

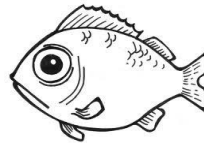


The Aarhus Convention and the EU – Recent developments

Aarhus - *acquis*



- EU *acquis* – **international** obligations
- **EU traditions** of transparency, public involvement and effective judicial protection.
- **Aarhus perspective**: who should protect the environment, if it cannot protect itself?
- Our environment is everyone's concern.
- **Advocate General Sharpston** : ‘a Ferrari with its doors locked shut’
- ‘The fish cannot go to Court’



Multi-layered legal system including international law, EU law, Charter of Fundamental Rights Art 47.

EU Treaties and case-law of the CJEU already acknowledged these rights during the development of EU *acquis*, during the last decade, already before the ratification of the Aarhus Convention.

Aarhus however, is very important for ensuring legal certainty and being explicit about rights of civil society. NGOs as watchdogs protecting the environment, that cannot protect itself (see more recent discussions on Rights of Nature ([https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU\(2021\)689328_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU(2021)689328_EN.pdf))).

AG Sharpston at the hearing of the Trianel case used the metaphor of fish that cannot go to court, hence the need for NGOs, who can represent them before tribunals. She also compared some courts to Ferraris, only accessible to those who can afford these and not for the public concerned at large.



The European Union and the Aarhus Convention



The Aarhus Convention (AC) ratification by EU (Decision 2005/370).

The Convention forms an integral part of the legal order of the EU - see Article 216 TFEU.

CJEU has jurisdiction to give interpretation via preliminary ruling procedures (Article 267 TFEU)



Ratification of Aarhus Convention by the EU, status in EU legal order. However, an important cornerstone: the preliminary reference procedure.

This highlights the dual nature of the system, EU level (before EU institutions and bodies) and national level access to justice before national courts.



Introduction: the EU and Aarhus

Some instruments contain access to justice provisions

- ❑ For the EU: Regulation 1367/2006
For the Member States:
- ❑ Pillar I + Art. 9(1): Directive 2003/4/EC
- ❑ Pillar II + Art. 9(2), 9 (4):
Environmental Impact assessment,
Industrial emissions Directive,
SEVESO (major accident hazards) III,
Drinking Water Directive.
- ❑ Pillar III - Art. 9(3) & 9(4): Environmental
liability Directive and more to come!



How the Aarhus Convention was implemented into EU law. Several pieces of legislation referring to access to information, participation and access to justice. Importance of case-law of CJEU interpreting these EU provisions.



Case-law of the Court of Justice of the EU

Booming case-law since ratification of Aarhus (and also before)

Two main driving forces of developing case-law:

1) Role of **the Commission** and powers granted by the Treaty

Article 17 EU and role as « **Guardian of the Treaties** »

Specific powers under Articles 258 TFEU et 260 TFEU



2) **Role of national judges** and role of the **Court of Justice** of the European Union

The concept of « direct effect »

The possibility to ask questions from the European Court of the European Union (**preliminary references**)





Case C-240/09 - The Brown Bear case

- ☐ Hunting derogations
- ☐ Impact on Habitats Directive
- ☐ If NGOs can challenge these decisions under Article 9 (3) of the Aarhus Convention?



C-240/09: <https://curia.europa.eu/juris/liste.jsf?language=en&num=c-240/09>



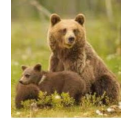
Case C-240/09 and Direct effect (2)

- ☐ Court has jurisdiction to interpret the provisions of Article 9(3) of the Aarhus Convention
- ☐ Test of direct applicability was applied
- ☐ wording, purpose, nature of the agreement,
- ☐ clear and precise obligation
- ☐ not subject, in its implementation or effects to subsequent measures



Outcome of the test: Article 9 (3) NO DIRECT EFFECT

However...



Case C-240/09 and Direct effect (3)

- ☐ Objective is to ensure effective environmental protection.
- ☐ It is for domestic legal system to safeguard rights derived from EU law.
- ☐ Those detailed rules must be no less favourable than those governing similar domestic actions (**principle of equivalence**)
- ☐ Must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (**principle of effectiveness**).



