

Conference session 2: Overview of access to justice in four national jurisdictions.

Summary

ClientEarth held this second session of the conference “*Access to justice in environmental matters: obstacles, impacts and ways forward*” on 15th October. This session provided us with the opportunity to get an overview of access to justice hurdles in Spain, Estonia, Germany and France, as well as to share national best practices and possible recommendations.

The conference opened with the situation in France, presented by **Arnaud Schwartz**, President of France Nature Environnement, the French environmental organisation with the largest lawyer’s network. Arnaud Schwartz is also a member of the EEB law working group, and a member of the European Economic and Social Committee.

Insisting on the fact that France is not as green as it pretends to be, Arnaud Schwartz started by giving us an overview of what he considers being the most significant remaining problems in France for protecting the environment:

- He highlighted the lack of resources to have people on the ground preventing environmental damages and violation of the laws. Consequently, he explained that infringements are often found too late to be avoided, or even stay unidentified.
- He raised the problem of punishments not being deterrent enough, especially toward public authorities. He explained that this is a real problem in a centralised state like France because some specific public authorities (namely the préfets) are in charge of taking decisions with several interest competing, which often results in poor environmental considerations.

- Arnaud Schwartz also emphasised that the lack of specialised prosecutors and judges in a complex legislative area such as environmental matters often results in disappointing judgments.
- Finally, regarding the legal avenues to protecting the environment and enforcing the rule of law, Arnaud Schwartz pointed out the ineffectiveness of the French system for injunctive relief in environmental matters, and explained that the different levels in the French judicial system make it very challenging to get a French judge refer a question for preliminary ruling to the CJEU.

To conclude, Arnaud Schwartz expressed France Nature Environnement points of view regarding possible ways forward:

- He considers that more political willingness is needed to address the above-mentioned issues and thus bring real changes. Therefore, he said that we have to keep on raising citizens' consciousness on environmental matters, as it directly influences the choice of public authorities appointed at local, regional and national level.
- Arnaud Schwartz also said that FNE supports the idea of having an independent authority for environmental protection, in charge of assessing whether a project complies with the environmental legislation. Such independent authority would replace the préfets.
- Finally, he proposed to create specific sanctions for activities threatening the environment.

The second speaker was the Spanish lawyer **Ana Barreira**, director and founding member of the International Institute for Law and the Environment IIDMA, a non-for-profit environmental law and policy center based in Spain and member of the European LIFE-funded project on access to justice.

Ana Barreira mainly brought to our attention the barriers that the Aarhus Convention has contributed to address since ratified by Spain in December 2004:

- Regarding standing, Ana Barreira explained us that the ratification of the Aarhus Convention had been followed by the law 27/2006, which introduced what she described as a “qualified” action popularis. Only open to non-for-profit legal person and under some conditions, this legal avenue has nevertheless led in 2017 to the recognition of standing to an NGO, considered for the first time as a concerned party (Judgement 1783/2015 of the Supreme Court in the case Fundacion Oceana vs Ministry of Public works).
- About injunctive relief also, Ana Barreira affirmed that a significant access to justice development occurred. She explained that bonds used to be too expensive for NGO to request injunctive relief, but for the first time in 2019 injunctive relief was granted without a bond to an environmental NGO.
- Ana Barreira also highlighted a major consequence on costs that the application of the Aarhus Convention had. She shared the experience of IIDMA in a case before the Spanish Supreme Court. In this case, because IIDMA was granted legal aids according to a direct application of Article 23.2 of the Aarhus Convention, the Court exonerated IIDMA from the judicial cost. Such decision is a major step forward for access to justice as it means that Spanish NGOs simply need to apply for legal aid, which is a basic administrative procedure, in order to be exonerated from judicial cost.

Having said so, Ana Barreira also mentioned the remaining issues regarding access to justice in Spain.

The main problem she raised was the timeline around court proceedings, being too slow to address the ecological problems on time. She explained that this time-related issue is partly caused by a lack

of resources provided to administrations and to the judiciary system. Finally, she expresses the need to have judges specialised on environmental law, to avoid the surprising rulings currently observed.

The overview of the Estonian access to justice situation was given by the lawyer **Kadi-Kaisa Kaljuveer**, who co-manage the Estonian Environmental Law Center (EELC) which is part of our LIFE-funded project.

