



Access to Information in Environmental Matters

Dr. Lorenzo Squintani, University of Groningen



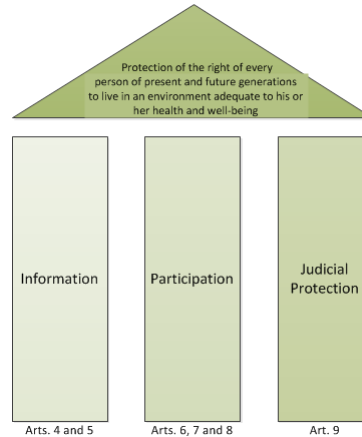
Learning Outcomes:

1. Basic understanding of Aarhus Convention, in particular access to information;
2. Basic understanding of how this Convention is applied in the European Union at both EU and national level;
3. Thorough knowledge and understanding of the challenges existing at EU and national level as regards access to information;
4. The ability to apply above mentioned knowledge to your area of expertise.



Aarhus Convention: an overview

- › The UNECE Convention adopted on 25th June 1998
- › 47 Parties ([see map](#))
- › Entered into force on 30 October 2001
- › Goes to the heart of the relationship between people and governments
- › Compliance entrusted to ACCC



You already knew the Aarhus Convention in the general introduction, but quickly...

It focus on environmental democracy, so the relationship between the public on the one hand and the responsible parties for the decision-making procedures. Mostly public authorities, but it also applies to private undertaking when they do projects in the environmental field. The three pillars, then, aim at achieving this overarching goal: to improve the right of any individual to live in an environment that fulfills its needs today, but also those of future generations.

... (review of main aspects)



Aarhus Convention: Access to Information (basis I)

- › Article 4: *passive* dissemination → right to request environmental information
 - “**Environmental information**” means any information in written, visual, aural, electronic or any other material form on: (a) The state of elements of the environment and the interaction among these elements; (b) Factors affecting or likely to affect the elements of the environment, and economic analyses and assumptions used in environmental decision-making; (c) The state of human health and safety, conditions of human life, cultural sites and built structures
 - This list is indicative
 - “**Public authorities**” is a broad concept that covers also private parties performing public tasks, but excludes bodies or institutions acting in a judicial or legislative capacity
 - C-279/12 *Fish Legal/Shirley* → exorbitant powers notion
 - See also cases C-240/09 and C-515/11

Article 4 of the Aarhus Convention has been taken over by EU law, and the transposition is kind of literal.

There are two means by which the information should be made available to the public: passive and active.

In this slide, we reproduce the main aspects of the passive dissemination method. It means that the public authorities make information about the environment available to the public only on request by a member of the public.

As you can see, information here is interpreted very very broadly. Any information about the status of the environment or any activities that could have effect on the environment.

And the meaning of environmental information is pivotal to understanding the scope of application of this right.

Other key concept is public authorities, because the piece of information in question should be under the possession of a public authority.

The Fish Legal case is a case in which a private party asked access to

information to a water company responsible for the water quality. It was a private company, but entrusted with a public task. In that case, the Court of Justice came to the conclusion that also this kind of legal persons should be considered to be public authorities within the scope of the Aarhus Convention. Therefore, also subject to the passive duty of dissemination of information.

That is the usual way to interpret EU law (teleological method), which leads to an ever growing interpretation and effectiveness of those pieces of regulatory framework that aim at achieving the main goal of the regulatory framework in which they are inserted.



Aarhus Convention: Access to Information (basis II)

- › Article 4: *passive* dissemination → right to request environmental information
 - “**Charges**” for supplying environmental information:
 - may **not** include any part of the cost of maintaining a database used by the public authority to answer requests for environmental information, but
 - **may include** the **overheads** attributable to the time spent by the staff of the public authority on answering individual requests for information
 - provided that the total amount of the charge does **not exceed** a reasonable amount
 - Judgment CJEU of 6 October 2015, case C-71/14, points 29-41.

Therefore, all of the provisions of the Convention that could lead to a restriction of the ability of a person to achieve the goals of the Convention are interpreted restrictively. And this brings us to the concept of charges but also, as we will see in the next slide, to the grounds for refusing a request to access to information in environmental matters.

One of the questions that is asked is if can the public authority ask for compensation for the activities that they have undertaken to make the information available to the public, and whether it can be covered by the concept of charges. (see conclusions in the slide)

So, the charges may not refrain the public from requesting information. How much is that is still unclear.



Aarhus Convention: Access to Information (basis III)

- › Article 5: *active* dissemination → responsibility for public authorities to inform the public ([eg air quality in Groningen](#))

So, moving to the second way of providing information to the public: the so-called active dissemination duty.

