Measures on access to justice in environmental matters (Article 9(3))

Country report for Malta

milieu
ENVIRONMENTAL LAW & POLICY

This Report has been prepared by Milieu Ltd., under contract to the European Commission, DG Environment (Study Contract N° 07-010401/2006/450607/MAR/A1). Simone Borg undertook the work on this Task and drafted this report. **The views expressed herein are those of the consultants alone and do not represent the official views of the European Commission**. The report is based on the information gathered from Member States authorities and literature research.

Milieu Ltd (Belgium), 29 rue des Pierres, B-1000 Brussels, tel: 32 2 514 3601; fax 32 2 514 3603; e-mail: e.pozo@milieu.be

Table of contents

Executive summary 5

1. Introduction 7
   1.1. Overview of the administrative and judicial structures in Malta 7
   1.2. Environmental protection within that context 7

2. Access to justice in environmental matters 8
   2.1. Administrative procedure 8
   2.2. Judicial procedure 9
      2.2.1. General aspects 9
      2.2.2. Legal standing and participatory status 10
      2.2.3. Possibilities for appeal 10
      2.2.4. Costs and length of the procedure 10
      2.2.5. Other issues 11

3. Assessment of the legal measures for implementing Article 9(3) requirements on access to justice 12

4. Conclusions 13

Bibliography

Annex: List of compiled national measures implementing the requirements of Article 9(3) of the Aarhus Convention

Executive summary

Although Malta has both a general as well as a more specific remedy that provides for access to justice via judicial review for environmental issues, it is not fully in line with the provisions of article 9 (3) of the Aarhus Convention. This is mainly because Maltese law has predated Malta's ratification of the Convention and although when introduced these judicial remedies did reflect innovative legal thinking, nowadays they fall short of the requirements dictated by the notion of direct access to justice on environmental matters to the individual and to NGOs, that is typical of the Aarhus Convention. The Maltese authorities have acknowledged that there is this gap and have issued public statements that the matter is currently being subjected to a legal exercise that would eventually harmonise Maltese legislation with the Aarhus Convention]. Malta does not have an administrative procedure for access to justice, which can be used for environmental matters.

These remedies consist of a general provision under the Code of Organisation and Civil Procedure, Article 469A that provides for the judicial review of any act by the public sector. This legal provision does not only apply to violations of environmental law but to all administrative actions carried out by the public sector in general. It is general but actually more valid when it comes to the application of Article 9(3) of the Aarhus Convention because the environment specific remedy, provided by article 24 of the EPA allows only the Chairman of the Environment Fund to institute an action for environmental damages when environmental laws are breached. The wording of article 24 also obligates the Chairman to take such action on behalf of the government. This prevents the Chairman from acting when the public institution involved is the government itself. It can only proceed when the public institution has a separate juridical personality that is distinct from the government.

The NGOs lack legal standing because there is currently no legal instrument that bestows them with a legal personality. This is being tackled by a draft Bill that is currently awaiting promulgation by Parliament but the Bill has been more than five years in the pipe line.

To date none of the two remedies have ever been applied in practice with respect to a breach of environmental law. This makes it difficult to assess the length of time involved and the costs as well as any legal difficulties the courts may encounter in deciding upon such a case. If proceedings were to be initiated both under the COCP and the EPA, there is the possibility of an appeal before the Civil Court and legal aid is also available.

It is estimated that the costs involved would range between 100 to 300 Euros if legal aid is resorted to, although in the case of an action by the Chairman of the Fund there would be no costs involved and the time frames involved would be around two years for the courts of first instance to reach their final decision.

1. Introduction

1.1. Overview of the administrative and judicial structures in Malta

The Judiciary acts as the guardian of the rule of law and the Constitution ensuring that neither the Legislature nor the Executive abuses its powers as imposed by the Constitution itself. The highest court of the land is the constitutional court (that hears cases that constitute an alleged breach of the provisions of the constitution) followed by the superior courts of civil and criminal jurisdiction, which are in turn hierarchically superior to the inferior criminal and civil courts. The Criminal and Civil courts in Malta are separate. It is the nature of the criminal offence or the civil wrong that determines whether it is the inferior the superior courts that will take cognisance of it. It must be pointed out that the superior courts always take cognisance of case, when the government of Malta is a plaintiff or a defendant in it. These are all courts of first instance. There is only one chance to appeal before the Court of Appeal from a decision of the constitutional, superior or the inferior courts.