Case C-240/09 and Direct effect (4)



- ☐ Effective protection of EU environmental law.
- ☐ Article 9(3) of the Aarhus Convention not to be interpreted in a way as to make it in practice **impossible or excessively difficult to exercise rights** conferred by EU law.
- ☐ Obligation on **national courts to interpret,**
- ☐ To the **fullest extent possible,** national rules **to safeguard rights** (including NGOs' standing) conferred by EU law in light of Article 9 (3) of the Aarhus Convention.



Case C-240/09 and Direct effect (5)



Thank you Justice Gavalec!

Judge Gavalec was the one who introduced the preliminary reference under the C-240/09. He is currently a judge at the CJEU.



The judges' perspective: Approach to judicial review (1)



General considerations for judges, as 'juges Communautaires' when applying EU law in the area:

- Multiple layers of law (national, international, EU),
- CJEU often says what not to do, but not exactly what to do, question on what is too restrictive? (see Notice on Access to justice establishing standards however)
- National case-law trends of direct application of CJEU verdicts, in the absence of EU or national rules (Article 9 (3) cases)
- The growing importance of preliminary references



The judges' perspective: Approach to judicial review (2)

- Where such a question is raised, **if national court considers** that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
- In a case pending before national court against whose decisions there is no judicial remedy, that court or tribunal **shall bring the matter before the Court.**



Article 267

(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.



The judges' perspective: Approach to judicial review (3)



Why referring a question to the CJEU?

- A problem related to EU law
- A problem which is not hypothetical
- A problem which was not already solved

- See also:

http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14552_en.htm



The judges' perspective: Approach to judicial review (4)

– Aarhus specific issues

- Legislation, normative acts and hybrid categories ([Boxus](#)/[Solvay](#) case-law)

'National courts to review legislative acts'

- Disapply national rules (see [Case C-664/15](#), para 55 (Protect)

'(...) for the referring court to disapply, in the proceedings before it, the rule of national procedural law.'

- Judicial control of discretion of administration (Case [C-197/18](#), para 72)

'the decisions taken by the competent authorities must be subject to judicial review, in particular in order to verify they have not exceeded the limits set for the exercise of those powers.'

Boxus ruling:

Article 9(2) of the Convention on access to information, public participation in decision making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that:

- when a project falling within the ambit of those provisions is adopted by a legislative act, it must be possible for the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive to be submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law;
- if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.

Protect:

53 In the present case, it is apparent from the documents submitted to the Court that it is not ruled out, *prima facie*, that an environmental organisation, such as Protect, might nevertheless be recognised as having the status of party to the procedure on the basis of an interpretation of the general provision in Paragraph 8 of the AVG.

54 In that regard, it must be noted that 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 proceedings, in accordance with both the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental organisation, such as Protect, to challenge before a court a decision taken following an administrative procedure that may be contrary to EU environmental law (see, by analogy, judgment of 8 March 2011, *Lesoochránárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 52).

55 However, if such a compliant interpretation were to be found to be impossible, it would then be for the referring court to disapply, in the proceedings before it, the rule of national procedural law requiring the environmental organisation at issue to have the status of a party in order to be able to bring an action against a decision granting a permit for a project that may be contrary to the obligation to prevent the deterioration of the status of bodies of water as set out in Article 4 of Directive 2000/60.

C-197/18:

72 Therefore, although the Member States have discretion in that regard, the fact remains that the decisions taken by the competent authorities must be subject to judicial review, in particular in order to verify they have not exceeded the limits set for the exercise of those powers (see, to that effect, judgments of 24 October 1996, *Kraaijeveld and Others*, C-72/95, EU:C:1996:404, paragraph 59; of 25 July 2008, *Janecek*, C-237/07, EU:C:2008:447, paragraph 46; and of 26 June 2019, *Craeynest and Others*, C-723/17, EU:C:2019:533, paragraph 45).



