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REVIEW

Taking access to justice seriously:
diffuse interests and actio popularis. Why not?

Alexandra Aragão and Ana Celeste Carvalho

Access to justice in environmental matters in Italy –
an incentive for new specialists

Eva Maschietto

Chemicals in material cycles:
how EU law needs adjustments for the transition
to an environmentally beneficial circular economy

Alice Bernard

Reducing hazardous substances in municipalities
through public procurement

Katja Kontturi, Hannamaria Yliruusi and Martyn Futter

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Editorial

Access to justice in environmental matters has been in the focus of *elni* since the very beginning of the network. Two articles of the *elni Review* 2017/2 address interesting country case reports in this respect:

First off, *Alexandra Aragão* and *Ana Celeste Carvalho* explain the Portuguese system of *actio popularis*: according to the authors the most favourable of all with regard to *locus standi* in environmental matters. They argue that the dichotomy between public and private environmental damage underlying the construction of the right of access to justice is not an accurate representation of the real life social relations concerning the environment. This is where the concept of diffuse interests, adopted in Portuguese constitutional law comes in.

Eva Maschietto then casts some light on the Italian access to justice perspective that appears to be peculiar for its historical and political context. Her article aims at sketching some of the instruments that the Italian legal system has rendered available to individuals, environmental organisations and public agencies representing citizens and residents. These instruments address some of the most important aspects of environmental matters, disputes and barriers that are still present in the system, along with some potential solutions for the way forward.

Next, the current *Review* provides two contributions linked to the issue of chemicals in products.

Alice Bernard's piece seeks to answer, "how EU law needs adjustments for the

transition to an environmentally beneficial circular economy". She argues that the current EU legal framework, notably the chemicals regulation REACH, needs adjustments to ensure that recovered materials do not contain hazardous chemicals in concentrations that are no longer considered safe. The article also shows, with a case study, gaps in EU law regarding information on hazardous chemicals in material cycles. According to the author, these gaps are barriers for economic actors willing to switch from primary to secondary production.

Finally, in the *Recent Developments* section, *Katja Kontturi*, *Hannamaria Yliruusi* and *Martyn Futter* report on how municipalities can control hazardous substances via public procurement. In this respect, they present results from interviews conducted with public procurement representatives of Gdańsk, Kaunas, Pärnu, Riga, Silalė, Turku, Västerås, and Stockholm as part of the EU InterReg Baltic Sea Region -funded project "Innovative management solutions for minimizing emissions of hazardous substances from urban areas in the Baltic Sea Region" (NonHazCity).

elni will further dive into the issue of chemicals in products in a 2018 event. More information is soon to be provided on www.elni.org.

We hope you enjoy reading.

Julian Schenten/Gerhard Roller
December 2017

Reducing hazardous substances in municipalities through public procurement

Katja Kontturi, Hannamaria Yliruusi and Martyn Futter

1 Introduction

How can municipalities control hazardous substances via public procurement?* This is one of the questions addressed by EU InterReg Baltic Sea Region -funded project “Innovative management solutions for minimizing emissions of hazardous substances from urban areas in the Baltic Sea Region” (NonHazCity). NonHazCity aims to encourage reductions in the use and consumption of hazardous substances across the Baltic Sea Region. Among other activities, municipalities are addressed by various means with the main goal to prevent hazardous substances ending up in the sewer and, ultimately, in the Baltic Sea. The NonHazCity project unites 18 partners in the Baltic Sea Region including municipalities and regional authorities, research institutions and wastewater treatment plants.

Municipal public procurement is one way of reducing the environmental load of hazardous substances. Turku University of Applied Sciences studied what is the status quo in the NonHazCity partner municipalities with regards to sustainable public procurement and how hazardous substances are considered in tenders. This paper presents results from interviews conducted with representatives of Gdańsk, Kaunas, Pärnu, Riga, Šilalė, Turku, Västerås, and Stockholm. Interviews were performed between April and June 2017 and any description of regulations is based on reports from interviewees. Interviewees were persons dealing with public procurement – procurement and environmental experts and in Stockholm personnel with special expertise in chemicals.

2 Green public procurement (GPP) and guidelines

In the cities where interviews were conducted, public procurements are regulated at a national level and the Green Public Procurement (GPP) guidelines are mainly national. In Latvia, interviewees reported that the government has specified seven obligatory product groups where GPP must be used when contracts exceed specific thresholds, while in Lithuania it was stated that criteria exist for 30 supplies and 45 % of public procurement concerning these product groups should be purchased according to GPP. The Polish interviewee noted the ambitious aim for GPP by 2020 is set to 25 % of all procurement. The Estonian interviewee said that sustainable alternatives are

preferred when possible, but no concrete policies exist. In Finland there are voluntary national GPP criteria for 17 product groups. However, many cities including Turku have sustainable development strategies that also address public procurement.

In Sweden GPP guidelines are also national, but both Stockholm and Västerås have taken action, including city-level Chemicals Action Plans to limit hazardous substances in public procurement. The Swedish national guidelines aim for a toxic-free environment, and one of the ways to achieve this is through public procurement.

3 Use of chemical criteria for hazardous substance reduction

As GPP criteria usually include limitations for hazardous substances, when GPP guidelines are followed some hazardous substances can be reduced. Within the cities, GPP criteria are commonly used in acquisition of product groups such as paper, cleaning products and services, office equipment, computers, vehicles/transportation, food and food services, lighting (indoor and street), furniture and textiles.

