Questionnaire
EUFJE Conference 2013, VIENNA
29/30 November 2013

Access to Justice in matters of environmental law

Danish report
High Court Judge Karsten Bo Knudsen

Introduction to the Danish system on judicial and administrative appeal in environmental matters

In contrast to the continental tradition in for example Germany, Sweden and the Netherland, the Danish judicial system is not divided in administrative courts and civil courts. The Danish judicial system is based on courts at three levels (lower courts, two high courts and the Supreme Court) which are dealing with civil cases as well as cases on decisions by national and local authorities and Administrative Appeal Boards.

Regarding environmental legislation, decisions of administrative authorities as permits and plans the legislation mainly provide access to administrative appeal to the Nature- and Environmental Appeal Board (NEAB) which is an independent administrative appeal body established by the Act on the Nature- and Environmental Appeal Board. However, neighbours or NGOs complains about that a company is not complying with a permits under the Environmental Protection Act cannot be brought before the NEAB – only the permit and the conditions of permits can be brought before the NEAB. The number of appeal cases before the NEAB pr. year are about 3.000 cases. The majority of the cases concerns disputes on local planning and restrictions on change of land use under the Nature Protection Act.

Decisions by the NEAB can be brought before the lower court by the citizen/company significant and individual effected by the NEAB decision and by NGOs which have made administrative appeal. Lower court judgements can be appealed to the higher court. Early the number of the NEAB decisions which are brought before a lower court are 30-35.

When Denmark in 2000 adopted legislation to ratify the Aarhus Convention the former system of appeal to the Environmental Agency (under the Ministry of Environment) was changed replacing the Environmental Agency as the appeal body with the NEAB to ensure a timely and not prohibitively expensive legal review by an independent body. However, some of the administrative decisions within the scope of the Aarhus-Convention art. 9(1) and art. 9(2) cannot be brought before the NEAB but can only be brought before the national courts. For example, decisions on EIA on most offshore projects cannot be appealed to the NEAB. Instead cases on the legality must be raised before the lower courts which never has decided to give suspensive effect of the pleading case.

During the last years, the Parliament has modified the access to administrative appeal to the NEAB. First, because of an opening letter from the Commission, the access to appeal to NEAB regarding the Danish implementation of the SEA-Directive (2001/42) was extended in 2009. However, one year later access to appeal to NEAB was restricted regarding the Danish water plans (under the Water Frame Directive 2000/60) implying that the NEAB is only entitled to review errors in the preparation of the water plans. Recently, the Minister of Environment has send a draft proposal for a new legislation in public hearing and according to the proposal of the Minister, there will not in the future be access to appeal to the NEAB regarding water plans.

A. General Questions

1. What was the influence on your national legal order, if any, of the recent developments in the case law of the Court of Justice of the European Union (CJEU) on standing of individuals and/or NGOs (notably cases C-237/07 *Janecek*; C-263/08 *Djurgarden*; C 115/09 *Trianel*; C 240/09 *Slovak Brown Bear; C 416/10, Krizan*). Have environmental laws been amended? Please illustrate.

Answer:

These landmark cases from the CJEU have neither been reflected in legislation nor by national Danish courts or by the NEAB. The reason seems to be that very few lawyers are familiar with these cases and there consequences. In particular, the Janecek ruling in C-237/07 on air quality plans, the Slovak Brown Bear ruling in C-240/09 on the application of the Aarhus-convention art. 9(3) regarding protected species and the Krizan ruling in C-416/10 on the obligation of courts to ignore rulings of higher courts in conflict with EU Law and suspend IPPC-permits will be a challenge for Danish national courts and the NEAB.

2. Have there been any changes in the jurisprudence of the national courts concerning standing of individuals and/or standing of NGOs as a result of CJEU's recent judgements? Have the courts in your country relied on the principle of effective judicial protection or used arguments about CJEU case law in order to widen up standing for individuals and/or NGOs in environmental procedures since the signing/ratification of the Aarhus Convention? If so, please illustrate.

Answer

It has not been possible to identify any change in jurisprudence by Danish courts regarding standing, suspension or other legal remedies since the Aarhus Convention was ratified. The Aarhus-convention has been used as an argument by a NGO to support standing in a case regarding violation of art. 6(3) of the habitat directive in the beaver case (UfR 2001.1594 V). Standing was accepted by the high court but without any reference to the Aarhus-Convention. In a recent case on a test centre for Windmills nearby Special Bird Protected Areas, the Aarhus Convention was used as an argument for the suspensive effect by a NGO but the argument was not even commented by the High Court or the Supreme Court which rejected suspension arguing that the public interest in not postponing the project were more important than the interest of the damage to the plaintiff (UfR 2012.2572 H).

