The Making of a New European Legal Culture: the Aarhus Convention


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The Making of a New European Legal Culture: the Aarhus Convention

At the Crossroad of Comparative Law and EU Law

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CHAPTER I

Introduction

The Making of a New European Legal Culture: The Aarhus Convention

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The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, usually known as the Aarhus Convention, was adopted in 1998. The Convention introduces the three pillars of environmental democracy, which is a governance system where citizens and civil society organisations are fully involved in the decisions affecting the environment we live in.[1] As it has been remarked, "The foundational idea of the Convention is that sustainable development can be achieved only through the involvement of all stakeholders – *i.e.* the people. The Aarhus Convention represents a leap forward in terms of environmental agreements in granting rights to the public and imposing to the public authorities of its Parties certain obligations in terms of administrative and judicial procedure".[2]

The Aarhus Convention is an ideal topic for both comparative law and EU law research.[3] Starting with comparative law, the Convention is an extremely interesting example of legal transplantation through international law instruments.[4] Of course, its provisions did not spring out of Jupiter's head as Minerva did (according to myth).[5] The building blocks on which the Convention was built were the past experiences in jurisdictions where environmental concerns run deeper. Possibly even more interesting is that, once ratified, the Convention was expected to bring about important changes in jurisdictions that were historically less receptive to both environmental problems and direct citizen involvement in policy and decision-making. In this context, the Aarhus Convention may be considered an instance of legal transplant. However, the transplants are not

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1 The implications of different takes on 'democracy' for participation in environmental matters are discussed by Birgit Peters, 'Towards the Europeanization of Participation? Reflecting on the Functions and beneficiaries of Participation in EU Environmental Law' in Cristina Fraenkel-Haeberle and others (eds), *Citizen Participation in Multi-Level Democracies* (Leiden/Boston, Brill Nijhoff, 2015) spec. 316 ff and 332 ff.

2 Rui Tavares Lanceiro, 'The Review of Compliance with the Aarhus Convention of the European Union' in Edoardo Chiti e Bernardo G. Mattarella (eds), *Global Administrative Law and EU Administrative Law* (Berlin – Heidelberg, Springer, 2011) 360; see also Eva Julia Lohse and Margherita Poto, 'Introductory Remarks on the idea and Purpose of a German-Italian Dialogue on Participation in Environmental Decision-Making' in Eva Julia Lohse and Margherita Poto (eds), *Participatory rights in the Environment Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective* (Berlin, Duncker & Humblot, 2015) 9.

3 On the contrary the ECHR does not seem to add much to the combined effects of the Aarhus Convention and EU law: see the analysis by Birgit Peters, 'Towards the Europeanization of Participation?', see footnote 1, 325 ff.

4 The notion of legal transplants and related ones are clarified by Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, OUP, 2006) 443 ff.

5 Or, as Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions', see footnote 4, 454, puts it, "nobody really likes to re-invent the wheel".

directly from one jurisdiction to the other, rather they are facilitated through an international legal instrument.[6]

For most of the parties to the Aarhus Convention, the transplants of the Convention are facilitated – and strengthened – through EU legislative measures.[7] The Aarhus Convention is a so-called mixed agreement, having been ratified by both the (then) European Community and its Member States. Because of its specific architecture, the EU discharges its obligations under the Convention both through its own institutions and through the institutions of the EU Member States. As is better explained in the specific chapter on the EU in this book, the provisions of the Convention bind both the EU institutions and the Member States and have become part of the EU environmental *acquis*. This means that the Aarhus Convention binds the EU Member States not just as an international law instrument but also as a matter of EU law. This translates into legal transplants with a very special and very strong binding force due to the fact that provisions of the Convention benefit from the enhanced legal force which is provided by EU doctrines, such as primacy and direct effect. It is well-known that, through the so called 'community method', the EU Commission, the Court of Justice of the EU and the national courts[8] all contribute in enforcing EU law, against Member State institutions, agencies and other bodies.[9] It is somewhat ironic that, when it comes to the EU institutions however, the Aarhus Convention loses its special force and becomes again an instrument with an international law character.[10]

If the Aarhus Convention is benefiting from being enforced through EU law, then (what is now) EU law in turn benefited from the systematic and consistent

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6 See also the instance analysed by Cristina Fraenkel-Haeberle, 'Participatory Democracy and the Global Approach in Environmental Legislation' in Eva Julia Lohse and Margherita Poto (eds), *Participatory rights in the Environment Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective*, see footnote 2, 40 ff.

7 EU environmental law is analysed in details by Jan H. Jans and Hans H.B. Vedder, *European Environmental Law* (Groningen, Europa Law Publishing, 4th 2012); different aspects have been analysed in the papers collected by Richard Macrory, *Reflections on 30 Years of EU Environmental Law* (Groningen, Europa Law Publishing, 2006).

8 On the role of courts see specifically Luc Lavrysen, 'The European Court of Justice and the Implementation of Environmental Law' in Richard Macrory (ed), *Reflections on 30 Years of EU Environmental Law*, see footnote 7, spec. 447 ff.

9 See Richard Macrory, 'The Enforcement of EU Environmental Law. Some proposals for Reform' in Richard Macrory (ed), *Reflections on 30 Years of EU Environmental Law*, see footnote 7, 383; see also Margherita Poto, 'Strenghts and Weaknesses of Environmental Participation Under the Aarhus Convention: What Lies Beyond Rethorical Proceduralisation?' in Eva Julia Lohse and Margherita Poto (eds), *Participatory rights in the Environment Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective*, see footnote 2, 40 ff., 100.

