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**NATIONAL JUDGES AND THE EU
AARHUS ACQUIS
Focus on Access to Justice**

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Scope and standard of judicial review



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Please feel free to interrupt



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On the Advocate General

- Member of the Court
- Advises the Court by independently preparing Opinions
- Does not participate in deliberations
- Opinion is not a Judgment
- Only the Judgment has the authority of the Court
- Opinions can illuminate the background
- Presentation is my personal view



This slide aims to illuminate the background of the author and original presenter of this presentation. There is no need for others to retain it.

Article 252 TFEU

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Remarks:

The Council has decided to increase the number of AGs to eleven.

The AG is not assigned to any particular chamber of the court. She does not participate in the deliberations of the judgment.

Overview

- Scope of Review
 - Art. 9(2) + 6 - decisions subject to public participation
 - Art. 9(3) - compliance with general environmental law
- Standard of Review
 - Review of Complex Appreciations and Balancing in EU law
 - The Aarhus Compliance Committee on the UK Wednesbury test
- Art. 9(1) + 4 - Access to Information



Content of the presentation

Scope of Review

Art. 9(2) + 6

Decisions subject to Public Participation

- EIA Directive 2011/92
- IE Directive 2010/75
- Art. 6(1)(b) of Aarhus: decisions on (other) activities which may have a significant effect on the environment



Art. 9(2) of the Aarhus Convention covers judicial review of decisions that are subject to public participation.

EU law has implemented this provision by way of the EIA and IE Directive. Both provides exhaustive lists of projects that are subject to public participation. However, other decisions may come under Art. 6(1)(b) of the Aarhus Convention that applies, in principle, to all other activities and such decision can therefore be subject to judicial review under Art. 9(2) of the Convention and Art. 47 of the EU Charter of Fundamental Rights (C-243/15, C-664/15).

Art. 6(1)(b) provides that Each Party shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in Annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions. Under the jurisprudence of the Court this appears to mean that permits that could come into conflict with EU environmental law would require public participation under the Aarhus Convention and be open to challenges under Art. 9(2) (cf. cases C-243/15 – LZ II, C664/15 – Protect)

Scope of Review

Art. 9(2) + 6

Standing:

- members of the public *concerned* (C-826/18) - affected or likely to be affected by, or having an interest by the decision
- having a sufficient interest or maintaining impairment of a right (wide access to justice)
- rights can result from EU law
- NGOs deemed to have sufficient interest or right
- broader public: Art. 9(3)



Standing under Art. 9(2) is awarded to members of the public as defined by Art. 2(4) and (5). The public includes natural and legal persons, including NGOs meeting the requirements of Member State law. 'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making.

They can be required to demonstrate sufficient interest or the impairment of a right, depending on the requirements of the system of judicial review in question. Such conditions are to be interpreted and applied with the objective of providing wide access to justice. Though MS enjoy some discretion with regard to individuals, they may not exclude recognised NGOs (C-115/09 – Bund Naturschutz [Trianel]). Moreover, individuals enjoy certain rights under EU environmental law, e. g. they can demand the adoption of an air quality plan if the limit values for ambient air are breached (C-237/07 - Janecek).

Conversely, members of the broader public can rely Art. 9(3) with regard to rights in the context of permit procedures falling under Art. 6 if such rights granted by Member State law (C-826/18 – Stichting Varkens en nood).

Scope of Review

Art. 9(2) + 6

Challenge the Substantive and Procedural Legality

- C-115/09
 - without in any way limiting the pleas
 - allowing at least EU environment law
- Individuals can be limited to their rights
- C-470/16 - public's right to participate
- ACCC - no restriction to environment law



According to Art. 9(2) of the Convention and the implementation by way of the EIA and IE Directives, the material scope of judicial review is the substantive and procedural legality. The main line of jurisprudence of the CJEU appears to mean that, in principle, all pleas based in environmental law can be raised and that at least EU environmental law can be invoked (eg. C-115/09, C-137/14).

Nevertheless, the more restrictive standing rights by individuals are reflected by the challenges that they can invoke. If standing depends on rights the challenges must be based on these rights (C-137/14).

A recent case, C-470/16 - North East Pylon Pressure Campaign and Sheehy, is based on an even more restrictive consideration, namely that the scope of Art. 9(2) and the implementing provisions is restricted to the public's right to participate. It may be that this jurisprudence is an outlier or limited the specific issue, namely cost protection. Or it may be that the Court has turned away from earlier jurisprudence.

Conversely, the Aarhus Convention Compliance Committee sees no legal basis in the Convention to restrict actions under Art. 9(2) to environmental law (ACCC/C/2008/31; ece/mp.pp/c.1/2014/8, 4 June 2014, para. 78)

Art. 9(3)

In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.



