



The Aarhus Convention: its status in the EU legal system

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Outline of presentation

I.	Effective judicial protection of rights conferred by EU law
II.	Status of the Aarhus Convention in the EU legal order
III.	Direct effect of a provision in an agreement concluded by the EU and a non-member country

Self-explanatory

I- Effective judicial protection of rights conferred by EU law

- Article 19 (1) TEU: *'Member States shall provide remedies sufficient to ensure legal effective protection **in the fields covered by Union Law**'.*

- Article 47 Charter of Fundamental Rights: *'Everyone whose **rights and freedoms guaranteed by the law of the Union** are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article'*. It corresponds to Articles 6 and 13 ECHR (respectively, right to a fair trial and right to an effective remedy).

Article 19(1) TEU and 47 of the Charter **only** apply in the field of EU law.

The legal basis



II - Status of the Aarhus Convention in the EU legal order

The Aarhus Convention (AC) was signed and approved by the European Community (Decision 2005/370).

Therefore, as other agreements concluded by the EU, its provisions form an integral part of the legal order of the EU (see Article 216 TFEU*).

Within the framework of that legal system, CJEU has jurisdiction to give preliminary ruling concerning the interpretation of the AC (as other treaties concluded by the EU).

* Article 216 TFEU: '1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States'.

Background



II- Status of the Aarhus Convention in the EU legal order - The judgment of the EUCJ (Grand Chamber) of 8 March 2011- case C-240/09*

Since the AC was concluded by the Community and all Member states on the basis of joint competence, where a case is brought before the Court, it has jurisdiction to define the obligations which the Community has assumed and those which remain the sole responsibility of the Member States.

To define so, it must be determined whether, in the field of an article of the AC, the EU has exercised its powers and adopted provisions to implement the obligations deriving from it. If so, EU law would apply and it would be for the CJEU to determine whether the relevant provision has direct effect.

* Jurisprudence confirmed in the judgment of 15 March 2018 case C-470/16.

Self-explanatory



II – (1) Status of the Aarhus Convention in the EU legal order - The judgment of the EUCJ (Grand Chamber) of 8 March 2011- case C-240/09

With a structured reasoning (see points 34 to 42 of the judgment), the Court of Justice came at the conclusion that it has jurisdiction to interpret the provision of Article 9 (3) of the AC.

Self-explanatory

III- Direct effect of a provision in an agreement concluded by the EU and a non-member country

A provision in an agreement concluded by the EU with a non-member country must be regarded as being **directly applicable** when, taking into account its wording, the nature and the purpose of the agreement, the provision contains a **clear and precise obligation** which is **not subject**, in its implementation or effects, **to the adoption of any subsequent measure**.

Directly applicable means that the provision can be applied in judicial (or administrative) actions between individuals and public authorities*. This effect does not occur in the judicial actions between individuals.

*For the notion of public authorities see Judgment CJEU (Grand Chamber) of 10 October 2017, case C-413/15 Farrell and the related judgment of 12 July 1990, C-188/89, Foster.

The notion of “direct effect” through the lens of logical and teleological reasoning as well as literal interpretation.



III- (1) Direct effect of a provision in an agreement concluded by the EU and a non-member country: the Aarhus Convention

Article 9(3) and (4) of the AC deals with procedural rules.

In the absence of EU rules governing the matter, it is for domestic legal system of each Member State to lay down **detailed procedural rules** governing the rights that individuals derive from EU law. Those detailed rules must be no less favourable than those governing similar domestic actions (**principle of equivalence**) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (**principle of effectiveness**).

Article 9 (3) and (4) of the AC has no direct effects.

However, it can not be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

Main message: Given that the EU law doesn't deal with procedural rules relating to access to justice and effective remedies, in such cases domestic procedural rules are applicable in the light of the principle of equivalence and principle of effectiveness.