There are some areas (such as air quality) in which the public authorities are required to make the information available regardless of whether the public asked for this information. In the EU, of course, we have a lot of substantive directives (on water management, air quality...) that requires the public authorities to make the information available, and to report regarding the status of the environment...

One of the main importances of this is that the public makes informed choices.



Aarhus Convention: Access to Information (basis IV)

- › Application of Arts 4 and 5 is restricted by the 11 grounds mentioned in Art. 4(3 and 4)
- › This list is **exhaustive** and must be interpreted **restrictively**



Aarhus Convention in the EU

- › As regards the EU itself:
 - Information:
 - [Regulation \(EC\) No 1049/2001](#), as amended by
 - [Regulation \(EC\) No 1367/2006](#)
 - Peculiarity:
 - It covers also information from public authorities acting in **legislative capacity**
 - It covers also **written pleadings before ECJ** once judgment are published

The EU, being na especial kind of organization, has two diferente frameworks for transposing the Convention. One addressing the EU institutions themselves and one addressing the MS.

There was already a regulation in the EU when the Convention was negotiated and implemented. But then that framewor has also been used for the implementation of the Aarhus Convention. So, you see that there are two regulations mentioned in the slide. In 2006, the first one (general) was amended, in order to make sure that the context of that regulation was in line with articles 4 and 5 of the Aarhus Convention. That is now the framework that applies to access to information in the EU. And this is also a nice example because already allows us to discuss a peculiarity of the Aarhus Convention: it is based on the so-called minimum level of protection. It means that, while the parties to the Convention have to respect the standards in the Convention, they are free to offer an even higher level of protection of the environment, or access to information, or public participation, or access to justice, than the one prescribed by the Aarhus Convention itself. The EU makes use of this possibility in the contexto of the access to information by enlarging the activities in regards to which access to information may be requested. (see part about peculiarity in the slide)



Aarhus Convention in the EU

- › As regards the Member States:
 - Information:
 - [Directive 2003/4/EC](#)

As a directive, it is, of course, meant to be transposed by the MS.

Also here, you see an almost literal transposition of articles 4 and 5 of the Aarhus Convention. Then it has been transposed by many MS to the national level.

The MS have a big margin of discretion on how to organize the procedural itself to comply with the Aarhus Convention. Also remember that the whole European Environmental Law is shaped by the minimum harmonization.

The Commission Notice on Access to Justice interprets all provisions on access to justice to environmental matters in light of the case law of the Court of Justice.



Access to information: Frontier

- › Assessments and monitoring typical EU law tools → Data creation by public authorities
- › What about information created by the public?
- › Citizen Science (CS)
- › Focus on legal dimension of CS and decision-making:
 - From the perspective of the decision-maker
 - From the perspective of judges
 - From the perspective of citizens

There is a growing attention to the presence of information. A lot of discussion on how to assess the quality of the environment.

A new tendency that starts to receive recognition (you will see if you open the newer pieces of EU environmental cases) is the use of data that come from the public => citizen science.



Setting the stage

- › Citizen science means the involvement of non-academics in scientific research
- › Fast growing phenomenon:
 - the number of citizen science publications exploded from 38 in 2006 to 402 in 2015
- › Why?
 - Cheaper than traditional means, and
 - More effective
 - It activates citizens (public participation)
 - Duncan C. McKinley et al (2015) Citizen science can improve conservation science, natural resource management, and environmental protection



Bonney and others model:

- › i) *Contributory* Projects, designed mostly by scientists with the public contributing data;
- › ii) *Collaborative* Projects, designed mostly by scientists with the public helping in data collection, analysing the data and disseminating findings; and
- › iii) *Co-created* Projects, which has scientists and the public actively cooperating along every step of the way

Source: R Bonney and others, 'Public Participation in Scientific Research: Defining the Field and Assessing its Potential for Informal Science Education (2009) CAISE Inquiry Group Report → **this model is based on the degree to which participants are included in the various elements of the scientific process**

We saw many reasons of why to do it. But... How to do it?