Aarhus package

TRIGGERS



Compliance Committee findings



Lisbon treaty changes



Developing case-law

RESPONSES



Council and Parliament calling on the Commission to amend the Aarhus regulation



A2J in **Green Deal communication**



Commission:

- Revision of the Aarhus Regulation
- Communication to Member States
- Cooperation with judges programme (since 2008)
- LIFE+ Regulation - funding

The Communication on 'Improving access to justice in environmental matters in the EU and its Member States'



- ☐ Political context
- ☐ Key messages
- ☐ Priorities
- ☐ Commission's role



https://ec.europa.eu/environment/aarhus/pdf/communication_improving_access_to_justice_environmental_matters.pdf

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To improve the EU's system of access to justice in environmental matters, in line with the Convention, to which Member States are parties in their own right, the Commission calls on Member States to step up implementation of applicable EU laws. It is equally important that Member States' rules applicable to the judiciary and judicial practice fully implement CJEU case law on access to justice in environmental matters. Furthermore, national legislations should not create a barrier to this, for example by not providing legal standing to NGOs as required under the Convention. To ensure legal certainty in all Member States, national law must meet the requirements of the Convention, of EU legislation and of CJEU case law. National courts should also apply and enforce the applicable rules in light of the requirements set in their national legal orders stemming from EU law.



The European Green Deal



(i) consider revising the Aarhus Regulation ...

(ii) The Commission will also take action to **'improve access to justice before national courts in all Member States'**.

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The Commission committed in the European Green Deal to 'consider revising the Aarhus Regulation to improve access to administrative and judicial review at EU level for citizens and NGOs who have concerns about the legality of decisions with effects on the environment. The Commission will also take action to improve their access to justice before national courts in all Member States'.



Access to justice Communication and key messages

I. CALL FOR JOINT ACTION



II. THE IMPORTANCE OF ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN THE EU



III. THE EU AS A PARTY TO THE CONVENTION



IV. MEMBER STATES' OBLIGATIONS UNDER EU LAW



V. THE WAY FORWARD: PRIORITY AREAS FOR ACTION

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The structure of the Communication – main headings.





Key messages – call for joint action

Aim of this Communication - vital role of Member States including national-level courts – preliminary references.

Safeguarding rights of NGOs and individuals.

The 2019 Environmental Implementation Report - **shortcomings** in national legal systems.

The Commission calls on Member States to **step up implementation** of applicable EU laws.






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The aim of this Communication is to highlight the vital role that Member States play within the EU's overall system. Member States are to provide and facilitate access to justice in environmental matters governed by acts adopted under EU legislation, including national implementing measures related to non-legislative EU acts. Access to justice includes providing legal standing for NGOs and individuals directly affected by a breach of environmental law also in a cross-border context. Unfortunately, there are shortcomings in practice. In 2019, the Commission published the Environmental Implementation Review , which identified a series of systemic shortcomings concerning on-the-ground implementation of access to justice in environmental matters in national legal systems. In particular, it highlighted problems faced by NGOs in obtaining legal standing to bring legal challenges on EU-related environmental issues and procedural hurdles, such as prohibitively high costs.

To improve the EU's system of access to justice in environmental matters, in line with the Convention, to which Member States are parties in their own right, the Commission calls on Member States to step up implementation of applicable EU laws. It is equally important that Member States' rules applicable to the judiciary and judicial practice fully implement CJEU case law on access to justice in environmental matters. Furthermore, national legislations should not create a barrier to this, for example by not providing legal standing to NGOs as required under the Convention.

To ensure legal certainty in all Member States, national law must meet the requirements of the Convention, of EU legislation and of CJEU case law. National courts should also apply and enforce the applicable rules in light of the requirements set in their national legal orders stemming from EU law.



Key messages – Importance of national access to justice



- ☐ **Fundamental right** of the EU's legal order
- ☐ Ensuring **accountability** of public administration
- ☐ **Individuals and NGOs** play a crucial role in identifying potential breaches.
- ☐ Advocate General Sharpston:



'Neither water nor the fish swimming in it can go to court. Trees likewise have no legal standing'.

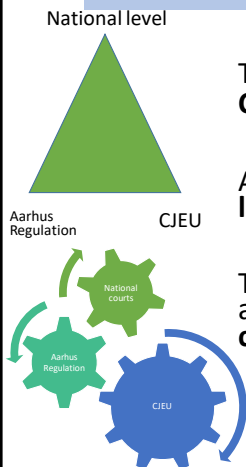
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Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, and in CJEU case law on access to justice in environmental matters. Access to justice in environmental matters is also relevant in the context of Article 41 and 47 of the Charter of Fundamental Rights of the EU and helps provide legal certainty

Individuals and NGOs play a crucial role in identifying potential breaches of EU law by submitting complaints to administrations or taking cases to court. When individuals or NGOs seek justice before a non-judicial, administrative body, the review is called an administrative review; if they seek redress in court, it is called a judicial review.



