



Access to Justice in Environmental Matters

Dr. Lorenzo Squintani, University of Groningen

It is an introductory presentation.



Learning Outcomes:

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



Overview:

- › Aarhus Convention: an overview
 - Access to Justice
- › Aarhus Convention in the EU
 - As regards EU law
 - As regards national law
- › Specific focus on:
 - Tension between procedural autonomy and harmonisation
 - Sincere judicial cooperation

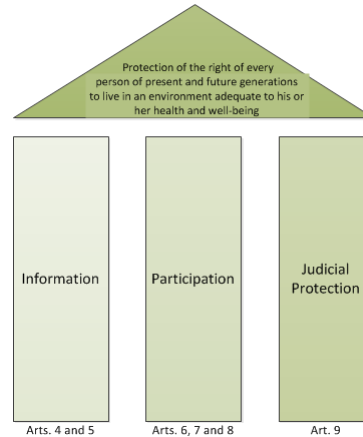
The concepts within the Aarhus Convention are taken over by the legal orders in EU and Member States.

Given the nature of this presentation, the focus will be mostly on the national orders. More specifically, the focus will be on those two tensions.



Aarhus Convention: an overview

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



Although it is a regional convention, it has an impact for many countries, including countries outside the European continent. For example, China looks greatly to it, and a new convention in South America is trying to repeat the success of the Aarhus Convention.

Therefore, it is somehow pointing on the direction of harmonization in the subject of access to justice on environmental matters world-wide.

To what concerns hierarchy, it is somewhere in between primary and secondary law in Europe. Because it is above all laws, but below the treaties. In that sense, it also benefits from all principles within European law, such as supremacy and autonomy.

The Convention focuses on the relationship between citizens and governments in environmental protection. The main goal, as stated on art. 1, is to protect the right of every person of present and future generations to live in an environment adequate to his or her health. But in his opinion, the very heart of the convention, what really brings a revolution in certain legal orders, is the provisions in three pillars, by which the convention operationalizes this right. Those pillars are what is generally referred to as environmental democracy.

The Aarhus convention also has a compliance body, which is known as the

Aarhus Convention Compliance Committee. They advise about the level of compliance achieved in specific situations in specific countries. It is activated by a complaining parties, who could be anyone from individuals to NGOs. Its conclusion does not have a binding force. However, the CJEU gives great authority to it.

In that sense, the Aarhus Convention Implementation Guidance is also a nice tool, because it gives explanation about the interpretation of article by article, paragraph by paragraph, of the convention. Those are commonly quoted by the CJEU.



Basic framework under Aarhus Convention

- › As regards access to information → yes (Art. 9(1) AC)
- › As regards Article-6 decisions → yes (Art. 9(2) AC)
 - But..... many Article-6 decisions take the form of an Article-7 decision (ie plans and programmes)
 - Aarhus Convention Compliance Committee, Armenia, ACCC/C/2004/8
- › As regards Article-7 acts → yes (Art. 9(3) AC)
 - Aarhus Convention Compliance Committee, Armenia, ACCC/C/2004/8

When focusing on the pillar of the access to justice, which is the focus of today's presentation, one of its aims is to enhance the effectiveness of the other two pillars.

The Aarhus Convention Compliance Committee clarified that the parts of plans and programmes that deal with specific topics have actually to do with the article 9(2) (rather than 9(3)) of the Aarhus Convention to what concerns access to justice. It is relevant because 9(2) and 9(3) have some essential differences.

In art. 9(2), it is possible to see an attempt to reconcile the two main different legal traditions in (continental) Europe when it comes to access to justice and administrative matters. Art. 9(2) looks at access to justice as essentially an administrative issue. "Sufficient interest", for instance. But it continues with a more German tradition-related alternative.

The procedure by itself is not regulated by the convention at all. So, the Court of Justice decided that art. 9(2) and 9(3), although having a strong interpretative value, do not have direct effect. This is a similarity that they share.

A difference that the two paragraphs have is their scope. 9(2) only focuses on parties that have a legitimate interest or imperative right. Art. 9(3) has a much broader scope. It gives the right to challenge any wrong-doing potentially affecting the environment, which, therefore, could also be used to challenge the wrong-doing from private parties. The famous Urgenda Case, in the Netherlands, used tort law for the wrong-doing of the government, but now we see in other countries also the use to challenge the wrong-doing from private parties.