Commission Notice on Access to Justice in Environmental Matters, 2017/C 275/01

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**Europäische Akademie (ERA)- National Judges and
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Outline of presentation

I.	Basics: Notice, background
II.	Decisions, acts, omissions – Role of national courts
III.	Access to justice in environmental matters
IV.	Legal standing
V.	Scope of review
VI.	Effective remedies
VII.	Costs
VIII.	Concerns linked to the Notice
IX	EU-level support

Self-explanatory



I - (1) Why an initiative on access to justice specifically for environmental matters in 2017?

Commission has stressed the importance of **redress mechanisms** at national level (COM(2017)198 final) to complement more strategic Commission enforcement.

For environment, it is necessary to **overcome basic barriers** that exist in many legal systems, in particular, if the right to go to court is very restricted.

Significance of **Aarhus Convention (1998)**, ratified by EU in 2005.

Case-law of the CJEU has considerably evolved since 2003 (Proposal for a Directive) and now covers much of the subject-matter of the proposal.

I - (2) Why a Notice and what is the Notice?

- **EU access to justice provisions** are included only in few EU secondary environmental legislation*;
- **A Commission proposal** of 2003 sought to fill the gaps but did not receive the necessary support from MS.
- Commission **Notice (Interpretative Communication)**, published in Official Journal C275 of 18 August 2017
- Focuses on what the Court of Justice (CJEU) has said about how national courts should deal with private environmental litigation against public authorities (38 cases cited in the Notice).

* EIA Directive 2011/92/EU, Industrial Emissions Directive 2010/75/EU, Seveso Directive 2012/18/EU, Environmental Information Directive 2003/4/EC, Environmental Liability Directive 2004/35/EC.

The selection of the “Notice” as an instrument is rather rare in environmental law in contrast to the fields of competition and free movements of goods.

The Notice constitutes an interpretative Communication based on the relevant CJEU case law and reflecting the opinion of the Commission on these topics.

I- (3) The Commission's Approach to drafting Notice

Create no new legal obligations but draw inferences from EU legal principles and CJEU case-law in case of gaps in EU secondary legislation

Cover all relevant aspects of access to justice in a comprehensive way, i.e. rights, standing, scope of review, effective remedies, costs, at the same time keeping the length reasonable

Target a broad readership of national administrations, national courts, legal practitioners, economics operators and NGOs

Scope of the Notice: Decisions, acts and omissions by public authorities of the Member States; it does **not** address litigation between private parties and the judicial review of acts of EU institutions via EU courts.

This Notice is not a legally binding act; it aspires to close the existing gaps in the EU secondary legislation.



II - (1) Decisions, acts and omissions at the national level

Parliament: national primary legislation

Minister: regulatory acts (statutory instruments)

Government and government departments: plans, consent systems, enforcement

Local government and specialised bodies: environmental infrastructure, monitoring, plans, consents, enforcement

Self-explanatory

II – (2) Decisions, acts and omissions at the national level: what can go wrong?

Primary legislation and regulatory acts: adopted late; content incomplete or too narrow

Designations: not made or incomplete

Land-use and sectoral plans: no strategic assessment or incomplete assessment; inconsistency and incoherence

Quality standards: breaches

Environmental action plans: delayed or inadequate

Infrastructure investments: not made or insufficient

Consent and operating requirements: no assessment or weak assessment and conclusions; inaction against illegal development or operational nuisances

Transparency: no active dissemination, slow responses to information requests

Self-explanatory

II – (3) Role of national courts in environmental litigation

National courts are not only in charge of oversight of national measures (decisions, acts or omissions) but are also '**the ordinary courts**' for implementing **EU law** within the legal systems of the Member States (Opinion CJ 1/2009, ground 80).

They deal with:

- **Private enforcement** involving litigation *against* public authorities;
- **Private enforcement** involving litigation *between* private parties;
- **Public enforcement** involving criminal law and legal actions *by* public authorities

Self-explanatory

III – (1) Access to justice in environmental matters: notion

A set of guarantees to allow **court challenges** by **individuals and their associations** against **decisions, acts and omissions** of **public authorities**

Guarantees relate, amongst others, to:

- standing;**
- scope of review;**
- effective remedies;**
- costs;**
- practical information**

Brief definition.