The Communication and key messages –The EU and its Member States as parties to the Convention



The EU and its 27 Member States parties to the **Aarhus Convention**.



Access to administrative and judicial review is a **multi-layered system in the EU**: a triangle.



The appropriate **functioning** of the **EU's system** of administrative and judicial redress is secured **of all components were well**, including national level.



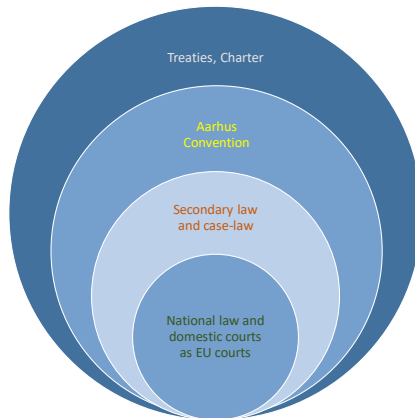
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EU and the Member States signed and ratified the Convention, resulting in obligations stemming from both actions.

The effective protection under the EU legal order can be characterized as a triangle. Or as circles working together, if you remove any one of these or one of them is dysfunctional, it impacts all other components and the whole of the EU legal order. Of this whole construction the national level is also a key cornerstone.



The Communication and key messages –Member States obligations (1)



2017 Commission Notice on access to justice describing the standards:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2017:275:TOC>

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Case T-600/15 para 56:

‘56 It follows that the international agreements concluded by the European Union, including the Aarhus Convention, do not have primacy over EU primary law, with the result that derogation from the fourth paragraph of Article 263 TFEU cannot be accepted on the basis of that agreement.’

The EU’s system of administrative and judicial redress as a whole encompasses not only the internal review mechanism under the Aarhus Regulation and access to the CJEU, but it also relies on national courts. In particular, Article 267 of the Treaty on the Functioning of the European Union (TFEU) allows any natural or legal person who is party to proceedings before national courts to request a preliminary reference to the CJEU regarding the validity of acts adopted by EU institutions. The EU and the national systems of redress taken together are essential to provide effective access to justice in environmental matters in the EU.



Key messages – Member States obligations (2)

The 2019 Environmental Implementation Report –
evaluation of national legal systems.

Shortcomings in terms of safeguarding rights of NGOs
and individuals.

Main problems included:



Standing or locus standi



Prohibitive costs

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CJEU case law developed over the years has clarified that the Member States are obliged to ensure access to justice in environmental matters covered by EU rules, including on decisions, acts and omissions in a range of environmental policy areas, such as water, nature and air quality. To take stock of the practical implications of CJEU case law and to help Member State authorities and practitioners to understand the importance of these implications in the fields regulated by EU environmental law, in 2017 the Commission issued a Notice on access to justice in environmental matters. The Notice outlined the standards governing access to justice in environmental matters in terms of procedural guarantees and legal standing for NGOs and individuals. It also clarified the requirement to avoid expensive or lengthy procedures and that Member States must make all information related to access to justice publicly accessible, as required by CJEU case law. Member States should follow the developments of CJEU case law, as summarised in the Notice, and take the necessary measures to implement them.

Effective implementation of the adopted EU rules on the ground by the Member States is indispensable in order to draw the full benefits for the protection of the environment. It is also important to ensure that access to the CJEU for members of the public and for NGOs under Article 267 TFEU is not unduly restricted. Removing

obstacles to access to justice would yield further benefits by increasing legal certainty, improving administration of justice and reducing administrative burdens. The Commission's 2019 Environmental Implementation Review found that several Member States should take further measures to provide legal standing to environmental NGOs to bring legal challenges on EU-related environmental issues. It also found that environmental claimants should not face national procedural hurdles, such as prohibitively high costs (hundreds of thousands of euros in some cases).



The priority areas of action



1. Member States to secure **correct transposition** of EU secondary law
2. Co-legislators to include **provisions on access to justice** in draft EU legislation for new or revised EU law concerning environmental matters
3. The **review** by the Member States of their own national legislative and regulatory provisions to remove barriers based on case-law of CJEU
4. The obligation of national courts to **guarantee the right of individuals and NGOs** to an effective remedy under EU law.



