

Public participation in environmental decision-making

Identification of the “public concerned”

Exceptions for public participation requirements

Public participation provisions under the EU substantive environmental law (*EIA/SEA, Water Framework Directive, IED, Seveso III, Air Quality Directive, Waste Framework Directive, Environmental Noise Directive*)

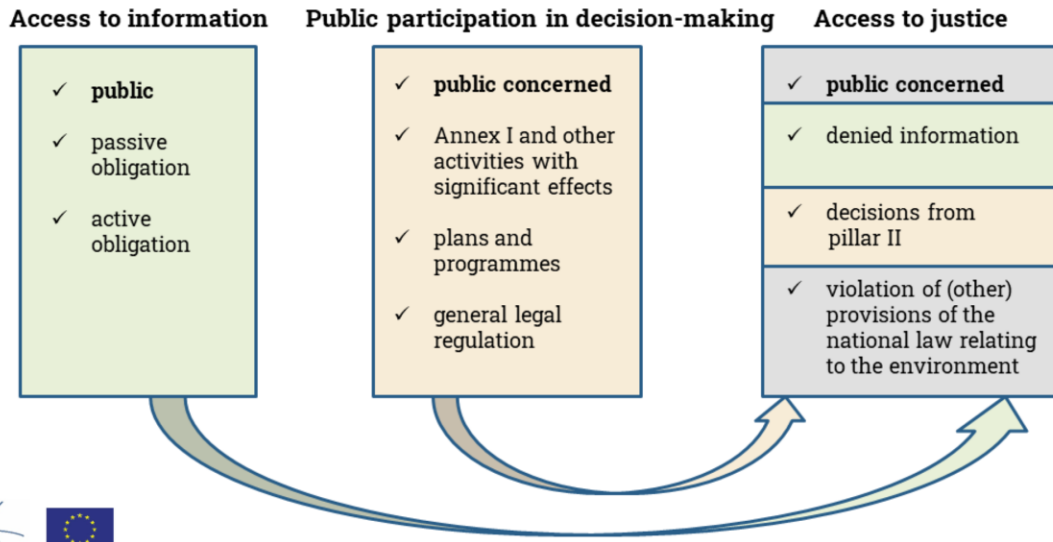
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NATIONAL JUDGES AND THE EU AARHUS ACQUIS
Focus on Access to Justice(online workshop, 1 March 2021)

Public participation in environmental decision-making has become an indelible feature of many environmental regulatory systems worldwide over the past few decades. Individuals and organisations affected by development approvals, pollution licences, land use plans and other types of regulatory processes have increasingly demanded greater consultation, and more transparent and accountable decisions. This article considers historical perspectives, theoretical approaches and legal mechanisms for public participation.

The three-pillar structure of the Aarhus Convention



In the Aarhus – EU legal framework, public participation in environmental decisionmaking is presented by the second pillar of the Aarhus Convention . The public participation requirements reach beyond the narrow scope of decision-making and apply also to adoption of plans and programmes and legislative process. In these areas, however, the participation takes consultative form and the Member States are provided larger space for consideration on detailed rules.

The Aarhus Convention implemented by EU law

[Directive 2003/4/EC](#) of the European Parliament and of the Council of 28 January 2003 on **public access to environmental information**

[Directive 2003/35/EC](#) of the European Parliament and of the Council of 26 May 2003 providing for **public participation** in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives **85/337/EEC** and **96/61/EC**
+ **number of other environmental directives**

Proposal for a Directive of the European Parliament and of the Council
on **access to justice**

[Regulation \(EC\) N° 1367/2006](#) of the European Parliament and of the Council on the **application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies**

(information - extends [Regulation \(EC\) No 1049/2001](#))



At the EU level, the Aarhus requirements have been implemented by a single comprehensive directive (2003/35/EC), which amended the directives dealing with the most important procedures – the EIA Directive on environmental impact assessment of large projects and the IPPC (now the IED) directive dealing with large industrial installations.

Public participation provisions under the EU environmental law

1) Directives explicitly implementing the Aarhus Convention (decision-making)

- **EIA Directive** – environmental impact assessment (construction and other activities)
- **IED Directive** – industrial emissions (permits for industrial activities)
- **Seveso III Directive** - major accident hazards

2) Directives implementing the Aarhus Convention according to the CJEU (decision-making)

- **The Habitats Directive** (Natura 2000) – assessment of plans and projects: Art. 6(3)
- Participation required as a condition for access to justice (C-664/15)

3) Directives focused on participation in the elaboration of plans

SEA Directive, Water Framework Directive, Air Quality Directive, Waste Framework Directive, Environmental Noise Directive



Three major groups of EU directives can be identified with regard to the Aarhus requirements in the second pillar. The directives in the first group lay down requirements for participation in decision-making. Besides the EIA Directive and the IED Directive, also the SEVESO Directive dealing with major accident hazards makes a direct reference to the Aarhus Convention. The directives in the second group also require the Member States to grant the public concerned participatory rights according to the Court of Justice, but this might not be evident at the first sight since they do not include explicit requirements. Beside these, there is a large group of directives that require public participation in elaboration of plans.