The legal standing is the most crucial issue. The practical information aspect is of great significance for the citizens.

III – (2) Dual approach: rights of the public and obligations on Member States – Notice Section C1

Access to justice can be based on

- **Procedural and substantive rights** envisaged in EU law for individuals or Environmental NGOs and
- **Obligations on Member States arising from provisions of a directive which are unconditional and sufficiently precise;** incompatible with the binding effect laid down in Art. 288 TFEU to exclude the possibility of the obligation imposed by a directive being relied on by persons concerned. The CJEU mentioned initially **directives on air quality and drinking water to protect health** but **this rationale goes beyond** and covers other rights.

Self-explanatory.

The first approach is quite obvious and expected. As regards the second approach it is important to mention the C-72/95, *Kraaijeveld* case .



IV - Legal Standing: a key issue to bring a legal challenge - Notice, Section C2

Legal standing is fundamental. Individuals or Env NGOs can only be heard by a judge if they have the right to bring a legal challenge.

Only a few acts of EU secondary law explicitly provide for legal standing for certain grievances.

However, the CJEU has recognised legal standing for individuals or Env NGOs in several contexts. Individuals need to show a sufficient interest or the impairment of a right to obtain legal standing. Recognised Env NGOs meeting the criteria envisaged by national laws enjoy legal standing *ex lege*.

Based on different legal systems across the EU, the legal standing may be related either to the question of interest (i.e France) or to the principle of impairment of a right (i.e. Germany, Austria).

IV- (2) Legal standing in the Aarhus Convention

Requests for environmental information (Art.9(1) AC)

Specific activities subject to public participation (Art. 9(2) AC)

Requests for action under the environmental liability rules (Art. 9(3) AC)

Other subject-matter, including national implementing legislation, general regulatory acts, plans and programmes (Art. 9(3) AC)

As regards Art. 9(2) of the Aarhus Convention, Annex I concerns activities that must be subject to public participation, whereas Annex II covers the activities that could be subject to public participation, if there is a significant on the environment.



IV – (3) Legal standing - Article 9(2) of the Aarhus Convention

Article 9(2) of the Aarhus Convention:

Each Party shall (...) ensure that members of the public concerned having a sufficient interest or, alternatively, maintaining impairment of a right (...) have access to a review procedure before a court of law (...) to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of **Article 6** (...)

Article 6(1)(b) of the Aarhus Convention

Each Party shall (...) also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions

Article 6(1)(b) of the Aarhus Convention applies to the procedure laid down in Article 6(3) of the Habitat Directive 92/43/EEC (appropriate assessments). Therefore, Article 9(2) applies to all decisions taken in the framework of Article 6(3) of the Habitat Directive.

The CJEU have dealt with these topics in the famous cases C-240/09 LZ 1, *Slovak Brown Bear* and C-243/15 LZ 2, *Slovak Brown Bear* establishing a link between Art. 9(2) and Art. 6 of the Aarhus Convention in the framework of Article 6 of Habitats Directive (appropriate assessment).



IV – (4) Legal standing: C-243/15 - LZ II **Effects of the judgment**

Rationale of the case LZ II can be applied **to other sectors of EU environmental law** (e.g. Water Framework Directive **C-664/15 – *Protect Natur***).

Challenge **procedural and substantive legality** of the contested decision or act in its entirety (CJEU judgment 15.10.2015, C-137/14, point 80),

In this case, it is very interesting to see how the CJEU ended up saying that there is legal standing relating to a directive without any explicit relevant provision.

IV - (5) Legal standing: Article 9(3) of the Aarhus Convention

Article 9(3): "Each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

C-240/09 – LZ 1, "Slovak Brown Bear": "it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law" (point 51) - See **also Case C-470/16**, point 58.

