Questionnaire
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Access to Justice in matters of environmental law

Finland
Judges Jan Eklund, Vaasa Administrative Court, and Kari Kuusiniemi, the Supreme Administrative Court

Introduction

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.

In Finland, society's environmental interests have traditionally been promoted by administrative authorities which, each within their administrative competence, have had the right to appeal in matters concerning the environment. Authorities responsible for nature protection, environmental quality, fisheries management, roads and waterways, *etc*. have been able to appeal decisions contrary to their relevant interests. In contrast, NGOs´ right of appeal was limited until the mid-1990´s. The administrative judicial procedure law was interpreted narrowly so as to exclude environmental or inhabitants´ associations from the groups who were entitled to appeal.

According to the environmental clause (sec. 20) of the Finnish Constitution (originally sec. 14 a in the Constitutional Amendment in 1995), nature and its biodiversity, the environment and the national heritage are the responsibility of each citizen. Public authorities shall strive to ensure citizens a healthy environment and the possibility to influence decisions that concern their own living environment.

This constitutional provision, along with the principles of the Aarhus Convention, has led to several legislative amendments. Currently, environmental legislation includes numerous provisions affording NGOs the right of appeal. For example, the Environmental Protection Act (EPA, sec. 97), states that appeals may be made by: 1) those, whose right or interest may be concerned (the parties); 2) registered associations and foundations whose aim is to protect the environment, human health or to promote the amenity of a dwelling area, provided that the project affects the organization's geographical area of activity; 3) the municipality where the project of the applicant takes place, and any other municipality affected by pollution from the the project; 4) the regional environmental authority (Centre for Economic Development, Transport and the Environment), the municipal environmental authority of the municipality where the project of the applicant takes place, and the environmental authority of any other municipality affected

by the project; and 5) any other authority promoting specific public interests that are affected by the project.

In Finnish law, there are no requirements regarding the number of members of a NGO or the length of time a NGO has been active as requisites for the right of appeal (cf. the Djurgården case). The only prerequisite is that the NGO be registered by the competent register office and that its regulations include the mandate to influence environmental matters.

Additionally, several other environmentally relevant acts have similar provisions, such as the Water Act, the Nature Protection Act, the Land Use and Building Act (in part), the Highways Act, the Railways Act and the Mines Act. Through these statutes, the legislature has fulfilled the constitutional task set out in sec. 20 of the Constitution.

There are some acts, however, that do not include modern provisions of expanded rights to appeal*, e.g.*, the Forest Act and the Expropriation Act; previously also the Hunting Act, which has recently been amended to enable NGO appeals against certain derogations of closed seasons and protection provisions. Nevertheless, the Supreme Administrative Court has taken, already before the above mentioned precedential decisions of the Court of Justice, into consideration the interpretative effect of the Constitution and the obligation to ensure the effectiveness (effet utile) of the EU Law, and heard the appeals of environmental organizations with respect to derogations from the protection of wolves (SAC 2007:74) and closed seasons for unprotected birds (SAC 2004:76). In the wolf case the Court referred to the environmental clause of the Constitution, the obligation to guarantee an effective application of EU Environmental Law and the comparable provisions in the Nature Protection Act, according to which environmental NGOs have locus standi.

The most notable Finnish case referring directly to the ECJ Slovak Brown Bear case is the judgement of the Supreme Administrative Court (SAC 2011:49) in the case of an expropriation permit for a gas pipeline which had been subject to an EIA procedure (an Annex II project). According to the Expropriation Act, the right to appeal against the permit decision belongs to the parties, primarily owners of the real estates which may be expropriated. An NGO lodged appeals against the permit decision on environmental grounds. In its reasoning the Court referred to the relevant provisions of the EIA Directive, the Aarhus Convention and the corresponding national provisions and quoted extensively the judgment of the ECJ in the Slovak case. The Court emphasized that, according to the established interpretation of the administrative procedure law, the NGO in question would not have the right of appeal against the expropriation permit. However, taking into account the purpose of the NGO and the grounds for its appeal, the field of application of the Aarhus Convention, provisions of the amended EIA Directive and the interpretative effect of the case law of the ECJ, and the fact that the project in question had been subject to an EIA, the Court heard the appeals of the NGO.

The Trianel case, on the contrary, has had no effect on Finnish legislation or jurisprudence. When an NGO has standing in a case, it can invoke all possible grounds to support its appeal.

