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elni

REVIEW

The Aarhus Convention in operation

Ralph Hallo

Aarhus related cases of the Belgian Constitutional Court

Luc Lavrysen

Highest court abolishes EIA-permit

Thomas Alge/Dieter Altenburger

Public Interest Litigation in Environmental Matters

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Opening the Doors to Justice - Strengthening Public Access

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Editorial

Access to Justice is a never-ending issue for elni. The very first elni Conference in 1990 was on “Participation and Litigation Rights of Environmental Associations in Europe”. Since then impressive progress has been made concerning the possibilities for NGOs to act in favour of the environment all over Europe. This issue of the *elni review* focuses on the Aarhus Convention, a legal instrument that undoubtedly has an important impact on the ongoing endeavours to strengthen public information, participation and access to the Courts. Therefore, there are good reasons to take a look at the implementation of this Convention two years after its implementation deadline. *Ralph Hallo* provides us with the initial results of the survey conducted by the EEB. How is access to justice working in practice? *Luc Lavrysen* tells us more from the perspective of the Belgian Constitutional Court. That even Court decisions made in favour of the environment are not necessarily hindering ongoing building measures is reported by *Thomas Alge and Dieter Altenburger* in an article on the Austrian motorway case. German law is known for its restrictive approach concerning access to justice. *Doris Schaffrin* and *Michael Mehling* explain in their article the sophisticated legal theory and practice under German law which hinder NGOs making effective claims. *Irina Zodrow and Cathrin Zengerling* report on an interesting scientific conference under the Aarhus Convention.

A compelling issue of international law is handled by *Christoph Holtwisch* in his article: The Asia-Pacific Partnership on Clean Development and Climate. He tells us more about this very new phenomenon in international climate policy. Finally, *Carlos da Silva Campos* provides us with an exhaustive analysis of the ECJ rulings concerning waste: an issue of utmost importance for almost every industry in Europe. Although some considerable progress has been made in developing the legal framework for waste operations in Europe, some fundamental questions are still under discussion, e.g. what is waste and what is not?

The focus of the next issue of *elni review* will be on legal aspects of biodiversity. Articles are welcome and should be sent by mid-December 2007. If you have any information on conferences and seminars that might be of interest for *elni* members, please do not hesitate to inform the editors.

Gerhard Roller

October 2007

elni forum on WEEE revision

Please note that an **elni forum** on the results of a research project on WEEE and the revision process of the Directive will take place in Brussels on either 31 January or 7 February 2008. Have a look at the elni website for further information.

elni Members and Networks: J&E - More than just an NGO

Pavel Černý

1 Introduction

Justice & Environment (J&E) is a non-partisan, mission-driven network of five public interest environmental law and nature protection organisations from EU Member States¹. **J&E aims to use environmental law to protect people, the environment and nature. Our primary goal is to ensure the implementation and enforcement of EU legislation through the use of European law and exchange of information.** As a new association, J&E is committed to growth and welcomes new members, especially from new Member States.

2 A brief history of J&E

J&E was informally established² in Brno, Czech Republic, in January 2003 as an informal association³ under the provisional name 'Network of Central European Environmental Law Organisations' (ELOnetCE). At its second meeting in November 2003 in Amsterdam, J&E accepted the Estonian Fund for Nature (ELF) as a new member. The informal network was subsequently incorporated in September 2004 under the name Justice & Environment (J&E). Austrian NGO Oekobuero joined J&E at the AGM in May 2005.

3 J&E Focus

The recent round of EU expansion has brought significant pressures to European citizens. With the transposition of the *Acquis communautaire*, a tremendous amount of new legislation has been introduced in countries with developing but still young democratic traditions. Citizens from new Member States all too often find that public institutions do not act in true public interest, preventing these same citizens from defending their rights and the environment. Such cases frequently concern development projects, many of them utilising tax payers' money in the form of EU funds or state incentives. Cases involving the conflict between rapid economic growth and environmental values or rights of local citizens are the focus of the J&E.

J&E is convinced that for any policy, not just environmental, correct interpretation and implementation of the law is a key issue. The EU has put in place policies which safeguard the rights of its citizens, and NGOs have a key role in ensuring that the state correctly performs its duties. These transposition and implementation issues⁴ are relevant to every EU Member State. By working on these issues, J&E is best seen as a legal, rather than an environmental, NGO.

4 How J&E works - J&E's activities

Justice & Environment works on both an EU and a national level.

Internationally, J&E focuses on implementation and transposition of horizontal legal issues. The strong grassroots contacts of our members encouraged J&E to concentrate on problems with the Aarhus Convention and related legislation, EIA and SEA, transport-related issues, environmental liability, air/noise issues, IPPC and Natura 2000. We often find synergies between these fields. The structure of J&E, the scope of its members' activities and our experience in the field of law and EU environmental Law in particular, provide added value and allow us to examine these issues from a broad perspective.

J&E adds real benefit to public knowledge of EU law. The network has a unique ability to analyse and evaluate the implementation of the environmental *acquis* in new EU accession states. We can provide expert, comparative perspectives in identifying and assessing the gaps in the implementation of existing EU environmental provisions and evaluating what impact new EU environmental provisions can have on new Member States given the specific characteristics of their legal systems, economic development and natural environment. Legislation compliance analysis is largely undertaken by companies and the results are often not made public. J&E work provides a publicly available record of information not otherwise available, in the form of legal analysis (comparing EU law to national law and finding the weaknesses therein), case studies (representing good or bad application of the law on a country-by-country basis), position papers and subsequent communication of this "message" to decision-makers.