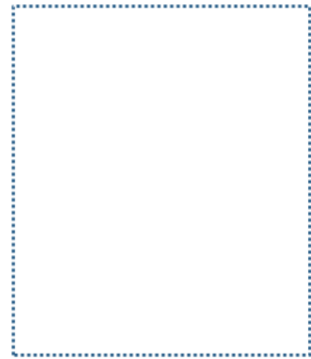
1) Directives explicitly implementing the Aarhus Convention (decision-making)

EIA Directive, IED Directive, Seveso III Directive

Public participation in decision-making



- ✓ public concerned
- ✓ Annex I



The directives in the first group lay down requirements for participation in decisionmaking following the second pillar of the Aarhus Convention. Within this group, the activities permitted under the EIA Directive and the IED Directive can be subsumed under the activities listed in Annex I of the Aarhus Convention.

The EIA Directive (2011/92/EU)

Art. 6(4): *The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.*

Art. 6(5): *The detailed arrangements for informing the public, (for example by bill posting within a certain radius or publication in local newspapers), and for consulting the public concerned, (for example by written submissions or by way of a public inquiry), shall be determined by the Member States. Member States shall take the necessary measures to ensure that the relevant information is electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level.*

Art. 6(6): *Reasonable time-frames for the different phases shall be provided for, allowing sufficient time for the public concerned to prepare and participate effectively in the environmental decision-making*

Art. 6(7): *The time-frames for consulting the public concerned on the environmental impact assessment report referred to in Article 5(1) shall not be shorter than 30 days.*



The EIA Directive provides a clear obligation to provide for public participation before any construction work has been done. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article. When providing time-frames for public participation, Member States shall take into account the complexity of the decision-making procedure and the project. As a minimum, the public concerned should be given 30 working days after all relevant information has been made available for them by the competent authority to prepare and participate effectively.

The EIA Directive

- Rules on the transboundary EIA (Art. 7)
- The competent authority or authorities shall promptly inform the public when a decision to grant or refuse development consent is taken (Art. 9)

Article 11

*1. Member States shall ensure that, in accordance with the relevant national legal system, **members of the public concerned**:*

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.

4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law. Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.



In the framework of access to justice provisions, the Convention requires the parties, to provide adequate and effective remedies, including injunctive relief as appropriate, which shall be fair, equitable, timely and not prohibitively expensive. Article 9 (2) of the Convention has been implemented through Article 11 of the Directive.

The EIA and the IED directives have similar provisions on public participation, but they have a wider scope in that they also provide for cross-border public participation and provisions on access to justice.

Public concerned: NGOs + individuals

C-570/13 (*Gruber*):

40 Therefore, *although the national legislature is entitled, inter alia, to confine the rights whose infringement may be relied on by an individual in legal proceedings contesting one of the decisions, acts or omissions referred to in Article 11 of Directive 2011/92 to individual public-law rights, that is to say, individual rights which, under national law, can be categorised as individual public-law rights (see, to that effect, judgment in Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen, C-115/09, EU:C:2011:289, paragraphs 36 and 45), the provisions of that article relating to the rights to bring actions of members of the public concerned by the decisions, acts or omissions which fall within that directive's scope cannot be interpreted restrictively.*

41 In the present case, *it appears from the order for reference that Ms Gruber is a 'neighbour', within the meaning of Paragraph 75(2) of the Gewerbeordnung, a concept which includes persons to whom the construction, continued existence or operation of a facility might pose a risk or cause a nuisance or whose property or other rights in rem might be put at risk.*



In a preliminary ruling, the CJEU found a specific of the Austrian EIA regime to be in conflict with Art 11 EIA Directive: The Austrian EIA Act provides for a procedure in which the EIA authority examines and decides whether a particular project requires an EIA ('declaratory procedure'). In case the authority comes to a negative decision, i.e. no EIA is required, neighbours do not have a right to contest this administrative decision. Additionally, they do not have the right to bring an action directly against this administrative decision in any later permitting procedure to which they are parties; thus, the administrative decision not to conduct an EIA is having 'binding effect' on neighbours. The CJEU confirmed that Member States dispose of a wide margin of discretion when implementing Art 11 of the EIA Directive. However, it underlined that this discretion is limited by the need to respect the objective of ensuring wide access to justice for the public concerned, expressed in Art 11(3) EIA Directive and Art 9(2) Aarhus Convention.