10 See more recently Case C-404/12 P *Council and Commission* v *Stichting Natuur en Milieu and Pesticide Action Network Europe*, paras 45 ff; see also the discussion in Adam Daniel Nagy, 'The Aarhus-acquis in the EU – developments in the dynamics of implementing the three pillars structure', in this book, ...

approach to environmental democracy embodied in the Aarhus Convention.[11] In the end "there is a significant interplay between the Aarhus Convention and the Community law and they both provide stimulus for further developments of each other".[12]

The Aarhus Convention is also bringing about some measure of convergence in the administrative law of the Parties. Convergence is expected to be stronger among the EU Member States as an effect of binding EU law principles and the use of secondary law instruments, such as directives. But a spill-over effect of the EU approach to Aarhus Convention influencing the laws of Parties that are not EU Member States cannot be ruled out either.[13] This is supported by the fact that the compliance mechanism of the Aarhus Convention is unusually strong, as judged by standards of international law; which, it has has been argued, is precisely due to the desire of the EU to limit the risk of dual speed enforcement of the Aarhus Convention being comparatively fast in the EU, and slow outside of its borders.[14]

1 The research question

The question addressed in this book is whether and to what extent the common rules (and principles) enshrined in the Aarhus Convention will bring about, or at least contribute to, the making of a New European Legal Culture.

This question is based on the premise that law is more than just black letter rules. It encompasses the way rules are interpreted, and even how those interpreting the rules are selected and trained and how legal professions are organised. It includes discussion of how all of the above interacts with the wider society.[15] Thanks to the 'indeterminacy and fuzziness' of the term 'culture',

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[11] Hans-W. Micklitz, 'Collective Action of Non-governmental Organisations in European Consumer and Environmental Law' in Richard Macrory (ed), *Reflections on 30 Years*, see footnote 7, 456, rightly remarks that "the piecemeal approach of the European Community might have contributed to the success of the Aarhus Convention"; the extent to which the characters of the Aarhus Convention have translated into EU secondary law is however limited: Birgit Peters, 'Towards the Europeanization of Participation? Reflecting on the Functions and Beneficiaries of Participation in EU Environmental Law' in Cristina Fraenkel-Haeberle and others (eds), *Citizen Participation in Multi-Level Democracies*, see footnote 1, 312.

[12] Jerzi Jendroska, 'Public Information and Participation in EC Environmental Law. Origins, Milestones and Trends' in Richard Macrory (ed), *Reflections on 30 Years*, see footnote 7, 63; see also 84.

[13] And would itself be part of a wider web of influences: see Eva Julia Lohse, 'Access to Justice' above fn. SEE FOOTNOTE N. ...? 169 ff.

[14] Jerzi Jendroska, 'Public Information and Participation in EC Environmental Law. Origins, Milestones and Trends' in Richard Macrory (ed), *Reflections on 30 Years*, see footnote 7, 72.

[15] See Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, see footnote 4, 710.

'legal culture' is a useful short hand to refer to all of these factors.[16] In a similar vein Zweigert and Kötz cover some of this idea in their writing of '*mentalité*'.[17] Legal culture includes what in French is known as *la doctrine*, but it goes beyond academic circles.[18] In a very wide sense 'legal culture' may be understood as encompassing 'lay' (not legally trained) citizens and civil society at large. An 'internal' legal culture encompassing lawyers, judges, law professors and all legal professionals may thus be distinguished from an 'external' legal culture.[19]

The focus of this book is on the internal culture. Occasionally, however, reference to the external culture is needed to explain obstacles to the full implementation of the Aarhus Convention. For example, one needs to remember that democracy is still relatively new to Eastern European countries, even more so is the type of direct democracy envisaged in the Aarhus Convention, making full implementation difficult once we move from the law in the books to the law in action. This is bound to affect the development of a common European legal culture.[20]

Legal culture is important because it is overly simplistic to believe that once rules are enacted, they will be correctly understood and easily applied. This is not always true for domestic rules and even less true for non-domestic rules, either of international, transnational or foreign nature. One reason is that non-domestic rules are alien, or at least foreign, to the local legal culture.

That legal culture matters to the implementation of non-domestic rules has already been made clear in the early XIX century German debate about codification of civil law. In this debate Thibaut thought that the French civil code could easily be adapted to Germany, while von Savigny argued that codification could

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[16] Stefan Vogenauer, 'Foreword', in Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture* (Beck, 2014), vii; see also the analysis by Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, see footnote 4, spec. 717 ff, and 725 ff.

[17] Konrad Zweigert and Hein Koetz, *Comparative Law* (Oxford, OUP, 3rd 1998) 69 ff; see also the discussion in Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, see footnote 4, 721 ff.

[18] In giving systematic coherence to legal knowledge, *la doctrine* has however a very important role in shaping legal culture: see Francis Snyder, 'Creuset de la communauté doctrinale de l'Union européenne: regards sur les revues françaises de droit européen', in Fabrice Picod (ed), *Doctrine et droit dans l'Union européenne* (Bruxelles, Bruyllant, 2009) 36 ff.

[19] The distinction was proposed by Ralf Michaels, 'Legal Culture' in Jurgen Basedow, Klaus J. Hopt and Reinhard Zimmermann (eds), *Max Planck Encyclopedia of European private Law* (Oxford, OUP, 2011), is often followed: e.g. Régis Lanneau, 'Dogmatics in Comparison to US-American Law and Economics – Dogmatism as a Cultural Element of Law in Europe?' and Ari Afilalo and Dennis Patterson, 'Statecraft, the Market State and the development of European legal Culture' both in Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture*, see footnote 16, 27 and 278 respectively.