Kadi-Kaisa Kaljuveer's work focuses on advising the local community, individual citizens, civic organizations and administrative body officials. Therefore, she could share her experience in several cases and raised the following points:

- To start with, she mentioned a lack of awareness about access to justice rights in environmental matters in Estonia. This remark concerned the civil society, which is even missing the basic understanding of procedural rights, but also the judges. Indeed, she explained that in a small country like Estonia with only a few number of judges, specialisation is not as common as in other countries because judges are asked to adjudicate in all the various areas of law.
- Then, Kadi-Kaisa Kaljuveer gave some insights regarding the standing situation in Estonia. She clarified that even though environmental NGOs are supposed to have standing, in practice it is often questioned in Court whether the NGO is truly working to protect the environment. Consequently, environmental NGOs are sometimes refused standing, and the Court verify very strictly that all arguments brought are environmentally related.
- Coming to the Estonian system for injunctive relief, Kadi-Kaisa Kaljuveer communicated that unfortunately injunctive relief is usually not granted. She also explained that injunctive relief can only be asked for at a very late stage of a project development, which minimises the possibilities to reverse the decision.
- Another issue raised by Kadi-Kaisa Kaljuveer relates to the burden of proof. As she explained, environmental NGOs lack resources to produce environmental impact assessment detailed and consolidated enough to compete in Court with environmental impact assessments carried out by the industries. Consequently, she regrets to see that judges often rely more on the industries' proofs.
- Kadi-Kaisa Kaljuveer also denounced the proceeding time, being in general too long to protect the environment, especially because the injunctive relief is rarely granted.
- Finally, regarding the Court costs in Estonia, Kadi-Kaisa Kaljuveer affirmed that even though costs are not excessive in Estonia, this financial concern still is dissuasive for individuals and NGOs. She highlighted the possibility for NGOs to ask for a cost reduction which is usually granted, but she affirmed that from her experience, costs still deters NGOs from going to Court, especially when they fear having to pay the cost of interveners.

Finally, the PhD candidate at the University of Kassel and former intern at the Secretariat of the Aarhus Convention, **Kathleen Pauleweit**, currently working at the Independent Institute for Environmental Issues – UfU e. V. in the Department of Environmental Law & Participation, gave us an overview of the German situation.

After a brief introduction on the German federal structure and court system, Kathleen Pauleweit started by commenting the provisions regarding legal standing in Germany, which she described as too narrow. She first explained that the general rule is that for individuals to have standing, there needs to be an impairment of a right, and that the courts interpret this rule quite restrictively. Yet, she further explained that thanks to an exception, this rule does not apply to environmental NGOs. However, she drew our attention to the difficulties around the recognition as an environmental NGO. She explained that the five criteria for recognition are very restrictive. Not a single environmental foundation and NGOs such as WWF or Greenpeace can be recognised under the Environmental Appeals Act (EAA) and therefore have no standing in Germany. Regarding this issue, she informed us that WWF filed the Communication 137 to the ACCC, and that the findings might result in a new amendment to the EA A, which is the most important legal instrument for litigation for ENGO in Germany. This complex and technical act has already been subject of seven amendments since its adoption in 2006.

Then, Kathleen Pauleweit commented on the scope for judicial review in Germany, which she also described as too narrow. The Environmental Appeals Act entails a final list of acts and omissions that can be reviewed. Regarding this limitation, she informed us about another pending admissible Communication 178 to the ACCC, arguing that Germany is not in compliance with the Aarhus Convention because this final list does not entail all relevant acts and omissions.

Kathleen Pauleweit also shared her concerns regarding the last legal developments in Germany, with the legislator bringing further legal uncertainty. As an example, she mentioned the new provision on abusive or dishonest conduct added by the legislator to the appeal procedure, which she suspects is a sneaky way to reintroduce the provision on material preclusion, abolished in 2017. Overall, Kathleen Pauleweit denounced a double standard when it comes to access to justice for environmental NGOs. She pointed out as an example the newly added limit of ten weeks for environmental NGOs to provide their statement of claims, while general German administrative procedural law contains no strict deadline

Also, Kathleen Pauleweit updated us about a forthcoming new dispute settlement procedure for denied access to information requests in Germany. She explained that so far, disputes in Germany around denied access to environmental information were heard by administrative courts, but that in September 2020 the federal ministry for the environment proposed to introduce a new alternative review procedure before the Federal Commissioner for Data Protection and Freedom of Information. She is convinced that the new dispute settlement procedures can complement the administrative court procedure.

To conclude, Kathleen Pauleweit advised environmental NGOs in Germany but also in Europe in general to stay alert and cautious about the political developments, and be ready to hold our governments accountable if they do not comply with international and unional legal standards.