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In line with the Commission's strategic communication entitled EU law: better results through better application, the first priority area for Member States is to secure the correct transposition of EU secondary law. This concerns EU environmental legislation that include provisions on access to justice. Member States have an obligation to transpose these directives correctly and in full with the objective to ensure implementation, in line with Article 291(1) TFEU.

The second priority area, is for the co-legislators to include provisions on access to justice in EU legislative proposals made by the Commission for new or revised EU law concerning environmental matters³⁸. This requires active support by the European Parliament and the Council when the Commission comes forward with such proposals. Access to justice provisions will be drafted in light of CJEU case law as summarised in the Notice. In recent years, the Council has been reluctant to adopt such provisions, departing from its previous approach, which has led in the past to the adoption of the directives mentioned above.

The third priority area is the review by the Member States of their own national legislative and regulatory provisions other than those that transpose the directives referred to above. National provisions that prevent NGOs active in environmental

protection of individuals directly affected by a breach of EU environmental law resulting from the actions or omissions of public authorities. Therefore, it is indispensable to revise these national provisions for the purpose of removing any barriers to access to justice, such as restrictions on legal standing or disproportionate costs, and as a result, ensure effective access to justice in environmental matters in the EU.

The fourth priority area concerns the obligation of national courts to guarantee the right of individuals and NGOs to an effective remedy under EU law. The role of national courts as Union courts is one of the cornerstones of the proper functioning of the EU's system of effective judicial protection. Where necessary, national courts must set aside any provisions that are contrary to EU law, even if these are of legislative or regulatory nature. This should include undue restrictions on legal standing to ensure that EU rules have full force and effect. The supreme jurisdictions of the Member States have a preeminent role to play in this respect, due to their position in the national judiciaries and the influence of their case law on the lower courts. The effectiveness of this role is indispensable for the proper functioning of the EU's general system of access to justice in environmental matters.



The Commission support



1. Improving access to information and monitoring



2. Engaging with stakeholders, continuing cooperation with judges



3. Legislative proposals – legal certainty

4. Guardian of the Treaties



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The first, third and fourth priorities will guide the Commission's action in its role as guardian of the treaties when dealing with unduly restricted access to justice in environmental matters covered by EU law.

This includes the power to initiate infringement procedures.

EU legislative action, under the second priority area, will also play an important role to support Member States in establishing the required standard of national access to justice (as required by the Notice). With regard to the national courts, the Commission will closely follow how national courts, including supreme courts, ensure effective judicial protection in environmental matters in their respective legal orders, and will take action as necessary.

In pursuing all four priorities outlined above, the Commission will support Member States and step up its work to engage actively with civil society and public authorities to achieve full implementation of applicable EU environmental law. It plans to run further capacity-building initiatives, training and education schemes and information exchange initiatives with civil society for public administrations and NGOs.

Areas of cooperation with the judiciary include the European Judicial Training Network (EJTN), the European Union Forum of Judges for the Environment, and the Association of European Administrative Judges.

The Commission will continue to monitor the implementation of EU law regarding

access to justice in environmental matters. To facilitate this, it will make information available online on the Commission's eJustice-portal and carry out regular implementation monitoring work as part of the Environmental Implementation Review.



eJustice portal



- In support of the 4 priorities identified including transposition, legislation and role of national judges:
- **Monitor the implementation** of EU law regarding access to justice in environmental matters.
- **To facilitate this, it will make information available online on the [Commission's eJustice- portal](https://ec.europa.eu/environment/aarhus/pdf/communication_improving_access_to_justice_environmental_matters.pdf).**

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https://ec.europa.eu/environment/aarhus/pdf/communication_improving_access_to_justice_environmental_matters.pdf

What will the eJustice fact sheets deliver?



‘Mirror, mirror on the wall who is the fairest one of all?’

[Source: Snow White](#) by the [Brothers Grimm](#), as adapted by Walt Disney.

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eJustice useful for several reasons:

Informing the public. Also if EU citizens visit other MS, as the fact sheets will be available in all official languages in 2022.

Helping Commission to monitor implementation.

Also helping MS to get a clear view on where they are with implementation on access to justice environmental matters.



Fact sheets on access to justice in environmental matters

- **Contract launched** in December 2019
- To be delivered in all official languages
- **2021 May: Updated fact sheets online**

Thank you for your attention

