Possible initiatives on access to justice and economic implications

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Overview

- Research team
- Goals and structure of the study
- Results (draft Final Report)
  - Law & Economics analysis
  - Empirics – country studies
- Concluding remarks

Research team

- Maastricht University, Faculty of Law, research institute METRO
  - Prof.dr. Michael Faure
  - Dr. Niels Philipsen
    - in co-operation with:
  - Prof.dr. Chris Backes
  - Mr. Fokke Fernhout
  - Dr. Manuela Mühl
  - Dr. Leïla Choukroune

Goals and structure of the study

- Study for DG Environment
- Goal:
  - to present, at EU level, the (socio-) economic effects of changes in the regulation of public access to justice in environmental matters
  - the focus will be on the four options defined by DG ENV in the Invitation to Tender
- Methods:
  - Law & Economics (i.e. economic analysis of law)
  - Law & Society
  - empirical study (country studies / interviews)

Goals and set-up study

- Four options (defined by DG ENV)

1. Business as usual (soft-law approach)
2. Commission addresses any existing gaps in MS provisions for ensuring access to justice on the basis of Article 258 TFEU
3. Drafting a new legislative proposal targeted on entitlement to access implied by (in particular) *Slovak Brown Bear case* with the conditions of access mirroring those already established for EIA and IPPC
4. Sticking to the original proposal, COM(2003)624

Goals and structure of the study

- Structure
  - Ch. 1 Introduction
  - Ch. 2 Legal background
  - Ch. 3 Examining the four options
  - Ch. 4 Economic analysis
    - economics of procedural law
    - stakeholder analysis (incentives)
    - economics of federalism: levelling the playing field
  - Ch. 5 Law and Society approach
    - Public Interest Litigation and socio-economic rights
  - Ch. 6 Empirical study
  - Ch. 7 Conclusions and recommendations

Near-to-final results

- Current status of research:
  - Draft Final Report (early November)
  - Legal background: finished, not presented
  - Law & Society: finished, presented
  - Empirics: nearly finished, presented
- In this presentation, focus on:
  - Law & Economics
  - Empirics / country studies

Law and Economics

- Economic analysis of procedural law
  - social welfare approach
  - behavioural approach

- Social welfare approach: expected benefits and costs of an enhanced access to justice
- Benefits: litigation helps to solve a market failure
  - verdicts as *public goods*
  - *positive externalities*
    - e.g. in case of injunctive relief awarded
  - reduce *negative externalities*
    - i.e. caused by environmental harm

  => law provides legal certainty?

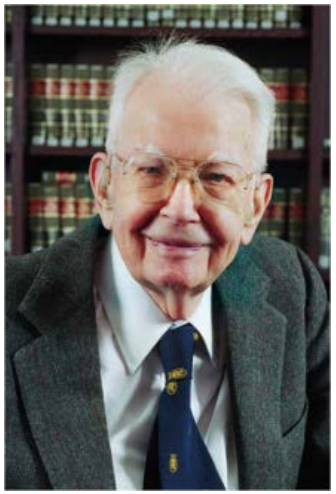
Law and Economics

- Costs:
  - Courts: more cases?
    - "demand for trials" depends on the number of conflicts, which in turn depends on many factors, such as:
      - level of care taken by potential plaintiffs and defendants
      - legal costs and allocation of these costs among the parties
      - perceived chances of winning a case
      - quality of law and precedents
      - time investment for the dispute resolution
      - people's customs
  - costs for business and administrative authorities
    - legal costs and opportunity costs (time/opportunities lost)
  - overdeterrence due to opportunistic or repeated trials?
- Economists generally prefer settlements over trials, unless trials lead to positive externalities (reduction of social costs)
  - improvement of law; private benefits of a verdict go beyond a pure re-distribution

Law and Economics

- Behavioural approach
  - incl. trials vs settlements and mediation
  - incl. collective redress / PIL
  - importance of information

- Incentives stakeholders:
  1. plaintiffs (NGOs, citizens)
  2. defendants (industry)
  3. institutions (at MS level + Commission)
  4. courts
  5. the environment



- Analyse effects of the ‘four options’

Law and Economics and ‘locus standi’

- Private law remedies to be used by individuals (e.g. in torts) may not work in environmental law
  - damage widespread => *rational apathy*
    - note that even class actions (where possible) may not always follow due to high transaction costs
  - also: causal link, latency, etc.
- Basic rationale for ‘locus standi’ requirement: gatekeeper argument, i.e. preventing inefficient use of the court system and overdeterrence
- Argument may be different in public law, such as judicial review cases