[20] See also Martijn W. Hesselink, 'The New European Legal Culture – Ten Years On' in Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture*, see footnote 16, 21.

not be achieved without a developed local legal culture.[21] This issue resurfaced at the end of the past century with the heated debate following Pierre Legrand's seminal writings about the (non-)convergence of European legal systems.[22] This led to a renewed focus on several fundamental themes in comparative law research: issues such as what makes a specific legal culture, what are the different and special traits of any given legal culture, what are the preconditions for successful legal transplants, how are foreign principles, rules and institutions changed once they are transplanted in a given jurisdiction, how do rules and institutions impact upon the local law (possibly well beyond their specific subject matter), and whether or not a European legal culture is in development.[23]

The starting point for the exploration in this book is that, through the Aarhus Convention, the EU and its Court of Justice provide a common *forum* for the Member States to foster a common understanding of participation, the right of access to information and the right of access to courts. The dialogue between the Court of Justice and national courts by way of the preliminary reference procedure is of course well understood as a tool to shape a (form of) common legal culture.[24] The EU is an autonomous legal order and many notions, including those originating from the Aarhus Convention, have become EU law notions to be understood independently from the law of the Member States.[25] As was rightly remarked, an autonomous legal order "necessarily requires an autonomous legal culture".[26]

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[21] The story has been told many times: see it in Franz Wieacker, *A History of Private Law in Europe* (Oxford, Clarendon Press, 1995) (transl. Tony Weir) 290 ff; for a fresh approach see Helge Dedek, 'When law Became Cultivated: 'European Legal Culture' between Kultur and Civilization' in Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture,* see footnote 16, spec. 356 ff.

[22] The first being Pierre Legrand, 'European legal System are not Converging' [1996] Int. & Comp. Law Quarterly, 63; see the discussion in Michele Graziadei, 'Legal Transplants and the Frontiers of Legal Knowledge' [2009] Theor. Enq. In Law 10, spec. 727 ff.

[23] High points in the debate include Martijn W. Hesselink, *The New European Legal Culture* (Deventer, Kluwer, 2001); see also the works collected by Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture*, see footnote 16; similar analysis focus on private law topics: e.g. Reinhard Zimmermann, 'Comparative Law and the Europeanization of Private Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, see footnote 4, 539 ff; Michele Graziadei, 'Fostering a European legal identity through contract and consumer law' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Elgaronline, 2016).

[24] Since the provisions in the Aarhus Convention are value driven, here as well the analysis by Chantal Mak, 'Judges in Utopia. Fundamental Rights as Constitutive Elements of a European Private Legal Culture' in Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture* , see footnote 16, spec. 384 ff, will apply.

[25] E.g. Case C-279/12 *Fish Legal and Shirley*, para 48; see also Roberto Caranta, 'Les exigences systémiques dans le droit administratif de l'Union européenne' in Claude Blumann, Fabrice Picod (dir.), *Annuaire de Droit de l'Union Européenne 2012* (Paris, Editions Panthéon Assas, 2014) 21.

[26] Ari Afilalo, Dennis Patterson and Kai Purnhagen, 'Statecraft, the Market State and the development of European legal Culture' in Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal*

As such, the Aarhus Convention – and environmental law more generally – is a very important piece in the development of European administrative law in the sense of covering both the administrative rules applicable to EU institutions,[27] and those applied by the Member States in discharging their duties under EU law.[28]

In this framework we are not simply having recourse to a comparative law method to try and gauge how much uniformity or harmonisation was actually achieved by enacting the Aarhus Convention.[29] While keeping in mind that even among *la doctrine* many specific communities may exist, some more open to EU, others more focused on national law,[30] this book aims to find out whether significantly harmonised environmental law rules are leading to a common intellectual mindset or, as Zimmermann puts it, to a Europeanization of legal scholarship[31] which extends beyond universities and research centres to encompass (a number of) learned judges keen to learn about the law in other jurisdictions.[32]

We restate again that legal culture is more than legal scholarship or *la doctrine*, and that it encompasses more than professors and judges. However, we recognise it is hard to dispute that they are an integral and important part of legal culture and thus a valuable object of analysis.

Culture, see footnote 16, 278; see also 286.

27 This narrower meaning is the one chosen by Paul P. Craig, *EU Administrative Law* (Oxford, OUP 2nd 2012).

28 Jean-Bernard Auby and Jacqueline Dutheil de la Rochère, 'Introduction' in Jean-Bernard Auby, Jacqueline Dutheil de la Rochère and Emilie Chevalier (dir), *Traité de droit administratif européen* (Bruxelles, Bruylant 2ed 2014), spec. 26 ff; Matthias Ruffert, 'Le droit administrative européen' in Pascale Gonod, Fabrice Melleray and Philippe Yolka (dir.) *Traité de droit administrative* (Paris, Dalloz, t1 2011) 734; for a critical assessment see however Richard Rawlings and Carol Harlow, *Process and Procedure in EU Administration* (Oxford, Hart, 2014) spec. at 310 ff.

29 Which by itself is a legitimate use of comparative law: Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, see footnote 4, 456.

30 See Francis Snyder, 'Creuset de la communauté doctrinale de l'Union européenne: regards sur les revues françaises de droit européen' in Fabrice Picod (ed), *Doctrine et droit dans l'Union européenne*, see footnote 18, 73 ff.

31 Reinhard Zimmermann, 'Comparative Law and the Europeanization of Private Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, see footnote 4, 546 ff.; for an interesting parallel between this development and that that took place in Germany in the XIX century see Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, see footnote 4, 715 and 729 ff.

32 The past decade has seen "an increased use of comparative law by courts", Mads Andenas and Duncan Fairgrieve, 'Courts and Comparative Law. In Search of a Common language for Open Legal Systems' in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (Oxford: OUP, 2015) 4; on the role of courts and judges see also some of the contributions in Mads Andenas and Duncan Fairgrieve, *Tom Bingham and the Transformation of the Law. A Liber Amicorum* (Oxford, OUP, 2011).

