The thirteenth meeting of the Task Force on Access to Justice to the Aarhus Convention
Geneva (hybrid), 15 February–16 February 2021

For Agenda Item 3 **Access to justice in cases relating to air quality**

Dear Mr. Chair, dear Colleagues,

This statement is made on behalf of Justice and Environment and the BlueLink Foundation. It is based on a survey of access to justice in the practical implementation of European Union air quality laws in selected EU countries -Austria, Bulgaria, Czech Republic, Hungary, Romania.

1. Why is this sector of particular relevance when it comes to access to justice?

1.1. Overly complex cases

Ambient air is a special environmental media, with multiple actors on both side of pollution (perpetrators and victims), also typically with long causal links and stochastic probabilities instead of linear, deterministic relationships – all that make it especially difficult to prove administrative liability and achieve meaningful results in amending the quality of air in our major cities. These same obstacles de facto exclude the public from an effective access to justice in clean air cases (CZE). Yet, under such circumstances indirect participation rights of NGOs gain especially high significance, whereas direct rights of individuals and local communities might not work at all in air protection administrative cases. This is why ensuring access to justice, especially for professional NGOs is of key importance.

1.2. Costs and timeliness

Clean air protection cases have a series of legal specialties, which makes it difficult to manage them in the regular ways concerning public participation, too. In several countries courts are quite reluctant to acknowledge access to justice rights of citizens and NGOs in respect of challenging the regional or municipal ambient clean air programmes (BUL, HUN). This situation might have constitutional legal ramifications, too, in connection with the right to health and to a favorable environment. In other cases, civil groups might be admitted to the relevant cases, for instance EIA final decisions, as well as EIA screening decisions, but the increasing court fees in cassation proceedings and the award of *very high costs* may lead to restrictions on access to justice (BUL). In other instances the *length of the judicial procedures* might render the efforts of the NGOs to protect the air of certain regions futile (ROM).

1.3. Economic and political pressure

In air protection matters there is usually a *high amount of money* at stake, considering that preventive measures, such as air filtering are very expensive (e.g. in the case of certain relevant facilities, such as incinerators or recycling factories, the amount spent on them might mount up to 40 % of the total investment expenses), which fact results in high economic and political pressure on the authorities. At the

same time these difficulties make public participation indispensable, in order to balance the sides of the stakeholders and achieve socially better acceptable results in clean air matters (HUN).

2. Key facts of the cases Justice and Environment lawyers have examined in the project

The cases we have dealt with are divided between ambient air quality and pollutant emission cases – no doubt, both approaches shall be applied in order to build up and support successful air protection programs. In the first aspect, we mostly concentrated on the zonal planning of the occurrence of the polluting materials regulated by the AAQ Directives, while in the latter topic we have examined various kinds of permitting and EIA cases. As we see, the ambient air quality protection measures usually take the legal form of planning, normative decisions, while the main administrative tools of emission reduction are various individual decisions mostly. However, this is not an unbreakable rule, in complex air protection programs both kinds of administrative measures shall take place, let alone that the differentiation between general and individual types of administrative decisions should not be rigid, there should be communication and overlap between them. Both general and individual decisions can have different time dimensions: prevention of (more) future pollutions or responding to prevailing situations of unacceptable air pollution.

3. What are the critical issues regarding access to justice in those cases?

3.1. Making clear that the Aarhus Convention relates to all air protection cases

Undoubtedly, the largest success amongst the cases analyzed in this project is that of the Austrian member organization of Justice and Environment. Originally, the Air Pollution Control Act did not account for any access to justice provisions at all. Only following the ruling by the Supreme Administrative Court, such provisions were inserted into to the law and it was amended accordingly (AUT). It seems to be obvious that air protection is part of environmental administrative law, including all its general (zonal planning) and individual (permitting, EIA etc.) measures. It can be interpreted, therefore, that the national transposition of the Aarhus Convention prevails in air protection cases, too. Even if so, for the sake of unambiguous legal practice, an inclusion of the proper provisions into the Act was a necessary step.

3.2. eNGOs' role in initiating changes in AQPs

Another delicate legal interpretation issue was raised in the Hungarian test AQP case. While the right of an NGO to participate in the zonal planning procedure is undeniable, an NGO demand for the renewal of a state plan of environmental protection was not yet acknowledged to be made legally. The Supreme Court just recently decided that the initiative of the NGO to amend an AQP is baseless, its request was dismissed, so a proper examination of the arguments of the NGO about the shortcomings of the AQP as it stands now and about the questions how much it responds to the legal requirements of the Directives on air protection was eventually omitted (HUN). We note here that the very core of such a decision might be questionable: a planning document which belongs to the discretionary organizing power of a governmental body is vastly overlapping in such cases with a decision that closely concerns the rights and responsibilities of legal subjects, therefore sharing the fate of an individual administrative decision at the same time, based on the rules of general administrative procedural law.

3.3. Expenses of clean air litigations

The Bulgarian case pointed out the costs of the complicated and expert based air protection administrative and court cases. 4 individuals and one NGO (claimants) and the Sofia Municipal Council Toplofikacia Sofia JSC had to pay for the attorney fees only for the cassation instance in the amount of BGN 54.000

(appr. EUR 27.000) – this is only a fragment of the total expenses, including the expert(s) work, court fees and expenses of the other party in case of losing the case. Such costs may restrict the applicants from appealing against other administrative acts and thus restrict access to justice (BUL).

Other critical issues reviewed in the study include the time factor and injunctive relief, the criteria of standing in environmental court cases, considering evidences on probability, formal participation rights vs. substantial influence on the content of air protection measures.

Conclusions

In all of the cases we have examined in this project we can establish that the European NGO community fighting for healthier air and more stringent and effective measures from the side of the relevant authorities is just at the beginning of a long route. We are starting multiple cases in several aspects, as a usual strategy of the NGOs in order to test several administrative bodies and courts in these new kinds of cases, which has no meaningful court or administrative practice yet. At the same time, our efforts show that life is more complex than it is prospected in the European air quality laws.

We have learned that there are enormous technical and social problems mounting ahead of a successful air protection policy in the examined (and most probably in every) European countries. Our problems start with the difficulties to trace the way of air pollutants and to estimate their concrete effects on the health of the population, continue with the social and political opposition to any meaningful (and, indeed, extremely expensive) air protection measures, and culminates in the difficulties of handling these post-modern (complex, information based etc.) legal problems with several hundred years old, positivist legal attitudes.

In such a stalemate situation, we think public participation efforts are extremely important. Practical orientation, system approach and motivation from the members and organizations of the public break the path for more effective, complex air protection policies in our major cities. Such policies should encompass general legislative and planning decisions, as well as keeping in mind the general principles entrenched in the plans in individual permitting and environmental impact assessment procedures concerning activities with significant air pollution effects.

Public participation in AQP shall not be exhausted in formal information and collection of opinions, the environmental authorities shall consider the local communities and professional environmental NGOs as partners who help them achieve meaningful results in designing and implementing effective plans. Also, in individual cases, people living in the vicinity of planned or operating polluting facilities shall be considered as indispensable participants of the procedures. Having taken into consideration the enormous technical, economic, social and political hindrances, environmental authorities have no other chance to reach acceptable results in air protection than the widest and deepest cooperation with the members and associations of the general public.