Challenges for access to justice

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Joint Aarhus Convention/Cartagena Protocol round table on access to information, public participation and access to justice regarding GMO

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Environmental NGOs concerns about burdens to get access to justice as defined by the Aarhus convention

- Client Earth tabled complaint in 2008, European Courts do not provide access to justice to individuals and NGOs
  - Contradiction between Art 230,4 in EC Treaty and Art 9 Aarhus convention
- Gaps in access to information and public participation in decision about use of GMOs impact in various ways access to justice
- European Commission, some governments weak commitment to implement rulings of ECJ as well basic GM acts on national level in regards to public participation, access to information as prerequisites for access to justice
- GMO are highly controversial issue with major gaps in transparency (public registers, lack of contamination register) as well as in jurisprudence
Aarhus convention frames and defines obligations of parties to secure access to justice

- Objective (Art 1) “each party shall guarantee the rights … to access to justice”

- Art 2(5) defines that Environmental NGOs „shall be deemed to have an interest“

- Art 3(1-3) obligation for parties to establish framework, ensure that authorities provide guidance for access to justice, as well as environmental education about it

- Art 8 public participation in drafting acts „while options are still open“
Article 9 access to justice

Art 9 (1) provides access to justice to challenge decision to withhold information

Art 9(2) to challenge substantial and procedural legality of decisions taken under art 6 of the convention which provides the right to participate in certain types of decision-making processes mostly described in Annex

Art 9(3) more general provision which provides access to justice in other situation to challenge decisions which contravene environmental law
Access to justice and level playing field

- Lack of public participation in decision taking process and impact on honey sector and environment
- Then key GMO acts were decided at EU level bee keepers not consulted and involved
  - Results: specific labeling problem for honey was disregarded
  - Regulation 1829/2003 defines that any plant based product containing GMO must be labelled
  - Whilst products derived from animals fed with GMO are excluded from the GMO labeling requirement
  - Honey is both in parallel: a plant based and animal based food
  - Then EC developed non-binding coexistence rules, long flying distances for bees were not reflected
  - Thus most national governments did not specify distances due to pollinators
Impacts on access to information and access to Justice

- Pollinators as bees have huge economic relevance for major parts of the food chain
- Also huge environmental relevance for ecosystem across the whole territory of the EU
- Bee keepers faced with severe problems
- Finally beekeepers wanted clarity and started a legal case about questions of contamination of pollen and honey with specific GM maize, due to several problems:
  - Lack of active information where GM crops (trials or commercially are grown)
  - No legal framework to give beekeeping priority vs GM crops
  - Legal uncertainty about GM pollen in honey and its impact labeling or non-authorised product?
Impacts on access to information and access to Justice

Finally bee keepers wanted clarity and started a legal case about questions of contamination of pollen and legal option to market honey contaminated with specific GM maize.

In September 2011, (C 442-09) ECJ ruled in favour of bee keeper that any contamination (how minor and irrelevant how it is caused) would need a full food authorisation for the EU.

What did the Commission?

- Attempt to deliver testing method - without success
- Once more no participation of beekeepers in the implementation of the ruling
- No change in coexistence rules
- No priority for bee keepers vs field trials/commercial cultivation
Lessons learnt from Bee keeper case

- Pro-active framework for public participation needed
- Ruling in favour for protection of the environment is not implemented due to weak and partly biased access to information as well as public participation structure
- FoEE sees as problematic that citizens made donations to defend a right what was already defined by law (if a GMO does not have an authorisation for a specific purpose its marketing contradicts EU law)
- No action taken to protect bee hives vs GM field trials and contamination with only partly authorised GM maize
- More problematic EU institutions are trying to redefine general EU GMO labeling rules
Access to justice: lack of legal certainty, non-compliance with EU laws and ECJ ruling

- Legal framework EU directive 2001/18 about environmental risk assessment, framework for field trials, commercial cultivation
- Strong emphasize on precautionary principle and preventive actions (recitals 4,5,6,8,10)
- Art 25(4) defines confidentially, also about information in regards of field trials
- Art 31,b „exchange of information and reporting“ defines that location of field trials shall be made known to the public
- ECJ ruling (C 552/07) fully backed that exact location must be made known to the public (and that public order can not be relied on against disclosure
Access to justice: lack of legal certainty, non-compliance with EU laws and ECJ ruling II

- Legal situation is clear (Aarhus Convention, EU directive plus ECJ ruling)
- Spain does not have a public register for field trials (nor for commercial cultivation)
- Friends of the Earth Spain requested the locations from the government – without response from Spanish officials
- After the ruling in 2009, repeated request and finally received the data
- After change in government: information again rejected
- FoE Spain needed advice from lawyer to get information where and how to challenge this decision
Access to justice: lack of legal certainty, non-compliance with EU laws and ECJ ruling - Conclusions:

○ parties failed to implement easiest access to information about use of GMO (additionally required by specific EU directive and confirmed by highest EU Court9

○ Environmental NGO can not use their resources to bring the same cases again and again to court

○ Spanish government failed to
  - Ensure that information is provided to public on access to administrative and judicial review procedures
  - Consider assistance mechanism to remove or reduce barriers to access justice
  - Non-compliance with Art 3 (2) and Art 3 (3)
Access to justice: non-compliance with EU laws, failure to act:

- Directive 2001/18 in Art 31,a defines that member states shall establish public registers in which the location of the release of GMOs is recorded.

- Member states should have implemented this by 2003!
  - Good implementation in Germany
  - In 2010 a Polish NGO complaint about lack of such a register, end of 2012 finally EC reminded the Polish government and prepared official complaint.
  - Same situation in Spain. The EU Commission did not act. Now, a Spanish NGO informed EU Commission about lack of implementation of basic requirement non-compliance with Art 31,a (Dir 2001/18)
CONCLUSION

- Once more: Environmental NGOs are not official monitor offices for lack of implementation of basic requirements under Aarhus Convention or environmental legislation.

- FoEE call on parties of Aarhus convention to proactively implement its key requirements into national law, especially about access to information, education and real and comprehensive public participation as well as make access to justice work for public on a day to day basis.

- In order to identify non-approved GMOs a comprehensive global register for all GMOs is needed. It has to include: all authorized GMOs, all GMOs tested in field trials but never put forward for authorisation, all GMOs formerly approved but later withdrawn from market.