

## Collective Redress in Environmental Matters:

*key challenges, trends, good practices & suggestions for the way forward*

Introduction by **Dr. J.G.B. Pikkemaat, Senior Legal Counsel at the Ministry of Infrastructure & Water Management, Netherlands** at the 28<sup>th</sup> meeting of the Working Group of the Parties of the Aarhus Convention (Geneva, 2-4 July 2024. Thematic session Tuesday, 2 July 2024 (10.50 a.m. – 1 p.m. and 3-3.10 p.m.), Panel (a) *Access to justice to challenge violations of laws relating to the environment*

### 1.<sup>1</sup>

Dear Chair, dear participants, thank you all for providing this opportunity to introduce today's panel discussion; I would like to do so by sharing some remarks on Collective Redress related to Environmental Law. To get a clearer focus on matters in this field, I would like to reflect very briefly on what exactly is the meaning of the concept collective redress, Many features of which already have been called to attention in previous contributions today.

### 2.

*A. Collective litigation frameworks: defining collective redress and identifying redress mechanisms to end illegal activities or claim compensation.*

Generally spoken, collective redress, also known as collective or class action, might be characterized as attaining compliance with the law, if the individual means of legal action fail to do so. The law described as the system used to structure society, granting substantive rights to its participants, has to provide for the means to determine these rights and to effectively uphold them.

Point of reference in upholding the law is to be found in these subjective rights; base-line in legal procedure usually will be individual redress: legal claims take the individual's rights or interests as a starting point. Law suits basically will be initiated by one or more individual parties. For various reasons though – legal complexity, lack of legal knowledge, high amount of litigation costs compared to the expected outcome of proceedings, the small individual against the State or a big powerful company – individuals who experience infringements may refrain from enforcing their rights. But these disadvantages of individual claims may accumulate into one effective legal interest when addressed collectively. Gathering individual claims into one single law suit might overcome various reasons for not

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<sup>1</sup> Numbers referring to PPS slides

enforcing these claims individually. Avoidance of parallel litigation and legal uncertainty also count in favor of class litigation; mass tort cases are a speaking example here. Legal systems originating in the Anglo-American Common Law traditionally are familiar with the concept of class actions or collective actions. But class litigation in different forms has been developing strongly in continental Europe over the past half century or so.

The legal phenomenon Collective Redress then, will appear in many different forms; roughly speaking, three types might be distinguished: (i) group actions, where claiming parties themselves may take part<sup>2</sup>; (ii) representative actions, where a well-defined interest is pursued but the litigation is carried out on behalf of a large number of interested parties not clearly identified (although represented in court by one or more agents); and (iii) group settlements, where by representative organizations and liable parties an agreement on redress is settled out of court, after which in court application is made to request declaration of binding effect for a group of injured parties. Although collective redress is largely known and developed within the civil law, it might be materialized through public law as well, including criminal law for that matter.

### 3.

#### *B. Identifying (i) different types and merits of Collective Redress (ii) particularly related to 'environmental matters'*

As our focus here lies on environmental matters, collective redress-mechanisms will have to furnish the possibility, that two or more members of the public, or their representatives (like environmental NGOs), can claim collectively, cessation of illegal activities or compensation in environmental disputes. The purpose of collective redress becomes particularly clear in environmental matters, constituting a field where protection of individual rights and public interests are equally paramount. As I just noted, the law, in particular the law on public or civil procedure, has to provide for the effective enforcement of the rights and interests of its subjects. Where the concept of rights is linked to the individual person, procedural law will take the individual claim as a rule; this seems to be less so, if the interests of a certain group of individuals not so clearly identifiable, like society as a whole, are tried in court. The modes of collective redress have to fit

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<sup>2</sup> although with one or two legal representatives of the plaintiffs acting on behalf of the parties in the group, representing the claim(s) in court.

into an existing procedural framework, which is more often than not based on an individual party-approach, so to speak. Given the national characteristic of procedural law, provisions on collective redress show a differentiated picture per member state or party. A few common denominators though, can be identified:

(i) Collective redress, as a means of Access to Justice, is realized basically in the fields of Public and Civil law; opportunities for collective redress within the Criminal Law are used less, compared to the Public and Civil Law.<sup>3</sup> Basically, collective redress does not differ from individual redress in its aims: asserting rights, asserting compliance with the law, seeking redress, through legal proceedings. Redress sought through Public Law will need a clear point of reference in an act by the public administration to be challenged in administrative procedure available for any interested party affected by that act, although restrictions on admissibility are possible.

