Access to Justice in EU Member States

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I. Introduction

As a signatory of the Aarhus Convention, the European Union aims to transpose its provisions into EU law. The so-called legislative package presented by the European Commission at the end of 2003 to complete the implementation of the Aarhus Convention at the Community level contained a draft directive on access to justice in environmental matters, a proposal for a council decision on the conclusion of the Convention on behalf of the European Community and a draft regulation applying the three pillars of the Convention to all EU institutions.

Currently, the first element of the package stands little chance of being adopted. This is due to resistance by the Member States. Also, although the Commission claimed in 2003 that the proposal represented "a milestone in strengthening democracy in environmental policy-making", it now seems willing to give up on the idea of an "access directive". It is thus expected that the "package" will be adopted without the "access directive" in order to be able to ratify the Convention in time for the meeting of the Parties to the Convention in Almaty in May 2005. This assessment is further supported by the Environment Ministers' political agreement of December 2004 regarding both the proposed regulation and the proposed decision, which, in the opinion of the Ministers, together pave the way for the Commission to ratify Aarhus on behalf of the EU next year.

Whether or not this development is a regrettable one will be assessed in this article based on the results of a comparative study on access to justice in the (old) EU Member States undertaken in 2003/2004.

II. Access to justice under the Aarhus Convention

Of all the provisions of the Aarhus Convention clearly the most difficult one to implement both at Community and Member States level is Art. 9, which is entitled "access to justice". Art. 9 grants access to justice in respect of violations of different rights: The impairment of the right of access to information (Art. 9(1)), the impairment of the right to public participation (Art. 9(2)) and access to justice where acts or omissions of public authorities or of private persons contravene the law relating to the environment (Art. 9(3)). The provisions of Art. 9(3) were initially intended to grant everybody the widest possible access to justice in environmental matters but were weakened considerably during the negotiations.

The resulting obligations for the Contracting Parties under Art. 9(3) are disputed. On the one hand, it has been argued that Art. 9(3) requires no more than the establishment of some kind of administrative court procedure to deal with infringements of national environmental law. The reference to "national law" contained in the provision

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1 This article is based on a comparative study, which is available at De Sadeleer/Roller/Dross (eds.), Access to Justice in Environmental Matters and the Role of NGOs; Empirical Findings and Legal Appraisal, 2005.
6 Environmental Daily, ISSUE 1540, 28 October 2003.
7 Environmental Daily, ISSUE 1794, 21 December 2004.
would thus allow the Contracting Parties to limit access to justice substantially. On the other hand, Art. 9(4) states that "the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive." One can argue that this creates an obligation to provide for the possibility of obtaining legal remedies with regard to all substantive environmental law.

The Member States' resistance to an "access directive" is motivated by different reasons. Firstly, some Member States believe it will force them to introduce changes to their respective judicial systems. Secondly, the Member States have questioned the EU's competence to adopt such a directive in the light of the principle of subsidiarity. Finally, a number of arguments relating to factual aspects have been put forward. These reflect a fear, amongst others, that introducing additional litigation rights for NGOs (and private persons) will lead to an excessive case load for the courts and the misuse of those rights. These last points are usually based on assumptions and have been repeatedly voiced throughout the debate on access to justice.

III. The Access Study

In order to gain empirical insights on access to justice in environmental matters, the Commission had a study undertaken by the Centre d'Etude du Droit de l'Environnement (CEDRE), Brussels and the Öko Institut (Institute for Applied Science). The study had two aims, first, to present the legal background for access to justice in environmental matters in a number of selected Member States and, second, and more importantly, to make previously unavailable empirical data on lawsuits brought by NGOs on environmental matters available. The Member States chosen were Belgium, Denmark, France, Germany, Italy, Netherlands, Portugal and the UK, due to their different legal backgrounds and traditions, and their diverse experience regarding access to justice by environmental associations. For each of the countries a report outlining the legal framework as well as detailed data on the number and outcome of lawsuits brought by NGOs on environmental matters was presented. In addition, the study included, for each Member State, a case study chosen specifically to reflect the general findings of the national study in a concrete legal case. The case study addressed the ecological, economic and democratic aspects of the selected court case.

1. Legal background

a. Administrative proceedings

In all Member States covered by the study, NGOs have access – however limited – to the administra-