Text of Art. 9(3)

Scope of Review

Art. 9(3)

Legal Effect?

- No direct effect, but duty to interpret existing (MS?) rules in conformity (C-240/09)
- EU implementation on MS level failed
- BUT: Combination with Art. 47 Charter (C-664/15): some access must be possible wrt EU environmental law (at least for NGOs)
- EU level implementation by Aarhus Regulation >> Internal Review >> Art. 263(4) first limb TFEU, no extension to 2nd limb, third limb?



... where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

The first question with regard to Art. 9(3) relates to its legal effect because the proposal for an implementing instrument with regard to the Member States failed. Recent discussions didn't go very far either.

Nevertheless, the Court considers itself competent to interpret Art. 9(3), certainly with regard to the enforcement of EU environment law (C-240/09), but also beyond to guarantee a coherent interpretation (C-470/16). In any event, the Court has repeatedly decided that Art. 9(3) does not have direct effect because it refers to the criteria laid down in Member State law.

Recently, however, the Court has adopted a combined reading with the right to effective judicial protection under Art. 47 of the Charter and found that Art. 9(3) would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing conditions, certain categories of 'members of the public', a fortiori 'the public concerned', such as environmental organisations that satisfy the requirements laid down in Article 2(5) of the Aarhus Convention, were to be denied of any right to bring proceedings.

Scope of Review Art. 9(3)

Subject Matter

- Acts and Omissions
- Acts by Public Authorities (C-664/15, C-470/16, C-826/18)
- Actions of Private Parties?
- Law Relating to the Environment



... to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

The subject matter of the action under Art. 9(3) of the Convention is very broad: acts and omissions should cover all types of activities, not only acts creating legal effects, but also real life actions or failures to act. The cases the Court dealt with directly only concerned acts of public authorities (permits), but private parties should not be lost from view.

Finally, the concept of „law relating to the environment“ also is open to discussion. For purposes of the Aarhus Regulation it has been defined as legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems (see T-33/16: broad interpretation).

A Small Case

Your court sits in a big city where air quality is an issue. A number of local citizens and an environmental NGO introduce a case. They challenge the validity of the type approval granted to the newest generation of diesel car of producer X by the competent national authority. They claim that the rules on the testing of the emissions of diesel cars infringe the EU Regulation on type approval.[The testing methods foreseen are unsuitable to check compliance with the emission limits.]

The national authority argues that according to their legal basis these rules do not relate to the environment, but to the internal market. What do you think?

A - environmental law, B - no



[Inspired by T-339/16, T-352/16 and T-391/16, *Ville de Paris and Others v Commission*, Now pending C-C-873/19 - *Deutsche Umwelthilfe*]

The case aims to highlight that the question whether certain provisions are part of the “law relating to the environment” can pose problems. However, it should be obvious that rules on type approval that address environmental impacts should be part of this law even if they were not adopted on the basis of EU environmental powers.

Another Small Case (C-723/17)

Same as before, but according to the air quality sampling results the limit values are respected. However, the plaintiffs claim that the sampling points are in the wrong locations and they demand that certain specific sampling points in other locations are created. To support their case they provide scientific studies.

The rule says that sampling points shall be sited in such a way as to provide data on the areas where the highest concentrations occur to which the population is likely to be directly or indirectly exposed.

The competent authority disputes that you are competent to appreciate the scientific basis of the location of sampling points. [Is it important that they provide studies of their own?]



This case serves as an introduction to the difficulties that can confront a court when asked to verify complex appreciations. Participants have the opportunity to explain how their system deals with such issues.

Standard of Review

- in the Absence of EU rules
- the Procedural Autonomy of MS applies, subject to
 - the principle of Equivalence and
 - the principle of Effectiveness



The Standard of Review, that MS courts must apply, comes under the principle of procedural autonomy. This means that in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State, in accordance with the principle of the procedural autonomy of the Member States, to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law (eg. judgment in *Agrokonsulting-04*, C-93/12, EU:C:2013:432, paragraph 35 and the case-law cited).

The detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (eg judgments in *Impact*, C-268/06, EU:C:2008:223, paragraph 46 and the case-law cited, and *Asociación de Consumidores Independientes de Castilla y León*, C-413/12, EU:C:2013:800, paragraph 30).

Standard of Review

Absence of EU rules?

- eg. Art. 6(3) of the Habitats Directive
 - agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site
 - remove all reasonable scientific doubt (C-441/17, para 116)



It is possible that the standard of review follows from the EU provision in question, such as in the case of the Art. 6(3) of the Habitats Directive where the Court has found that in the light of the precautionary principle all reasonable scientific doubt with regard to negative impacts on the conservation objectives needs to be excluded. But it is submitted that such specific requirements are the exception.