Before moving on, keep in mind the importance of distinguishing between natural persons and NGOs.



- › As regards the EU itself:
 - Access to Justice:
 - Articles 263 and 267 TFEU
 - Regulation (EC) N° 1367/2006



Access to Justice at EU level: the limited standing issue

- › Examples?
- › Access to justice at EU level in environmental matters is limited (C-321/95P *Greenpeace* case)
 - Strict interpretation of individual and directly concern criteria
- › Attempts to enlarge access to justice for NGO has not been successful so far:
 - T-600/15 *PAN Europe* case (direct concern and Charter)
 - T-330/18 *Carvalho* case (individual concern and Charter)

The Compliance Committee has condemned the EU for wrongful implementation of the Convention, because of the strict interpretation given by the CJEU to the concept of individual concern, and even denying the attempts of NGOs to broaden that interpretation.

EU countries are majority to the Aarhus Convention, so they blocked the discussion on whether the Committee's opinion should or not be adopted, but it is still an important discussion.



- › As regards the Member States:
 - Access to Justice:
 - Article 216 TFEU
 - Directive 2003/35/EC, on IE and IEA Directives
 - Directive 2003/4/EC, on information
 - Commission Notice on Access to Justice → nice overview of case law on specific aspects of the framework
 - › Two main aspects:
 - Tension between procedural autonomy and harmonization
 - Functioning of ‘sincere judicial cooperation’

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

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



Tension between procedural autonomy and harmonisation

- › Judicial procedures left to MSs to decide, except for some fundamental general aspect, e.g. standing
- › MSs must respect the principles of equivalence and effectiveness (*Rewe/Comet* doctrine)
- › Relevance of principle of effective judicial protection (article 19 TEU and 47 EU Charter)

Also, the convention establishes that the costs have to be proportionate and that there must be a reasonable time limit.



What about national route (preliminary references)?

- › The issue of judicial protection in the context of a programmatic approach (PA)
- › The issue of sincere cooperation between national courts and the ECJ

In the field of plans and programmes: there are several states, such as The Netherlands, that do not allow for access to justice to review the plan or programme as such. What it allows is to review the legality of the plan or programme (for example, for a permit). But there is more and more pressure to apply a system of judicial review of plans and programmes, to prevent delays in compliance.



- › Distinguish between decisions, acts and omissions concerning:
 - requests for environmental information and entitlement to receive information, Article 9(1) AC
 - specific activities that are subject to public participation requirements Art. 9(2) AC
 - requests for action under environmental liability rules, Art. 9(2) AC
 - other subject matter, such as national implementing legislation, general regulatory acts, plans and programmes, Art. 9(3) AC



- › For the first three categories, express legal standing rights can be largely found in secondary EU environmental legislation
 - Article 6(2) of the Access to Environmental Information Directive, 2003/4/EC; Article 13 of the Environmental Liability Directive, 2004/35/EC; Article 25 of the Industrial Emissions Directive, 2010/75/EU; Article 11 of the Environmental Impact Assessment Directive, 2011/92/EU; and Article 23 of the Seveso III Directive, 2012/18/EU. See also recital 27 of the National Emissions Ceiling Directive, (EU) 2016/2284
- › For the last category, legal standing depends on general principles governing legal standing as interpreted by the CJEU.
 - Case C-243/15, *LZ II*
- › The extent of legal standing also varies according to whether the person seeking to challenge is an individual, environmental NGO or other entity.

Example: The Habitats Directive has no provision on access to justice (also, it was written six years before the adoption of the Aarhus Convention, when it was not considered a priority). But the Court of Justice said that art. 6(3) should be interpreted in light of the Aarhus convention, and, therefore, there should be a right to standing and access to justice also related to this aspect of the European Law.



Standing under 9(2) AC

- › Relevant selection criteria for establishing standing for individuals:
 - public concerned vs the public
 - sufficient interest vs impairment of a right
 - Up to the member states to define the concepts, Case C-115/09 *Bund für Umwelt und Naturschutz*, paragraph 44.
 - Within limits dictated by the goal of granting a 'wide access to justice', Case C-570/13 *Gruber*, paragraph 39 and Case C-115/09 *Bund für Umwelt und Naturschutz*, paragraph 44



› Special position for NGOs:

- As soon as they comply with relevant national standards to be considered an environmental organisation...
 - Active in environmental field (C-263/08 *Djurgården*, paragraph 46)
 - Number of participants are ok, if they do not restrict wide access to justice goal (C-263/08 *Djurgården*)
- ... they always comply with legal standing requirements (*de lege standing*)
- Otherwise, same standing requirements as for individuals

This affected Germany very hardly, because 9(2) was interpreted as if NGOs needed to show the imperative of a right.

