

ACCESS TO JUSTICE WITHIN THE EU IN CASES RELATING TO WATER PROTECTION (Part: I)

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**NATIONAL JUDGES AND
EU WATER LEGISLATION: Focus on access to justice**
Online workshop for judges and prosecutors (24 October 2022)

ACCESS TO JUSTICE WITHIN THE EU IN CASES RELATING TO WATER PROTECTION

Part I:

- **Aarhus Convention**
- **Commission Notice on Access to Justice in Environmental Matters**
- **Standing: key principles and case law of the CJEU**

Part II:

- **Intensity of judicial review of water-related cases**
- **Adequate and effective remedies: key principles and case law of the CJEU**



JUDICIAL REVIEW AT THE NATIONAL LEVEL: TENDENCIES?

Gradually becoming more complex and more technical?

construction permits



operation permits



operation permits – monitoring/control (inspection) – liability



monitoring + financial tools



climate change – positive obligations of the State – review of the policies?



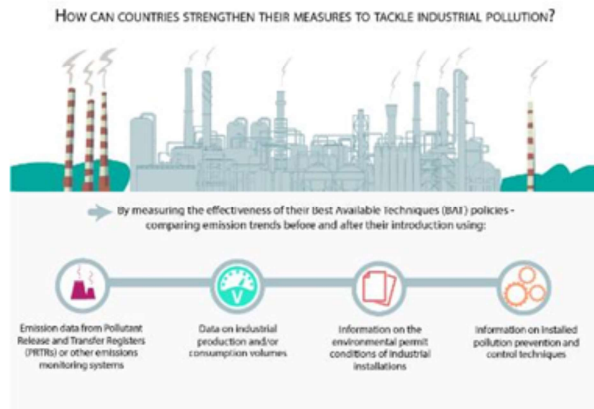
Judicial review in environmental matters at the national level is becoming more complex and technical. This is due to the increasing complexity of environmental issues and the growing importance of scientific evidence in environmental decision-making.

Environmental matters often involve complex scientific, technical, and legal issues, which require specialized knowledge and expertise. Judges and courts are therefore required to have a good understanding of scientific principles and technical terminology in order to effectively evaluate evidence and make informed decisions.

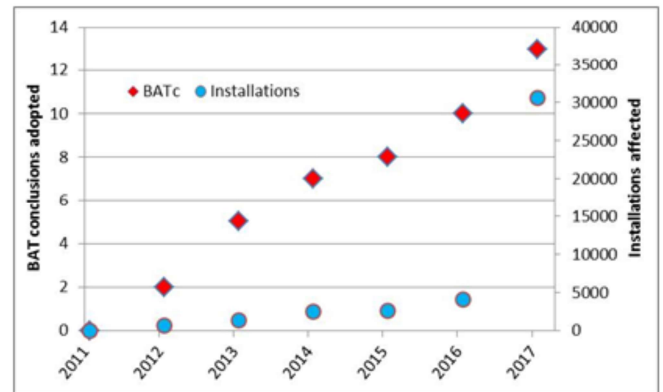
In addition, environmental law is constantly evolving, with new regulations and policies being introduced at the national and international level. This requires judges and courts to stay up-to-date with the latest developments in environmental law and to have a good understanding of the legal principles and frameworks that apply to environmental matters.

JUDICIAL REVIEW AT THE NATIONAL LEVEL: TENDENCIES?

Effects on access to justice?



Best Available Techniques (BAT) to Prevent and Control Industrial Pollution - OECD



REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT on implementation of Directive 2010/75/EU and final reports on its predecessor legislation (version 22/09/2017) COM/2017/0727 final



Overall, the increasing complexity and technicality of environmental issues mean that judicial review in environmental matters is becoming more challenging and demanding, and requires judges and courts to have specialized knowledge and expertise in environmental law and science.

TENDENCIES: WHO COMES TO THE COURT? WHO IS AFFECTED?

Joined Cases C-177/19 P to C-179/19 P - Allemagne - Ville de Paris and Others v Commission

- City of Paris (Case T-339/16), City of Brussels (Case T-352/16) and the Municipality of Madrid (Case T-391/16) brought an action for annulment of the Regulation (EU) 2016/646.
- They submitted, in particular, that the Commission could not, by that regulation, adopt NTE values for emissions of oxides of nitrogen above the limits laid down for the Euro 6 standard by Regulation No 715/2007.
- In 2018, the General Court annuled part of the Regulation.
- In 2021, the CJEU found the cities are not individually concerned – and set aside the judgment of the General Court.

Consequences?