Public concerned: NGOs + individuals

C-570/13 (*Gruber*):

42 Having regard to that provision's terms, *it appears that persons falling within the concept of 'neighbour' may be part of the 'public concerned'*, within the meaning of Article 1(2) of Directive 2011/92. Those 'neighbours' can bring an action only against a consent granted for the construction and operation of a facility. Since they are not parties to the procedure examining whether an EIA need be carried out, they cannot challenge that decision in the context of an action against the development consent decision. *Thus, by restricting the right to bring an action against decisions examining whether an EIA need be carried out in relation to a project only to the project applicants, the participating authorities, the ombudsman for the environment (Umweltanwalt) and the municipality concerned, the UVP-G 2000 deprives a large number of individuals from exercising that right to bring an action, including, in particular, 'neighbours' who may meet the conditions laid down in Article 11(1) of Directive 2011/92.*

43 That near general exclusion restricts the scope of Article 11(1) and is accordingly *incompatible* with Directive 2011/92.



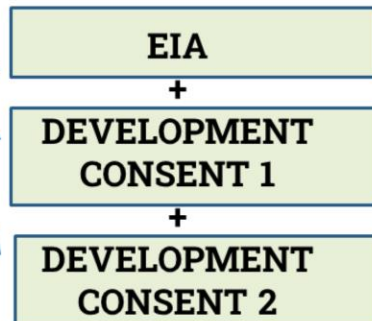
The Austrian legislator has exceeded the bounds of its discretion: According to the CJEU, current law precludes a majority of persons being part of the 'public concerned' and satisfying the criteria laid down by national law concerning 'sufficient interest' or 'impairment of a right' from bringing any action against the decision not to conduct an EIA. Thus, provided 'neighbours' as defined by the relevant Austrian law satisfy the criteria set out in Art 1(2) EIA Directive, a decision declaring that a particular project does not require an EIA must not be binding on them.

The EIA Directive (2011/92/EU)

A ONE-STOP-SHOP PROCEDURE



MULTIPLE PERMITTING PROCEDURES



public concerned

EIA

+

**DEVELOPMENT
CONSENT 1**

+

**DEVELOPMENT
CONSENT 2**

**JUDICIAL
PROTECTION**



The implementation of the EIA Directive differs among the Member States. In some countries, the one-stop-shop procedure is employed, with only one permitting procedure, meanwhile elsewhere, the permitting procedure consists of more phases. As a general rule, the requirements regarding public participation apply to all these separate phases.

Participation in decision-making ≠ access to justice

C-263/08 (*Djurgården-Lilla Värtans Miljöskyddsförening*, para. 38): ...participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 is **separate and has a different purpose from a legal review**, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure.

C-137/14 (Commission v Germany):

80 As regards the argument concerning the efficiency of administrative procedures, although it is true that the fact of **raising a plea in law for the first time in legal proceedings** may, in certain cases, hinder the smooth running of that procedure, it is sufficient to recall that the very objective pursued by Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 is not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety.

81 None the less, the national legislature may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings.



Public participation in decision-making cannot be easily replaced by the court proceedings. In a judgement in case C-263/08, the CJEU concluded that access to justice and participation in decision-making are two different aspects of participation.

According to the CJEU, the arguments raised for the first time before the court cannot be easily rejected because they have not been raised in the administrative proceedings. However, the Member States may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings.

Administrative challenge as a precondition for access to justice?

AG in C-470/16 (*North East Pylon Pressure Campaign a Sheehy*):

101. Article 11 of the Directive requires Member States to provide access to review procedures. How that result is achieved procedurally is, however, left largely to the Member States.

102. In practice, there is a significant diversity of decision-making processes between Member States and even within single Member States. Review procedures also differ considerably.

104. Differences in decision-making structures and outcomes will then naturally impact on review mechanisms. Other fundamental differences also exist between review procedures. **For example, before an action can be introduced before national courts, Member States may (or may not) require an administrative challenge to be brought.** Institutional differences also exist in relation to such challenges (appeal to ministry, competent authority, or specific appeals board and so on).

105. The Directive does not generally require or prohibit challenges being brought against 'non-final' decisions. That flexibility is entirely to be expected in the light of the potentially large range of different decision-making and review structures that exist.

106. **However, as explained above, Member States must clearly state the stage at which a challenge may be brought.** That in itself implies that national law makes it clear for potential applicants when a particular act constitutes a challengeable decision and whether an applicant can and/or must bring an action against a 'non-final' decision or act.

107. **In the absence of EU law rules, it is for national law to lay down the detailed rules on when an application for leave to challenge can be brought, but it must be possible for all the relevant decisions, acts or omissions to be reviewable at that given time.**

C-73/16 (Puškár) on the exhaustion of available administrative remedies as a prerequisite for bringing a judicial remedy



On the other hand, the jurisprudence of the CJEU and the opinion of general advocate Bobek confirm it is possible to require participation in decision-making as a precondition to access to justice.