Main message: Given the lack of direct effect of the Article 9(3) of the Aarhus Convention, the domestic law should be interpreted through the lens of the objectives of the Aarhus Convention and the obligations arising from EU.



IV - (6) Legal standing - Article 288 TFEU – risks for human health

Air quality cases:

C-237/07 - *Janecek* – Air quality plan

C-404/13 - *Client Earth* – Air quality plan

C-165 to 167/09 - *Stichting Milieu* – National emission ceiling

Overview of CJEU cases

IV – (7) Legal standing- new CJEU cases

Case C-529/15 - *Folk*: clarifies both a right (to use the environment) and a standing right in relation to the Environmental Liability Directive (Relevant to paragraphs 55 and 89 of the Notice)

Case C-664/15 – *Protect Natur*: application of the principles established in case 243/15 – *LZ II* to the Water Framework Directive (Relevant to paragraph 70 of the Notice)

Overview of CJEU cases

V - (1) Scope of review Notice, Section C.3

Possible grounds and arguments for judicial review:
the extent to which grounds and arguments may be restricted

Intensity of scrutiny: The extent to which national judges have to review the legality of acts and omissions

Self-explanatory

V - (2) Scope of review: possible grounds of judicial review

Art.9 (2) cases: specific activities with public participation

- Individuals: Restriction possible to grounds which entitled to legal standing (C-137/14 – **Commission v Germany**)
- eNGOs: no restriction of the grounds possible (C-115/09– **Trianel**)

Art. 9(3) cases:

No specific case law

- individuals: restrictions possible and comparable to Art. 9(2)
- eNGO: at least those provisions which gave rights to action before a court, however: NGO enjoy a broad right to protect the environment and invoke obligations before a court (C-243/15 - **LZ II and C-664/15 Protect Natur**)

Self-explanatory



V - (3) Scope of review: possible arguments in judicial review

Preclusion: scope of review may not be reduced to the objections raised during the administrative procedure (C-137/14 – ***Commission v Germany***)

The principle applies to case falling under Article 9(2). For Article 9(3) see Protect Natur C-664/15, points 88 to 90)

Provisions to protect against arguments submitted abusively or in bad faith are allowed

In the German legal order, legal arguments which have not been raised at the administrative phase cannot be raised for the first time at the judicial phase.

This is not in line with the EU law which clearly separates the administrative stage from the judicial stage.

V - (4) Scope of review: intensity of scrutiny

- EU law does not provide specific rules for the intensity of scrutiny
- CJEU: *'In the absence of further detail in EU law, it is for the legal systems of the Member States to determine that extent, subject to observance of the principles of equivalence and effectiveness'* (C-71/14 – **East Sussex** – access to information context, point 53)

Conclusion: The level of scrutiny is determined by the objectives of the substantive EU law (C-71/14, point 58).

- This approach was confirmed by the judgment of the CJEU (Grand Chamber) of 16.05.17, in Case C-682/15 in administrative co-operation between Member States in fiscal matters and, indirectly, by the Case C-664/15 **Protect Natur**.

Main message: the intensity of the judicial review depend on the domestic legal traditions (i.e. In Germany the scope of the review is extensive, whereas in France the principle of demand applies and, therefore, the judge is only bound to the demand raised by the complainant)

V - (5) Scope of review: intensity of scrutiny

Both procedural and substantive legality need to be scrutinized

Procedural legality (e.g. public participation requirements)

Substantive legality

- **Facts of the case**
- **Assessment of the merits of a decision, act or omission (examples: significant effect on a Natura 2000 site, significant effect in an EIA context, appropriateness of measure in an air quality plan)**

The review of the substantive legality may be challenging for the French jurisprudence.

