



EU environmental law and the Aarhus Convention

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Status in Europe and direct effect at EU level



As international agreements often go, the judiciary and the public struggle to see how this relates to their activities.

We will examine how the Aarhus convention and how it affects the EU and national legal framework.

Status in Europe

- EU and all MS Parties to the Convention
- Art. 216(2) TFEU – Convention is ‘binding upon Union and its MS’
- C-612/13 P - the Convention was ‘*manifestly designed with the national legal orders in mind, and not the specific legal features of institutions of regional economic integration, such as the European Union*’
- Article 19(5) – to ‘the extent of their competence with respect to the matters governed by this convention.’
- Implementation via Aarhus Regulation (1367/2006) regarding EU institution

The Aarhus Regulation implements all 3 pillars.

Horizontal instruments at EU level

Aarhus Convention Pillar	Implementation
Access to environmental Information (Art. 4, 5 and 9(1))	Access to Environmental Information Directive (2003/4/EC)
Public Participation (Art. 6, 7 and 9(2))	Public Participation Directive (2003/35/EC)
	EIA Directive (2011/92/EU)
	SEA Directive (2001/42/EC)
Access to Justice (Art. 9(2) and (3))	Horizontal Instrument proposed 2003. Never adopted.

II. The priority areas of action under the Communication on access to justice (2020)

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

- It wasn't until the election in 2019, under the Green Deal, that the Commission issued a communication in 2020 calling upon the Member States to implement this Access to Justice Pillar.
- The EU called upon national courts to guarantee the rights under the Aarhus Convention.

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Sectoral Provisions

- Access to environmental information Directive (2003/4/EC)
- Public Participation Directive (2003/35/EC)
- IED (2010/75/EC)
- ELD (2004/35/EC)
- Seveso III (2012/18/EU)
- EIA Directive (2011/92/EU)
- Deforestation Regulation (2023/1115)
- Ambient Air Quality Directive
- Urban Waste Water Directive
- (Critical Raw Materials Act)
- (Net Zero Industry Act)

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- This is the current Access to Justice acquis.
- The two last ones are not part of the acquis of DG environment but contain access to justice provisions.

Sectoral Provisions

- Recital in Nature Restoration Law (2024/1991)
- Recital in RED III (2023/2413)

In RED, the provisions for access to justice did not pass the co-legislators, and remained only in the recital.

Proposed Sectoral Provisions

- Soil Monitoring Law
- Plastic Pellets Directive
- Green Claims Directive

Upcoming or on-going evaluations

- Directive on the reduction of national emissions of certain atmospheric pollutants (NEC) 2016/2284
- REACH Regulation 1907/2006

Sectoral Provisions Example: EUDR

Article 32

1. **Any natural or legal person having a sufficient interest**, as determined in line with their existing national systems of legal remedies, [...], where they meet the criteria, if any, laid down in its national law, shall have access to administrative or judicial procedures **to review the legality of the decisions, acts or failure to act** of the competent authorities under this Regulation.
2. This Regulation shall be without prejudice to any provisions of national law which regulate access to justice and those which require that administrative review procedures be exhausted prior to recourse to judicial proceedings.

- An example of that an A2J provision can look like.
- It is positive that this was included in the end. A lot was cut down.

European Commission Notice on Access to Justice in Environmental Matters



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 4. **The obligation of national courts to guarantee the right of individuals and NGOs to an effective remedy under EU law.** 

- The Commission is aware that there are many Access to Justice cases.
- In this vein, it has issued the notice on A2J.

Why an initiative on access to justice?

- COM(2017)198 final – Commission stresses the importance of **redress mechanisms** at national level to complement more strategic Commission enforcement
- Necessary to **overcome basic barriers** that exist in many legal systems, in particular, if the right to go to court is very restricted.
- **Case-law** of the CJEU has considerably evolved since 2003 (Proposal for a Directive) and now covers much of the subject-matter of the proposal.