Obstacles to participation in decision-making?

Costs: C-216/05 (*Commission v Ireland*): Although Directive 85/337 does not preclude fees such as those charged under the national legislation at issue in the present case, **they cannot, however, be fixed at a level which would be such as to prevent the directive from being fully effective**, in accordance with the objective pursued by it (see, to that effect, Case C-97/00 *Commission v France* [2001] ECR I-2053, paragraph 9). **This would be the case if, due to its amount, a fee were liable to constitute an obstacle to the exercise of the rights of participation...**

Publication of the decision on the internet?

C-280/18 (Flausch and Others): Can Articles 6 and 11 of Directive 2011/92/EU, read in combination with the provisions of Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that a system of provisions of national law as set out in the abovementioned paragraphs, which ultimately provides that publication of decisions approving the environmental conditions of projects and activities with a significant environmental impact, **by means of posting them on a special website, creates a presumption of full knowledge** on the part of every interested party for the purpose of exercising the legal remedy available under current legislation (application for annulment before the *Symvoulío tis Epikrateias* (Council of State)) within a period of sixty (60) days, is compatible with those articles, bearing in mind the legislative provisions governing publication of environmental impact studies and public information and participation during the procedure to approve the environmental conditions of those projects and activities, which provisions place the wider administrative unit (region), rather than the municipality concerned, at the centre of those procedures?



The CJEU also had an opportunity to deal with various obstacles to participation in decision-making, although not that often as in the matters concerning access to justice. Most notably, in case C-216/05, it concluded that the EIA Directive does not preclude introduction of fees. The members of the public concerned may therefore be required to pay certain fee in order to participate in the permitting procedure. Nevertheless, the fees cannot be fixed at a level which would be such as to prevent the directive from being fully effective.

Derogatory regimes?

- The Aarhus Convention excludes legislative acts from its scope
- The EIA Directive excludes from its scope projects the details of which are adopted by a specific act of national legislation.

= no public participation?

Boxus (*Joined cases C-128/09 to C-131/09, C-134/09 and C-135/09*) and **Solvay** (*C-182/10*):

- requirements on the legislative procedure
- the national courts must be ready to scrutinize national legislative acts to ensure that they meet any conditions that would justify their exclusion from environmental impact assessment requirements.



You have also heard that legislative acts are excluded from the scope of the Aarhus Convention and also from the EIA Directive. Still, there are some requirements as regarding the judicial review. So, even though there is no participation as such in this second pillar, there comes a sort of judicial review, which may even say that the exception was not applicable to this case – the permit procedure must go back within the administrative level, not the legislative one. And the public concerned must be allowed to participate.

The IED Directive (2010/75/EU) – LARGE INDUSTRIAL ACTIVITIES

Preamble: ...effective public participation in decision-making is necessary to enable the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken. *Members of the public concerned should have access to justice in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.*

Article 19 Developments in best available techniques

Member States shall ensure that the competent authority follows or is informed of developments in best available techniques and of the publication of any new or updated BAT conclusions and *shall make that information available to the public concerned.*



The EIA and the IED directives have similar provisions on public participation, and also provide provisions on access to justice.

The IED Directive

Article 24 Access to information and public participation in the permit procedure

1. Member States shall ensure that the public concerned are given early and effective opportunities to participate in the following procedures:

- (a) the granting of a permit for new installations; (b) the granting of a permit for any substantial change;
- (c) the granting or updating of a permit for an installation where the application of Article 15(4) is proposed;
- (d) the updating of a permit or permit conditions for an installation in accordance with Article 21(5)(a).

The procedure set out in Annex IV shall apply to such participation.

2. When a decision on granting, reconsideration or updating of a permit has been taken, the competent authority shall make available to the public, including via the Internet in relation to points (a), (b) and (f), the following information:

- (a) the content of the decision, including a copy of the permit and any subsequent updates;
- (b) the reasons on which the decision is based;
- (c) the results of the consultations held before the decision was taken and an explanation of how they were taken into account in that decision;
- (d) the title of the BAT reference documents relevant to the installation or activity concerned;
- (e) how the permit conditions referred to in Article 14, including the emission limit values, have been determined in relation to the best available techniques and emission levels associated with the best available techniques;
- (f) where a derogation is granted in accordance with Article 15(4), the specific reasons for that derogation based on the criteria laid down in that paragraph and the conditions imposed.



According to the Preamble of the IED (§27) and according to Article 24 of the Directive itself, the Directive ensures that the public has a right to participate in the decision-making process, and to be informed of its consequences, by having access to permit applications in order to give opinions, permits, results of the monitoring of releases and the European Pollutant Release and Transfer Register (E-PRTR).