Municipalities do play an increasing role in judicial enforcement of environmental protection. This is because municipalities are often responsible for enforcing environmental laws and regulations at the local level, and they may have the authority to issue fines, penalties, or other sanctions for violations of these laws. However, they may access the courts as unique entities affected by violation of environmental law.

TENDENCIES: WHO COMES TO THE COURT? WHO IS AFFECTED?

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.*

TENDENCIES: WHO COMES TO THE COURT? WHO IS AFFECTED?

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.



Access to justice in Environmental Matters: Sources (Layers)

National Law

Specific Acts (EIA, IED)

Constitutional Law + judicial process

EU Law

Specific Directives (EIA, IED)

Art. 47 EU Charter

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy... (fair and public hearing within a reasonable time + legal aid)

Direct applicability of EU law

International Law

The Aarhus Convention

Pillar III: Access to justice

European Charter of Human Rights

Art. 6 (procedural – access to justice)
Art. 2 (protection of life)
Art. 8 (protection of private and family life)
Art. 1 of Protocol No. 1 (protection of property)



The general legal framework for access to justice in Europe is based on several international and regional instruments that aim to guarantee effective and equal access to justice for all. These include:

1. The European Convention on Human Rights (ECHR): The ECHR is an international treaty that sets out the fundamental rights and freedoms of individuals in Europe. Article 6 of the Convention provides the right to a fair trial, which includes the right of access to court.
2. The Charter of Fundamental Rights of the European Union (CFR): The CFR is a legally binding document that sets out the fundamental rights of individuals in the European Union. Article 47 of the CFR guarantees the right to an effective remedy and to a fair trial, including access to justice.

THE A2J ALGORITHM FOR THE NATIONAL JUDGES (simplified)

1) **What kind of case are you dealing with? Is it an environmental case?**

2) **Is it an EIA, IED or Natura 2000 assessment-related case?**

2a) YES: Art. 9(2) AC regime + specific rules in EU Directives

= public concerned wide A2J (NGOs meeting criteria + affected individuals)

Is there an obstacle to locus standi? EU Directives are directly applicable

2b) NO, it is *another environmental case*. Art. 9(3) AC regime

= members of the public where they meet criteria laid down in the national law

Is there an obstacle to locus standi?

The case is EU-related: EU Directives could be directly applicable

The case is not EU-related: AC requirements still apply



THE ECHR FRAMEWORK

Art. 6 ECHR: Applicable to administrative matters – construction, expropriation, environmental protection (*Sporrong and Lönnroth v Sweden*, 7152/75; *Taşkın and Others v Turkey*, 46117/99)

Art. 2 and 8: Positive obligation of the State to protect from dangerous activities (i.e. illegal industrial operations)

Dzemyuk v. Ukraine (2014): The applicant alleged that the construction of a cemetery near his house had led to the contamination of his water supply – both for drinking and gardening purposes – leaving his home virtually uninhabitable and his land unusable (violation of Art. 8)

Solyanik v. Russia (2022): The applicant complained that the ongoing use of the cemetery near his home had led to contamination of the soil and a well, his only source of drinking water. (violation of Art. 8)



Article 6 of the European Convention of Human Rights guarantees the right to a fair trial. It establishes a number of procedural guarantees that must be respected in any criminal or civil proceedings. However, administrative procedures concerning sanctions or civil aspects are covered as well.

THE ECHR FRAMEWORK

Importance for damages (compensation):

Tătar v. Romania (2009): gold mining activities involving release of cyanide-contaminated tailings water into the environment; inaction regarding numerous complaints (violation of Art. 8 but the applicants had failed to prove the existence of a causal link between exposure to sodium cyanide and asthma)

Cordella and Others v. Italy (2019): 180 applicants complained about the effects of toxic emissions from the Ilva steelworks in Taranto on the environment and on their health. The Court considered that 19 applicants did not have victim status, since they did not live in one of the towns classified as being at high environmental risk. In respect of the other applicants, the Court held that there had been a violation of Article 8 and Article 13 (right to an effective remedy).