2 The Aarhus Convention and legal culture

It is to be expected, we suggest, that legal transplants are more problematic the greater they affect core areas of domestic law. For example, it might be easier to change the deadline for bringing an action, than to introduce a new form of action; but it is easier to introduce a new type of contract than to change the notion and the basic elements of contracting or the understanding of the freedom of contract.[33]

Thus, the Aarhus Convention is specifically relevant to providing some answers to questions about the making of a EU legal culture, *because* it purports to regulate some fundamental aspects of administrative – and, more generally, public – law. The right to participation, the right of access to information and access to courts – the so-called three pillars of the Aarhus Convention – are such fundamental aspects. These issues are not related to technical rules, which are the preserve of small groups of highly specialised experts. Participation, the right of access to information and access to courts are at the core of domestic administrative law. In some jurisdictions, they are also relevant from the point of view of constitutional law. The attitudes and preferences of law-makers, courts, and other legal professionals towards these topics have been shaped over a long time, in some case spanning more than a century, and thus have become grounded in the wider cultural setting. The fact that general environmental rules tend to apply to a wide range of situations reinforces our consideration of the Aarhus Convention as a relevant focal point for understanding European legal culture. This is even more true as innovation in the environmental sector can spill-over to other sectors, making adoption of 'foreign' principles, rules and institutions all the more sensitive.[34]

The above does not mean that we take Legrand's argument that law cannot be successfully transplanted from one legal system to the other as representing reality.[35] Administrative law has seen many legal transplants in the past two centuries, as the many imitators – in and outside of Europe – of the French model centred on a special court for administrative matters in the *Conseil d'Etat* shows. Of course, the *Conseil d'Etat* itself is taking a quite structured approach to staying informed of the law in other jurisdictions and is ready to

[33] See the discussion by Hans-W. Micklitz, 'The (Un)-Systematics of Private Law as an Element of European Culture' in Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture*, see footnote 16, 91 ff., concerning the implementation in the UK of Directive 99/44/EC on certain aspects of the sale of consumer goods.

[34] Helpful introduction on how domestic jurisdictions have responded to EU law (though in this case it was private law) in Hans-W. Micklitz, 'The (Un)-Systematics of Private Law as an Element of European Culture' in Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture*, see footnote 16, 100 ff.

[35] For a balanced critical assessment of this position see Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, see footnote 4, 729 ff.

take into account these foreign experiences.[36] German scholarship has also gathered a following, especially in the first half of the XX century.[37] Though originally a Scandinavian institution, the *ombudsman* has been adopted in many jurisdictions;[38] and the US-born *New Public Management* is also very influential, including in Eastern European countries.[39]

It cannot be claimed that all transplants were successful. But neither can it be said that they all went sour. The point is, of course, that law, legal culture and *mentalité* are not given once and for all. They evolve. That being said, we focus in this book on what we call a 'new' European legal culture as there have been previous movements towards a more common European legal culture throughout the 'nationalisation' wave of law in the late XVIII and early XIX centuries.[40] However, this process of 'nationalisation' can be (and has, in part, been) reversed as the concept of a "European Legal Culture is not static".[41]

Without going further into detail on these issues, which are a well-known fixture in the intellectual debate about law and the making of Europe, it seems to us that the Aarhus Convention is an ideal testing ground for how legal principles, rules and institutions behave once they are moved from one jurisdiction to the other and how the given jurisdiction itself reacts to receiving a transplant. Studying the Aarhus Convention allows us to answer the question of whether there is indeed a 'new European legal culture' in the making, at the crossroad of administrative and environmental law.

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[36] See Aurelie Bretonneau, Samuel Dahan and Duncan Fairgrieve, 'Comparative Legal Methodology of the *Conseil d'Etat*' in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law*, see footnote 32, 242.

[37] This was true for instance of Italy and Spain: Roberto Caranta, 'Cultural Traditions and Policy preferences in Italian Administrative Law' and Andrés Boix-Palop, 'Spanish Administrative traditions in the Context of European Common Principles' in Matthias Ruffert (ed), *Administrative Law in Europe: Between Common Principles and National Traditions* (Groningen, Europa Law Publishing, 2013) 69 and 86 respectively.

[38] See Milan Remac, 'The Ombudsman: An Alternative to the Judiciary?' in Dacian C. Dragos and Bogdana Neamtu (eds) *Alternative Dispute Resolution in European Administrative Law* (Berlin – Heidelberg. Springer, 2014) 565; other chapters in the book also cover the role of ombudsperson in different jurisdictions.

[39] E.g. in Klaus Mathis, 'Cultures of Administrative Law in Europe: From Weberian Bureaucracy to Law and Economics' in Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture*, see footnote 16, 149 ff.

[40] See, with reference to private law, Stefan Vogenauer, 'Foreword', in Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture*, see footnote 16, v; this so even if some differences might have an even longer history: see Hans-W. Micklitz, 'The (Un)-Systematics of Private Law as an Element of European Culture' in Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture*, see footnote 16, at 88 ff.

[41] Geneviève Helleringer and Kai Purnhagen, 'On the terms, Relevance and Impact of a European legal Culture' in Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture*, see footnote 16, 13.

3 Working on the *têtes de chapitre* of administrative law

The special interest in the Aarhus Convention, as a field for research into the development of a European legal culture, also lies in the fact that the three pillars, while undoubtedly dealing with core aspects of public law, were already influenced in the recent past by different degrees of change induced by the adoption of foreign principles, rules and institutions.

This has led to the implementation and domestication of the Aarhus Convention being simpler in relation to the right of access to documents/information than in relation to participation rights (concerning both regulatory/planning and individual decision making procedures). It has been very difficult in relation to the pillar on access to courts.

For access to documents, it must be remembered that secrecy, while present in many jurisdictions following the French approach,[42] was more a specific duty imposed on civil servants than a general principle of administrative law. So much so that even in the past most jurisdictions were ready to allow access in a large number of cases, especially when individual (including property) rights were at stake.[43] Moreover, for many decades some form of parliamentary or democratic oversight has been part and parcel of the Western legal tradition. Oversight and accountability necessarily require a degree of transparency. Transparency has also increased in many jurisdictions through the adoption of ombudsperson-like institutions.[44] Since rights of access were granted in most (Western) European jurisdictions from the '70s onwards, adapting to the first pillar of the Aarhus Convention did not pose major problems.[45]

Already in the '90s the EU itself adopted provisions on both transparency and a right of access to information at Treaty level, and also bound the Member States to allow access to information in environmental matters.[46] A common European discourse on this topic therefore started more than twenty years ago. At the same time it is true – and it shows in the case law of the Court of Justice

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[42] Jerzi Jendroska, 'Public Information and Participation in EC Environmental Law. Origins, Milestones and Trends' in Richard Macrory (ed), *Reflections on 30 Years*, see footnote 7, 63.