Standard of Review

Procedural Autonomy of MS - Freedom to specify the Powers of MS Courts

- Comprehensive review (Sweden?)
- Limited Review (UK Wednesbury Test, France?)



Procedural Autonomy with regard to the standard of review means that MS are, in principle, free to design their system of judicial protection, including the standard of review applied by their courts. There are legal systems that provide for rather comprehensive review such as Swedish courts that employ technical judges. Others, such as German courts, rely to a large degree on expert testimony.

On the other hand, there are systems that practice significant judicial self-restraint with regard to technical or scientific matters such as the UK or France.

Standard of Review

- the principle of Equivalence
 - similar treatment to purely domestic cases
- the principle of Effectiveness
 - not impossible
 - not excessively difficult



These principles limit the procedural autonomy of Member States.

The Principle of Equivalence means that EU law cases must not be treated differently than similar cases of a purely domestic nature. Such differences are quite rare and if there are differences it needs to be assessed whether the cases really are sufficiently similar to require similar treatments. E. g. there are rules in some MS that require a reopening of cases that were definitively judged if an infringement of the European Human Rights Convention becomes apparent after a judgment of the European Court of Human Rights. However, possible infringements of EU law do not require such reopening because, in principle, a reference to the Court of Justice could have been made to prevent the infringement (C-234/17).

In CJEU practice, the principle of Effectiveness is more important. It means that the design of judicial review in a MS must not make it impossible or excessively difficult to exercise the rights derived from EU law. Eg., mandatory delays to introduce actions are allowed under this principle, but the Slovak design of judicial review if the applicant was denied the status of a party in the administrative procedure was considered too restrictive (C-243/15).

Standard of Review

Consequences

- Minimum Standard can be derived from EU Court practice (C-120/97, C-211/03)
 - Complex Appreciation
 - Balancing of Interests
 - Exclusion of Discretion



With regard to the review practiced by MS courts the CJEU should not require more intensive review than it applies itself with regard to decisions by the institutions. The core concept in this respect is “complex appreciation”, balancing could be added as a specific expression and the counterpoint would be the exclusion of discretion.

Standard of Review

(Wide) Discretion?

- If no: strict review of compliance with rules, eg. if limit values for ambient air quality are breached an air quality plan must be adopted
- If yes: only **manifest errors** of substantial appreciation are sanctioned, but procedural obligations must be complied with, eg. wrt content of air quality plans discretion exists, but reasons must be given + pp (2003/35)



In practice this means that the provisions in question need to be interpreted whether they confer discretion or not. Ambient Air Quality Legislation provides examples in both regards: the limit values and the obligation to adopt an air quality plan are clear and do not allow for discretion. Therefore, courts must enforce this obligation strictly (C-237/07). However, the content of the plans requires a complex appreciation and also some balancing. Therefore, there must be (some) discretion.

Standard of Review

Reasons for Judicial Self-Restraint on Substance

- **Better Expertise of Specialised Authorities**
 - Eg. Commission with regard to Competition, Agricultural Policy, Fisheries
 - ECB with regard to Monetary Policy
 - Expert Witnesses? (Eg. Congestion Charge or Diesel Ban?)
- **Democratic Legitimacy with regard to Balancing of Interests**



The judicial self-restraint practiced by EU courts rests on a double foundation:

Firstly, there is the better expertise that specialised authorities have. They can employ experts and acquire practical knowledge in their area of responsibility. Commission action in the areas of Competition, Agricultural Policy or Fisheries provides many examples and lies at the roots of this jurisprudence. Recent cases on monetary policy confirm this approach. Obviously, the counter-argument lies in the possibility to hear expert witnesses. But in particular without specific training judges risk hearing bad experts and might be convinced for the wrong reasons.

The second foundation is even more important: Whenever the balancing of interests is required, the legislator, but also administrative authorities subject to parliamentary supervision enjoy stronger democratic legitimacy than independent courts.

Standard of Review

But: Procedural Obligations need to be enforced

- Duty to provide reasons, eg. with regard to the content of Air Quality Plans
- Has all relevant information been taken into account?
- Review of Effectiveness of Measures, again with reasons (often foreseen in legislation)
- Access to Environmental Information
- Right to be Heard or to Participate (EIA, SEA, IED)



The review of procedural obligations can be effective. In particular the duty to provide reasons is central to understand administrative action and to find possible issues for substantial review. A specific feature of environmental legislation is that it often requires review of the effectiveness of measures taken and, if necessary, adaptations. Any review would have to be accompanied by reasons. Access to environmental information can also help. And, with regard to Art. 9(2), the right to participate in the decision-making process is most important.

Standard of Review

Limitations to Discretion?

