

EXECUTIVE SUMMARY

Aim and scope of the study

The aim of this research is to present, at EU level, the socio-economic effects of changes in the regulation of public access to justice in environmental matters. Background is Article 9 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which under the third pillar calls for a reasonable entitlement to access (*locus standi*) and reasonable conditions of access (i.e. fair and effective procedures in terms of time and costs). Whereas the first two pillars of the Aarhus Convention have been covered in EU law by means of two Directives from 2003, proposal COM(2003)624 from that same year, directed at implementing provisions relevant to the third pillar, received strong opposition from a number of Member States. Recent events - such as the entry into force of the Lisbon Treaty, but in particular developments in CJEU case-law - have put this pending proposal and alternative ways of improving access to justice back in the spotlight.

Our analysis of the economic effects of an increased access to justice addresses four options that were proposed in the Invitation to Tender:

1. Business-as-usual, soft-law approach;
2. Addressing any existing gaps in MS provisions for ensuring access to justice on the basis of Article 258 TFEU;
3. Drafting a new legislative proposal (or significantly amend COM(2003)624) targeted more precisely on entitlement to access implied by the cases *Janecek* and *Slovak Brown Bear*, with the conditions of access mirroring those already established for environmental impact assessment;
4. Sticking to the original proposal, i.e. COM(2003)624, with possible minor modifications.

It should be stressed that our study was running parallel to another research that addressed access to justice in EU Member States from a legal perspective. Hence, the goal of our study was not to examine to what extent Member States accurately implemented the environmental *acquis* with respect to access to justice, nor the Aarhus Convention. Also, the report did not aim to provide an impact assessment of the costs of access to justice. Rather, the four options of access to justice were examined from a Law and Economics and Law and Sociology perspective.

Chapters 2 and 3 of the report provide the legal background and closer examination of the four options. Chapter 4 provides the economic framework for analyzing access to justice in environmental matters, both from a theoretical perspective and applied to the four options. The results of a brief Law & Society analysis are presented in Chapter 5. Chapter 6 contains a small number of country studies. The empirical analysis contained in that chapter, in which the results obtained in the theoretical study are

tested by means of interviews, is crucial since it provides indications on how stakeholders experience the differences between the four options. Conclusions and policy recommendations are presented in Chapter 7.

Background of the study (Chapters 1-3)

Case law based on Directive 2003/35/EC provides a broad interpretation of the possibilities of access to justice in the areas where the EIA and IPPC Directives apply. However, the interpretation and application of Article 9(2) of the Aarhus Convention still significantly differs in the Member States. The most important development in case law comes from the *Slovak Brown Bear Case*, which forces national courts to interpret law as much as possible in such a way as to enable environmental NGOs, in line with Article 9(3) of the Aarhus Convention, to challenge administrative environmental decisions in Member States. However, this case alone will not lead to a full application of Article 9(3) since substantial differences between EU Member States in the application of Article 9(3) do exist and are likely to remain. Nevertheless, many Member States may anyway be forced to bring their national legislation in line with the obligations resulting from the Aarhus Convention as interpreted by the CJEU.

Law and Economics (Chapter 4)

Several economic perspectives on access to justice are presented, including a welfare economic analysis and a behavioral approach, which focuses on the question how different rules affect the incentives of stakeholders. Starting point of the economic analysis is that access to justice is considered positively, provided that such access does not lead to frivolous litigation. Environmental harm is seen as a negative externality which can be reduced by litigation. A judgment can be considered as a public good (since others than the parties involved may benefit from it) and when e.g. injunctive relief is awarded (prohibiting e.g. the legal installation of a harmful activity) such a decision can generate positive externalities. However, economists also stress that cases may generate high costs and therefore strongly advocate settlements over trials. In the behavioral Law and Economics literature particular ‘biases and heuristics’ are discussed that may affect the behavior of the judiciary, which may result in potential plaintiffs not bringing particular suits, preventing a maximization of social welfare. Standing for NGOs is from an economic perspective considered as positive since it can remedy the “rational apathy” problem that may emerge when the damage has a very widespread character, an argument that often applies to environmental harm. The same rationale that justifies class actions in case of consumer losses of a scattered nature also justifies standing for environmental NGOs, under the important condition that these eNGOs serve a public interest goal.

Addressing the question how the four options will affect the incentives of the various stakeholders involved, we conclude that the first two options (business as usual and addressing existing gaps via case law) have the disadvantage that legal uncertainty will to a large extent remain. Options 3 and 4

both rely on the creation of a new directive, which is likely to reduce uncertainty costs. In both options access to justice would be enlarged, especially in option 4 (sticking to the original proposal COM (2003) 624). This may potentially even lead to overdeterrence where questions could arise as a result of the broad scope of the proposal. This could hence lead to a slight preference for option 3 (drafting a new legislative proposal taking into account the recent case law). Our economic analysis added an additional perspective by looking at the extent to which the various options create a level playing field for industry and plaintiffs. Theoretically, differences between Member States as far as access to justice in environmental matters is concerned, could endanger the level playing field. Options 1 and 2 do not guarantee a level playing field, whereas this is more likely under options 3 and 4. However, in option 4 cross-border NGO standing would not be regulated. This would hence once more suggest a slight preference for option 3.