L&E and ‘levelling the playing field’

- Economics of federalism: harmonisation when:
  1. transboundary externalities
  2. economies of scale
  3. race to the bottom
  4. levelling the playing field / internal market argument
  - first three arguments apply to *substantive* environmental law
  - last argument can also be applied to *procedures*
- RTB: Pollution haven hypothesis
  - Destructive competition and risk of ‘regulatory chill’
- LPF: Minimum standards and legal certainty

Effects of four options

- Option 1: business as usual (soft law approach)
  - gaps in transposition and application of Art. 9(3) of the Aarhus Convention would remain; no appeal and recognition procedure would be introduced in MS where this does not yet exist; co-operation and promotion strategies continue to be used by Commission
- effects on (social) costs for courts and administrative authorities and (private) costs for plaintiffs and defendants to a large extent depend on Member State law
- limited costs for Commission: drafting guidelines etc.
- legal uncertainty remains, which may lead to private costs for operators; access to justice NGOs?
- possible social ('external') costs
- no EU level standards => no level playing field

Effects of four options

- Option 2: addressing existing gaps in MS provisions by Commission
  - based on case law, in particular *Slovak case, Trianel*, *Janecek* and *Djurgarden* and => wider access to justice for environmental NGOs and (perhaps) individuals
- additional costs for institutions (European Commission and Member States concerned)
  - including, possibly, adaptation costs for MS if national law needs to be adapted (also under options 1, 3 and 4)
- infringement procedures lead to *direct costs* (time spent in court, legal fees) and *indirect costs* (opportunity costs and knock-on effects on other policies)

- Option 2: addressing existing gaps in MS provisions by Commission (cont'd)

- Information increases through infringement procedures
  - number of suits closer to 'optimal level'?
- Perhaps: more access to justice for NGOs (*Trianel*) and individuals (*Janecek*), depending on national law
  - plaintiffs: possibilities/incentives to litigate increase
  - defendants: costs increase; deterrent effects?
  - courts and administrations: workload increases
- *Slovak case*: MS courts must facilitate access to justice beyond cases falling under the EIA and IPPC Directives
  - if interpreted broadly: effects described above
  - still some legal uncertainty: interpretation of some case law (notably *Slovak case*) is debated
- some differences remain: no level playing field?

Effects of four options

- Option 3: new proposal
  - targeted on entitlement to access implied by *Slovak case* with the conditions of access mirroring those already established for EIA and IPPC
  - acces to justice for NGOs also in MSs whose statutes at present cannot be interpreted in accordance with Art. 9(3)
  - introduction of environmental mediation
- some similarities with effects of option 2 (if *Slovak case* is interpreted broadly), but:
  - lower costs for Commission
  - more *legal certainty* (depending on implementation of new Directive in MSs) and if this is so, less need for litigation
- overdeterrence can to some extent be avoided
  - e.g. excludes provision on entitlement to challenge all administrative acts and omissions (in option 4)
- level playing field

Effects of four options

- Option 4: proposal COM(2003) 624 final
  - including legal standing of qualified entities in all environmental proceedings (Art. 5), criteria for recognition (Art. 8) and requirements to introduce administrative procedures (Art. 6, “request for internal review”)
- Stakeholder analysis (different for each Member State)
  - courts: higher workload, possibly court delay
  - administrations: higher costs (“internal review” procedures)?
  - plaintiffs: wide access to justice
  - defendants: higher costs if more cases; lower costs if legal certainty is provided. Overdeterrence?
- high environmental protection vs ‘frivolous suits’?
- legal certainty OR discussion on scope of Directive, creating uncertainty and leading to higher costs?
- level playing field

Stakeholders	Option 1	Option 2	Option 3	Option 4
1. Plaintiffs a. individuals b. NGOs	No legal certainty. NGOs may help create precedents, but uncertainty.	Legal certainty can improve. Uncertainties remain, less suits than optimal.	More legal certainty. Number of suits by NGOs closer to optimal number.	Same as in 3. Danger of strategic behaviour by plaintiffs.
2. Defendants	Net cost of trial not to be estimated.	Uncertainties are undesirable.	Defendants will internalize externality; strategic behaviour reduced.	Risk of overdeterrence.
3. Institutions	Relatively low.	Costs of procedures: MSs and Commission.	Costs of implementing directive.	Costs similar to option 3. Also: new preliminary references?
4. Courts	Costs of new preliminary references and uncertainties.	Increasing costs for CJEU and Member States.	Less suits resulting from increased legal certainty. However: more suits because of standing NGOs?	More suits because of standing NGOs? If so: increased workload.
Level playing field?	No level playing field; existing differences remain.	Uncertainties remain; no level playing field.	Level playing field more likely than 1 or 2, less uncertainty. More flexible and effective.	Level playing field more likely than 1 or 2, less uncertainty. Cross-border NGO standing not regulated.