Any natural or legal person has access to justice before the courts once the person proves a direct interest. It is only when the matter constitutes a breach of fundamental human rights and freedoms as entrenched in Chapter 4 of the Constitution that a person can initiate legal proceedings without needing to prove a direct interest. Besides these Courts, there are also a number of administrative tribunals, which are tribunals that settle matters of an administrative nature or a specific nature e.g. there is a tribunal for industrial disputes. However, there is no such tribunal for environmental disputes. There is no binding law of precedent under Maltese law although judgements are considered to be authoritative with respect to the interpretation of the law.

The legal system in Malta is based upon the continental system of codification. The Codes are hierarchically superior to the Acts of Parliament. Codes are more generic in nature, so Acts may supersede previous interpretation and application of the legal provisions of the Codes when they are more specific and set in more detail the legal parameters for the application of the law on particular subjects. In this context the Code of Organisation and Civil Procedure (COCP) provides for the judicial review of acts by the public sector. To date, it is the only legal source that allows this, but it may be supplemented by another legal instrument in the form of primary or subsidiary legislation that would specifically provide for access to justice specifically on environmental matters. This is because the Acts of Parliament, also referred to as primary legislation, may be enabling in nature, permitting the Minister responsible to issue subsidiary legislation. Subsidiary legislation or secondary legislation cannot go beyond the *vires* (the parameters) of the enabling Act (i.e. the Act under which it is issued). This is in fact another power which Maltese Courts of Law have, namely to review subsidiary legislation and render it null and void if it is deemed to be *ultra vires* the parent Act.

1.2. Environmental protection within that context

All the laws of the environmental *acquis* were transposed via subsidiary legislation and this has mainly been done by virtue of the Environmental Protection Act (hereinafter EPA). The EPA under its article 9 gives the Minister responsible for the Environment wide powers to issue environmental legislation and impose criminal punishment in case of a breach. It also specifies that the Minister may establish a competent authority to act as a regulator with respect to the any legal obligations listed in the EPA and the regulations. The competent authority is the Malta Environment and Planning Authority (herein after MEPA).

There is no administrative procedure for access to justice under the EPA. This means that there is no administrative procedure for access to justice with respect to violations of environmental law and the granting of permits or authorisation for operations that may have an environmental impact and that are regulated by the EPA and any regulations issued there under. MEPA provides however an administrative procedure that ends with an administrative decision for which an appeal to the law courts is possible only a point of law with respect to the granting of development planning permits regulated by the Development Planning Act. This latter type of access to justice by administrative procedure, relates to Article 9(2) of the Aarhus Convention rather than Article 9(3). It is only being pointed out to emphasise the lacuna that exists with respect to environmental law proper.

There exists under the EPA however a possibility to initiate a judicial procedure alleging violation of environmental law by an act or omission of a public authority and this is provided for under the EPA. The Chairman of the Environment Fund has the right to institute an action for damages on behalf of the government against any person who breaches environmental laws. Only the Chairman of the Fund can institute this action for environmental damages, such an action shall be in addition to other civil and criminal actions that a breach of environmental law gives rise to. The Fund has a separate juridical personality from the government and MEPA. The Chairman of the Environment Fund can in principle initiate such judicial proceedings against the public institutions as well but the wording of the law expresses that he or she must institute this action on behalf of the government and therefore unless a public entity has a separate juridical personality from the government, the Chairman would be unable to institute such an action. The Chairman of Fund has a more limited role than that required by the Aarhus Convention with respect to access to justice as will be explained under 2.2.

The provisions of Article 9(3) of the Aarhus Convention can presently only be exercised under Article 469A of the Code of Organisation and Civil Procedure Civil Procedure (COCP), entitled, "*Judicial Review of Administrative Action*". This section was introduced in the COCP in by Act XXIV of 1995 as amended by Act IV of 1996 and provides for judicial review of administrative acts carried out by the public institutions. This legal provision does not only apply to violations of environmental law by public authorities but to all administrative actions carried out by the public sector in general.

As to the most recent legal developments relating to access to justice in environmental matters as envisaged by Article 9(3) of the Aarhus Convention, MEPA is currently drafting subsidiary legislation to implement more specifically the provisions of article 9(3) of the Aarhus Convention and thus transform these provisions into national legislation[1].