J&E cooperates with the G10. As a legal specialist, J&E fills a niche in providing hard evidence for the

¹ The members of J&E are: Via Iuris (formerly CEPA, Slovakia), The Estonian Fund for Nature (ELF, Estonia), The Environmental Law Service (EPS, Czech Republic), The Environmental Management and Law Association (EMLA, Hungary) and OEKOBUERO – Coordination Office of Austrian Environmental Organisations (Austria). Dutch NGO Milieukontakt Oosteuropa (MKT) is an associate member.

² The following NGOs established ELOnetCE on 10 January 2003 according to Dutch law: Environmental Law Center (ELC), Environmental Law Service (ELS), Center for Environmental Public Advocacy (CEPA), Environmental Management and Law Association (EMLA) and Milieukontakt Oosteuropa. ELC has subsequently left the association.

³ in Dutch: "informele vereniging met beperkte rechtsbevoegdheid".

⁴ **Transposition:** transferring the EU directives into national law. **Implementation:** is a combination of transposition, actual use of the law and its enforcement.

lobbying efforts of EU level environmental NGOs. Organisations such as the EEB, Bankwatch, T&E and Birdlife need this information for their lobbying efforts. The information flow is two-way: J&E receives valuable information on the current issues in EU policy development and lawmaking, enabling us to keep up with the state of the play. J&E then redistributes this information to network members.

On a national level, **J&E aims to make governments more accountable for their actions.** A problem faced by our members is the difficulty that national level NGOs have in resolving implementation issues. This was one of the primary reasons for the formation of J&E: to actively support and boost the effectiveness of the work of J&E members.

Members of the network are national experts in environmental law. All have significant professional experience with their national legal systems and the challenges faced by their respective NGO communities. Members share many similarities. Most of them serve as the main environmental law “service points” for the environmental movement in their home countries: all are active in influencing national legislation and all provide environmental NGOs and other stakeholders with educational activities. J&E members are rightly distinct and all benefit from the exchange of their experiences.

J&E provides direct financial support to its members, allowing them to litigate, lobby and educate for positive change. Ongoing internal capacity building helps member organisations develop expertise in EU environmental law and progressively incorporate further aspects of EU law into their agenda on a national level. National activities give substance and specific outputs for our work on an international level, which reciprocally strengthens capacities of the network and its members.

5 What we do in detail

Analysis - For each country in which J&E members are active we research the situation concerning legal implementation, application and enforcement of the issue and the related EC directives. We compare the legal mechanisms used for implementation to determine their efficiency in protecting environmental rights.

Collecting case studies - We compile collections of major national cases to portray the situation in the region in which J&E members are active – legal issues, legal tools used and effects establishing change.

Compiling joint position papers - Based on the above analysis and case studies, we prepare position papers presenting deficiencies in each of our countries and propose the solutions. These position papers are disseminated to governments of J&E members, to the European Commission and to organisa-

tions operating on an EU level (see discussion and education below).

Strategic complaint - We will identify a legal case(s) that best represents the deficiencies in the implementation and/or application of the issue relevant to EC directives, which thus might be suitable to present as a strategic complaint at the relevant authorities, including at the European Commission. In 2006, we will concentrate on a strategic complaint to the UNECE Aarhus compliance committee.

Discussion and education - J&E members will hold workshops, discussion fora, etc. (both internally and externally) in order to share information and build capacity. J&E will open stakeholders’ dialogue with representatives of other NGOs, both those operating on an EU level and grassroots NGOs with experience in the application of the relevant issue. We will take special care to include representatives of NGOs from the Western Balkans, Bulgaria, Romania, Turkey, etc. in addition to those from other EU Member States.

Outreach - For all of the above-mentioned activities we will use J&E’s existing website and the websites of the members in their national languages and electronic conference to spread the information amongst NGOs, and the expert and general public. Publications use a cost-sensitive combination of print and electronic formats.

Needs Analysis - For some topics we cover only needs analysis to map out requirements for future work.

More information on J&E can be found on its website at www.justiceandenvironment.org or by writing to info@justiceandenvironment.org.

Imprint

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The Editors would like to thank **Vanessa Cook** (Öko-Institut) for proofreading the elni Review.

Focus of the forthcoming issue :

Legal aspects of biodiversity

Manuscripts should be submitted as files by email to the Editors using an IBM-compatible word processing system.

The elni Review is the review of the Environmental Law Network International. It is distrib-

uted twice a year at the following prices: commercial users (consultants, law firms, government administrations): € 52; private users, students, libraries: € 30. Non-members can order single issues at a fee of €20 incl. packaging. The Environmental Law Network International also welcomes an exchange of articles as a way of payment.

The elni Review is published with financial and organisational support from Öko-Institut e.V., and the Universities of Applied Sciences in Darmstadt and Bingen.

The views expressed in the articles are those of the authors and do not necessarily reflect those of elni.

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elni Membership

If you want to join the Environmental Law Network International, please use the membership form on our website: <http://www.elni.org> or send this form to the **elni Coordinating Bureau**, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

The membership fee is €52 per year for commercial users (consultants, law firms, government administration) and €21 per year for private users and libraries. The fee includes the bi-annual elni Review. Reduced membership fees will be considered on request.

Please transfer the amount to our account at **Nassauische Sparkasse** – Account no.: **146 060 611, BLZ 510 500 15**, IBAN: DE50 5105 0015 0146 0606 11; SWIFT NASSDE55XXX.

“Yes, I hereby wish to join the Environmental Law Network International.”

Name: _____

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Profession: _____

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Date: _____

Signature: _____

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research:

- **European environmental policy**
 - Research on implementation of European law
 - Effectiveness of legal and economic instruments
 - European governance
- **Environmental advice in developing countries**
 - Advice for legislation and institution development
 - Know-how-transfer
- **Companies and environment**
 - Environmental management
 - Risk management

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the

- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brus-

sels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd., London, 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilmowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

ElNi Website: elni.org

On the elni website www.elni.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.