

Dr. Elena Fasoli
Queen Mary University of London
e.fasoli@qmul.ac.uk

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Study on the Possibilities for non-governmental organizations promoting environmental protection (ENGOS) to Claim Damages on Behalf of the Environment in Four Selected Countries – Draft Outline and Preliminary Findings

1. INTRODUCTION

2. OUTCOMES FROM THE NATIONAL REPORTS

2.1. Liability under the Environmental Liability Directive and the Role Played by the ENGOS

2.1.1. Preliminary Evaluation and Suggestions for Improvement

2.2. Liability under Civil Law Remedies and the Role Played by the ENGOS

2.2.1. Costs Incurred by the ENGOS

2.2.2. Moral Damage and Purely Ecological Damage

2.2.3. Preliminary Evaluation and Suggestions for Improvement

3. GENERAL CONCLUSIONS

1. INTRODUCTION

The aim of the present study is to investigate whether it is possible for ENGOS to be awarded damages on behalf of the environment¹.

The following countries have been covered: France (FR), Italy (IT), The Netherlands (NL) and Portugal (PT). The national reports are written by distinguished scholars in environmental law matters:

FR: Jessica Makowiak, Université de Limoges

IT: Elena Fasoli, Queen Mary University of London

NL: Anke Houben and Chris Backes, Maastricht University

PT: Alexandra Aragão, Universidade de Coimbra

¹ This report focuses particularly on civil actions for damages brought by ENGOS. The topic of judicial review of administrative decisions has been tackled by “Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union” by Prof. Jan Darpö, available at http://www.unece.org/env/pp/tfaj/analytical_studies.html.

The task of each national expert was to provide a general picture of the laws and administration in the environmental area; a description of the legal framework, including case-law, concerning environmental damages in general and the available actions for ENGOs in particular, including costs. A general evaluation of the national system, including suggestions for improvement, was also required. The main aim of the synthesis report is to aggregate the outcomes of the national reports and draw conclusions in order to answer to the research question as to whether the ENGOs have the possibility to claim damages on behalf of the environment.

2. OUTCOMES FROM THE NATIONAL REPORTS

2.1. Liability under the Environmental Liability Directive and the Role Played by the ENGOs

In the context of the national provisions transposing the Environmental Liability Directive (2004/35/EC):

- in all four Countries analysed the operator, who operates or controls the occupational activity, is liable for the environmental damage and for the costs of the remedial measures. If the competent authority takes remedial measures itself, they are able to recover these costs from the operator. ENGOs have the right to submit observations and request the competent authority to take action. In The Netherlands, France and Italy ENGOs are not entitled to claim damages from the operator. By contrast, in Portugal through the civil *actio popularis* the ENGOs can exercise the civil action for damages asking for the full restoration of the environment from the operator.
- Interestingly, in France, under exceptional circumstances, when the operator liable for taking preventing and remedial measures cannot be identified, the ENGOs can suggest the competent authority to be allowed to take these measures themselves. A different approach is applied in Italy where in case of inactivity of the competent authority the ENGOs are entitled to go before the administrative judge in order to appeal this inactivity and to ask for the compensation of the injury caused by the delay in taking action.

2.1.1. Preliminary Evaluation and Suggestions for Improvement

- All national reports confirm that this type of liability has a very limited practical application. One of the reasons is because only the environmental damage with “significant adverse effect” is relevant.
- It could be fruitful to consider the possibility to introduce a judicial or non-judicial remedy that entitles the ENGOs to challenge the inactivity of the competent authorities (should they fail to adopt remedial measures in relation to an environmental damage) so that to order them to take action.

- It would be helpful to establish an online database containing information on the (on-going and past) investigations on cases of environmental damage and the costs that the competent authorities were able to recover from liable operators (including the compensations obtained *via* judicial proceedings) along with their utilisation.
- It would be helpful to encourage operators to use financial insurances to cover their responsibility.

2.2. *Liability under Civil Law Remedies and the Role Played by the ENGOs*

2.2.1. Costs Incurred by the ENGOs

- In The Netherlands, France, Italy and Portugal the ENGOs can exercise the civil action, including joining a civil action to proceedings before criminal courts, against the operators to recover expenses directly suffered (material damage). The ENGOs have to demonstrate that they employed human or financial resources to protect the environment and that these resources have been nullified as a result of the environmental damage caused by the operator. The remedies granted by the courts usually take the form of an award of damages, justifying the expenditure incurred by the ENGOs in order to carry out their activities effectively.

2.2.2. Moral Damage and Purely Ecological Damage

- A trend has been noticed in France, Italy and Portugal to give relevance also to the “moral” damage suffered by the ENGOs in consequence of the occurrence of the environmental damage. The courts consider that the failure to respect the environmental legislation by the operators undermines the efforts made by the ENGOs to protect the environment. The remedies granted by the courts usually take the form of an award of damages.
- An emerging trend has been noticed in France (but only in case-law) and in the Netherlands (but only in legal literature) with regard to the reparation of the “purely ecological damage”, which is damage to the ecosystem in itself. Case-law on the matter is very scarce and the legislation is not sufficiently developed in order to specify the conditions and the modalities upon which this type of damage has to be repaired. A purely ecological damage is in fact difficult to assess in monetary terms. In the very few cases mentioned in the national reports the reparation of this type of damage took the form of compensation or a declaratory judgment. By contrast, in Italy the ENGOs seem not to be allowed to exercise the civil action claiming the generic violation of the ecosystem in itself or of the right to a healthy environment.

2.2.3. Preliminary Evaluation and Suggestions for Improvement

- As an overall assessment civil procedures are rarely pursued. One of the reasons is because of the difficulties for the ENGOs to demonstrate a direct and personal damage in environmental matters.
- The scarcity of these judicial actions is also due to the high costs of the civil procedures. A tendency has been noted for the ENGOs to join civil actions to on-going criminal proceedings in order to avoid high costs. Therefore, it could be fruitful to reduce the costs of civil procedures. In this regard, a positive trend has been noticed in Portugal where there are no costs associated to the exercise of the right to (civil) *actio popularis* by the ENGOs unless the claim is considered “manifestly groundless”. Another positive trend has been noticed in France where there are risks of high costs of civil procedures only when the ENGOs need the assistance of a lawyer (which is mandatory only depending on the value of the trial and the nature of the jurisdiction).

3. GENERAL CONCLUSIONS

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