The screenshot shows the ECtHR website interface. At the top, the URL is echr.coe.int/Pages/home.aspx?p=home. The header features the Court's name in English and French: "European Court of Human Rights" and "Cour européenne des droits de l'homme". A navigation menu includes links for Law, Press, Hearings, Statistics, Applicants, Official texts, Events, and Library. A large purple arrow points to the "Press Service" dropdown menu, which is open, showing options like "Press encounters", "Factsheets", and "Country Profiles". The "Factsheets" option is highlighted. On the left sidebar, a list of links includes "Recent judgments", "Recent press releases", "Multimedia @ ECHR_CEDH", "Applicants", "Superior Courts Network", "Other languages", "Factsheets & Country profiles", "Case-Law Information Notes", and "Information visits". The main content area is titled "Factsheet – Environment and the ECHR" and includes a date stamp "July 2022". A disclaimer states: "This factsheet is not exhaustive and does not bind the Court". The main heading is "Environment and the European Convention on Human Rights". A text box explains that while the Convention does not enshrine a right to a healthy environment, the Court has developed case-law on this matter. The section "Right to life (Article 2 of the Convention)" is highlighted, followed by "Dangerous industrial activities" and the case Öner vildiz v. Turkey (30 November 2004, Grand Chamber). The case summary states: "The applicant's dwelling was built without authorisation on land surrounding a rubbish tip". At the bottom left, there are logos for the ERA (European Roma Rights Association) and the European Union.

Summary of major ECtHR decisions in the field of environmental protection (in English)

Press/Press Services/Fact Sheets/Environment

Environment and the European Convention on Human Rights

Even though the [European Convention on Human Rights](#) does not enshrine any right to a healthy environment as such, the European Court of Human Rights has been called upon to develop its case-law in environmental matters on account of the fact that the exercise of certain Convention rights may be undermined by the existence of harm to the environment and exposure to environmental risks.

Right to life (Article 2 of the Convention)

Dangerous industrial activities

Öner vildiz v. Turkey
30 November 2004 (Grand Chamber)
The applicant's dwelling was built without authorisation on land surrounding a rubbish tip

The European Court of Human Rights (ECtHR) provides fact sheets on its website to help the public understand the Court's work and the rights protected under the European Convention on Human Rights (ECHR).

The fact sheets cover a wide range of topics, including protection of environment. Each fact sheet provides a brief overview of the relevant Convention article, as well as a summary of the Court's case law on the topic.

The fact sheets are available in several languages

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (The Aarhus Convention)



Access to information

- ✓ public
- ✓ passive obligation
- ✓ active obligation

Public participation in decision-making

- ✓ public concerned
- ✓ Annex I and other activities with significant effects (*EIA, IED, Natura 2000, SEVESO III*)
- ✓ plans and programmes
- ✓ general legal regulation

Access to justice

- ✓ public (concerned)
- ✓ denied information
- ✓ decisions from pillar II (*EIA, IED, NATURA 2000, SEVESO III*)
- ✓ violation of (other) provisions of the national law relating to the environment



The Aarhus Convention is a multilateral environmental agreement that was adopted in 1998 by the United Nations Economic Commission for Europe (UNECE). The Convention has a three-pillar structure, which is designed to promote public participation in environmental decision-making, access to environmental information, and access to justice in environmental matters.

The three pillars of the Aarhus Convention are:

1. The pillar on access to information: This pillar requires parties to the Convention to provide the public with timely and accurate information on the state of the environment and on activities that may affect the environment. The Convention establishes procedures for requesting and receiving information, as well as for ensuring that the information provided is understandable and usable.

2. The pillar on public participation: This pillar requires parties to the Convention to provide the public with opportunities to participate in environmental decision-making processes. This includes providing information about proposed activities, allowing public comments and participation in hearings, and ensuring that the public's views are taken into account in the decision-making process.

3. The pillar on access to justice: This pillar requires parties to the Convention to ensure that individuals and organizations have access to justice in environmental matters. This includes the right to challenge decisions that may affect the environment, to request a review of those decisions, and to have access to legal proceedings and remedies.

Overall, the three pillars of the Aarhus Convention are designed to ensure that environmental decision-making is transparent, participatory, and accountable, and that the public has access to the information, processes, and remedies needed to protect the environment and their rights.

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (The Aarhus Convention)



Access to justice

✓ public (concerned)
✓ denied information
✓ decisions from pillar II (<i>EIA, IED, NATURA 2000, SEVESO III</i>)
✓ violation of (other) provisions of the national law relating to the environment

= information on water quality/emissions, effects of products...

= **permits for construction and operation of the large industrial operations and the application of the best available technologies** (EIA: large ports, dams, waterways, groundwater abstraction, transfer of water resources, waste water treatment, EIA: energy industries, production and processing of metals, mineral industry, chemical industry, waste management, other...)

= construction and operation permits for other buildings/industrial applications with possible impact on water quality, plans and programmes



The third pillar of the Aarhus Convention is access to justice in environmental matters. This pillar recognizes the importance of ensuring that individuals and organizations have effective access to legal remedies and procedures to challenge decisions and actions that may harm the environment.