Conclusions from L&E theory

- Theoretical analysis seems to point at option 3
  - compared to options 1 and 2: more legal certainty, more deterrent effects (internalizing externalities), optimal number of suits, less costly than option 2
    - MC of awarding more access to justice via a Directive may be minimal whereas MB of reducing uncertainty and creating a level playing field are likely to be high
  - compared to 4: less controversial, less possibilities for strategic behaviour NGOs, less overdeterrence
    - excludes e.g. reference to “all administrative acts and omissions” and criteria for recognition NGOs
- Also: creation of a ‘level playing field’ and environmental mediation

Empirics – Country studies

- Follow up on theoretical (stakeholder) analysis
- Interviews based on a questionnaire
  - lawyers representing plaintiffs and/or defendants, members of courts dealing with environmental cases
- Available literature, e.g:
  - bulletins from NGOs and websites administr. agencies
- Collection available empirical evidence?
  - parameters difficult to quantify
  - micro-analysis Member States beyond scope of study
  - data on environmental cases are scarce
    - court statistics exist, but do not specify environmental cases as a specific category

Empirics – Country studies

Selection of Member States (initial idea)

- 2 where there already is a wide access to justice
  - Latvia
  - Portugal
- 2 countries with relatively restricted access or 'controversial' conditions of access
  - Germany
  - UK (high procedural costs)

=> Latvia, Germany, UK, Portugal (problems), NL

Interviews: methodology

- Four options broken down into different elements that could be part of any option
- Customized questionnaire, one hour interview (skype, phone), verification reports by interviewees
- Lawyers acting on behalf of plaintiffs were *inter alia* interviewed on the considerations to sue, while potential defendants were interviewed on the effects of all elements, including the option of ‘levelling the playing field’.
- In addition the ‘system costs’ were addressed, i.e. the burden that the various options put on the judiciary system in the Member State concerned.
- Stakeholders were asked to comment on the current situation and thus (indirectly)on the costs of inaction (option 1).

Interviews

- Definition of ‘environmental matters’
  - would according to most interviewees be useful
  - none objected to the idea that this definition would include national law instead of EU law, which is understandable, since Art 9(3) Aarhus is already applicable to national law
  - however, would also be (too) complex; Latvia is doing without such a definition and decides on a case to case basis whether (an aspect of) the case is environmental.
  - it was noted that scope of Aarhus is narrow
- Private litigation
  - many cases in UK are “storewars” (25% of all environmental cases), i.e. not with environmental protection in mind, but using environmental law as a weapon in competition

Interviews

- Suspensive effect
- Possible outcome of trial
  - Relation to Art 9(4), i.e. “adequate and effective remedies”
- Consequences judiciary
  - Broad access in LV and UK (in LV combined with low costs). Nevertheless: few cases. Many explanations, but most importantly perhaps: well-functioning NGOs.
- Requirements NGOs
  - Only Germany has special recognition procedure. This does not violate Aarhus provisions.
  - Potential problem *ad hoc* NGOs,if they do not serve specific environmental interest
  - Swedish *Djurgarden* case already showed that there are limits to NGO requirements
  - Some recognition criteria (option 3) seem reasonable

Interviews

- Actio popularis
  - experience UK and Latvia with respect to NGOs (EIA and IPPC Directives) is positive: NGOs channel complaints and prevent explosion of cases
  - it is not recommended to extend actio popularis to individuals (also strong views on this in Germany)
- Costs
  - Art 9(4) prescribes that procedures may not be prohibitively expensive => problem in UK
    - suggestion: administrative procedure as in German or Dutch model? (option 4, perhaps option 3)

Interviews

- Third party protection
  - MS have procedural rules to prevent that interested parties are excluded => no reason for EU to intervene
- Measures to obviate frivolous claims
  - no complaints (incl. MSs with liberal standing rules)
- Levelling the playing field
  - important, but minimum level of protection is (too?) difficult to determine on EU level
- Mediation
  - useful, but needs to be adapted to environmental cases, and used in an early phase of the dispute (e.g. prior to granting certain permits)


The end