Sweden offers the best example of detailed national chemical criteria for procurements. In Stockholm, criteria are mainly used in centralized procurements, due to their large volume and thus high hazardous substance reduction potential. Procurements concerning goods and services for children and adolescents are prioritised. According to the Stockholm chemical experts interviewed, procurement officers need support in setting the chemical criteria, since their expertise is naturally in procurement and not in chemistry. Procurement officers from some of the other cities also stated that they do not have enough knowledge to include criteria about hazardous substances in requests for tender. In all partner cities except one, there is a possibility to consult local environmental experts, but this opportunity is rarely used except in Stockholm and Västerås.

* Interviews by Katja Kontturi and Sonja Lankiniemi, Turku University of Applied Sciences.

4 Use of ecolabels

Ecolabels might be recommended for some product and service groups, typically cleaning products and services. Only interviewees in Västerås and Šilalė mention some mandatory eco-labelled product groups.

Requirements for ecolabels in invitations to tender vary. In Turku, when ecolabels are used, they are a mandatory core criteria. In Riga, ecolabels are a comprehensive criteria, where points are awarded, but offers for products and services without ecolabels are also considered. In Stockholm, where the ecolabel criterion is required instead of the label itself, ecolabels are used as a suggestion to verification. It seems that in some cities it is perceived that requiring ecolabels is discriminatory, thus the criteria behind the label are used. However, according to the new EU Public Procurement Directive third-party ecolabels can be required.

5 Mindset in the cities

Among the interviewees, the focus and level of discussion varied. In Riga the discussion is on a ministry level and it concerns issues related to EU's Candidate List of hazardous substances. In Kaunas, hazardous substances have been connected to health issues and public procurement, but the work is just beginning. In Turku, discussions have started and in *Gdańsk*, current discussions are generic. In *Šilalė* and Pärnu no special attention is yet addressed to hazardous substances. As Västerås and Stockholm are ahead in the reduction of hazardous substances, discussions in those cities already address the next level and it is no longer discussed whether something needs to be done or not, but rather how to enhance the work.

There is a mindset in the partner cities to implement GPP and cut down hazardous substances, but the initiative to go beyond national or EU regulations is not always present.

6 Working with the market

There is a division between the partner cities in the attitude towards consulting the markets and working with companies. In Kaunas, Šilalė and *Gdańsk* the law is seen as being restrictive on the matter, and the interviewees felt that any consultation with the markets would threaten requirements for non-discrimination. In Pärnu, consulting the market is also seen as problematic and is rarely used.

In Turku, Västerås and Stockholm, consulting the market is seen as part of the procurement process and is often used. Consultations are made using RFIs (requests for information) and by organising events for companies with an objective of gathering

information about safer choices companies can offer and helping procurers to set appropriate purchasing criteria.

In Västerås, consulting the market is also seen as a way for the city to inform companies about municipal values and needs, and cooperation with the companies has resulted in reductions in hazardous substances. Desired results are reached by increasing criteria levels step by step. In Riga, consulting with companies can occur during the contract period (e.g. 5 year contracts with high threshold) and improvements concerning hazardous substances can be negotiated.

Stockholm's chemical experts underline the need to start the dialogue with companies at an early stage in order to understand company perspectives, needs and obstacles.

"A dialogue with market parties before the procurement process begins can help identify innovative solutions which the public authority may not have been aware of. It can also assist the market in meeting the criteria which will be applied in the procurement process, by providing information about the public authority's expected requirements."
(European Commission)

7 Obstacles and support

Based on the interviews conducted, there is a need for more information about hazardous substances and their effects on human health and the environment. Partner cities need more guidance about how to incorporate hazardous substances into the public procurement process. Interviewees indicated that all levels of the society and institutions need to be educated. Furthermore, institutions need clear and concrete guidelines, and there should be more information and training for the procurement officers on how to include environmental aspects into tenders.

Procurement units might be willing to buy more green items, however, in many cases, the budget sets limitations. Understanding that green products are only more expensive for a while before the demand increases the supply and lowers the prices needs to be improved.

The budget also regulates human resources. Procurement units might be understaffed and therefore procurements are carried out the same way year after year. It needs to be realized at a political level that municipalities need to commit time and resources to the work. There is also a need to strengthen administrative support, and more environmental specialists need to be involved in the procurement processes. The importance of environmental consultancy is emphasized by the Swedish interviewees. Interviewed procurers state that it is

most important to influence the heads of the administration and politicians. Because municipal development plans, acts and budgets are made at a higher level in the cities, increasing knowledge at that level would help in cutting down hazardous substances in public procurement.

8 Proposals for public procurement

1. Plan a joint strategy for the city to address the issue. A common vision and strategy ensures resources and finally results.
2. Increase and distribute information about hazardous substances, their risks and the benefits of reduction in all levels of the society. Networks are one important way to share information. Informing political and administrative levels will help to get resources.
3. Make new criteria easy to use and share information on the existing ones. Train procurement officers to use the criteria and tell them about the benefits of their use. Share procurement success stories where hazardous substances have been avoided to illustrate the possibilities.
4. Ensure environmental and chemical experts are available to support the procurement units.
5. Consult the markets. This helps to set sufficient criteria levels and it sends a signal to companies about desired developments.
6. Strive for stricter legislation on hazardous substances and demand requirements to implement GPP.

Imprint

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We invite authors to submit manuscripts to the Editors by email.

The *elni Review* is the double-blind peer reviewed journal of the Environmental Law Network International. It is distributed once or 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.

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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.

DECLARATION OF MEMBERSHIP

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

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If you want to receive the print version of the elni Review the fee is €52 per annum for commercial users and €21 per annum for private users and libraries.

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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
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 - Know-how-transfer
- **Companies and environment**
 - Environmental 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

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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. 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

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, focusing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review 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).

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

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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