V - (6) Scope of review: intensity of scrutiny

Additional aspects:

Scrutinizing **regularisation decisions**

Scrutinizing decisions on **plans**

Scrutinizing **national legislation and regulatory acts**

New case (after the adoption of the Notice):

Comune di Corridonia, 26 July 2017, joint cases C-196/16 and C-197/16. Clarifies role of national courts in scrutinizing regularization decisions linked to the Environmental Impact Assessment Directive and related effective remedies (relevant to paragraphs 135 and 164 of the Notice).

Scrutinizing decisions on **plans** → obligation coming from Art. 7 of the Aarhus Convention

Scrutinizing **national legislation and regulatory acts** → If this EU provision is not enshrined in the relevant domestic provisions, the national judge should take aside the domestic law and apply the EU law.

VI - Effective remedies - overview

Notice, Section C.4

- Minor procedural defects
- Suspension, revocation, annulment of unlawful decisions or acts, including disapplication of legislation and regulatory acts
- Omissions
- Making good unlawful harm (*including compensation for pecuniary damage*)
- Interim measures (referred to as '*injunctive reliefs*' in Article 9(4) of the Aarhus Convention)

Self-explanatory

VII - (1) Costs – context and general principles

Notice, Section C.5

Article 9(4) of the Aarhus Convention* and some EU secondary legislation (such as Article 10a Directive 85/337)

- Court procedures must not be prohibitively expensive (NPE requirement); no *a priori* objection to loser pays

- It covers

all costs of participation: legal representation, court fees, cost of experts, financial security and

all stages of proceedings: appeals as well as first instance, including leave to bring a challenge in the course of a development consent process (case C-470/16, points 31-32)

- Reasonable predictability

*No direct effect (case C-470/16, points 52-53).

The topic is more acute in the UK and Ireland but also in some other jurisprudence.

For further information, there is a tailor-made presentation on this topic within the present training module.

VII - (2) Costs: assessment criteria

In Case C-260/11, **Edwards**, CJEU has established subjective and objective criteria which have to be taken into account in making a cost order:

- **Subjective criteria** include: (1) financial situation of the litigant; (2) prospects of success; (3) importance of what is at stake; (4) complexity of the case; (5) frivolous nature of the claim at its various stages;

- **Objective criterion**: costs of proceedings may not be objectively unreasonable.

New cases (after the adoption of the Notice):

CJ Judgment 15.03.2018, case **C-470/16 – North East Pylon**: asks national judges to extend the NPE requirement across environmental litigation.

CJ Judgment 17.10.2018 case **C-167/17 – Klohn**: the national court called upon to rule on the amount of costs is under an obligation to interpret national law in conformity with Directive 85/337 (Article 10a), in so far as the force of *res judicata* attaching to the decision as to how the costs are to be borne.

Self-explanatory

VII – (3) Costs: cost allocation regimes

CJEU does not establish cost allocation regimes – however, the cost regime should respect the NPE requirement. Examples of cost allocation approaches:

Loser pays principle

Back-to-back cost allocation

Protective cost orders (cost caps)

One-way cost shifting

Self-explanatory

VII– (4) Costs: Legal aid

No obligation in EU secondary legislation to provide legal aid for environmental cases

Article 47(3) of Charter of Fundamental rights requires that legal aid should be made available, but the right to legal aid is not absolute and may be subject to restriction

A legal aid scheme may not in itself demonstrate that costs are not prohibitive -> depends on the conditions (e.g. excluding NGOs)

Self-explanatory

VIII - Concerns linked to the Notice: Notice itself

Helping readers: Related Citizen's Guide using FAQ approach

New CJEU case-law: Correlation table to track new cases

Self-explanatory



IX - EU-level support: funding relevant to access to justice in environmental matters

Programme of co-operation with national judges:

https://www.era.int/cgi-bin/cms?_SID=6007682c167bcc34db5dd583b8a9ceeca4ddf67100603765788254&sprache=sitemap_en&bereich=artikel&aktion=detail&idartikel=123789

LIFE Programme (Governance and Information):

<http://ec.europa.eu/environment/life/funding/life2018/traditional/index.htm>

Self-explanatory