Without a clear public act, claims anyway will have to be forwarded under civil liability law (or Tort Law); even more so of course if another civilian party will have to be addressed legally. In civil procedure, common interests might be operated through so-called ‘collective actions’. Legal procedure will have to determine admissibility, where representativeness of the claimant often is the main requirement. If sufficient interest for the parties represented is lacking altogether – this goes for NGOs and individual parties alike – civil claims are not easily admitted. In mass damage-claims the individual rights-based approach often will cover procedural possibilities; claims relating exclusively to the public interest will often depend on specific possibilities for this kind of collective actions.

(ii) especially in ‘environmental matters’, legal dispute concentrates often on public interests: apart from actual damages suffered as a result from environmental liability, which may be compensated either individually or collectively, an interest-based approach is obvious whereas, of course, the environment cannot speak for itself; to put it in the wordings of A-G Sharpston in the ECJ-landmark Trianel-case – and I quote – ‘...it may be said that the environmental NGO was seeking to act on behalf of the environment itself’.<sup>4</sup>

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<sup>3</sup> Criminal prosecution as a rule will have to be initiated by the public prosecutor although the law might provide for opportunities for members of the public to claim prosecution of criminal (environmental) offences; environmental NGO’s might be able to make use of these possibilities that could be qualified as collective redress in the sense proposed here in this introduction, if successful prosecution could result in some form of redress. Claims from injured parties, individuals and representative bodies alike, might be possible within a criminal trial; criminal judgements also might form the basis of a civil tort claim which may be carried out either individually or collectively.

<sup>4</sup> Case C-115/09, 2011, ECR-3673

In short, environmental collective redress might be sought from public authorities 1. by representative organizations through administrative proceedings. 2. Outside the Public Law, representative organizations focusing on public interests may seek collective redress from public bodies and private entities alike, in all sorts of manner, for infringing environmental interests.<sup>5</sup> Compensation for damages is not limited to financial restitution.

#### 4.

##### C.

Evidently, parties to the Convention, are free to determine rules concerning NGO's standing before their national courts, as for instance article 9 declares; these national rules should comply with the requirement of a wide access to justice in environmental matters whereas paragraph 4 demands effective remedies that are equitable, timely and not prohibitively expensive. The Aarhus Compliance Committee allows for requirements like an NGO to have a legal interest for filing a claim, but these restrictions should not go that far as to exclude environmental NGO's from Access to Justice; Access to Justice should be the norm not the exception.<sup>6</sup> Relevant, case-law from the European Court of Justice and from the European Court of Human Rights, points in the same direction; both Courts provide for extensive case law in these matters.<sup>7</sup> In short, regulations under national procedural law concerning environmental protection must be balanced with an effective compliance with treaty obligations.

In a somewhat older contribution<sup>8</sup> on Collective Redress in Environmental Matters in the EU, from 2014, the author Mariolana Eliantonio concludes – and I quote – that *‘in environmental matters, while not primarily EU-driven, there is already a well-established framework of collective litigation established by the Aarhus Convention.’*

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<sup>5</sup> claiming compensation for damages, seeking redress, financially, compensation for losses suffered, but also pleading for 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.

<sup>6</sup> The preamble and articles 1 and 3 determine as much.

<sup>7</sup> Parties to the Convention who are Member States of the European Union are subject to the rulings by the European Court of Justice concerning Aarhus, as most Parties to the European Convention are also bound by the findings of the European Court of Human Rights on Aarhus.

<sup>8</sup> (Mariolana Eliantonio, Collective Redress in Environmental Matters in the EU: A Role Model or a Problem Child?, in: Legal Issues of Economic Integration 41 nr. 3 (2014) 257-274.

*Trends:* At this point I may remark that in the last decade or so we have seen an increase of collective litigation in environmental matters (but not exclusively), in member states and parties to the convention alike; we all know of some or more famous examples, that might well underline the quotation on a well-established framework of collective litigation.

*Good practices in this context might be:* procedural admission rules for NGO's should not be too restrictive, effectively barring NGO's from challenging compliance with environmental rights or seeking redress for its violations.

*As Key Challenges we could name:* maintaining legal certainty regarding substantial law and legal procedure as well, for instance who may stand in court, which type of claims (case based or interest based) may be submitted and to which court? And: is the judiciary sufficiently equipped to cope with serious increase of case-load?

*The way forward:* That is the question which this Forum may try answering, to which I turn now for any *Suggestions* on this path. Thanking for your attention I would like to close by submitting the question whether Environmental Collective Redress might be considered an already secured asset or still work in progress.