There are no limitations linked *e.g.* to a public subjective right. By the way, the same is true for private parties: inhabitants affected by emissions from an industrial plant may invoke grounds based on nature protection to support their appeals against the environmental permit of the plant.

Neither seems the Krizan case be problematic from the Finnish point of view. It is unthinkable that a planning decision could be kept secret, and there is also an explicit provision in the Finnish pollution control law that information about the emissions and environmental impacts of a plant never can be kept confidential (sec. 109 of the EPA).

By the EIA Act, individual persons and NGOs alike may present their opinions on the project that is being assessed and on the assessment itself. The EIA itself is not a decision that could be appealed, but those having standing to appeal against the later permit decisions of the project may contest the legality of a decision to accept the offered EIA as sufficient or a decision that EIA is not required.

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.

See above. Finnish Courts have not always been in the forefront to promote the aims of the Aarhus Convention with regard to the standing of NGOs, but the trend seems to be changing towards a more open and permissive attitude. However, the present specific provisions in almost all relevant environmental acts affording NGOs standing irrespective of the number of their members or years of operation, have solved the problems linked to the standing of NGOs.

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?

National practices, legislation and administrative structures are deeply rooted in the society. The obligations of the Aarhus Convention are in part wider than the Finnish practice has been. The occasional conflict between national practice and international obligations is, however, not easy to discern, due to the weight and familiarity of the customary practice. Especially in those situations, where explicit provisions on the standing of NGOs are lacking, interpretation may be challenging.

One challenge in interpreting the judgments of the CJEU is linked to dissimilarities of the systems in the member states. The decision of the CJEU is partly formed taking into account

of the national legislation and practice, which may cause difficulties in interpreting the key message of the judgment in the legal system of another member state.

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?

In Finland, environmental litigation is almost exclusively a matter of strife between parties over the conditions and terms of environmental permits or rectification of violations and negligence. These cases are settled by the administrative courts. In practice, full cost liability is applied only rarely, in certain two-party proceedings. In matters concerning environmental permits, court procedure costs are to a large extent regarded as inherent to the commercial activity and, thus, to be borne by the operator regardless of the outcome of the case in court. Hence, the cost risk to be borne by NGOs and individuals is considerably reduced, not to say inexistent.

In civil and criminal court procedure the rule is that the loser pays. Thus, in court proceedings concerning an alleged criminal offence (*e.g.*, an emission exceeding the limit values) causing economic loss to the plaintiff, the losing party would pay the adversary´s costs as well as his own. The same is true for civil cases concerning damages for environmental pollution. This constitutes a risk of expenses, which may be considerable. High cost risk in many cases deters private persons from opening court proceedings in civil cases.

Court fees are not very high. In administrative courts the fee for the decision is less than 100 euro and in the Supreme Administrative Court some 250 euro. In administrative procedure it is not even necessary to hire a lawyer; in the written procedure even laymen may successfully proceed by hand-written appeals!

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?

The air quality directive (2008/50/EC) has been implemented through the Environmental Protection Act (amended sections 102-102e, 13/2011). Municipalities shall, insofar as possible, ensure good air quality in their area of administration, paying attention to the provisions on air pollution under the EPA and the provisions on air quality protection plans and short-term action plans drawn up to secure air quality. In the implementation of plans drawn up to secure air quality, municipalities may issue regulations on restricting and suspending activities other than those subject to a permit. Separate provisions are issued on lowering the emissions caused by activities subject to a permit and preventing unpredictable, severe air pollution. These provisions of the EPA include *i.a*. amending or even revoking a permit, under conditions specified by law.

If the alert threshold specified under the EPA for sulphur dioxide or nitrogen dioxide, is exceeded or there is a risk thereof, the municipality must prepare a short-term action plan to reduce the risk and duration of such an exceedance. When the alert threshold for ozone is exceeded or there is a risk thereof, the municipality is only obliged to prepare a short-term action plan if such a plan would be of use in reducing the risk, duration or severity of such an exceedance. The plan must be prepared without delay after the alert threshold has been exceeded or a risk thereof has been detected.

Municipalities shall announce the draft plan on the official notice board of the municipality, in a local newspaper or in electronic format on the web, thus giving the public the opportunity to express its views on the draft plan. A statement on the draft plan must be sought from the regional environmental authority, the Centre for Economic Development, Transport and the Environment.