In E-PRTR, emission data reported by member states are made accessible in a public register, which is intended to provide environmental information on major industrial activities. E-PRTR has replaced the previous European Union-wide pollutant inventory, the so-called European Pollutant Emission Register (EPER).

The competent authority can make information available via the internet, under Article 24 (2) and 24 (3). In order to do so, referring to Article 14 (1d), the operator has to supply to the competent authority (at least annually) (a) emission monitoring results and other required data and (b) a summary of the results of emission monitoring (Article 15 (3b)).

The IED Directive

Article 24 Access to information and public participation in the permit procedure

3. The competent authority **shall also make available to the public, including via the Internet at least in relation to point (a):**

(a) relevant information on the measures taken by the operator upon definitive cessation of activities in accordance with Article 22;

(b) the results of emission monitoring as required under the permit conditions and held by the competent authority.

4. Paragraphs 1, 2 and 3 of this Article shall apply subject to the restrictions laid down in Article 4(1) and (2) of Directive 2003/4/EC.

Article 25 Access to justice: Similar to Art 11 EIA Directive:

...to challenge the substantive or procedural legality of decisions, acts or omissions subject to Article 24

Article 26 Transboundary effects

Article 55 Reporting and public information on waste incineration plants and waste co-incineration plants



The IED's Article 24 and Annex IV concerns: "access to information and public participation in the permit procedure". They describe the minimum standards for how decisions about permits should be publicised, how citizens should be involved in the process, and how information should be made available.

Article 24 of the IED is an obvious example of the principles of the Aarhus Convention being written into EU law. It sets out minimum requirements towards implementing the Convention by including the need to publish relevant information proactively and online.

The provision on access to justice (Art. 25) is very similar to Art 11 of the EIA Directive

The IED Directive

Article 65 Access to information

1. The decision of the competent authority, including at least a copy of the permit, and any subsequent updates, **shall be made available to the public**.

The general binding rules applicable for installations and the list of installations subject to permitting and registration **shall be made available to the public**.

2. The results of the monitoring of emissions as required under Article 60 and held by the competent authority **shall be made available to the public**.

3. Paragraphs 1 and 2 of this Article shall apply, subject to the restrictions laid down in Article 4(1) and (2) of Directive 2003/4/EC.



In fact, Article 24 requires further information to be made available to the public but does not oblige Member States to ensure this information is published online as well. There is no clear justification for why some but not all environmental information should be available online. For example, emissions monitoring data, which is by default public information, could also be included.

Article 65 imposes further requirements as regards access to information.

The SEVESO III Directive (2012/18/EU) - major accident hazards

Preamble – principles: information + participation in decision-making

Article 14 Information to the public

1. Member States shall ensure that the **information referred to in Annex V is permanently available** to the public, including electronically. The information shall be kept updated, where necessary, including in the event of modifications covered by Article 11.
2. For upper-tier establishments, Member States shall also ensure that:
 - (a) **all persons likely to be affected** by a major accident receive **regularly and in the most appropriate form**, without having to request it, clear and intelligible information on safety measures and requisite behaviour in the event of a major accident;
 - (b) the **safety report** is made available to the public upon request
 - (c) the **inventory of dangerous substances** is made available to the public upon request



The SEVESO III Directive (2012/18/EU) - major accident hazards

Preamble – principles: information + participation in decision-making

Article 15 Public consultation and participation in decision-making

1. Member States shall ensure that the public concerned is **given an early opportunity to give its opinion** on specific individual projects relating to:

- (a) **planning for new establishments** pursuant to Article 13;
- (b) **significant modifications** to establishments under Article 11, where such modifications are subject to obligations provided for in Article 13;
- (c) **new developments around establishments** where the siting or developments may increase the risk or consequences of a major accident pursuant to Article 13.

4. Member States shall ensure that the public concerned is entitled to express comments and opinions to the competent authority before a decision is taken on a specific individual project as referred to in paragraph 1, **and that the results of the consultations held pursuant to paragraph 1 are duly taken into account** in the taking of a decision.

6. Where general plans or programmes are being established relating to the matters referred to in points (a) or (c) of paragraph 1, Member States shall ensure that the public is given early and effective opportunities to participate in their preparation and modification or review using the procedures set out in Article 2(2) of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.

This paragraph **shall not apply** to plans and programmes for which a public participation procedure is carried out under Directive 2001/42/EC.



Directive 2012/18/EU – also known as Seveso III – has the aim of preventing major accident hazards involving dangerous substances and of limiting their consequences for human health and the environment. It is the third amendment after Seveso I and II, the name of which derives from the disastrous dioxin accident of 1976 in the Italian town of Seveso. After its adoption by the European parliament and the Council, Seveso III came into force on 1 June 2015 and is thus binding for all EU member states.

The SEVESO III Directive grants detailed rights to citizens in terms of access to environmental information, public participation and access to justice.

