

Note on the **UNECE** Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters, **Task Force on Access to Justice's**

'Study on the possibilities for NGO's to claim damages in relation to the environment in four selected countries'

on behalf of the **State of the Netherlands** , Ministry of Infrastructure and the Environment

INTRODUCTION

The UNECE 'Study on the possibilities for NGO's to claim damages in relation to the environment in four selected countries', is an unedited, informal document which was prepared to be discussed at the 2015 Task Force on Access to Justice-meeting. The study aims at investigating the possibilities for non-governmental organizations promoting environmental protection (ENGOS) to be awarded damages in relation to the environment. The study covers the national legal systems of France, Italy, the Netherlands and Portugal.

The contents of the paper, which are directed towards civil actions for damages brought by the ENGOS, is divided into two parts: The first (I) part, (pp. 5-9), the 'Synthesis Report', focuses on the possibilities for the ENGOS to be awarded damages in relation to the environment. Its content and conclusions are based upon the National Reports in part II (pp. 10-84), where the legal systems of France, Italy, the Netherlands and Portugal have been covered.

The State of the Netherlands/the Ministry of Infrastructure and the Environment would like to comment on the study, particularly on the conclusions it contains concerning the national law of compensation in the Netherlands. These remarks are motivated by the general principles of the law of compensation for damages, as they are laid down in the Dutch Civil Law Code and the adjacent Statutory regulations in the field of Dutch civil law and interpreted by the Dutch civil Courts.

COMMENTS

Basic principles of the Study – Financial damages only?

In the national report on the Netherlands a rather sweeping conclusion is drawn on p. 58:

“Concluding, it seems that claiming damage on behalf of the environment by ENGOS is rather difficult, since the public regulations only provide this competence to administrative authorities and civil law excludes the option to claim damage, unless the ENGO has made

investments itself to recover the environment. It is not only rather difficult, it is also quite uncommon that an ENGO takes advantage of article 3:305a Civil Code. There are only a few judgments available (which are mentioned above), so the practical relevance is quite limited. Therefore it cannot be said that the legal system in the Netherlands leads to efficient and effective legal protection.“

In focusing on the financial aspects of claims for damages, the national report for the Netherlands seems to suggest that the concept of 'damage' within the framework of the underlying report must be understood as 'financial damage' only.

According to the Relevant Legal Framework set out in chapter I.3, the report engages with the possibilities national jurisdictions of France, Italy, the Netherlands and Portugal provide for NGOs to raise 'claims for environmental damages'. On page 4 'the liability of the operators that caused damages to the environment' is addressed. Damages here mean 'material harm to the environment' and 'liability' points to the parties legally accountable. Legal claims redressing these damages within the 'legal framework' of the civil law are referred to as 'civil law remedies', or (further on) 'remedial measures'.

In the report a definition of 'legal or civil law remedies for damages', is not given, however, on page 3 reference is made to damages as material or moral damage caused by an unlawful act or omission, attributed to an operator acting intentionally or with fault. Claims for damages therefore are understood to involve remedies which either may comprise purely financial compensation for losses suffered, or consist of other legal remedies such as injunctions, court orders to restore or prevent specific damage on duty of penalties, some sort of specific performance, and declaratory judgments.

From the contents of chapter I.3 it appears that the concept of 'claims for damages' should not be understood as restricted to claims for financial damages. Damages of course may be understood in a strict – procedural - sense as 'financial compensation'. Damages meaning 'damage to the environment and the ways to repair and compensate these', as is the starting point in the matter at hand, may cause different claims of which compensation in financial sense is but one of them. Whereas this report – e.g. in I.2 and I.3 – refers to damages and civil law remedies, other means of reparation than financial compensation evidently fall under the scope of this Task Force on Access to Justice-report. The national reports on France, Italy and Portugal all include other means of compensation than the purely financial. The national report on the Netherlands – chapter II.C, pp. 44-58 - seems to start answering the questions raised in this report from the idea, that claims for damages raised by an NGO can consist only in claims for financial damages. Such a starting point is incorrect.

Compensation for Damages in Dutch Law – limitations for NGO's?

One of the essentials of the Dutch law of compensation is, that damages are compensated for financially unless the plaintiff claims another form of remedies. These claims for damages under the law of compensation may consist in claims for financial compensation for losses suffered, injunctions, court orders to restore or prevent specific damage on duty of penalties, claims for some sort of specific performance, and declaratory judgments that may be used by other parties for claiming specific financial (or other) compensation. The matter at stake in this report obviously does not limit compensation for damages to financial restitution nor exclude these other forms of compensation.

The National report on the Netherlands focuses on the so called 'collective action' article 3:305a Dutch Civil Code provides for. Under art. 3:305a Civil Code, foundations and associations with full legal personality (capacity) may take legal action on behalf of the (legal) interests they protect. (Art. 3:305b Civil Code extends this possibility to corporations according to public law.) NGOs that are constituted as legal foundations or legal associations to protect environmental interests therefore may claim damages; it is not possible for an NGO under this article – or under civil law for that matter - to claim financial damages on behalf of individual persons whose interests are protected by the NGO. But does this fact inevitably lead to the conclusion, that NGOs cannot bring about effective remedies in environmental law?

Certainly, claims for financial damages by NGOs that can be raised under public law – c.f. pages 45-51 – and initiated within a public law procedure, cannot be continued in a civil law-proceedings, should this claim exceed the maximum amount of € 25.000, as would be possible if an individual had initiated the proceedings personally under public law regime. Nevertheless, all other than financial claims for civil remedies are possible for NGOs to raise in civil law courts.