The public shall be informed of the approved plan and of how account has been taken of the views expressed by the public and the regional environmental authority. The approved plan shall be communicated to the Centre for Economic Development, Transport and the Environment and to the Ministry of the Environment.

There are some specific provisions concerning exceedance of limit values due to road sanding and salting as well as postponement of the deadline related to limit values for nitrogen dioxide.

There are no specific provisions in the EPA concerning the right of the public to challenge the plan as such. According to the Gov´t Proposal, the plans themselves would not have direct legal effect and, thus, could not be subject to appeals. However, if the municipality would not prepare a necessary short-term action plan, the Centre for Economic Development, Transport and the Environment could according to the Gov´t Proposal order the municipality to do so. The legal basis would be the provision concerning rectification of a violation or negligence (sec. 84 of the EPA). This implies that an action may be initiated before the Centre by whoever may have a right or interest in the matter (*i.a*. inhabitants of the relevant area) and

NGOs active in the area (sec. 92 of the EPA).

If the supervisory authority declines the initiative, the parties and NGOs have the right to challenge the negative decision in the administrative court. The same would apply in situations where the plan has been drawn up but is insufficient. There are no specific rules concerning evidence in these cases, but the court assesses the situation freely. There is certainly no legal obligation for the appellant to provide conclusive evidence in support of his claims . The risk of exceeding limit values as such should suffice.

Legal remedies will, however, be applicable when the plans are implemented. If the municipality decides to issue regulations on activities (not subject to a permit) or if the permit authority decides to amend a permit in order to implement the plan, they must base their decisions on the relevant substantive provisions in the EPA. Thus, legal protection in these cases is based on the general provisions of the act, affording wide possibilities to lodge appeals (e.g. inhabitants or NGOs who feel that restrictions are not tight enough).

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?

In Finland, infrastructure projects are typically regulated in specific acts. The Environmental Protection Act as such does not normally apply. For the sake of simplicity, we take construction of a motorway as our example.

Under the Highways Act, construction of a motorway shall be based on a preliminary road plan and a final engineering plan adopted by the transport authority. These plans under the Highways Act can be characterised as hybrids of a land use plan and a permit.

Engineering plans shall be based on legally binding land use plans, as provided in the Land Use and Building Act. Thus, land use planning guides decision-making concerning location of highways. The provisions laid down in the Nature Protection Act and issued pursuant thereto shall be taken into consideration when drafting preliminary and final engineering plans. Consequently, the plans under the Highways Act shall be assessed according to national provisions implementing Article 6(3) of the Habitats Directive and, if the engineering plan would significantly deteriorate the integrity a Natura site, the plan must not be adopted, except in

situations defined in Article 6(4) of the Directive.

As a rule, the Finnish Transport Agency is the competent authority to adopt plans under the Highways Act. Its decision can be appealed in a regional administrative court and further in the Supreme Administrative Court.

Standing belongs to parties, such as real estate owners and inhabitants of the area where the motorway will be located and where the environmental impacts of the road construction itself or the future traffic will affect rights and interests of these persons.

In addition, municipalities, Centres for Economic Development, Transport and the Environment and regional councils are entitled to appeal decisions to adopt preliminary and final engineering plans whose impacts affect the area of the municipality or the jurisdiction area of the authority.

Also NGOs have nowadays locus standi according to the Act: in matters coming under their purview, registered local or regional corporations or foundations are entitled to appeal decisions to adopt preliminary or final engineering plans whose impacts affect the purposes of the NGO.

A preliminary engineering plan shall always be drafted for projects where an EIA is mandatory. As motorways are included in Annex I of the EIA Directive and the corresponding national legislation, a preliminary engineering plan is necessary before drafting a final engineering plan for a motorway. Interested parties, NGOs *etc*. would, of course, have their say also in the EIA process. However, the parties´ court standing is not affected by the rules concerning the EIA.

Under the Finnish system, the authority adopting engineering plans (or granting environmental permits under the EPA) does not have the competence to approve of the project on the basis national regulation implementing Article 6(4) of the Habitats Directive. This competence is vested exclusively with the Government (see the Nature Protection Act, section 66). The authority responsible for adopting engineering plans must not approve of the project before the Government has taken its affirmative decision. The Government´s decision, in turn, can be appealed on legality basis in the Supreme Administrative Court by those whose rights or interests are affected and by registered local or regional associations whose purpose is to promote nature conservation or environmental protection (NGOs).

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?