Under the third pillar of the Aarhus Convention, parties are required to ensure that the public has access to a range of legal procedures and remedies, including administrative and judicial proceedings, to challenge decisions and actions that may affect the environment. This includes the right to challenge decisions that have been made without public participation, that violate environmental laws or regulations, or that fail to take into account the potential environmental impacts of proposed activities.

The Aarhus Convention – Art. 9(1)

Article 9

ACCESS TO JUSTICE



1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

who: any person (applicant)

what: review procedure of decisions/omissions in access to information



The Aarhus Convention – Art. 9(2)



2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.



The Aarhus Convention – Art. 9(2) and 9(3)



The provisions of this paragraph 2 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.

who: public concerned (affected individuals + NGOs meeting national criteria consistent with giving wide access to justice) **if not?**

what: review procedure of decisions/acts/ommissions concerning activities with significant effect on the environment (EIA/IED/Natura 2000 + national law)

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.

who: members of the public where they meet criteria laid down in the national law

what: review procedure of acts/ommissions of private persons/authorities which contravene (any) provisions of the national law. **if not?**



Please note the difference between Article 9(2 and 9(3) of the Aarhus Convention.

The Aarhus Convention – Art. 9(4)



4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

what: all judicial procedures under 1/2/3

- **fair, timely and not prohibitively expensive**
- **adequate and effective remedies, including injunctive relief**
- **decisions made public**

if not?



The Convention requires parties to provide access to justice in a number of ways, including by ensuring that the costs of legal proceedings are not prohibitively expensive, by providing legal aid or other forms of assistance to those who cannot afford legal representation.


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The Aarhus Convention: An Implementation Guide (second edition)

[Environment Policy](#)
[Public participation](#)

Published: June 2014

Guide is available in Chinese, English, French and Russian. If you would require a hard copy of the Guide please contact the secretariat at public.participation@un.org

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<https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition>

Implementation guide – summary of the findings of the Aarhus Convention Compliance Committee – in English/French/Russian/Chinese




One of the most comprehensive implementing guides is the "Guidebook on Access to Information, Public Participation and Access to Justice Regarding Environmental Matters under the Aarhus Convention," which was published by the United Nations Economic Commission for Europe (UNECE) in 2014. This guidebook provides detailed information on the requirements of each of the Convention's three pillars, as well as guidance on how to implement the Convention's provisions at the national, regional, and local levels.

In addition to the UNECE guidebook, there are also other resources available to help parties implement the Aarhus Convention, including guidance notes, training materials, and case studies. These resources are designed to help parties to the Convention understand and implement its provisions in a way that promotes effective public participation, access to information, and access to justice in environmental matters.

EU Law – EIA Directive (2011/92/EU, Art. 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.



The EU EIA Directive (Directive 2011/92/EU) sets out requirements for access to justice in environmental matters related to the assessment of the environmental impact of certain public and private projects. The Directive requires EU Member States to ensure that:

1. Access to justice is available to members of the public who have a sufficient interest or are likely to be affected by the environmental decision-making process. This includes the right to challenge decisions that have been made without public participation, that violate environmental laws or regulations, or that fail to take into account the potential environmental impacts of proposed projects.
2. Legal proceedings to challenge decisions are "fair, equitable, timely, and not prohibitively expensive." This includes ensuring that the costs of legal proceedings are not so high as to discourage individuals and organizations from bringing cases to court, and that individuals and organizations have access to legal aid or other forms of assistance to ensure effective access to justice.
3. Decisions on access to justice are made within a reasonable time frame. This means that individuals and organizations have the right to timely decisions on their requests for access to justice, and that undue delays in decision-making are avoided.
4. Parties have the right to seek remedies and relief, including suspension or annulment of the decision at issue, where appropriate.

EU Law – IED Directive (2010/75/EU, Art. 25)

1. Member States shall ensure that, in accordance with the relevant national legal system, **members of the public concerned** 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 Article 24 when one of the following conditions is met:
 - (a) they have a sufficient interest;
 - (b) they maintain the impairment of a right, where administrative procedural law of a Member State requires this as a precondition.
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 this end, the interest of any non-governmental organisation environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of paragraph 1(a). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of paragraph 1(b).
4. Paragraphs 1, 2 and 3 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. Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.



Basically the same requirements under the IED Directive.

EU Law – Environmental Liability Directive (2004/35/CE, Art. 13)

1. The persons referred to in Article 12(1)* **shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive.**
2. This Directive 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.

*

Natural or legal persons:

- (a) affected or likely to be affected by environmental damage or
- (b) having a sufficient interest in environmental decision making relating to the damage or, alternatively,
- (c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition, shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive.

