

Implementing the Aarhus Convention Access to justice in environmental matters

SUMMARY

The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters is an international agreement that gives the public a number of rights with regard to the environment. It consists of three pillars, one of them covering the right of access to justice in cases of non-compliance with environmental law.

Implementation of the convention's provisions on access to justice have been the focus of two recent documents, one published by the European Commission and the other by the United Nations Economic Commission for Europe (UNECE) Aarhus Convention Compliance Committee.

While the European Commission examines the implementation of the convention provisions in the Member States, the UNECE Committee takes a critical look at implementation at EU level. Both papers point to shortcomings, in particular with regard to the right of non-governmental organisations to be heard in court.

Regarding implementation at Member State level, the Commission has launched a dialogue procedure with each Member State concerned. When it comes to implementation at EU level, the convention's Meeting of the Parties in September 2017 postponed its decision on the findings of the Aarhus Convention Compliance Committee in respect of the EU to its next meeting in 2021.



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Glossary

Legal standing: the right to be heard in court and to be a party to legal proceedings. Legal standing comprises the provisions regulating the identification of the (groups of) persons who are allowed to bring a claim before a court.

Impairment of rights principle: one condition that can be required in order to win the right to be heard in court. According to this principle, the potential claimant needs to demonstrate to a court that rights that they enjoy are affected.

Article 263 of the Treaty on the Functioning of the European Union (TFEU): this provision governs legal actions aimed at requesting the annulment of a measure of an institution, body, agency or office of the EU. It specifies the conditions under which a natural or legal person can challenge a decision before court, one of them being 'direct and individual concern'.

Internal review procedure: request to an EU institution or body to consider whether an administrative act it has adopted is contrary to EU environmental law or whether it failed to adopt an action. It does not apply to institutions and bodies acting in a judicial or legislative capacity.

Action for annulment: legal procedure brought before the Court of Justice of the European Union (CJEU) to review the legality of an act adopted by an EU institution, body, office or organisation.

Preliminary rulings: procedure provided for in Article 267 TFEU giving national courts the possibility to address the CJEU in order to obtain a ruling. The procedure is meant to ensure that EU law is applied by national courts in a uniform manner.

Background

Aarhus Convention

The Aarhus Convention is an international agreement under the auspices of the United Nations Economic Commission for Europe (UNECE). It was adopted in 1998 in Aarhus (Denmark) and was ratified by the European Union (EU) in 2005.¹ It establishes a number of rights for individuals and associations with regard to the environment. The convention consists of **three pillars** providing for three different rights: first, the right to receive environmental information that is held by public authorities (also referred to as 'access to environmental information'); second, the right to participate in environmental decision-making; and third, the right to challenge public decisions that do not comply with legal requirements in environmental law ('access to justice'). With its ratification by the EU and its entry into force, the Aarhus Convention became an integral part of EU law and is binding on Member States. The EU Court of Justice has the competence to give rulings concerning the interpretation of the Aarhus Convention in the European Union.

Aarhus Convention and EU legislation

The first pillar of the convention concerning the right to receive environmental information was implemented at EU-level by [Directive 2003/04/EC](#) on Public Access to Environmental Information. The second pillar on the right to participate in environmental decision-making was implemented by [Directive 2003/35/EC](#) providing for public participation. In addition, public participation provisions are included in several directives.² The third pillar, access to justice, is reflected in the Aarhus [Regulation 1367/2006](#), which applies the convention to EU institutions and bodies. Several directives also contain provisions concerning access to justice.³ A 2003 [proposal](#) for a directive on access to justice was meant to secure coordinated transposition of the convention's requirements concerning access to justice at national level. No agreement could however

be reached on the proposal, as several Member States doubted the EU's competence to legislate on matters concerning access to justice. The Commission eventually [withdrew](#) the proposal in 2014.⁴

Third pillar of the Aarhus Convention: Access to justice

Access to justice is governed by Article 9 of the convention. Article 9 is again divided into three parts covering rights in three different cases of possible non-compliance:

- Article 9(1) deals with access to justice in case of refused information rights;
- Article 9(2) covers access to justice in case of non-compliance with participation rights;
- Article 9(3) provides rules on other aspects concerning non-compliance with national environmental law.