[43] This included in what we would today consider environmental matters: Jerzi Jendroska, 'Public Information and Participation in EC Environmental Law. Origins, Milestones and Trends' in Richard Macrory (ed), *Reflections on 30 Years*, see footnote 7, 67.

[44] Again Milan Remac, 'The Ombudsman: An Alternative to the Judiciary?' in Dacian C. Dragos and Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law,* see footnote 38.

[45] For an overview John. Michael , 'Freedom of Information: Where we Were, Where we Are (and Why), Where we are Going (and How)' in Richard A. Chapman and Michael Hunt (eds), *Open Government in a Theoretical and Practical Context* (Aldershot, Ashgate, 2006) 99.

[46] See generally Ludovic Coudray, 'La transparence et l'accès aux documents' in Jean-Bernard Auby, Jacqueline Dutheil de la Rochère and Emilie Chevalier (dir), *Traité de droit administratif européen*, see footnote 28, spec. 710 ff.

of the EU – that some jurisdictions embrace transparency in administration with far more enthusiasm than others.[47]

As to participation rights, administrative law has in many countries been traditionally organised in a very top-down manner, again following the French centralised model.[48] Bureaucrats were tasked with divining the public interest in both planning cycles and in individual decisions.[49] In most jurisdictions, a certain level of participation rights have, primarily, been recognized in individual proceedings, where those proceedings possibly lead to the imposition of fines or sanctions (which is now mandatory under the CEDU).[50] This corresponds with the notion of participation as *defence* against administrative decisions affecting one's rights, and is often translated as the right to a fair hearing. Participation under the Aarhus Convention seems instead to fit in a different pattern: that of participation as *consultation*. Participation as consultation can more easily lead to instances of participation as a form of negotiation or co-decision, all of which may be very far removed from the top-down approach of classical French administrative law.[51] In this pattern of participation as consultation, civil society and its NGOs are the main actors.[52] This notion corresponds to a rather novel public law development in many jurisdictions,[53] where the role of civil society has been (and to some extent still is) limited, while giving favour to more traditional representative democracy institutions.[54] As will be shown in the

47 Member States are often divided on right of access: e.g. Case C-506/08 P *Sweden* v *MyTravel and Commission MyTravel and Commission, C-506/08 P, EU:C:2011:496*.

48 See also Roberto Caranta and Anna Gerbrandy, 'Introduction' in Roberto Caranta and Anna Gerbrandy (eds) *Tradition and Change in European Administrative Law* (Groningen, Europa Law Publishing, 2011) 4 ff.

49 See again Jerzi Jendroska, 'Public Information and Participation in EC Environmental Law. Origins, Milestones and Trends' in Richard Macrory (ed), *Reflections on 30 Years*, see footnote 7, 63.

50 See the contributions collected by Oswald Jansen and Philip M. Langbroek, *Defence Rights during Administrative Investigations* (Antwerp – Oxford. Intersentia, 2007).

51 The complexity in the notion of participation is stressed by Birgit Peters, 'Towards the Europeanization of Participation? Reflecting on the Functions and Beneficiaries of Participation in EU Environmental Law' in Cristina Fraenkel-Haeberle and others (eds), *Citizen Participation in Multi-Level Democracies*, see footnote 1, 313 ff.

52 See Roberto Caranta, 'Evolving Patterns and Change in the EU Governance and their Consequences on Judicial Protection' in Roberto Caranta and Anna Gerbrandy (eds), *Tradition and Change in European Administrative Law,* see footnote 48, 42 ff; Roberto Caranta, 'Civil Society Organizations and Administrative Law' [2013] Hamline Law Rev, 36:1, 39.

53 But for instances already in XIX century Prussian legislation see Bilun Müller, 'The Effect of the Aarhus Convention's Right of Access to the Courts in Germany' in Eva Julia Lohse and Margherita Poto (eds), *Participatory rights in the Environment Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective*, see footnote 2, 205 ff.

54 See for in depth discussion Birgit Peters, 'Towards the Europeanization of Participation? Reflecting on the Functions and Beneficiaries of Participation in EU Environmental Law' in Cristina Fraenkel-Haeberle and others (eds), *Citizen Participation in Multi-Level Democracies*, see footnote 1, 320 ff.

contributions in this book, the specific legal culture of the different countries to a large extent mirror the prevalence of either the top-down or the participatory model.[55] While the prevalent model of any jurisdiction may well be criticised, rules, principles and institutions will inevitably turn around that model, conditioning the topics of the legal discourse and shaping the local legal culture. A possible pattern shift because of the Aarhus Convention will inevitably meet some resistance. At the same time, and we reach here a quite encompassing meaning of legal culture, this development needs a lively civil society.[56]

EU law has a long track record in acknowledging some form of public participation as well. This goes back to Directive 85/337/EEC, the first EIA directive.[57] Legislation in this area is however piecemeal when compared to that on access to environmental information.[58]

Access to courts (and the remedies available therein) seems to be the thorniest issue of the three pillars of the Aarhus Convention. Even if access to justice was added in the negotiations leading to the signature of the Aarhus Convention with relative ease, there was no pre-existing legislation at (what has become) the EU level.[59] Judicial review is, however, central in any system of administrative law in that it defines the relations between courts, the government and its citizens. At the same time, in many jurisdictions courts have developed in very distinctive ways what are often scant legislative provisions defining standing to bring judicial review challenges against administrative action.

More specifically there is a sharp and well known distinction (reference to Michel Fromont's works will suffice here) between, on the one hand, jurisdictions like France which follow the objective legality review pattern and, on the other hand, jurisdictions like Germany requiring subjective rights as a condition for access to judicial review.[60]

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55 For a useful analysis of different theoretical approaches see Cristina Fraenkel-Haeberle, 'Participatory Democracy and the Global Approach in Environmental Legislation', see footnote 6, spec. 34 ff; see also at 42 ff.