As stated before, in Dutch civil law compensation for damages is not limited to 'financial compensation'. In the national report for the Netherlands the Dutch law of Torts as laid down in articles 6:162 etc. of the Civil Code is taken as a point of reference for evaluating the possibilities NGOs in the Netherlands have for claiming damages. Paramount in this evaluation seems the regulation in article 3:305a under 3 Civil Code, that an NGO is barred from claiming financial compensation for individual persons whose interests the NGO is aiming to protect; civil remedies to redress damages in other ways than by means of financial compensation are not discussed seriously in this national report.

These other civil remedies, such as natural redress or *restitutio in integrum*, court orders to prevent injuries, injunctions on duty of penalties, claims nullifying contracts that have been closed contrary to environmental laws, are all equally disposable under article 3:305a Civil Code. This kind of remedies or legal regulations are merely hinted at, in the closing remarks of paragraph 3.3 on p.

56, where it is said 'the options of a declaratory judgement, a prohibition or a commandment are only possible when there is some form of liability on the base of the articles mentioned in paragraph 3.2'. But this condition applies to every civil remedy aiming to redress damages, claims raised under article 3:305a Civil Code included: in civil law no claim for damages can be established without some form of liability of the defendant. Furthermore, the option of claiming a declaratory judgment does not constitute, as the national report seems to suggest, a mere theoretical remedy: the famous and groundbreaking Urgenda-case is a good example of such a claim.

Furthermore, NGOs may ask for a declaratory judgment to establish liability of the responsible party for environmental damages, which judgment individual persons may invoke separately in order to claim financial damages from this responsible party. A similar idea has been laid down in the 'Wet collectieve afwikkeling massaschade', a Statute of 27th July 2005 on class actions for collective damages, laid down in articles 7:907-910 of the Dutch Civil Code. The Statute enables an NGO and a party liable for environmental damage that have agreed upon a settlement for financial compensation to request the Amsterdam Court of Appeal to declare this settlement mandatory for all other parties equally to have suffered the same damages. Under the terms of this settlement, other individual parties can claim their financial damages in so far as these damages are agreed upon in the settlement. An NGO may initiate such a settlement for class compensation suffered through environmental damage. The national report does not mention these possibilities so far. By ignoring these possibilities an incomplete picture is given of the civil law of remedies for environmental damage under Dutch law.

The national report does not go into the principles upon which the Dutch law of compensation is founded; it is this law and the principles it is based upon that bar the award of financial compensation for a certain group of more or less unqualified individuals claimed for by an NGO under the article 3:305a Civil Code. Within the legal system of Dutch civil law, financial damages for individual persons can only be judged individually, whereas the judge has to take into account the specific circumstances of each individual case, such as individual liability for fault and the individual's duty to limit or control damage. The national report does not mention these fundamental considerations.

The national report for the Netherlands does mention the possibility for NGOs to claim financial compensation for environmental damage, brought about e.g. for cleaning up environmental pollution; such a claim however does not constitute a class action under article 3:305a Civil Code but is settled through the general law of torts.

Furthermore, the national report does not point out the possibility of claiming financial damages within the framework of a criminal prosecution (cf. page 3, penultimate paragraph). Dutch criminal law does offer the victim of a crime, the so called 'injured party', the possibility to claim financial compensation for the

damages suffered through the perpetration of the crime the defendant has to account for. This claim is considered a civil law claim within the criminal law case, the criminal judge when considering the claim acting as a civil judge. Although these claims can only comprise rather straightforward damages which – in order not to burden the criminal procedure too much, otherwise the claim is referred to a civil law court – must be able to be established easily, an NGO may join a criminal prosecution as an injured party in order to raise a claim for financial damages, if a defendant is criminally charged for breaking environmental laws.

Procedural Costs – a serious impediment?

Finally, the national report for the Netherlands addresses the problem of procedural costs that have to be paid for by the party against whom the judgment is given; according to the national report, these costs are relatively high compared to procedural costs in public law suits, consisting of court fees and lawyers' salaries, therefore – it is said in the national report - barring most of the NGO's from initiating civil legal proceedings.

Considering the court fees in civil procedure, they depend on the amount of damages claimed for, so they can vary from case to case; whereas an NGO can, in civil procedure, only claim other than financial remedies, these kind of claims are rated as the but-one-lowest category court fees. The costs for legal representation which the party who has lost the case has to pay its counterpart, are calculated by the court according to fixed rates that do not relate to the real costs a party has to pay its lawyers.

CONCLUSION

For these reasons, the State of the Netherlands cannot agree with the conclusion on pages 57-58 in the national report concerning the effectiveness of private law regime. As these conclusions affect the Synthesis Report in part I of the report where the Netherlands are considered, the State of the Netherlands would like to suggest an addition or adaptation to the General Evaluation in chapter I.4 in the sense that Dutch public, civil and criminal law provides for a fairly balanced legal system for NGO's claiming damages in relation to environmental matters. As an *obiter dictum* the State of the Netherlands would like to highlight that the main problem within the civil law scope as indicated by the national report, will disappear within due time altogether, as due to a relevant parliamentary resolution¹, legislation is being prepared to alter art. 3:305a Dutch Civil Code:

¹ Acts of Parliament, Kamerstukken II, 2011-2012, 33 000-XIII, nr. 14. See also letter by the Minister of Safety and Justice of 26 June 2012 in reaction to this resolution, Kamerstukken II, 2011-2012, 33 126, nr. 6.

amongst other adaptations the limitation for NGOs not being able to claim financial damages will be removed.