The first two paragraphs of Article 9 are thus aimed at ensuring the implementation of the Aarhus Convention itself, whereas Article 9(3) goes beyond simply implementing the convention and regulates the public's rights in cases of presumed violation of environmental law.⁵ Whereas Article 9(1) and Article 9(2) contain specifications concerning their application, this is not the case for Article 9(3) on access to courts, which leaves much to the discretion of the parties, and provides room for possible discrepancies between the different national provisions.⁶

Implementation issues under the spotlight

The [Aarhus Convention](#) on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters is the subject of two major documents issued in 2017. Both documents focus on access to justice in cases of non-compliance with environmental law, i.e. on Article 9(3). They both highlight issues regarding the possibility of individuals and non-governmental organisations (NGOs) to turn to court in matters concerning environmental protection.

In March 2017, the UNECE Aarhus Convention [Compliance Committee](#), which is in charge of reviewing implementation by the parties to the convention, published its [findings](#) concerning compliance by the European Union. The report is based on a complaint by an NGO, arguing that the EU, in its Aarhus Regulation and in the Court of Justice of the European Union (CJEU) case law, fails to secure access to justice in environmental matters as provided for by the convention.⁷ The paper also considers that the EU applies different standards to its own institutions and to Member States.

In April 2017, the European Commission adopted an interpretative [communication](#), looking into access to justice in Member States. The communication covers all three aspects of access to justice. With regard to access to justice in cases of non-compliance with environmental law, it observes that Member States' provisions differ considerably, and in some cases are not fully in line with the convention requirements. In giving an overview of case law of the Court of Justice of the EU, the Commission paper aims to foster coordinated and correct implementation and reduce legal uncertainties affecting national courts, administrations and businesses as well as NGOs and individuals.⁸

One particular aspect that features high in both documents is **legal standing**. Legal standing determines who, under what conditions, is allowed to bring forward a complaint and to be heard in court. Legal standing can vary according to whether the claimant is an individual or an environmental NGO. While the Aarhus Convention, under Article 9(1) and (2), provides for or refers to access criteria in cases of denied information and participation rights, in particular for NGOs, it is less clear regarding cases of non-compliance with environmental law, as stipulated in Article 9(3).⁹ With regard to the

latter, the Aarhus Convention leaves the criteria granting individuals and NGOs access to court largely to the discretion of the parties, in the present case to the EU and the Member States.

Legal standing at Member State level

In its communication, the Commission points out that the Member States' discretion concerning criteria for legal standing under Article 9(3) is restricted. To this end, it refers to the [Aarhus Convention implementation guide](#), which clarifies that parties must not use criteria laid down in their national law so strictly that they essentially prevent environmental organisations from taking a case to court. In this context, the Commission also underlines the importance of two fundamental EU-law principles to be applied to the Aarhus Convention provisions: the principle of uniform interpretation, which is to be ensured in particular by CJEU preliminary rulings, and the principle of effectiveness, requiring Member States to ensure that their procedural rules do not make the enforcement of European rights 'impossible in practice'.¹⁰

Against this background, the Commission communication points to discrepancies between Member States concerning legal standing and to cases of excessively strict criteria hampering access to court, especially for NGOs.¹¹ It draws attention, in particular, to an overly strict interpretation of the 'impairment of rights principle' in some Member States. This principle requires proof that a right or a sufficient interest on the part of the claimant has not been upheld. The Commission paper considers this principle problematic insofar as it could prevent environmental NGOs in particular from taking a case to court, arguing that no specific rights of individuals are affected given the fact that environmental protection is usually aimed at the general public.¹² With regard to the impairment of rights principle in the context of legal standing, the Commission paper underlines that the implementation guide allows the application of this principle in order to restrict the number of possible claimants. The legal standing criteria must however not be contradictory to the overall objectives of the convention of ensuring access to justice and not be an impediment preventing NGOs from fulfilling their role of protecting general environmental interests.¹³ The implementation guide says in this regard that national criteria must not 'bar all or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment'.¹⁴ The Commission paper also underlines the principle of effectiveness, which requires Member States to adopt criteria that allow the rights conferred by EU law to be exercised. It refers in this context to the CJEU, which clarified in the Slovak Brown Bear case (see box) that the rights set out in Article 9(3) of the Aarhus Convention 'although drafted in broad terms, are intended to ensure effective environmental protection' and that their interpretation must not 'make it in practice impossible or excessively difficult to exercise rights conferred by EU law'. Here as well, the Commission points to the overarching importance of access to national courts for EU law in general. To ensure uniform interpretation of EU law, national courts can ask the CJEU for preliminary rulings concerning the interpretation of certain legal provisions. According to the Commission, this procedure could be put in doubt if access to national courts was either impossible or extremely difficult.

