Comparative report:

Environmental private law

Intervention by OEKOBUERO as observer in

ACCC Case ACCC/C/2013/85/UK

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OEKOBUERO has been following the written submissions in case ACCC/C/2013/85 with regard to the application of the Aarhus Convention in matters of private nuisance cases. In order to support the arguments of the communicant we made a request in our network and briefly summarized the legal position in various EU countries.

The following gathers information from six EU member states on environmental private law. In particular, the question of which private persons/entities have standing to file lawsuits against other private persons or entities for violations of environmental laws is answered. This shall aim to demonstrate what kind of private nuisance cases fall under the Aarhus Convention as they are an integral part of environmental law.

1. AUSTRIA

In Austria private persons have the following possibilities provided for in civil law:

Neighbors rights dependent on personal concernment:

Neighbors may file a claim concerning the defense against inadmissible immissions coming from adjacent properties. They are further entitled to prohibit immissions exceeding a certain level.

However, neighbors are not entitled to file a claim for preventive measures concerning impairments from a plant which was approved by a competent administrative authority. In this case they are restricted to claiming financial compensation for the given damage. Claims may only be raised in cases where the polluting plant has a full permit but the administrative authority is in delay of issuing further restrictions.

Right to preventive action against pollution detrimental to health

The Austrian Civil Code (ABGB) provides for a set of general and specific rules. In general, there is a right to preventive action against pollution detrimental to health: Anybody who is or fears to be endangered by pollution is entitled to file a lawsuit against the polluter an to seek an injunction

General principles of tort law

Personal injury and property loss as a result of environmental damage may also be assessed in accordance with the general principles of tort law. Provided in this regard is a fault-based liability. The obligation to pay compensation therefore presupposes an unlawful and culpable conduct, which was the cause of the occurrence of the damage. The burden of proof for the existence of all the facts establishing liability lies on the injured party.

For certain cases a no-fault strict liability is provided, e.g. in the Water Act, the Mineral Resources Act, in the Forest Act etc.

2. CZECH REPUBLIC:

Neighbors rights dependent on personal concernment:

The situation in the Czech Republic, concerning neighbors claims against nuisances, is the same as described in Austria.

The rule that neighbors cannot claim preventive measures concerning impairments from a plant which was approved by a competent authority, and in such case can only ask for financial compensations, is included in the new Civil Code, which came into force on 1st January 2014.

3. GERMANY:

In Germany, private persons have standing in a number of different proceedings.[1]

[1] see also more information at http://www.aarhus-konvention.de/einmischen.html.

Criminal Law:

Everyone (not only the neighbor or environmental protection agencies) can file charges with the office of prosecution, administrative authorities, police organs or the local courts (also anonymous) for the violation of environmental criminal acts (eg for contamination of water bodies or environmentally hazardous waste disposal) (police organs are the responsible for investigating these allegations).

Civil Law:

There are different possibilities within the civil law system, although there are some limitations here:

- It is not possible to request the closure of a plant, rather certain preventive measures are aimed at
- Negligible damage must be tolerated
- High procedural risk due to evidentiary factors
- Higher costs in comparison to other procedural forms (expert evidence,..)

Two primary Sections of the Civil Code are relevant for environmental harm:

§ 1004 Civil Code (in connection with § 906 Civil Code): for protection of ownership of neighbors (also provisions for protection of possessor and other persons, which are equaled with the owner)

§ 823 I, II Civil Code as well as provisions of the German Environmental Liability Law (hardly used in practice)

Environmental Damage Act

Empowers citizens to help reveal environmental damage – with an application to the authorities private persons which are concerned (in their rights, in particular ownership and health) can inform the authorities of environmental damage and request them to become active. The infringing party will then be obliged to repair the damage

4. HUNGARY:

In Hungary, there is a differentiation between different legal procedures:

Procedure is started for violation of environmental laws

There are two options:

- anyone (i.e. truly anyone) can report the case to the EPA and ask for administrative action

- if the violation is causing environmental damage or threat of damage, an environmental NGO can start a lawsuit against the polluter

Procedure is based on Civil Code:

If the violation also causes harm to someone else, i.e. personal rights and interests are affected, there are three types of claims that can be presented:

- if the violation is only disturbance, they can start a nuisance case, at the local court, anyone disturbed can go against anyone causing the nuisance

- separately or in combination with the nuisance, if the latter causes damage, the damaged party asks for damages in a tort procedure

- if the damage only threatens then the potentially damaged can still go to court and ask for stopping the activity

The very first is based on environmental law violations, but is not a lawsuit. The second is a lawsuit, but only NGOs can start it. The third are lawsuits and individuals can start it, but its legal basis is the Civil Code and no environmental laws have to be mentioned by the applicant, it is sufficient if the action infringes property or personality rights.

In comparison to Austria, Hungary also has protection offered in form of neighbors rights dependent on personal concernment (eg risk of personal health by air pollution emissions). likewise, where threatening damage can be proved, there is a right to preventive action against pollution detrimental to health.

Neighbors may file a claim concerning the defense against inadmissible immissions coming from adjacent properties. They are further entitled to prohibit immissions causing personal harm (not related to levels as in Austria though).

In assessing 'lawfulness' (in regard to immissions from a plant approved by a competent authority), Hungary's practice judges this separately. Hence, a facility can be fully approved and permitted (administratively lawful) and disturb someone (civil law unlawfulness) and judges regularly pronounce that in their judgments.

5. SLOVAKIA:

At present the possibility of the public to challenge a breach of the right to the environment from the private persons is inadequate in Slovak legislation and does not follow obligations set by the Aarhus Convention.

At present the range of persons, who may allege breach of rights related to the environment, constitutes only from those who have been directly affected on their individual rights, thus

- the holder of neighboring rights may claim court protection against harassment from neighbors

- persons affected by any damage, have the right to claim compensation, including reasonable satisfaction.

- if it is a serious risk posed to health, property, the environment or wildlife, persons requesting averting the imminent damage have the right to claim court order to perform appropriate and proportionate measure to avert the imminent damage.

The scope of these entities - by legal definition as well as its application - is narrow and does not give room for other members of the public who would like to contribute to the observance of laws - for example, environmental NGOs.

6. SLOVENIA:

The situation in Slovenia is as follows:

Classic nuisance: neighbor, person living on property

When using its property an owner has to abandon deeds and tackle the causes stemming from his property, which

a) hinder the use of other property over the rate that is usual according to the nature and purpose of the property, and according to normal local circumstances or
b) cause more significant damage (prohibited immission).

Without special title interference with special equipment is prohibited.

Law of obligations (article 133):

Requirement to remove the danger of damage

> *(1) Any person may request the other to remove the source of danger, from which him or indeterminate number of persons significant damage is treating, and to refrain from activities from which the disturbance or danger of damage if the occurrence of disturbance or damage cannot be prevented by appropriate measures.*
>
> *(2) The court shall order at the request of interested persons appropriate measures to prevent damage or disturbance or removal of the source of danger at the expense of its possessor, and if that alone does not do so.*
>
> *(3) If any damage occurs in the performance of generally beneficial activities, for which he is authorized by the competent authority, it can only be requested compensation for damage beyond normal boundaries.*
>
> *(4) However, in this case require eligible measures to prevent damage or to reduce it.*

In environmental law (article 14):

For the exercise of the right to a healthy living environment, citizens may (individually or in associations) require that a carrier stops starting an intervention in environment if it could cause or is causing:

a) excessive environmental load or
b) immediate danger to human life or health; a carrier can be prohibited from starting the environmental if there is a strong likelihood that it would cause such an effect.

Some comments:

- Possible lawsuits are usually not formulated on the grounds of breaching of environmental law (Nos 1, 2 from above are classical civil law suits) – but on ground of causing some personal damage – to property, health, well-being....

- In practice authorized activities cannot be prohibited by nuisance suit (article 133/3 OZ applies)
- No legal action has been based on environmental law in practice (No 3); high problem is probably the loser pays principle

Environmental damage (in sense of ELD) is an administrative law institute – NGOs with special status under environmental law can demand the start of proceeding for elimination of environmental damage; but not the proceeding for its prevention (when it is only threatening).

7. SPAIN:

Neighbors' rights

The situation in Spain is similar as to the regulation in Austria. However, in Spain neighbors are entitled to always file a claim for preventive measures because of an old case law.