The SEVESO III Directive (2012/18/EU) - major accident hazards

Article 23 Access to justice

Member States shall ensure that:

(a) any applicant requesting information pursuant to points (b) or (c) of Article 14(2) or Article 22(1) of this Directive is **able to seek a review** in accordance with Article 6 of Directive 2003/4/EC of the acts or omissions of a competent authority in relation to such a request;

(b) in their respective national legal system, **members of the public concerned have access to the review procedures set up in Article 11 of Directive 2011/92/EU for cases subject to Article 15(1) of this Directive.**



In addition, it includes specific provisions on inspections including the possibility to request ad hoc inspections in case of serious environmental complaints.

The national administrative bodies in charge of the implementation of the Seveso III Directive are primarily responsible to verify specific situations of alleged noncompliance and have the appropriate means to address the problem if the concerns are found justified. National courts are competent to uphold actions by individuals seeking protection against national measures that are incompatible with EC law or financial compensation for the damage caused by the lack of measures

Exceptions - limited scope

Art. 2(2) SEVESO III:

This Directive shall not apply to any of the following: military establishments, hazards created by ionising radiation originating from substances, the transport of dangerous substances and directly related intermediate temporary storage, the exploitation of minerals in mines and quarries, waste land-fill sites, including underground waste storage...

EIA Directive

(22) However, this Directive should not be applied to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.

(24) In the case of projects adopted by a specific act of national legislation, Member States should ensure that the objectives of this Directive relating to public consultation are achieved through the legislative process.

However C-128/09 (Boxus) or C-348/15 (Stadt Wiener Neustadt) – access to justice



The scope of the SEVESO III Directive and the EIA Directive is limited by several exceptions.

Exceptions - limited scope

C-128/09 (Boxus):

53 However, Article 9 of the Aarhus Convention and Article 10a of Directive 85/337 would lose all effectiveness if the mere fact that a project is adopted by a legislative act which does not fulfil the conditions set out in paragraph 37 of the present judgment were to **make it immune to any review procedure** for challenging its substantive or procedural legality within the meaning of those provisions.

54 The requirements flowing from Article 9 of the Aarhus Convention and Article 10a of Directive 85/337 presuppose in this regard that, when a project falling within the ambit of Article 6 of the Aarhus Convention or of Directive 85/337 is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive and set out in paragraph 37 of the present judgment **must be amenable to review, under the national procedural rules**, by a court of law or an independent and impartial body established by law.

55 **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 paragraph and, as the case may be, drawing the necessary conclusions **by disapplying that legislative act**.

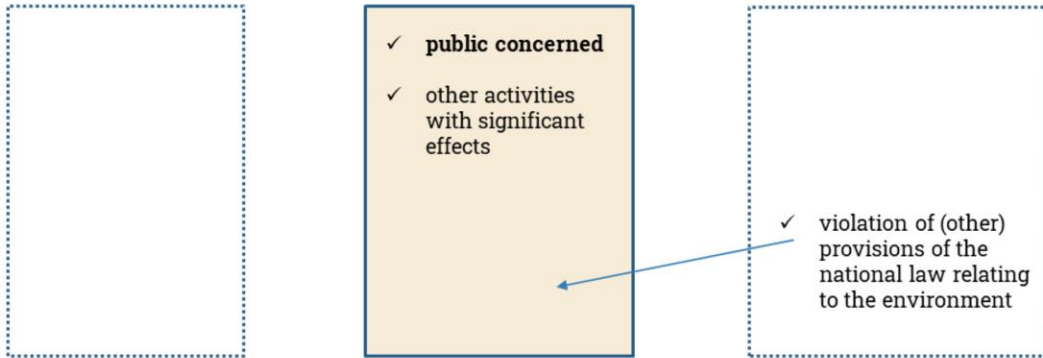


According to the CJEU, the judicial review is still possible in these cases, but limited to question whether all the conditions for specific regime have been met.

2) Directives implementing the Aarhus Convention according to the CJEU (decision-making)

- The Habitats Directive - Art. 6(3)
- Participation required as a condition for access to justice (C-664/15)

Public participation in decision-making



Besides the EIA Directive and the IED Directive, also the SEVESO Directive dealing with major accident hazards makes a direct reference to the Aarhus Convention. The directives in the second group also require the Member States to grant the public concerned participatory rights according to the Court of Justice, but this might not be evident at the first sight since they do not include explicit requirements.