Landmark cases**Slovak Brown Bear case (C-240/09)**

This CJEU [judgment](#) concerned a decision by a Slovak public authority to authorise derogations from species protection provisions laid down in the Habitats Directive (92/43/EEC), which would among other things allow the hunting of bears. A Slovak environmental protection association appealed against this decision and the Slovak court in charge referred the case to the Court of Justice, asking for a preliminary ruling concerning the NGO's right to challenge an alleged infringement of environmental law. The judgment of the Court acknowledged species protection provisions as being in the general interest of the public, and ruled that the claimant environmental NGO had a right to challenge the decision in question. It specified that Article 9(3) of the Aarhus Convention, although not precise concerning the legal position of individuals and associations, was 'intended to ensure effective environmental protection'. Therefore, it considered 'inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law'. Procedural rules at national level therefore 'must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness)'.

Plaumann case (C-25/62)

In 1963, the Court gave a [judgment](#) interpreting for the first time the criterion of 'individual concern' provided for by Article 263(4) TFEU (former Article 173(2) EEC Treaty). The Court's judgment refers to a case where a German fruit import company sought the annulment of a decision of the Commission in which the latter did not allow German authorities to suspend customs duties applicable to fruit imported from third countries. In its judgment, the Court stated that private parties can seek judicial review of decisions not expressly addressed to them only if they can distinguish themselves from all other persons. In that particular case, it decided that the company was not individually concerned by the Commission's decision. This definition is still the reference for determining 'individual concern'.

Legal standing at EU level

Implementation of the requirements of the Aarhus Convention, including jurisdiction, is supervised by the [Aarhus Convention Compliance Committee](#). The committee looks into complaints of alleged non-compliance. Its recent report, adopted on 17 March 2017, is based on an NGO complaint arguing that the EU fails to comply with the convention by restricting NGOs' access to justice in environmental matters in particular in two respects: first, in Regulation 1367/2006 on the implementation of the Aarhus Convention and second, in CJEU case law.

The report questions the compatibility of Article 10(1) of the Aarhus Regulation with Article 9(3) of the Aarhus Convention. In its Article 10, the Aarhus Regulation, which deals with the implementation of the Aarhus Convention at EU level, provides NGOs with the possibility to have administrative acts – adopted by an EU institution or body – reconsidered in what is referred to as the internal review procedure. In its definition of 'administrative act', the regulation limits this right 'to measures of individual scope'. Noting that this criterion does not apply to most acts in the field of the environment, the compliance committee report considers the limitation as not justified given that Article 9 of the convention does not provide for any restrictions.

In another issue concerning NGO access to court, the report underlines that the CJEU applies a very strict approach to legal standing for NGOs requesting the annulment of a decision adopted by an EU institution. The Court's approach is based on Article [263](#)(4) TFEU, which establishes that natural or legal persons can challenge 'an act addressed to that person or which is of direct and individual concern to them'. While the

convention allows the application of these criteria, the report criticises the CJEU for maintaining its interpretation of Article 263(4) TFEU according to the *Plaumann* doctrine (see box). The report concludes that this interpretation restricts legal standing before the Court of Justice in such a way as to effectively bar environmental organisations from access to court. The compliance committee refers in its report to the claimant NGO's statement that the CJEU applied a less restrictive interpretation of Article 263(4) in cases concerning, for instance, competition. It also draws attention to the fact that the CJEU demands broader court access for individuals and NGOs at Member State level (see the section above on 'Legal standing at Member State level') and criticises the Court for double standards.

A 2012 [study](#) commissioned by the European Parliament concludes in a similar vein that the CJEU's strict application of the *Plaumann* doctrine in the field of the environment has led to NGOs 'always being denied individual concern' and their claims not admitted. According to the study, the CJEU applies a more liberal approach to the criteria of 'direct and individual concern' in cases concerning specific economic policy fields.

Outlook

The Commission underlines in its communication that Member States that take measures to ensure compliance with the Aarhus Convention will be helped to make the necessary changes, for example via exchanges under the environmental implementation review (EIR). The first EIR, published in 2017, comprises a report on the implementation of environmental law for each Member State and also includes a more detailed description of the situation concerning access to justice. These reports serve as the basis for a structured dialogue between the Commission and each Member State. These [EIR country dialogues](#) were launched in March 2017.