Alternatively, Cooper and others model

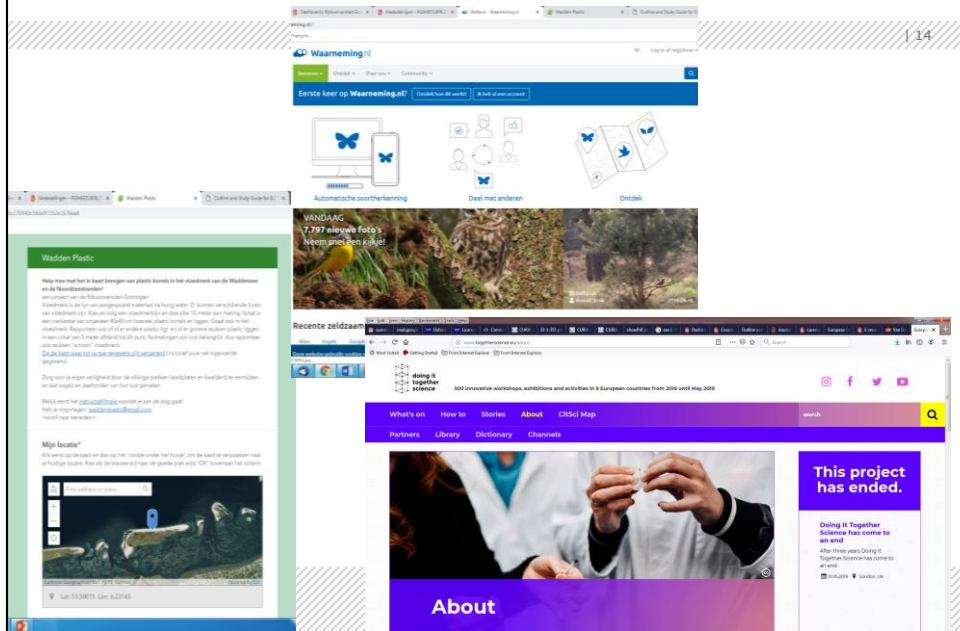
- › Focus is no longer on CS influencing science, but politics!
 - First, citizens, through citizen science, collect data and possibly draw some conclusions.
 - Those conclusions are then used to influence the design, implementation or evaluation of a policy process, according to public participation theories.
- › Is this still CS? Where to draw the line between CS and PP?
 - Victoria Y. Martin, Citizen Science as a Means for Increasing Public Engagement in Science: Presumption or Possibility?, Science Communication 2017, Vol. 39(2) 142–168

Source: C Cooper and others, 'Citizen Science as a Tool for Conservation in Residential Ecosystems' (2007) 12 2 Ecology and Society 11

So, this model focus on why citizens participate on science making,

Many times, citizens use those data to lobby decision-making.

The legal question is what to do if you are confronted with a claim that confronts official data with citizen data.

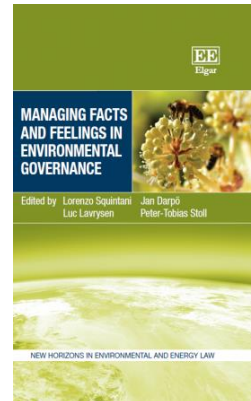




The legal dimension of CS (I)

From the perspective of the
decision-maker:

- › Alexandra **Aragão** (2019)
When feelings become scientific
facts: valuing cultural
ecosystem services and taking
them into account in public
decision making,



In this frontier publication, it is argued that public authorities have to take into account not only facts but also opinions of the public in public participation. Opinions and facts can then be linked to the data generated from citizen science activities and then they have the legal mandate to take them into account.



What about automatic decision-making based on CS?

- › Algorithms dictate outcome decision-making, eg. a permitting procedure
 - Society delivers data
 - Computers decide
- › How can judges review?
- › Asimmetry of information



What are the traditional sources of data for decision-making in this area, if any?

How reliable do you consider the CS data generated in the case study by you selected in comparison with the traditional data?

Some public authorities in the Netherlands are making decisions based on data created by private undertakings (usually not citizens), which are then putted in an algorithm and this indicates the outcome of the procedure to be taken.

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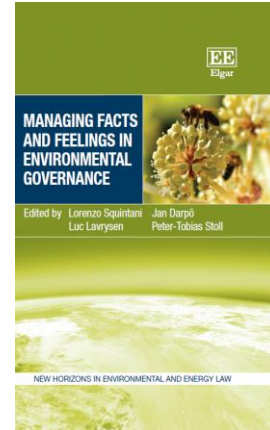
What should the judiciary do in face of that?



The legal dimension of CS (III)

From the perspective of judges:

- › Jan **Darpö** (2019), Scientific and technical knowledge in environmental litigation: national solutions, EU requirements and current challenges.
- › Merideth **Wright** (2019) Scientific Facts and Litigants' Feelings: Practical Innovations From the Vermont Environmental Court and Other Jurisdictions
- › Mikael **Schultz** (2019) Scientific evidence in Swedish courts: the use of technical judges for better integration of scientific data in environmental decision-making



And... How to assess science in the court room?

When does an information acquires the level of scientific data to be used in the court room to review decision-making procedures?

This is something that is open for debate. We don't know it yet.

The referred papers face this issue locally.



For questions
l.squintani_at_rug.nl