedural practice needed!!!!**
- **Additional soft law approach (guidelines) recommended**