The Habitats Directive (92/43/EEC)

Article 6(3) *Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*

C-243/15 (Lesoochránárske zoskupenie II, para. 45 - 48): *the project of constructing an enclosure on a protected site, at issue in the main proceedings, is not among the activities listed in Annex I to the Aarhus Convention, the fact that the competent national authorities decided to initiate an authorisation procedure for that project pursuant to Article 6(3) of Directive 92/43 permits, however, the inference that those authorities considered it necessary to assess the significance of the project's effect on the environment, within the meaning of Article 6(1)(b) of the Aarhus Convention. It is true that the latter provision states that the application of Article 6 of the Aarhus Convention is governed by the domestic law of the contracting party concerned. However, that statement must be understood as relating solely to the manner in which the public participation specified by Article 6 is carried out, and does not call into question the right to participate which an environmental organisation such as LZ derives from that article.*



In 2017, the CJEU confirmed that the Art. 6(3) of the Habitats Directive contains requirements on public participation, although not explicit.

The case evolves around an administrative procedure in Trenčín, Slovakia to authorise a project constructing an enclosure that would extend a deer reserve in an area in the Strážov Mountains, designated as a Natura 2000 site under the Habitats Directive. LZ (forest protection association VLK), fearing the negative implications this would have for wild brown bears in the area, objected to the authorisation.

The Court found that when a Member State's procedural rules apply to actions concerning the exercise of rights which an environmental organisation derives from article 6 (3) of the Habitats Directive; 'that Member State is implementing obligations stemming from those provisions and must therefore be regarded as implementing EU law' (para 52).

Such rights existed under article 6 (3) of the Habitats Directive because that provision had to be interpreted in conformity with Article 6 (1) (b) of the Aarhus Convention. To recall, article 6 (3) of the Directive provides that the competent national authorities, before agreeing to a plan or project as referred to in that provision, must, if appropriate, obtain the opinion of the general public. After noting the binding effect of that provision, the ECJ stated that it 'must be read in conjunction with Article 6(1)(b) of the Aarhus Convention, an instrument which forms an integral part of the EU legal order.' (para 45) The ECJ then proceeded with reiterating the right to public

participation in environmental matters under Article 6 of the Aarhus Convention, and found that LZ derived a right from Article 6 (3) of the Habitats Directive to participate within the meaning of the Aarhus Convention in a procedure for authorisation of a project likely to have a significant effect on the environment (paras 46-49).

Participation required as a condition for access to justice

C-664/15: extension of a permit for a snow-making facility

68 *Although Article 9(3) of the Aarhus Convention itself does not require a Member State to confer a right to participate, as a party to the procedure, in an administrative procedure for the grant of a permit such as the one at issue in the main action, that is not the case if, according to national law, obtaining that status is a condition that must necessarily be satisfied in order to bring an action seeking to contest the decision adopted at the end of that procedure.*

69 *If national law establishes a link between the status of party to the administrative procedure and the right to bring judicial proceedings, the refusal of such status would deprive the right to bring proceedings of all useful effect, and even of its very substance, which would be contrary to Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter.*

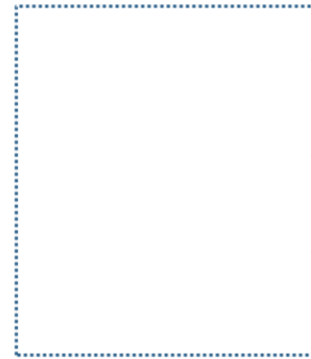
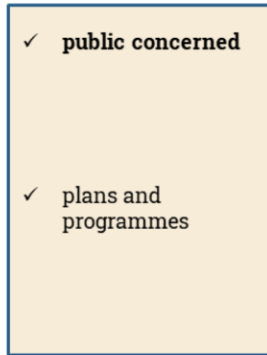


In this case, the CJEU ruled that environmental NGOs must have access to justice in water law proceedings. The Water Framework Directive does not lay down any specific requirement as regards public participation in decision-making. However, according to the Austrian legislation, participation in the administrative proceedings was a precondition for access to justice. If not allowed to participate in the administrative proceedings, the NGOs would have no chance to challenge the decision before the courts.

3) Directives focused on participation in the elaboration of plans

SEA Directive, Water Framework Directive, Air Quality Directive, Waste Framework Directive, Environmental Noise Directive

Public participation in decision-making



There is a large group of the EU environmental directives that require public participation in elaboration of plans and programmes, most notably the SEA Directive, the Water Framework Directive, the Air Quality Directive, the Waste Framework Directive and the Environmental Noise Directive.

The SEA Directive (2001/42/EC): Assessment of plans and programmes

Preamble - principles

Art. 3(7): Member States shall ensure that their conclusions pursuant to paragraph 5, including the reasons for not requiring an environmental assessment pursuant to Articles 4 to 9, are made **available to the public**.

Article 6 Consultations

1. The **draft plan or programme** and the **environmental report** prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article **and the public**.
2. The authorities referred to in paragraph 3 **and the public** referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.
4. **Member States shall identify the public** for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned.
5. **The detailed arrangements** for the information and consultation of the authorities and the public shall be determined by the Member States.