The compliance committee's findings were submitted to the [sixth session of the Meeting of the Parties](#) (MoP) to the Aarhus Convention, which took place from 11 to 15 September 2017 in Montenegro. The Parties came together to decide among other things on their endorsement of the compliance committee's [draft decision](#) concerning the EU's compliance with its obligations under the convention. In its [proposal for a decision](#) on the position to be taken at the sixth Meeting of the Parties, the European Commission had suggested a 'negative vote on the endorsement of the findings'. According to the Commission's proposal, the 'findings challenge constitutional principles of EU law that are so fundamental that it is legally impossible for the EU to follow and comply with the compliance committee's findings.' However, on 13 July 2017, the [Council](#) did not follow the Commission proposal and agreed instead on a conditional acceptance of the draft Aarhus decision, proposing in particular to 'take note' of the findings of the compliance committee instead of 'endorsing' them. The [MOP](#), however, decided to postpone the decision on the draft decision concerning compliance by the EU to the next ordinary MOP, to be held in 2021.

Main references

Banner C., *The Aarhus Convention – a guide for UK lawyers*, Hart Publishing, 2015.

Wennerås P., *The enforcement of EC environmental law*, Oxford University Press, 2007.

Wolf S. and Stanley N., *Wolf and Stanley on Environmental Law*, Routledge, 6th edition, 2014.

Endnotes

- ¹ All EU Member States have been party to the Aarhus Convention since 2012.
- ² In particular, in the Environmental Impact Assessment Directive ([EIA Directive](#), 2014/52/EU), the [Industrial Emissions Directive](#) (2010/75/EU), the directive on the assessment of the effects of certain plans and programmes on the environment ([SEA Directive](#), 2001/42/EC) and the [Water Framework Directive](#) (2000/60/EC).
- ³ See for instance the EIA Directive and the Industrial Emissions Directive. The Environmental Liability Directive (2004/35/EC) contains such provisions independently from the Aarhus Convention.
- ⁴ See P. Wennerås, *The enforcement of EC Environmental Law*, see in particular p. 91., Oxford University Press, 2007, and L. Krämer, 'The Aarhus Convention and the European Union', in: Charles Banner, *The Aarhus Convention – a guide for UK lawyers*, Hart publishing, 2015, see in particular pp. 92-93.
- ⁵ According to Article 2(2) of the Aarhus Convention, the right to question certain acts does not however include judicial and legislative acts. A possible incorrect transposition of EU legislation into national law in the form of a legislative act is thus excluded from the Aarhus provisions – see P. Wennerås, in particular pp. 107-108.
- ⁶ See P. Wennerås, in particular p. 90. Moreover, Article 9(4) and Article 9(5) of the Aarhus Convention refer to overriding conditions and lay down, for instance, that legal procedures must be timely and not excessively expensive and that assistance mechanisms to remove financial barriers to justice should be considered.
- ⁷ Concerning access to court in cases of non-respect of information and participation rights, the claimant NGO, [Client Earth](#), stated, prior to the publication of the report, that EU provisions were in line with the Aarhus Convention.
- ⁸ See Commission [communication](#), p. 5. The Commission explicitly states that a legislative option was not considered appropriate in view of the experience concerning the 2003 proposal, which was withdrawn in 2014.
- ⁹ Aarhus Convention Article 9(1) grants legal standing concerning information rights to any person who considers his or her request for information to have been wrongfully refused. Regarding Article 9(2) concerning participation rights, Member States are entitled to apply the impairment of rights principle. For recognised NGOs the impairment of rights or sufficient interest can, under certain conditions, be considered as given. As far as individuals are concerned, the definition of these notions is at the discretion of the convention's parties.
- ¹⁰ See R. Schütze, *European Union Law*, Cambridge, Cambridge University Press, 2015, see in particular p. 398.
- ¹¹ In its [Environmental Implementation Review](#) (EIR) published in February 2017, the Commission had already highlighted that in over a third of Member States, NGOs are denied legal standing owing to an over-restrictive approach.
- ¹² See Commission communication, in particular p. 30.
- ¹³ See C. Banner, in particular pp. 159-161.
- ¹⁴ Aarhus Convention implementation guide, p. 198.

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