Plus, this interpretation cannot be too strict. For example, it cannot be restricted only to national NGOs, or restricted only to NGOs with at least 2,000 members, as was the case of Sweden.

If the NGOs do not comply with the requirements, they can stand of individuals, if fulfilling the requirement of interest.



Standing for individuals and NGOs

- › Partaking to the public participation procedure cannot be a requirement for granting standing (C-263/08 *Djurgården*)

Therefore, NGOs have more rights than individuals.



What about sincere cooperation in 267-procedures?

- › Uploading phase:
 - Empirical evidences show poor compliance

- › Downloading phase:
 - Empirical evidences show:
 - Country-by-country differences
 - Theme-by-theme differences
 - Case-by-case differences





Categories of (un)cooperation:

- › Bogojević (2017):
 - *interchanged* dialogue,
 - *gapped* dialogue,
 - *interrupted* dialogue and
 - *silenced* dialogue
- › Squintani & Rakipi (2018):
 - *full* cooperation,
 - *fragmented* cooperation, and
 - *presumed* cooperation
- › Squintani & Annink (2018):
 - *withdrawn* cooperation
- › Upcoming: Squintani & Kaliswart (2020):
 - *suspended* cooperation





Interesting example of Sweden: it is known by its environmentally protective behavior, but when it comes to procedures for access to justice in environmental matters, it has a history of non-compliance with the decisions of the Court of Justice. The UK, on the contrary, despite being European-skeptical in nature, has a perfect record of compliance with the Court of Justice ruling concerning access to justice in environmental matters. The same can be said, although in different extents, about the Netherlands, Belgium, and Italy.

It may also change depending on the theme. For example, in Italy, GMOs made Italy take much more time to adjust.

So... We notice differences from jurisdiction to jurisdiction, from topic to topic, or even on a case by case basis.



Full system of remedies?

- › Lacuna's
 - Judicial protection against plans and programmes underregulated in EU legal framework
- › Uncooperative behaviours in both uploading and downloading phases
- › Preliminary reference procedure is a liability!
 - See discussion about ACCC's decision against EU ([link to documents on Council site](#))



What to change?

- › Insert explicit provisions on judicial protection against PA in EU environmental law
- › Start infringement procedures for lack of reference to ECJ
 - C-224/01 *Köbler* case approach → leniency
 - C-416/17 *Commission v France* approach → marshalling



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Thanks for listening!

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Questions: l.squintani_at_rug.nl



If you want to know more about my work:

- › Squintani, L., & van Rijswijk, M. (2016). Improving Legal Certainty and Adaptability in the Programmatic Approach. *Journal of Environmental Law*, 28(3), 443-470. <https://doi.org/10.1093/jel/eqw022>
- › Squintani, L., & Plambeck, E. J. H. (2016). Judicial Protection against Plans and Programmes Affecting the Environment: A Backdoor Solution to Get an Answer from Luxembourg. *Journal For European Environmental & Planning Law*, 13(3-4), 294-324. [https://doi.org/\(...\)63/18760104-01303005](https://doi.org/(...)63/18760104-01303005)
- › Squintani, L., & Annink, D. (2018). Judicial Cooperation in Environmental Matters: Mapping National Courts' Behaviour in Follow-up Cases. *Journal For European Environmental & Planning Law*, 15(2), 147-170. [https://doi.org/\(...\)63/18760104-01502003](https://doi.org/(...)63/18760104-01502003)
- › Squintani, L., & Rakipi, J. (2018). Judicial cooperation in environmental matters: Mapping national courts behaviour in follow-up cases. *Environmental Law Review*, 20(2), 89-108. <https://doi.org/10.1177/1461452918767791>
- › Squintani, L., Zijlmans, J. M., Annink, D., Rakipi, J., Hoffman, S., Tasset de Landtsheer, L., ... Senoner, A. (2019). Mitigation and Compensation Measures under the Habitats Directive in Selected Member States. *European Energy and Environmental Law Review*, 28(1), 2-16.