56 For this understanding see Volkmar Gessner, 'Global Legal Interaction and Legal Cultures' [1994] Ratio Juris, 134 ff; see also the discussion in Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, see footnote 4, 715 ff.

57 Jerzi Jendroska, 'Public Information and Participation in EC Environmental Law. Origins, Milestones and Trends' in Richard Macrory (ed), *Reflections on 30 Years*, see footnote 7, 67 ff .

58 Besides the chapter by Adam Daniel Nagy, see Angel-Manuel Moreno, 'Environmental Impact Assessment in EC Law' in Richard Macrory, *Reflections on 30 Years*, see footnote 7, 41 ff.

59 Jerzi Jendroska, 'Public Information and Participation in EC Environmental Law. Origins, Milestones and Trends' in Richard Macrory (ed), *Reflections on 30 Years*, see footnote 7, 71.

60 Michel Fromont, *Droit administratif des Etats européens* (Paris, Puf, 2006) 177 ff ; see also with specific reference to Germany Bilun Müller, 'The Effect of the Aarhus Convention's Right of Access to the Courts in Germany' in Eva Julia Lohse and Margherita Poto (eds), *Participatory rights in the Environment Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective*, see footnote 2, 207 ff.

Courts adhering to the *contentieux objectif* approach will be normally generous in granting standing. The reason is that judicial review responds to the public interest, and that without public prosecutor institutions like the US attorney general, individuals, companies and civil society organisations need to be enlisted to make sure that the Rule of Law is abided by. In systems which have adopted the *contentieux subjectif* model, standing is instead granted more sparingly and only to those holding a well-established Constitutional or civil law individual right.[61]

The adoption of the Aarhus Convention in the latter jurisdictions requires a major paradigm shift and is expected to face difficulties. Even when the Convention is faithfully implemented, its approach may be treated as an exception to the domestic principles, and as such it will play a limited role in shaping the local legal culture.[62]

It is noteworthy that the approach of both the EU Treaties and the case law of the Court of Justice on this topic are akin to the German one, meaning that the EU is not reinforcing the effectiveness of the Aarhus Convention and its specific meaning for the development of legal culture. Quite on the contrary![63]

Significant differences among the countries also concern the intensity of review. The remedies available – and their effectiveness – also vary a lot. Adapting/changing these other facets of access to courts and judicial review is fraught with difficulties, so much so that implementation of access to justice through secondary law is lagging behind when compared to the two other pillars of the Aarhus Convention.[64]

4 Structure of the book

The structure of the book flows naturally from the concepts set out above. The first part of the book is devoted to the analysis of how the Aarhus Convention has been received in a number of jurisdictions. This includes a consideration of the question of whether the law of these jurisdiction may have actually influenced the making of the Convention. This part begins with a chapter focusing on the EU. In line with the distinction of competencies between EU institutions and the Member States in the implementation of the Aarhus Convention within the overall EU legal order, the chapter deals in turn with EU

[61] Mariolina Eliantonio, *Europeanisation of Administrative Justice* (Groningen, Europa Law Publishing, 2008) 34 ff; Claus Dieter Classen, *Die Europäisierung der Verwaltungsgerichtbarkeit* (Tübingen, Mohr, 1996) 39 ff.

[62] See Mueller: in this book

[63] See, with specific reference to environmental law, Jan H. Jans, 'Judicial Dialogue, Judicial Competition and Global Environmental Law' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law* (Europa Law Publishing 2013) 160 ff.

[64] Besides Adam Daniel Nagy, see Mariolina Eliantonio, 'The Proceduralisation of EU Environmental Legislation: International Pressures, Some Victories and Some Way to Go' [2015] REALaw 4, 99.

law applicable to EU institutions and EU law applicable to the Member States. Chapters focusing on a number of EU Member States follow. The selected Member States include both common law and civil law jurisdictions, old and new members to the EU, and countries with different levels of sensitivity to environmental issues.

The importance of these chapters is twofold. First, they put the design and implementation of the Aarhus Convention in the more general cultural context, which is specific to the jurisdiction investigated. Moreover, while doing so they also provide an updated picture of the implementation of the Aarhus Convention and of the problems it may be facing, including for example the different approach to participation, right of access to information and access to courts which characterise the relevant jurisdiction.

The national chapters and the EU chapter provide the basis for the comparative chapters in the second part of the book. Each one of the first three comparative chapters focuses on a distinct pillar of the Aarhus Convention (right of access, participation, and access to courts). Here, the aim is twofold. On the one hand the authors of these chapters endeavour to chart which jurisdictions have contributed ideas that made their way into the different pillars of the Convention. On the other hand they map how the rules in the Convention were received in each of the jurisdictions analysed, pointing out the reasons these rules fitted more or less well with the pre-existing legal culture.

The last two comparative chapters investigate relevant issues which shed a clearer light on how the Aarhus Convention was influenced by the legal culture(s) of some jurisdictions and how it is having a multiplier effect by spreading the adopted principles and rules all over Europe (and to some extent beyond). A first chapter focuses on the place that NGOs have in the Aarhus Convention and more generally in the theory of environmental democracy. Legal culture is obviously central here. In many jurisdictions modern public law has been grounded on the assumption that individuals fight for their rights and the State looks after the general public interest. There is no room or not much room in this theoretical framework for intermediate bodies willing to take care of some meta-individual interest. In other jurisdictions civil society has always played a more important role. This chapter aims to show how the Aarhus Convention is tilting the balance towards the latter approach. The final chapter draws conclusions from all the previous ones, assessing the role of legal culture in shaping a European wide discourse. Finally, a last chapter works like a conclusion, drawing together the finding in all the previous chapters to to provide an account of the Aarhus Convention's influence on the legal culture in the jurisdictions analysed to the effect of showing how the Convention has reinforced the way towards a shared European culture which embodies a true environmental democracy, wherein the environment is protected on behalf of the citizens and their well-being.[65]

[65] The same role is played by the Aarhus Convention in other jurisdictions: see for instance Hannes Veinla – Sim Vahtrus, 'Substantive environmental right in Estonia – Basis for citizens's enforcement' [2016] 3 *Nordic Environmental Law Journal* 20 f.