3. What are, to your opinion, the main challenges for judges in your national legal system when it comes to access to justice in the field of environment and the development of the CJEU´s case law?

Answer

The main challenges for judges are in my opinion the lack of knowledge by lawyers of the CJEU's case law in environmental matters and its implication on even rather ordinary cases raised by NGOs.

4. Taking into account that access to justice in environmental matters is required to not be prohibitively expensive (cf. Art 25.4. IED; Art 11.4. EIA Directive, both reflecting Art 9.4. Aarhus Convention): How do you, all in all, evaluate the system of access to justice in your country when it comes to costs and liability for costs (e.g., court fees, lawyer´s fees, cost for administrative procedure, expert fees)? Do costs have a chilling effect in environmental litigation?

Answer

The ban of prohibitively expensive costs in art. 9(4) has been addressed by the Compliance Committee under the Aarhus Convention in cases against United Kingdom, Ireland and Denmark and by the CJEU in C-427/07 *Commission v. Ireland* and lately in case C-260/11 *David Edwards v. Environment Agency*. Until now, the question of most of the cases have been to what extend does the Aarhus-Convention art. 9(4) and the implementing EU-legislation protect NGOs or the citizens as the loosing party to pay the legal costs of authority as the wining party.

Appeal fees

The Danish case before the Compliance Committee on prohibitively expensive legal costs differs from the other cases. The background was that the Parliament in 2010 increased the fee for appeal to the Nature- and Environmental Appeal Board (NEAB) from 500 D.kr. to 3.000 kr. (65 € to 400 €). The fee was only increased for private companies and NGOs – not for individual citizens and the reason for increasing the fee was an officially attempt to reduce the number of appeal cases before the NEAB. The Danish Ornithological Association made complain to the Compliance Committee arguing that this was in conflict with art. 9(4) on prohibitively expensive costs. The Ministry of Environment rejected the claim arguing that the amount of money involved was small compared to the level of income in Denmark. However, the Compliance Committee finds that the increased appeal fee was in conflict with the ban of prohibitively expensive costs in art. 9(4) based on three reasons: (1) that NGO's actually were succesfull in most of the appeal cases and by this improve environmental and the effective implementation of the Danish Livestock Act; (2) the intention and expected result of the introduction of the new fee on the number of appeals by NGOs to NEAB; and (3) the fees for access to justice in environmental matters as compared with fees for access to justice in other matters in Denmark.

Paying the winning party's costs

The Compliance Committee's findings in the decision of 24 September 2010 in a case on EIA in the extension of Belfast Airport that it was in conflict with art. 9(4) of the Aarhus Convention that a local NGO losing the case should pay the authorities as the winning part 39.454 £ since this was prohibitively expensive. In another case decided the very same day, the Compliance Committee concluded that the British legal system which requires the loser of the case to pay the legal costs of the winner was not in accordance with art. 9(4) stating that it wasn't sufficient that the British court in many environmental didn't let the NGOs pay the legal costs because of legal uncertainty. In April 2013.

In case in C-427/07 *Commission v. Ireland* the CJEU took almost the same position declaring that Ireland failed to comply with the ban on prohibitively expensive costs in the EIA Directive since the Irish legislation didn't include such a prohibition.

In case C-260/11 *David Edwards v. Environment Agency* the CJEU seems to take a more nuanced view on the matter concluding that the ban of prohibitively expensive legal costs means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result and the national courts must ensure this taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment. In this assessment, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs and take into account the

situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime. The fact that a claimant has not been deterred in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive. Finally that assessment cannot be based on different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal.

Danish case law

The ban of prohibitively expensive costs in art. 9(4) and in EU legislation has until now not been addressed by Danish Courts. This can partly be explained by the fact that NGOs in some cases are granted all legal costs by the Danish State. However, this it not always the case as it can be illustrated by Eastern High Court ruling 7 November 2008 (MAD 2008.1950) in which a local NGO challenge the decision of the Minister of Transport and the Local Council to establishing a beach park without making an EIA screening. The local NGO lost the case in the lower court and in the high court and was ordered to pay about 65.000 Euro in legal costs to the Ministry and the Local Council, which cause the local NGO to go bankrupt.