2. Access to justice in environmental matters

2.1. Administrative procedure

Malta does not have an administrative procedure for access to justice, which can be used for environmental matters.

One may mention that, within MEPA, any individual may have recourse to the Users Committee, where he may query practices undertaken by MEPA when exercising its powers and ask the Chairman of the Users Committee to investigate it and pronounce his views on the matter. The decisions of the Chairman of the Users Committee are not binding. This is however only applicable under the Development Planning Act that regulates development planning and not the Environment Protection Act that regulates environment protection as such.

[1] The draft is not available yet.

The general public may also resort to the Ombudsman to seek his opinion as to whether a Ministry or any other public entity exercised its duties in a fair and equitable manner. The decision of the Ombudsman is not binding.

2.2. Judicial procedure

2.2.1.General aspects

The law courts may inquire on the validity of an administrative act, when a public authority has failed to observe the principles of natural justice[2] or mandatory procedural requirements, i.e. procedures set by law that are to be observed by public authorities when they carry out administrative operations, in performing an administrative act or because it has otherwise acted unlawfully. This is possible by virtue of Article 469A of the COCP. This section was introduced in the COCP in by Act XXIV. 1995.201.as amended by Act IV. 1996.8. This article 469A provides:

"(1) Saving as is otherwise provided by law, the courts of justice of civil jurisdiction may enquire into the validity of any administrative act or declare such act null, invalid or without effect only in the following cases:

(a) where the administrative act is in violation of the Constitution;

(b) when the administrative act is ultra vires on any of the following grounds:

(i) when such act emanates from a public authority that is not authorised to perform it; or

(ii) when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon; or

(iii) when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or

(iv) when the administrative act is otherwise contrary to law".

Under this article, "*Administrative act*" includes the issuing by a public authority of any order, licence, permit, warrant, decision, or a refusal to any demand of a claimant, but does not include any measure intended for internal organization or administration within the said authority: This definition under the article 469A also provides that saving those cases where the law prescribes a period within which a public authority is required to make a decision, the absence of a decision of a public authority following a claimant's written demand served upon it, shall, after two months from such service, constitute a refusal for the purposes of this definition.

Furthermore "*public authority*" is here defined as the Government of Malta, including its Ministries and departments, local authorities and any body corporate established by law.

Under the COCP article 469A, an action to impugn an administrative act shall be filed within a period of six months from the date when the "*interested person*" becomes aware or could have become aware of such an administrative act, whichever is the earlier. The provisions of this article shall not apply where the mode of contestation or of obtaining redress is provided for in

[2] There is no specific definition of this in the Code but it is understandable that these principles include for example a fair hearing, non discrimination, impartiality etc.

any other law. In any action brought under this article, it shall be lawful for the plaintiff to include in the demands a request for the payment of damages based on the alleged responsibility of the public authority in tort or quasi tort, arising out of the administrative act. The court shall not award the said damages, where notwithstanding the annulment of the administrative act, the public authority has not acted in bad faith, or unreasonably, or where the thing requested by the plaintiff could have lawfully and reasonably been refused under any other power.

The COCP therefore provides a general right to access to justice to any "*interested party*" to ask the courts to review the validity of administrative act or the breach of any law.

2.2.2.Legal standing and participatory status

It must be pointed out that under Maltese Law any reference to a "*person*" includes both a natural and a legal person. Any interested person may, by virtue of Article 469A of the COCP, submit a request for investigation by the Law Courts to review an administrative action that may be unlawful. The term "*interested person*" refers to the need to prove a link between the person initiating proceedings and the act/omission in violation of the law. In other words the person involved must prove a direct interest in the matter.

NGOs in Malta do not have a legal standing to make a legal claim because they are not recognized by law as legal persons, although a Bill addressing this issue and bestowing a juridical personality upon NGOs is in the final stages for approval before Parliament. As the situation stands, NGOs cannot bring forward claims *as* NGOs. The only option they have is for the members to bring such claims forward in their personal capacity. This very often leads judges to query their interest. In most cases, their interest is not recognized because NGOs members are not involved in the sense of being personally involved but as spokespersons for the general public. Under traditional interpretation of the term "legal interest", this is not enough. This issue however should soon be resolved.

Under the LN 116/2005 entitled Freedom of Access to Information on the Environment, the definition of the "*public*", that transposes the Aarhus Conventions provisions and the Directive includes NGOs but it is doubtful whether the Law Courts can apply this when applying Article 469A of the COCP.