The advantage of option 3 is that compared to options 1 and 2 it provides more legal certainty and that there may be a higher deterrent effect in terms of internalizing environmental externalities. In economic terms option 3 may even lead to an optimal number of suits, while it would be less costly than option 2, since calls on the CJEU could be avoided. Option 3 might also have the advantage compared to option 4 that it is less controversial, given the high opposition that originally occurred against proposal COM(2003) 624. Option 3 potentially also has the advantage of creating fewer possibilities for strategic behavior by NGOs, and less of a danger of overdeterrence. Perhaps the new draft, under option 3 could include more precise definitions and eventually not aim at explicit criteria for recognition of NGOs. Also the environmental mediation that could be included in option 3 could (under specific conditions) have the advantage of creating a low-cost alternative compared to the court system.

Law and Society (Chapter 5)

The Law and Society approach enlightens why generally a requirement of locus standi is necessary, but also shows that sticking to a very strict standing requirement and hence restricting access to justice may not be in the public interest in the environmental cases addressed in this study. Options 1 and 2 would not bring legal certainty, but may rather result in an extremely diverse legal environment. Option 4 could have advantages, but given the opposition to the Commission's original proposal, this option may not be very realistic, even when taking into account that there is now some CJEU case law. Option 3 may represent the "best of both worlds" by on the one hand allowing an implementation of case law and the environmental acquis with respect to access to justice, while at the same time preserving some regulatory autonomy for the Member States. However, in order to make environmental access to justice work, it is important to develop a genuine legal culture in favor of environmental public interest litigation. Hence, lawyers and civil society organizations could accompany the process of implementing option 3.

Empirics (Chapter 6)

Chapter 6 presents the empirical part of the research and more particularly country studies relating to Latvia, the United Kingdom and Germany. The goal of these country studies was to test the hypotheses formulated in the earlier chapters and more particularly to examine the preferences of stakeholders (plaintiffs, operators, administrative authorities, judiciary) in the Member States with regard to the four regulatory options central to this study. Rather than asking interviewees to react to these options directly, specific elements that are part of one or more of these options were discussed, such as suspensive effect, possible outcomes of proceedings, system costs, requirements for eNGOs and litigation between private parties.

Interestingly, all interviewees held that it could be useful to provide a definition of the concept '*environmental matters*', to which Article 9 (3) of the Aarhus Convention refers. This follows up on the importance of legal certainty that was explicitly mentioned in the economic analysis. On the other hand, no one objected that this definition would follow from national law rather than EU law. Currently e.g. Latvia is doing without such a definition and decides on a case-to-case basis whether (an aspect of) the case is environmental, apparently not leading to large difficulties.

Latvia and the UK have broad standing rules. Latvia moreover has very low costs for access to justice. Despite the combination of broad standing rules and low costs, there have been few environmental cases in Latvia. Although various possible explanations for that result were provided, an important one seems to be the quality and functioning of eNGOs. Well-functioning eNGOs are able to bundle and channel environmental complaints, rather than creating excessive litigation.

Only Germany has particular demands as far as the recognition of NGOs is concerned. If option 3 were followed, one could consider that the new directive provides particular minimum requirements for eNGOs. These requirements could guarantee that eNGOs indeed act for the goal for which they have been created.

The economic notion of legal certainty is, as we mentioned earlier, an important issue for many respondents in the countries we analyzed. Surprisingly, however, the respondents did not expect that "leveling the playing field" would be considered as a major issue for enterprises. It was generally believed that the less enterprises are hindered by eNGOs, the better. However, it was not held that differences in that respect between Member States constitute a major argument in favor of harmonization. Reducing legal certainty, however, would.

To a large extent the interviews confirmed the theoretical preference for option 3. A new directive would have the advantage of e.g. providing some requirements for the functioning of NGOs. This would at the same time allow NGOs to have the positive function of streamlining and channelling social unrest and thereby preventing litigation. From that perspective, locus standi for environmental NGOs (not necessarily for individuals) would not be problematic.

Policy suggestions

Based on our theoretical and empirical research, opt for option 3, i.e. a new legislative proposal (or significantly amended COM(2003)624) incorporating the recent CJEU case law. This would also have the possibility of introducing an optional environmental mediation.

Additional policy suggestions are formulated with a slight degree of caution. The reason is that some of these recommendations are based on reactions from respondents during the interviews and have not always been subject of thorough theoretical research (for details see Chapters 6 and 7).

- Provide a more precise definition of what the environmental matters are to which Article 9(3) of the Aarhus Convention would be applicable, thereby avoiding complex and too detailed definitions;
- Stimulate the functioning of environmental NGOs;
- Reduce costs and risks for plaintiffs;
- Accompany any formal change in legislation by measures that will promote a behavioral change as far as the legal culture promoting access to justice in environmental matters and compliance with (European) environmental law is concerned.

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