Under the Administrative Judicial Procedure Act the main rule is that an appeal has a suspensive effect on the decision (sec. 31(1)). There are, however, exceptions to this rule in the above-mentioned act itself and in other legislation. Decisions concerning the adoption of preliminary or final engineering plans may be enforced despite appeal unless otherwise ordered by an appellate court (sec. 107 of the Highways Act). When an appeal has been lodged, the court may, however, prohibit the execution of the decision, order a stay or issue another order relating to the execution of the decision.

Regarding environmental permits under the EPA, it may be mentioned that operations requiring a permit must not start before the permit decision has gained legal force. However, there are specific provisions concerning enforcement of decisions regardless of appeal. The permit authority may, at the request of the permit applicant, on grounds laid down in the Act and on condition that the enforcement does not defeat the purpose of the appeal, order that, regardless of appeal, the activity may be started in accordance with the permit decision. The applicant shall deposit acceptable security for restoration of the environment in case the permit decision is annulled or its terms changed. The appellate court may, on appeal, annul an order or amend it or otherwise prohibit the enforcement of the permit decision (sections 101-101a of the EPA).

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?

If an individual has status of a party under sec. 97(1) of the EPA (a person whose rights or interests the project may affect adversely), he or she may contest the permit decision on any grounds, including the requirements of the IED. But, obviously, there is no actio popularis affording anyone locus standi only in order to control that the provisions of the IED or other environmental directives would be implemented and enforced correctly.

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?

Permit decisions under the EPA may be challenged by appeals to Vaasa Administrative Court. NGOs have the right of appeal (see under A.1. above, sec. 97 of the EPA) and this right is not

restricted to those parties who have participated in earlier stages of the permit proceedings. Appealing against the decision by the Vaasa Administrative Court to the Supreme Administrative Court, however, requires that the party has first contested the permit decision in the administrative court, unless the administrative court has changed the permit decision so as to negatively affect the rights or interests of that party (e.g. the permit applicant whose permit has been revoked by the administrative court on the appeals of neighbours).

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.

To start with, the EPA includes an absolute ban on groundwater pollution. Sec. 8 of the EPA reads that a substance shall not be deposited in or energy conducted to a place or handled in a way that groundwater may become hazardous to human health or its quality otherwise materially deteriorate in areas important to water supply or otherwise suitable for such use; groundwater on the property of another may become hazardous or otherwise unsuitable for usage; or the said action may otherwise violate the public or private good by affecting the quality of groundwater.

The prohibition is effective irrespective of a permit. Even if the above mentioned consequences were caused by operation of the landfill in accordance with permit conditions the supervisory authority shall take the requisite measures, not to talk about operation in violation of the permit, to remedy the consequence.

Under the EPA (sec. 84), a supervisory authority may prohibit a party that violates the EPA or a decree or regulation based on it from continuing or repeating a procedure contrary to a provision or regulation or order a party that violates the EPA or a decree or regulation based on it to fulfil its duty in some other way. A party can also be ordered to restore the environment or to eliminate the harm to the environment caused by the violation. An operator may be ordered to conduct an investigation to establish the environmental impact of operations if there is justified cause to suspect that they are causing pollution contrary to the EPA.

A rarely, if ever, used provision in the EPA (sec. 86) enables also immediate action in cases of imminent danger. If a threat of environmental pollution causes direct harm to human health or immediate risk of major deterioration of the environment, the supervisory authority can suspend the activities if the harm cannot be eliminated or sufficiently reduced otherwise.

If the supervisory authority refuses to order rectification of the violation or negligence or suspension of the polluting activity, whoever may have a right or interest in the matter, NGOs

and certain authorities have the right to take legal action before the supervisory authority in order to have the violation rectified (sec. 92 of the EPA). A negative or insufficient decision of the authority can be challenged in the Vaasa Administrative Court and further in the Supreme Administrative Court by the same persons, NGOs and authorities. In the improbable case that the supervisory authority would take no decision on the basis of the action, the situation is unclear. Normally, the administrative court cannot examine the case, if there is no decision but only passivity by the authority. For sure, the Parliamentary Ombudsman or the Chancellor of Justice would give a notification to the civil servants in charge of the default.

Violation of the prohibition on groundwater pollution is also a criminal offence, regardless of how severe the consequences will be. The affected persons and NGOs may report the criminal offence to the police. The police will start an investigation, on the grounds of which the prosecutor will decide to press charges or not. Affected individuals can also initiate a criminal case.