What constitutes a 'sufficient interest' and 'impairment of a right' shall be determined by the Member States.

Folk (C-529/15): Persons with a fishing licence must be able to initiate review proceedings before a court or other competent public authority in accordance with Articles 12 and 13 of the Directive



The requirements under the ELD Directive are different. The Directive requires EU Member States to ensure that:
remedy is available to any natural or legal person who has suffered damage or is at risk of suffering damage as a result of environmental damage caused by the activities covered by the Directive.

What about the rest with no detailed rules? (Art. 9/3 regime)

Janecek (C-237/07), ClientEarth (C-404/13, ambient air quality assessment and management): The affected individuals must be able to require adoption of air-pollution action plans

= POSSIBLE DIRECT EFFECT

LINK BETWEEN THE AIR PROTECTION AND RIGHTS OF INDIVIDUALS?

- The air quality legislation (other than the EIA and IED) **does not contain comprehensive rules as regards access to justice.**
- However, **there is a link between the air protection and rights of individuals which satisfies the conditions for direct applicability of certain provisions of directives which do not contain requirements on access to justice** – such as the AQD or the NEC Directive.
- This is because the quality (concentration) limit values aim at the protection of human health. Thus, they have the objective to protect the individual right to health. They are sufficiently precise and unconditional to be of direct application.
- This means that **the individual person has a right to trace back the limit values in his national legislation**; it follows from this that Member States are obliged to transpose the limit values of the air pollution directive into their national law (C-361/88, Commission v. Germany)



What about the rest with no detailed rules? (Art. 9/3 regime)

C-237/07 (Janecek):

„the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts”.

WHY:

Protection of health

- *the failure to observe the measures required by the directives which relate to air quality and drinking water, and which are designed to protect public health, could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives (see Case C-361/88 Commission v Germany; Case C-59/89 Commission v Germany; and Case C-58/89 Commission v Germany).*

WHO:

- the natural or legal persons directly concerned

consequences for water quality legislation?



THE A2J ALGORITHM FOR THE NATIONAL JUDGES (simplified)

1) **What kind of case are you dealing with? Is it an environmental case?**

2) **Is it an EIA, IED or Natura 2000 assessment-related case?**

2a) YES: Art. 9(2) AC regime + specific rules in EU Directives

= public concerned wide A2J (NGOs meeting criteria + affected individuals)

Is there an obstacle to locus standi? EU Directives are directly applicable

2b) NO, it is *another environmental case*. Art. 9(3) AC regime

= members of the public where they meet criteria laid down in the national law

Is there an obstacle to locus standi?

The case is EU-related: EU Directives could be directly applicable

The case is not EU-related: AC requirements still apply



LEGAL STANDING: Preconditions and wide access to justice

Stichting Varkens in Nood and Others (C-826/18, Admissibility of the action subject to prior participation in the decision-making procedure):

Art. 9(2) regime: participation in the administrative procedure is not a suitable condition for the admissibility of the judicial proceedings brought by NGO, even though that condition does not apply where such organisations cannot reasonably be criticised for not having participated in that procedure.

However, **Article 9(3) AC** does not preclude the admissibility of judicial proceedings to which it refers from being made subject to the participation of the applicant in the procedure preparatory to the contested decision, unless the applicant cannot reasonably be criticised, in the light of the circumstances of the case, for not having intervened in that procedure



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



LEGAL STANDING: Preconditions and wide access to justice

Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation (C-664/15, Water Framework Directive):

Subject to verification by the referring court of the relevant matters of fact and national law, Article 9(3) and (4) of that convention approved by Decision 2005/370, read in conjunction with Article 47 of the Charter of Fundamental Rights, must be interpreted as **precluding**, in a situation such as that in question in the main action, **a national procedural rule that imposes a time limit on an environmental organisation, pursuant to which a person loses the status of party to the procedure and therefore cannot bring an action against the decision resulting from that procedure if it failed to submit objections in good time** following the opening of the administrative procedure and, at the very latest, during the oral phase of that procedure'.

Commission v Germany (C-137/14, IED): It is not possible to restrict the *'scope of the review by the courts to the objections which have already been raised within the time-limit set during the administrative procedure which led to the adoption of the decision'*.



Commission Notice on Access to Justice in Environmental Matters



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Commission Notice on Access to Justice in Environmental Matters



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Comments on the Commission's Notice on Access to Justice in Environmental Matters

http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2018/JE_Comments_EC_Notice_A2J_FINAL.pdf



THANK YOU FOR YOUR ATTENTION!

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