2.2.3.Possibilities for appeal

There is nothing which prohibits an appeal from the decision of the court when it reviews the validity of an administrative act under Article 469 A of the COCP.

The length of time for lodging an appeal would be covered by the provisions of the COCP on appeals before the civil courts. The provisions regulating appeals are found in article 226 of the COCP, which establishes that, in the case of appeals from the superior courts before the Court of Appeal, the time within which a notice of appeal is given shall be of twenty days, which shall commence to run from the date on which the judgement was delivered. An appeal is entered by means of a note to be filed in the registry of the court by which the judgement appealed from was delivered. An appeal may be entered for the whole or only parts of the judgement and both the plaintiff and the defendant may appeal.

2.2.4.Costs and length of the procedure

There are no official sources or legal provisions on the subject but costs and length have been estimated from general practice.

Costs

The costs of a case are difficult to estimate. Professional fees vary and the costs depend also on the length of time involved but one can estimate that a minimum of 1000 Euros would be norm.

Maltese courts provide legal aid but there are still tariffs to be paid to institute judicial proceedings, which can range from 100 to 200 Euros. These tariffs are stipulated by Schedule A to the COCP. Submissions before the Chairman of the Fund, the Users Committee and the Ombudsman are free of charge.

The person who qualifies for legal aid (on the base of its means) shall be exempt from payment of all fees and from giving security for costs. But, if as plaintiff or defendant he/she sets a counterclaim, he/she shall give a juratory caution to pay costs if able to do in case it shall be so adjudged.

It is also important to clarify that the lack of legal standing of NGOs prevents them from availing themselves of legal aid.

Length

Difficulties are envisaged as to the length of time that elapses before the law courts give their final decision, which may still be subject to appeal before the Court of Appeal.

Although a case may be appointed for hearing within a few months, on average it takes at least two years without appeal for the Courts to decide a case.

2.2.5. Other issues

Chairman

Apart from the COCP, another judicial procedure providing access to justice on violations of environmental law may be also instituted by the Chairman of the Environment Fund that is established by the Authority under Part VIII of the EPA. The Chairman has the right to institute an action for damages "*on behalf of the government,*" against any person who breaches environmental laws. The applicable section of the EPA runs as follows:

"*24. (1) Any person who causes damage to the environment, shall without prejudice to any other civil liability to make good any damages to any person or authority, be liable to pay to the Fund established under Part VIII of this Act, such sum, as may in the absence of agreement be fixed by the court arbitrio boni viri, to make good for the damage caused to environment and suffered by the community in general by the non-observance of any law or regulation by such person or by his negligence or wilful act or inability in his art or profession.*

(2) An action on behalf of the Government in accordance with sub-article (1) hereof shall be instituted by the Chairman of the Fund, or by his delegate, as established under Part VIII of this Act, and shall be prescribed by the lapse of eight years."

This is actually an action for environmental damages, rather than an action to review although the courts would obviously review the legitimacy of the act. The proceedings, which can be instituted only by the Chairman (or his delegate) are separate from and in addition to other civil and criminal actions that a breach of environmental law gives rise to. The Fund has a separate juridical personality from the government and MEPA. This is intended to ensure independence from the government but even though the Chairman of the Fund, can initiate an action for

damages when "*any person"* causes damage to the environment, the Chairman is to institute legal proceedings, "*on behalf of the government*". As the government cannot sue itself, the Chairman is restricted from taking action if the person is a public institution unless it has a separate juridical personality from the government. Therefore the term "*any person*" must be read in the light of this legal constraint that the Chairman must act on behalf of the government, rendering exempt therefore, the majority of the public sector. It is therefore easier to have an action for damages and access to justice for an action committed by the private sector.

The EPA does not specify whether any person should draw the attention of the Chairman of the Fund to institute an action for damages but it is only the Chairman who can act and institute proceedings. The matter is at his discretion. If the Chairman does not act any interested person may seek access to justice via Article 469 A asking the Court to inquire why the chairman has failed to act when he was legally bound to do so under article 24 of the EPA. There is no direct link between the citizen and the chairman established by law then this provision does not fulfil the requirements established by Article 9(3). However, although not fully compliant with Art 9(3), the action by the Chairman of the Fund does at least offer some form of remedy.

There is nothing which prohibits an appeal from the action taken by the Chairman of the Fund under article 24 of the EPA.