Law 27/2006, 18th July 2006, article 18.1

On July 18 2006, **Act 27/2006** regulating the rights of access to environmental information, public participation, and access to justice in environmental matters was approved. It was passed to create a legal framework for the application of these rights, by meeting the obligations arising from the Aarhus Convention and implementing Directive 2003/4/EC and Directive 2003/35/EC.

Act 27/2006 in Article 18(1) *inter alia* provides for specific provisions regarding public participation in the preparation, amendment and review of general dispositions related to the following matters: protection of water, protection against noise pollution, protection of soil, air pollution, rural and urban planning and land use, nature conservation and biodiversity, woodlands and forest management, waste management, chemical products, including biocides and pesticides, biotechnology, other emissions, discharges and releases of substances into the environment, environmental impact assessment, access to information, public participation in decision-making and access to justice in environmental matters, and any other matters provided for by regional legislation. This list is considered to be a non-exhaustive list as it is expressly mentioned by the stated purpose of Act 27/2006 (see also Legal analysis of the Aarhus Convention in Spain Santander, 10 July 2008)

CONCLUSION

The protection of the environment has gradually advanced from the public administrative law field to civil and criminal law protection as well. Hence, in all states **affected persons** have the right to seek protection, whether by preventive action or for compensation, against immissions caused by environmentally harmful conduct. Who is affected is interpreted variably among different states, generally however including neighbors (Austria, Czech Republic, Germany, Hungary, Slovakia, Slovenia, Spain), as well as persons claiming to be affected in their personal rights, in particular ownership and possessory rights as well as health (Austria, Czech Republic, Germany, Hungary, Slovakia, Slovenia, Spain).

There are – with one exception (Hungary, where "lawfulness" is determined separately in administrative and civil law) – some limitations to the exercise of these protection rights in cases of activities lawfully permitted by the authorities, as in these cases generally only financial compensation and not preventive measures may be asked for.

In some states (Germany, Hungary, Slovenia) protection rights in administrative or criminal law even go further, *e.g.*, entitling everyone to file charges with the office of prosecution, administrative authorities, police organs or local courts (Germany), to report the case to and inform the authorities (Germany, Hungary [also explicitly eNGOs are empowered]), and to request the removal of the source of danger (Slovenia).

In general, as soon as a disturbance is large scale, so it is also a violation of environmental law, the Aarhus Convention is applicable.

In its findings and **recommendations with regard to communication ACCC/C/2010/50 concerning compliance by the Czech Republic (29 June 2012 the Committee** states in paras. 83-85 of the CC findings that in general, cases concerning noise limits fall within the scope of the Aarhus Convention:

> *83. With respect to the possibility for members of the public to access administrative or judicial review procedures to challenge acts and omissions by private persons or private authorities, the communicant put forward examples relating specifically to health issues, nuclear matters and land-use plans.*
>
> *84. Under article 9, paragraph 3, of the Convention, members of the public have the right to challenge violations of provisions of national law relating to the environment. It is sufficient that there is an allegation by a member of the public that there has been such a violation (see findings on communication ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4). Moreover, it is not necessary that the alleged violation concern environmental law in a narrow sense: an alleged violation of any legislation in some way relating to the environment, for example, legislation on noise or health, will suffice. With respect to noise exception permits, Czech law, as interpreted by Czech courts, stipulates that only the applicant for the permit or the operator may be a party to the permit procedure and, according to Czech jurisprudence, this also defines standing before the courts.*

85. While article 9, paragraph 3, of the Convention accords greater flexibility to Parties in its implementation as compared with paragraphs 1 and 2 of that article, the Committee has previously held (ibid. and findings on communication ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2) that the criteria for standing may not be so strict that they effectively bar all or almost all environmental organizations or members of the public from challenging acts of omissions under this paragraph. It is clear from the oral and written submissions of the parties, that if an operator exceeds some noise limits set by law, then no member of the public can be granted standing to challenge the act of the operator (private person) or the omission of the authority to enforce the law. In addition, it is evident that in cases of land-use planning, if an authority has issued a land-use plan in contravention of urban and land-planning standards or other environmental protection laws, a considerable portion of the public, including NGOs, cannot challenge this act of the authority. The Committee finds that such a situation is not in compliance with article 9, paragraph 3, of the Convention.