B. Examples:

The aim of the following examples is to facilitate understanding of standing rules and conditions for access to justice in the various legal systems. The aim is to illustrate how different countries provide for access to justice in environmental matters and to prepare a discussion on the topic. **Please highlight the specific aspects of your legal system without going to much into detail. If possible, please deal with all the examples.** *Please feel especially welcome to illustrate your answer by referring to examples of national case law.*

Example 1: The competent authority has adopted an action plan on air quality that will not adequately reduce the risk of exceeding EU air quality limits (contrary to relevant secondary EU law).

Questions Example 1:

B.1. What are the possibilities open for the public to legally challenge the plan and to ensure that an adequate plan is adopted and implemented? If any, who (individuals, NGOs, other) is entitled to challenge the plan? Is the appellant/plaintiff required to provide evidence on potential harm/damage and to specify the measures that should have been taken?

B.1 - Answer:

There have not been such cases in Denmark. If the NGO is claiming that the plan is not adopted in accordance with the SEA-Directive (2001/42), the question of environmental impact assessment – but not any other questions - can by the NGO be brought before the Nature- and Environmental Appeal Board (NEAB). Any other questions regarding the air quality plan cannot be brought before the NEAB but must be brought before a lower court.

Whether it is possible at a Danish court to have a legal review on the air quality plan is disputed. When the Ministry of Environment in December 2011 adopted the water plans under the Water Frame Directive, this decision gave cause to about 300 complains to the NEAB and about 500 legal actions before the lower courts. In the court cases, the Lawyer of the State claimed that the water plans could not be subject to a full legal review and that the court could only decide on concrete matters effecting individuals. The question was never answered by the court because in December 2012 the NEAB annulled all the water plans decided by the Minister of Environment because insufficient public hearing.

Example 2: The competent authority has issued a permit for an infrastructural construction project (e.g., a motorway, a power line or a funicular). Part of the site concerned is situated in a Natura 2000 area. In spite of a negative assessment of the implications for the Natura 2000 site, the competent authority agreed to the project for imperative reasons of overriding public interest (Art 6.4. Habitats Directive).

Questions Example 2:

B.2.1. Who (individuals, NGOs, other) is entitled to challenge this decision by legal means? In what way do individuals need to be affected by the decision in order to have standing? With regard to standing rules for individuals and NGOs, does it make any difference whether the project in the example is subject to an EIA or not?

B.2.1. - Answer:

If the EIA permit is decided by legislator, NGO's and individually effected citizen has standing to bring the validity of the decision before a national court. The last example is a *case on a test centre for Windmills nearby Special Bird Protected Areas (UfR 2012.2572 H). The standing of NGOs was questioned by the lawyer of the State, but as in all previous cases standing was accepted by the court. It should however be added that Denmark has not in any case used the derogation in art. 6(4) of the Habitat Directive. All cases in Denmark have been on compliance with art. 6(3) of the Habitat Directive and until now the Danish Courts only in one case on Nature 2000 Protection has set aside the review of the public authorities.*

If the EIA permit to the project is decided by local authorities the NGO can make complain to the Nature- and Environmental Appeal Board (NEAB). One of the last example is a case decided by the NEAB 10 April 2013 in which the approval of a new road through a Natura 2000 site was annulled because of insufficient impact assessment and with particular reference to recent case law of the CJEU.

If the project falls outside the scope of the EIA Directive NGOs and individual citizens will not always have access to the NEAB or courts. First, under the Nature Protection Act individually effected neighbours have no right to complain to the NEAB but can only go to court. Second, if the project has negative impact on a Natura 2000 site, local NGO will in many cases only have access to the NEAB if the local NGO asked for information on the decision before the decision was taken. If this precondition for complain to the NEAB is not meet the local NGO will neither be able to bring a complain before the NEAB nor to bring a complain before a Danish Court.

B.2.2. Does an administrative appeal or an application for judicial review automatically have a "suspensive effect" on the decision at stake?

In case there is no automatic suspension in your national legal order: Under which conditions can the appellant obtain a suspension of the permit decision for the infrastructural project? Are there other measures of interim relief available to prevent negative harm to the environment until the final decision has been taken? In case of an automatic suspension: Can the developer of the infrastructural project ask for a "go-ahead-decision" in your national legal order?