Art. 7 – Transboundary consultations

Art. 9 – Information on the decision



Public participation under the SEA Directive takes form of consultations.

The Air Quality Directive (2008/50/EC)

Preamble – principles: information

Article 1(4): This Directive lays down measures aimed at the following: **ensuring that such information on ambient air quality is made available to the public**

Article 24(3) Short-term action plan: When Member States have drawn up a short-term action plan, **they shall make available to the public and to appropriate organisations** such as environmental organisations, consumer organisations, organisations representing the interests of sensitive population groups, other relevant health-care bodies and the relevant industrial federations both the results of their investigations on the feasibility and the content of specific short-term action plans as well as information on the implementation of these plans.



The Air Quality Directive focuses on dissemination of information.

The Air Quality Directive (2008/50/EC)

Article 26 Public information

1. Member States shall ensure **that the public as well as appropriate organisations** such as environmental organisations, consumer organisations, organisations representing the interests of sensitive populations, other relevant health-care bodies and the relevant industrial federations are informed, **adequately and in good time**, of the following:

- (a) ambient air quality in accordance with Annex XVI;
- (b) any postponement decisions pursuant to Article 22(1);
- (c) any exemptions pursuant to Article 22(2);
- (d) air quality plans as provided for in Article 22(1) and Article 23 and programmes referred to in Article 17(2).

The information shall be made available free of charge by means of any easily accessible media including the Internet or any other appropriate means of telecommunication, and shall take into account the provisions laid down in Directive 2007/2/EC.

- 2. Member **States shall make available to the public annual reports for all pollutants** covered by this Directive. (...)
- 3. Member States **shall inform the public** of the competent authority or body designated **in relation to the tasks referred to in Article 3**.



The Air Quality Directive (2008/50/EC)

C-237/07 (Janecek):

*"persons directly concerned must be in a position **to require the competent national authorities to draw up an action plan**, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution"*

Principles

- the persons concerned **must be in a position to rely on the mandatory rules** included in that directive
- it is incompatible with the binding effect of a directive to exclude, in principle, **the possibility of the obligation imposed by that directive being relied on by persons concerned**. That consideration applies particularly in respect of a directive which is intended to control and reduce atmospheric pollution and which is designed, therefore, to protect public health.



Even without explicit requirements, the CJEU concluded that the individuals affected by the air quality must be allowed to request the national authorities to adopt an action plan to fight the air pollution.

The Environmental Noise Directive (2002/49/EC)

Preamble – principles

Article 8 Action plans

7. Member States shall ensure that *the public is consulted about proposals for action plans*, given early and effective opportunities to participate in the preparation and review of the action plans, that the results of that participation are taken into account and that the public is informed on the decisions taken. Reasonable time-frames shall be provided allowing sufficient time for each stage of public participation.

If the obligation to carry out a public participation procedure arises simultaneously from this Directive and any other Community legislation, Member States may provide for joint procedures in order to avoid duplication.

Article 9 Information to the public

1. Member States shall ensure that the strategic noise maps they have made, and where appropriate adopted, and the action plans they have drawn up are made available and disseminated to the public in accordance with relevant Community legislation, in particular Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment⁽¹³⁾, and in conformity with Annexes IV and V to this Directive, including by means of available information technologies.

2. This information shall be clear, comprehensible and accessible. A summary setting out the most important points shall be provided.



The Waste Framework Directive (2008/98/EC)

Preamble - Stakeholders, as well as the general public, should have the opportunity to participate in the **drawing up of the programmes**, and should have access to them once drawn up, in line with Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment

Article 31 Public participation

Member States shall ensure that relevant stakeholders and authorities and the general public have the **opportunity to participate in the elaboration of the waste management plans and waste prevention programmes**, and have access to them once elaborated, in accordance with Directive 2003/35/EC or, if relevant, Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment. They shall place the plans and programmes on a publicly available website.



The Water Framework Directive (2001/42/EC)

Preamble - principles

Article 14 Public information and consultation

1. Member States **shall encourage the active involvement of all interested parties** in the implementation of this Directive, **in particular in the production, review and updating of the river basin management plans**. Member States shall ensure that, for each river basin district, they publish and make **available for comments to the public**, including users:

- (a) a timetable and work programme for the production of the plan, including a statement of the consultation measures to be taken, at least three years before the beginning of the period to which the plan refers;
- (b) an interim overview of the significant water management issues identified in the river basin, at least two years before the beginning of the period to which the plan refers;
- (c) draft copies of the river basin management plan, at least one year before the beginning of the period to which the plan refers.

On request, access shall be given to background documents and information used for the development of the draft river basin management plan.

2. Member States shall allow **at least six months to comment** in writing on those documents in order to allow active involvement and consultation.

3. Paragraphs 1 and 2 shall apply equally to updated river basin management plans.



THANK YOU FOR YOUR ATTENTION!

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