Approach

- **Create no new** legal obligations but draw inferences from EU legal principles and CJEU case-law in case of gaps in EU secondary legislation
- **Cover** all relevant aspects of access to justice in a comprehensive way, i.e. rights, standing, scope of review, effective remedies, costs, at the same time keeping the length reasonable
- **Target a broad readership** of legal practitioners and business
- **Scope of the Notice: Decisions, acts and omissions by public authorities of the Member States**; it does **not** address litigation between private parties and the judicial review of acts of EU institutions via EU courts.

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- The notice is only a communication, meant to be interpretive.
- It can assist judges look for relevant case law and refer to the CJEU.

Content

- A set of guarantees to allow **court challenges** by **individuals and their associations** against **decisions, acts and omissions** of **public authorities**
- Guarantees relate, amongst others, to:
 - **standing;**
 - **scope of review;**
 - **effective remedies;**
 - **costs;**
 - **practical information**

C-873/19 – type approval decision

- - **NGO** challenges a type approval decision for a specific vehicle model.
- - **National law:** No legal standing for NGOs
- - **National court** seeks clarification on whether ‘criteria laid down in ... national law’, within the meaning of Article 9(3) Aarhus
- - CJEU: **Legal standing to be granted to an NGO** authorised to bring legal proceedings on the basis of Article 9(3) in conjunction with Art. 47 Charter of Fundamental Rights.
- - The **Court applies a broad interpretation of Art. 9(3) that aims to ensure broad A2J for recognised environmental NGOs**, covering both public authorities and private persons’ acts and omissions (para 67).

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1. *Facts of the case*

The German competent authority for type approvals of vehicles (Kraftfahrt-Bundesamt, KBA) authorised a German car manufacturer (Volkswagen) to use a defeat device, which regulated the effectiveness of emission control system according to the external temperature (only fully effective if the external temperature was greater than 15 °C - temperature window). A German recognised environmental NGO (Deutsche Umwelthilfe) lodged a case against the decision, as it was of the view that the temperature window is in breach of Article 5(2) of Regulation No 715/2007 *on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicle*, which prohibits certain defeat devices.

1. *Legal question related to access to justice*

According to the German environmental redress act (Umweltrechtsbehelfsgesetz) recognised environmental NGOs do not have legal standing to challenge product permits before a national court. The referring court has doubts, whether this lack

of standing in the German law is compatible with the Courts case law on Article 9(3) of the Aarhus Convention, in conjunction with Article 47 of the Charter of fundamental rights.

1. Ruling of the Court

The Court concluded that an environmental association, authorised to bring legal proceedings in accordance with national law, has to be able to challenge before a national court an administrative decision granting or amending EC type-approval which may be contrary to Article 5(2) of Regulation No 715/2007. The Court justifies its decision by applying the criteria of Article 9(3):

- the type approval decision is an “act of a public authority which contravenes the provision of national law relating to the environment” (Material scope): Article 5(2) of No 715/2007 has such an environmental objective and therefore forms part of the ‘law relating to the environment’. It is not relevant that the law was not adopted on the basis of a specific legal basis relating to the environment (now Article 192 TFEU);
- an environmental association authorised to bring legal proceedings falls within the scope of Article 9 (3) of the Aarhus Convention (personal scope);
- the concept of ‘*criteria laid down in ... national law*’, within the meaning of Article 9(3) of the Aarhus Convention does not entitle Member States to reduce the material scope of Article 9(3) by excluding from the subject matter of the action certain categories of provisions of national environmental law (also no *de minimis* rule under this Article).

1. Conclusions

- The Court applies a broad interpretation of the term of law “relating to the environment” under Article 9 (3) Aarhus Convention. It is sufficient that the relevant law also has as objective to protect the environment.
- It clarifies that the concept of “*criteria laid down in ... national law*” may not limit the material scope of Article 9(3) Aarhus Convention. This statement is also relevant in the context of legal action against regulatory acts of a public authority in MSs.
- The Court reiterates that the Aarhus Convention Implementation Guide, may be regarded as an explanatory document.

- MS are not entitled to narrow the material scope of Article 9(3), no de minimis rule under the Convention. Environmental law can mean ,city planning, environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships are covered by paragraph 3, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws'. (paragraph 56)

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