Same conditions of length and costs apply as in the Court procedure.

Injunctive relief

In the inferior criminal courts, known as the courts of magistrates of criminal judicature, if the accused files an appeal this has the effect of suspending the execution of the sentence till appeal. Offences under the EPA are likely to fall under this category. The same applies for civil law cases. In the superior criminal court which tries criminal offences punishable by 10 years imprisonment there is no suspension effect of the execution of the sentence.

Transparency

In Maltese case law, it is necessary to lay down the arguments of the court in writing and evidence is accepted. Although the parties may bring evidence themselves, nothing stops the court from delving into the matter and appointing experts to further investigate or to explain evidence in a professional manner. Any oral proceedings or written testimonies are taken under oath and are admissible only if taken so. In the criminal courts the experts are independently appointed by the court. In civil proceedings they can be appointed ex parte ie by the parties themselves. The credibilty of these experts is therefore treated as the court treats witnesses brought by the parties to the case. In criminal proceedings evidence such as samples etc..is under safe custody before and throughout the court case. It is necessary for parties to quote the applicable law. If they do not quote the appropriate legal provision they run the risk of losing the case on a procedural basis.

3. Assessment of the legal measures for implementing Article 9(3) requirements on access to justice

The major obstacles can be overcome with the promulgation of legislation, namely the transposition of article 9(3) into Maltese legislation and the promulgation of an Act that gives NGOs a legal personality, which is currently in the pipeline.

The COCP provisions should remain as a general form of access to justice but the provisions of the EPA must do away with the main obstacles for members of the public or environmental organisations to introduce action where they find a breach of environmental law and put an end to the exclusive role of the Chairman as the only person who can institute such an action and extend it to "*any person*".

Also important is to do away with the qualification that the chairman has to initiate proceedings on behalf of the government to eliminate the potential risk that a public institution is exempted from such a judicial process of review. However, it is essential not to do away with the Chairman's role as a guardian for compliance with environmental law.

Furthermore by bestowing a legal personality on NGOs, Maltese law would allow them to qualify as legal persons and therefore they would be in a position to institute an action both under the EPA and the COCP.

An administrative process for access to justice should also be introduced to avoid lengthy procedures. Law courts usually take much longer in deciding a case than an administrative body.

4. Conclusions

There is no administrative system for access to justice in environmental matters when environmental law is breached.

The judicial remedy is available but it is not in conformity with Aarhus Convention for various reasons:

- The system is not open to NGOs because they do not have a legal personality and must institute proceedings in a personal capacity under the general provisions for access to justice under the COCP.
- Under the EPA the situation is worse in that only the Chairman of the Environment Fund can institute an action that gives access to justice for the breach of environmental laws.
- There is a serious constraint on the part of the Chairman who must institute such an action "*on behalf of the government,*" this exempts access to justice with respect to the actions by any public institution that does not have a separate juridical personality from government. It also lacks the transparency and independence required by Article 9 (3).

The transposition of the provisions of the Aarhus Convention Article 9(3) can only be complete with the publication of regulations establishing a review body under the EPA that will be in a position to grant persons a more expeditious right of review besides the one established under article 469A of the COCP. Both the Ministry for the Environment as well as MEPA have expressed that this is the direction Malta would be taking to implement Aarhus right of access to justice in environmental matters. There is no target date as to when this will occur.

The authorities may choose to amend the provisions relating to the Environment Fund and the role of the Chairman of the Fund. In order to comply with the Aarhus Convention, the Chairman of the Fund cannot remain the only person that can institute an action before the law courts when there is a breach of environmental law. Any person should be in a position to do so.

The authorities also need to bestow legal personality upon NGOs.

Bibliography

Websites:

- Ministry for Rural Affairs and the Environment: http://www.gov.mt/frame.asp?l=1&url=http://www.maf.gov.mt

- Malta Environment and Planning Authority: http://www.mepa.org.mt/

Monography:

- *Monograph of Maltese Environmental Law*, Borg Simone, International Encyclopaedia of Laws, Kluwer, 2000

Annex: List of compiled national measures implementing the requirements of Article 9(3) of the Aarhus Convention

- The Code of Organisation and Civil Procedure:
  http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf

- The Environment Protection Act:
  http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt435.pdf

- The Development Planning Act:
  http://docs.justice.gov.mt/lom/legislation/english/leg/vol_9/chapt356.pdf

- The Constitution of Malta:
  http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf