

Environmental governance in EU Member States

Member States Governance Assessments - emerging findings

Task Force on Access to Justice

February 28 - March 1, 2019

Dimensions and themes for the EGAs

Transparency	Participation	Rule of Law/Access to Justice	Accountability / Compliance assurance	Effectiveness/ Efficiency
Evidence and Reporting (3.1.1)	Public Participation (3.2.1)	Practical information (3.3.1)	Promotion, Monitoring, Enforcement (3.4.1)	Enabling financing (3.5.1)*
Access to information (3.1.2)	EIA/SEA (3.2.2)	Access to justice (3.3.2)	Complaint Handling (3.4.2)	Administrative Capacity (3.5.2)
Reliability/quality (3.1.3)	Public confidence (3.2.3)*	Effective remedies (3.3.3)	Liability (3.4.3)	Cross-sectoral coordination (3.5.3)
	Equitability/ inclusiveness (3.2.4)*	Judicial capacities (3.3.4)		Integrated assessment (3.5.4)*
		Corruption (3.3.5)		Flexibility/ adaptability (3.5.5)*

* Note: these themes are of a lower priority as compared to the others.

EGAs- methodological approach

- Assessment framework – scoping note, analysis of relevant frameworks
- Draft EGA template, tested through pilot EGAs
- EGAs were prepared primarily based on desk research and available online information
- 28 MS draft EGAs were produced within a relatively short time, covering 80 questions, within 20 themes and 5 dimensions.
- Internal rounds of quality control, with MS researchers addressing comments from the core team of reviewers and providing revised versions.
- Draft EGAs shared with Member States (and workshop attendees) online, and comments/information invited.
- Amendments of the EGA based on MS and, in some cases, NGOs input

Access to Justice: summary of findings

- Barriers to access to Justice: Standing and Costs
 - **Standing:** varied approaches, with some limiting standing to those directly affected, or to a subset of qualifying NGOs; some where courts in practice take a more liberal approach; and others where legislative guarantees are relatively liberal. Standing generally easier to establish in response to acts; standing on failure to act is often more of an issue.
 - **Costs:** present a barrier in roughly half of MS, and a significant barrier in UK and Ireland.
- Practical information on Access to Justice
 - A small number of MS (3) provide good practical information; most (18) provide information but not always in a user-friendly and clear form; and 7 provide insufficient information
- Judicial capacities; training and information events
 - Only 2 examples of specialised environmental courts (FI and SE). Information on environmental cases was generally difficult to identify, making it hard to draw broad conclusions
- Effective remedies
 - Extent to which a court can instruct authorities to take effective remedial action varies. In some cases, most likely outcome is a requirement to make a fresh decision. This is regarded as discouraging access to justice by some NGOs
- Corruption issues
 - Generally difficult to identify detailed information, but some interesting examples of recent cases (Slovakia), or mechanisms to address corruption.

Barriers on Access to Justice –standing 1/3

- Vast majority of MS have adjusted their legal frameworks to **grant standing to NGOs**
- **Only 16 MS** were found to have liberal standing with respect both to **individuals** and NGOs
- Commonly there are no specific standing rules for **individuals** on environmental cases; they are usually identical with the general administrative judicial review rules of standing.
- Several MS are approaching *actio popularis* for environmental matters (LV, PT, EL)
- Acts or omissions of public authorities in cases related to full or partial refusal to grant access to information, **standing is less of an issue**

		Legal standing for NGOs	
		Standing restricted in some cases	Liberal standing
Legal standing for individuals	Standing restricted in some cases	AT, BG, FI, PL	CZ, DK, DE, HR, HU, MT, SI, SK
	Liberal standing	none	BE, CY, EE, EL, ES, FR, IE, IT, LT, LU, LV, NL, PT, RO, SE, UK

Latvia **grants the public**, individuals and NGOs, a very broad access to justice in environmental cases (*actio popularis*).

Barriers on Access to Justice –standing 2/3

The Greek Council of State in its **jurisprudence accepts a very broad** interpretation of legal standing on cases for the protection of the environment, even groups of persons not possessing legal personality who are interested in the protection of the environment.