5 The making of a new European legal culture?

As was already remarked, by having the EU among its Parties, the Aarhus Convention benefits from an enforcement mechanism that sets it aside from other instruments of international environmental law, thus lending a stronger binding character to the Convention itself.[66]

This by itself is bound to lead to some degree of a dialogue between academic and practicing lawyers from different Member States. If nothing else, curiosity will prod lawyers to see how common rules interpreted by a higher court of the land are understood and applied in neighbouring jurisdictions. Academics will want to answer the call to give a systematic account of this part and other parts of EU administrative law.[67]

The contributors to this book heeded the call, and are adding to an already rich body of literature where EU law goes hand in hand with comparative law to foster mutual understanding and to some extent bridge the gaps between different jurisdictions.[68]

Ultimately the chapters in this book attest to the very general validity of the claim according to which "the comparative law method [...] embodies the interlocking relationship between the Union and the national legal orders, and with the advancement of European integration, it is deemed to play a central role in EU adjudication in the years to come".[69]

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66 See again Richard Macrory, 'The Enforcement of EU Environmental Law. Some proposals for Reform' in Richard Macrory (ed), *Reflections on 30 Years of EU Environmental Law*, see footnote 7, 385; see also at 393 ff.

67 Matthias Ruffert, 'Le droit administrative européen' in Pascale Gonod, Fabrice Melleray and Philippe Yolka (dir.) *Traité de droit administrative* t. 1, see footnote 28, 734 ff.

68 To use here a metaphor dear to the late Walter Van Gerven, 'Bridging the Unbridgeable: Community and National Tort Laws after *Francovich* and *Brasserie*' [1996] Int. & Comp. Law Quarterly, 45, 507.

69 Koen Lenaerts and Kathleen Gutman, 'The Comparative Law Method and the Court of Justice of the European Union. Interlocking Legal Orders Revised' in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law*, see footnote 32, 176.

CHAPTER 2

The Aarhus-Acquis in the EU

Developments in the Dynamics of Implementing the Three Pillars Structure

Adam Daniel Nagy

1 Introduction

The Aarhus Convention is an environmental agreements having substantially contributed to a more conscious and responsible approach towards environmental protection. It gives rights to citizens and their organisations, also covering non-governmental organisations active in the environmental field (eNGOs) and it gives a very broad space for the public to act on behalf of the environment. As Advocate General Sharpston stated in *Trianel*, the fish cannot go to court.[1] Instead of fish she could have said wolves or the environment as a whole. This is a very important aspect: this Convention is not directly about the protection of the environment, by imposing certain limit values for emission and so on, but rather goes a level closer to the human responsibility perspective and gives a strong role to the citizens. In this, the Aarhus Convention links human rights and environmental rights.[2] The Convention is also about people with a 'green heart', those who consider safeguarding nature and future generations a priority. One of the principal aims of the Convention is that environmental considerations should be channelled into the mainstream by involving those people (the public), who see the priorities for the environment and humanity in the long run more clearly. It all boils down to this: if we develop our economies by leaving out the environmental concerns then we jeopardize our own future.

Coming to the substance of the Convention, it is also important to highlight the inter-connectivity of the Convention which makes it crucial that all its requirements are implemented effectively. Without access to information and justice, we cannot speak about an effective system of participation. Similarly without justice, access to information may remain just an empty promise. If the public is not acquainted with its rights, justice remains a dead letter.

In ensuring effective protection of citizens' rights in the environmental field, based on the Aarhus Convention, Advocates General and the Court of Justice (CJEU) have undisputable merits. Advocates General Kokott and Sharpston deserve to be specifically mentioned because of their consistent remarkable series of Opinions contributing new concepts and useful insights.[3]

The Aarhus Convention was ratified by the then European Community in 2005 by way of Decision 2005/370/EC and therefore it is now part of EU law as stipulated by Art 216 of the TFEU. All EU Member States, including most

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1 C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg;* see also Christopher D. Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (1972); Charles Pirotte, 'L'accès à la justice en matière d'environnement en Europe: Etat des lieux et perspectives d'avenir' [2010] Aménagement-Environnement, 28ff.

2 Giulia Parola, *Environmental Democracy at the Global Level: Rights and Duties for a New Citizenship* (Versita, 2013), spec. 75 ff.

3 Of course the Cabinets of the AGs are very important, in particular members such as Mr Christoph Sobotta, the environmental expert in the Cabinet of AG Kokott.

recently Ireland have ratified it. The GMO amendment was also ratified by the EU with Decision 2006/1005/EC.[4]

The Convention's status in EU law is that of a mixed multilateral environmental agreement, meaning that both the Member States and the EU have the obligation to implement its provisions. This is the reason why I will address each of the three pillars of the Aarhus Convention focusing first on the obligations of the EU Institutions under the Aarhus Convention, then on those of MS, which are also based on EU law, to close with a discussion of current developments. Following this pattern I will deal in turn with access to documents/information (section 2), public participation (section 3) and access to justice (section 4). I will then discuss some recent developments (section 5) and end with conclusions (section 6).

2 First pillar: access to information

As a number of scholars have emphasized,[5] the right to environmental information relates to the possibilities of citizens to act responsibly on behalf of the environment. Citizens with effective access to information have the power to act on possible breaches of environmental law resulting from activities harming our environment. The enforcement of environmental law is thus directly linked to effective provision of information. In a nutshell effective means timely, without undue delays, and implies that appropriate information is disclosed as requested if no exceptions applies.

2.1 General framework of access to information at EU level

The access to information provisions of the Aarhus Convention are found in Article 4 on access to environmental information and in Article 5 on the collection and dissemination of environmental information.[6] Article 4 sets out the general right of persons to gain access to existing environmental information upon request, also known as the 'passive' right to access to information. Article 5 imposes an obligation on the Parties to the Convention to actively collect and disseminate information, involving an 'active' access to information. Under the Convention, all persons have the right of access to information.