- Is there really discretion? (Cf. UK Courts in C-404/13 - ClientEarth)
- Discretion must be exercised in view of its purpose
- Have the original assumptions later been disproved?
- Are particularly important objectives at stake that require stricter review?



With regard to the substance of a decision, careful distinctions must be drawn between issues that require discretionary action and issues where no discretion exists (eg. adoption of air quality plans vs contents). Moreover, the purpose of the discretion must be respected and this must be reflected by the reasoning. If discretionary action is based on assumptions or prognoses it is possible to review these at a later stage in light of the practical effects of the measure in question. While it is not possible to review the original decision in the light of later evidence this evidence is relevant for the future.

Finally, with regard to severe impacts on privacy and the protection of personal data the Court has applied a much stricter standard of review. It could be argued that for important environmental objectives, eg. protection of human health against severe risks, eg. air quality legislation (Opinion C-723/17), stricter review also is called for.

Standard of Review

Possible Criticism by ACCC (ACCC/C/2008/33)

- UK Wednesbury test
- Challenges for material error of fact; error of law; regard to irrelevant considerations and failure to have regard to relevant considerations; jurisdictional error; and on the grounds of Wednesbury unreasonableness
- ACC recommends proportionality test: link to objective, necessity



It should be mentioned that the ACCC has expressed concern about the standard of judicial review in the UK, in particular the Wednesbury test, a standard that appears to be similar to the manifest error test. However, the proportionality test proposed by the ACCC does not really resolve the issue because the question whether a measure contributes to the objective and whether it is necessary as well as the balancing also require complex appreciations. In CJEU practice strict reasoning requirements would appear to be the most interesting inspiration from the proportionality test (cf. C-92/09 and C-93/09 - Schecke).

Scope of Review

Art. 9(1) + 4

- Access to Environmental Information
 - EU level - Regulations 1049/2001 and 1367/2006
 - MS level - Directive 2003/4
- Judicial Review limited to Decisions on Applications for Access to Information
 - Applicant
 - Appeal by Authority
 - Third Party (eg. Original Owner of the Information)



The scope of review under Art. 9(1) of the Aarhus Convention is clearly defined by the very limited subject matter of the provision, namely access to environmental information. The Regulations and the Directive mentioned transpose this right into EU law. Actions will mostly be brought by the applicant if the application has been rejected. The authorities may initiate actions if they lose at a certain stage of judicial or administrative review (eg. C-71/10 – Office of Communications).

Third Party Actions will aim at the prevention of access; in this regard often interim relief will be fundamental for effective judicial protection (eg. T-621/17 R).

Scope of Review

Art. 9(1) + 4

Typical Issues

- Concept of Environmental Information
- Grounds for refusal
 - interpreted in a restrictive way (Art. 4(4))
 - taking into account the public interest served by disclosure
 - emissions into the environment (actual or foreseeable)
- Repeat Applications are possible



Unless there is already more general legislation on access to information, the first line of defence for a refusal will be the concept of environmental information. Both, the Convention and the Directive, define this concept in detail. It includes, in particular, information about the testing of pesticides because this information is relevant for possible health effects (C-266/09).

The Aarhus Convention and the Directive explicitly provide that the grounds for refusal need to be interpreted in a restrictive way. Moreover the public interest in disclosure must be taken account, although in practice the added value of this concept, distinct from the grounds for refusal and their interpretation, remains unclear.

Information about emissions into the environment can only be refused on some of the grounds for refusal. 'Emissions into the environment' within the meaning of the second subparagraph of Article 4(2) of Directive 2003/4 must be interpreted as including, inter alia, the release into the environment of products or substances such as plant protection products or biocides and substances contained in those products, to the extent that that release is actual or foreseeable under normal or realistic conditions of use (C-442/14).

Repeat applications for access and, as a consequence, repeat court actions are possible, because over time the appreciation of the grounds for refusal may change (C-362/08 P, EU:C:2010:40, para. 57).

Standard of Review

Art. 9(1) + 4

- Scope of Concepts and Grounds mostly an issue of Legal Interpretation >> Strict Review
- But Balancing with Public Interest implies Wide Margin of Appreciation
- CJEU recognized a Wide Margin of Appreciation with regard to a refusal for reasons of public interest, eg. public security or international relations



Many cases on access to environmental information turn on the legal interpretation of concepts or grounds and therefore imply a strict review of the decision at issue. However, there are also elements in the legislation that require a balancing exercise, in particular the balancing with the public interest in disclosure. This would imply a wide margin of discretion and could explain the reluctance of the EU courts to enter into a more intensive review of this issue. Moreover, in the field of general access to documents the Court has already recognised that the margin of appreciation with regard to a refusal on grounds of public interest must be wide (C-266/05 P).

Thank you for your attention!



Case law:

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