- **Rights and interest** based standing -legal standing requires a demonstration that the rights or the interests of the individual or organisation may be impaired
 - In various MS, the determination of the scope of rights or of interests **may be problematic**.
 - Such matters are usually **fact-based and complex**, the result is a **case-by-case determination** which can result in inconsistent application across a Member State's entire legal system.
- Many MS base NGO standing **solely on the purposes of the organisation** as described in its statute
- Other MS apply **certain criteria** in determining whether a specific environmental NGO can avail itself of liberal standing rules (eg SE min number of members, 3 years of existence etc)
- Sometimes **previous participation** in administrative procedures or EIA procedures (eg HR) is a prerequisite for legal standing in judicial review

Barriers on Access to Justice –standing 3/3

- The study looked at Court of Justice case-law on standing on air pollution and nature.
- In some MS, the **CJEU case was specifically taken into account** in establishing the standing rules in such cases.
- The assessments revealed that there is a **great disparity across the MS** with respect to how efficient they are in taking into account relevant CJEU decisions on the national level.

Germany is a positive example of aligning national legislation on standing to the Court's case-law, in particular on NGO standing.

Barriers on Access to justice –costs

- Costs may be high or low in absolute terms, but it is equally important to **look at relative affordability**
- Costs can generally be said to **be manageable** for administrative procedures including applications to administrative courts.
- The major cost issues are encountered in the case of judicial challenges to acts or omissions of public authorities and **the largest component is lawyers' fees.**
- **The loser pays principle** is common throughout the MS, associated with an uncertainty regarding the final litigation costs to be paid by the parties **-it is a definite risk** that an unsuccessful litigant against a government agency may have to pay the authority's legal costs
- Unforeseeable or **high costs associated with injunctive relief** have deterring effect

3.3.2 Q5 Costs	MS
High – barrier to access to justice	2
Some cost present barrier	14
Not high and do not present barriers	12

Costs mitigation measures

Various mechanisms are available to mitigate costs, particularly in those MS where costs are potentially high

- The court **may exempt the complainant** from paying costs
- **Protective Costs Orders** are employed in some MS
- Quite a number of MS have **schemes for legal aid** for individuals
- **Organisations have fewer opportunities** to avail themselves of the various mechanisms aimed at cost mitigation

Interesting practice

- In Slovakia, the relevant **statute specifically exempts environmental NGOs** from having to pay costs in cases that relate to public interest.
- Italy and the Netherlands, for example, **legal aid can also be extended to environmental NGOs** if their annual income is below a certain threshold

Germany provide **public guidance on expected or typical costs** related to access to justice as a means of increasing predictability in a **specialised brochure**.

Practical information on Access to Justice

Various approaches have been employed in the MS ranging from delivery of clear information on access to justice (DE, DK, FR) to lack of information on access to justice on environmental matters (quarter of the MS).

- In two third of the MS, information on access to justice is **available but it is not always presented in a user-friendly way** is not sufficiently targeting the audience, and it is not understandable enough
- In a quarter of the MS the information is **considered insufficient or lacking**. It is of very general nature, or has a strictly legal character.
- A few MS developed targeted brochures or manuals for access to justice (DE, DK, FR)

France 'Tout sur l'environnement' portal or Legifrance provide information on the national legal provisions on access to justice in relation to the Aarhus Convention.

Joint national portal 'www.aarhus.be', operated on behalf of all four competent government authorities in Belgium

Judicial capacities; trainings and information events

- MS differed largely in their approach in making information on judicial capacity building publicly available
- **None of the MS is considered to have good systematic, regular capacity building activities** on environmental law enforcement
- **In a few of the MS there is internal specialisation and distribution of cases in the courts,** thus, one or more divisions of the administrative courts are responsible for cases of environmental law or specialised specialised administrative appeals bodies (tribunal)
- There are only two examples of **specialised courts** for the environment (FI and SE)
- Precise quantitative data on environmental law – prosecutions, convictions, types of violations - was hard to obtain in most MS

The Centre for Judiciary Studies (Centro de Estudos Judiciários, CEJ) **Portugal** provides a course (“*formação contínua*”) in environmental topics for magistrates.

	No specialised court or units	Specialised units or sections of courts either first or second instance	Specialised environmental courts
AT		●	
BE		●	
BG	●		
CY	●		
CZ	●		
DE		●	
DK		●	
EE		●	
EL		●	
ES	●		
IE		●	
FI			●
FR		●	
HR	●		
HU	●		
IT		●	
LT	●		
LU	●		
LV		●	
MT		●	
NL	●		
PL	●		
PT	●		
RO	●		
SE			●
SI	●		
SK	●		
UK		●	



Institute for
European
Environmental
Policy

The MS governance assessments and the summary final report will be published soon on the European Commission environmental governance page
http://ec.europa.eu/dgs/environment/index_en.htm

Thank you

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