B.2.2 - Answer

Administrative appeal: Administrative appeal of EIA permit or IPPC permit to the NEAB has no suspensive effect unless the NEAB decide otherwise. In practice, the NEAB almost never order suspensive effect of administrative appeal of EIA permits or IPPC permits. Administrative appeal of local plans or other plans have no suspensive effect. The implication of this has been seen in the more than 1000 cases on IPPC permit to animal farming under the Livestock Act in which 95 % of the permits were annulled or changed by the NEAB (mostly because Natura 2000 impact and failing BAT). But because the farmer in many cases did already use the IPPC permit during the appeal, the annulment of the permit was postponed one year leaving the Municipality time to submit a new IPPC permit, which then went on a new appeal and in some cases also annulled the second time by the NEAB.

Administrative appeals of dispensation from restriction of land use under the Nature Protection Act has suspensive effect and the same is the case regarding administrative appeal of administrative orders to reduce pollution. In these cases the developer can ask the NEAB to annul the suspensive effect of appeal and ask for a go-ahead-decision. In practive the NEAB mainly reject such request.

Before Danish Courts: When EIA permits or IPPC permits are challenged before a Danish court, this legal action has no suspensive effect according to the Constitution section 63. However, the Supreme Court did in 1994 declare the Constitution doesn't prevent Danish Court to order suspensive effect when the case is pleading, provided the case is reasonable founded, the none suspension could cause irreversible damage or damages which out weight the public interest in no suspension. However, there are less than a handful examples of cases in which this power have been used by Danish court and the discretion has never been used when citizens or NGOs has challenged an EIA permit or an IPPC permit.

Example 3: The competent authority has issued a permit and established permit conditions for an installation falling under the scope of the Industrial Emissions Directive – IED (e.g., a waste treatment facility or a tannery) The national permit procedure had been carried out in accordance with requirements on public participation (Art 24 IED).

Questions Example 3:

B.3.1. Are individuals in your country entitled to challenge the permit decision on the grounds that permit requirements of the IED have not been met: say, that the best available techniques have not been applied and energy is not used efficiently?

B.3.1 - Answer:

Yes, to the first part of the question: Individuals as well as NGOs are entitle to challenge whether the IED-permit meet the substantial requirements on BAT and EU standards and national guidelines on emission of substances, noise and so on as well as whether the impact on Natura 2000 sites or on EU

protected species are in conflict with the Environmental Protection Act and the relevant EU Directives – and this is the question in a large number of cases before the NEAB and to some extend before the Danish Courts.

Regarding lack of efficient use of energy this isn't a matter which is really dealt with in the IPPC permits until now and I don't recall any cases from the NEAB in which such allegation has been presented. But following the normal understanding I expect that such allegation on energy efficiency could be rejected as being a matter which is covered by energy legislation and not environmental legislation (so called speciality principles of interpretation or something like *lex specialis*).

B.3.2. Is an NGO entitled to judicial review of the permit decision, even if it did not previously take up the opportunity to participate in the decision-making procedure?

B.3.2 - Answer

The lack of participation of the NGO in the decision making procedure doesn't have any impact on the right of the NGO to administrative appeal to the NEAB or on the right to take legal action before a court.

Example 4: Citizens are concerned about a landfill that has been granted permission but is obviously operating in breach of permit conditions. Samples that have been taken by an NGO indicate that there is imminent danger of a drinking water source being contaminated. The competent authority is not taking any action.

Question Example 4:

Evaluate the possibilities of members of the public (individuals, NGOs) to ensure that (remedial) action is taken.

Answer

If a landfill doesn't comply with the conditions and the authorities doesn't take action against the landfill, neither individual citizens nor NGOs have any access to appeal to the NEAB because such appeal on lack of enforcement is prevented by the Environmental Protection Act section 69. Moreover, legal action before a Danish court by the NGO against the operator of the landfill will be rejected by the court based on the argument that it is within the discretion of the public authority how to enforce any violation of the permit. Thus, under Danish Law the NGO has no legal remedy to take enforcement measures in these cases. The NGO can ask the Ombudsmand to look at the matter or ask the police to take action but such request doesn't give the NGO any of the remedies required under art. 9(4) of the Aarhus Convention. Therefore, it is questionable whether Danish legislation provide the access to justice required under art. 9(3) of the Aarhus Convention.