4 Economic Commission for Europe, Decision II/1 adopted at its second session (Almaty, 25-27 May 2005): the Meeting of the Parties adopted an amendment to the Convention on genetically modified organisms.

5 Àine Ryall, 'Access to Environmental Information in Ireland: Implementation Challenges' [2011] Journal of Environmental Law 23(1), 45 ff; Ludwig Krämer, 'Foreword' in Ralph E. Hallo (ed), *Access to environmental information in Europe: the implementation and implications of Directive 90/313/EEC* (Kluwer Law International 1996) OJ L158/56.

6 For more information on the topic see <http://ec.europa.eu/transparency/access_documents/index_en.htm> accessed 28 may 2016.

Article 15(3) TFEU also provides a very broad right of access to information not confined to EU citizens but given to all those residing or having their registered offices in a Member State. In accordance with the principle of transparency, detailed procedural rules are to be set by the individual institutions on access to information. The main legislative basis is Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents.[7]

Regulation EC/1049/2001 and the Aarhus Regulation EC/1367/2006

The other main instrument that needs to be highlighted is the Aarhus Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.[8] This Regulation lays down rules for access to documents containing environmental information which specific special (*lex specialis*) when compared to Regulation 1049/2001. It provides the definition of 'environmental information' (Article 2 (d)). The main rule is that access shall be granted. Partial access is granted or the application is refused when an exception applies (Article 4). All documents held by an institution, irrespective of their origin, are covered. In line with the requirements of the Aarhus Convention, the main rule under EC/1049/2001 is that any natural or legal person residing or having its registered office in a Member State can request access to documents.

Access and refusal

Under Article 8 of Regulation 1049/2001, in the case of partial access or complete refusal, reasons based on the exceptions provided by law must be stated and information on remedies must also be given, including information about the possibility to lodge a confirmatory application.

Generally speaking, the exceptions to access to documents are to be interpreted and applied restrictively so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the EU institution concerned.[9]

Access is refused based on Article 4(1) of Regulation 1049/2001,[10] where disclosure would undermine the protection of the public interest.[11] Unless there is an overriding public interest in disclosure, access shall be refused where

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7 See also Commission, 'Decision amending its Rules of Procedure' C (2001) 3714.

8 See also detailed analysis in Nicolas de Sadeleer, *Environnement et marché intérieur* (Ed. de l'Université de Bruxelles 2010) 189 ff.

9 See inter alia T-309/97 *Bavarian Lager v Commission*, para 39.

10 See also Ludwig Krämer, 'The Court of First Instance and the protection of the environment' in Gyula Bándi (ed), *The impact on ECJ jurisprudence on Environmental Law* (Szent István Társulat 2009) 110.

11 See (a) to (b) "as regards public security, defence and military matters, international relations, the financial, monetary or economic policy of the EU or a Member State, privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data".

disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, court proceedings and so on. Access will be refused if disclosure of the document would seriously undermine the institution's decision-making process. An overriding public interest in disclosure is deemed to exist where the information requested relates to emissions into the environment. EU institutions and bodies may also refuse access to environmental information where disclosure of the information would adversely affect the protection of the environment to which the information relates. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document must be released. In principle and unless it is clear that the document in question should or not be disclosed, Member State shall be consulted before disclosing documents originating from them.[12]

Sectoral rules

There are also some sectoral examples of access to information measures, such as for instance Regulation (EC) 1829/2003 on genetically modified food and feed. After the EU ratified the Pollutant Release and Transfer Registry (PRTR) protocol, the PRTR Regulation was adopted.[13] The main aim of the Commission with the help of the European Environmental Agency and national authorities is to make the information openly and freely accessible. Under Article 3 of the PRTR Regulation the information includes releases of pollutants, off-site transfers of waste and releases of pollutants from diffuse sources. The obligations under the E-PRTR Regulation extend beyond the scope of European Pollutant Emission Register,[14] mainly in terms of more facilities included, more substances to report, additional coverage of releases to land, off-site transfers of waste and releases from diffuse sources, public participation and annual, instead of triennial, reporting.

[12] See SG of the Office to the EU Ombudsman and the Commission representative, 'Presentations' (Task Force on access to information, Geneva 2014) available at <http://www.unece.org/env/pp/aarhus/tfai3.html#/> accessed 28 may 2016.

[13] European Parliament and Council Regulation (EC) 166/2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC [2006] OJ L33, 1–17.

[14] The EPER was established by a Commission Decision of 17 July 2000. EPER has been replaced by the European Pollutant Release and Transfer Register in which annually reported data are available from 2007 onwards.

2.2 General framework of access to information at Member State level

Background

Following the adoption of the 4th Environment Action Programme (1987-1992) it was expected that freedom of access to environmental information would soon be regulated at EU level.[15]

The resulting instrument, Directive 90/313/EEC on the freedom of access to information on the environment was the predecessor of Directive 2003/4/EC which is now in force. By making provisions for improved access to information on the environment, the Directive contributes to an increased awareness of environmental matters and hence to improved environmental protection. The CJEU provided important guidance on the interpretation and scope of the term of environmental information,[16] exceptions for disclosure,[17] judicial or administrative review of the decisions of public authorities,[18] on costs for supplying information.[19]

Although Directive 90/313/EEC was an important step towards freedom of environmental information, it was necessary to accommodate the case-law of the Court and to bring the provisions in line with the Aarhus Convention.[20] The Commission therefore decided to propose replacing it with a new instrument.[21]

The new Directive 2003/4/EC built on the experience gained mainly under its predecessor. Furthermore, at the time it was drafted, the European Union was preparing to ratify the Aarhus Convention as foreseen in the 6th Environment Action Programme.[22] The purpose of Directive 2003/4/EC is to implement Articles 4, 5 and 9(1) of the Aarhus Convention, regarding the right of access to information and related access to review procedures. The Directive also tried to take into account modern technology, in particular the format of available and accessible information. As a result, there is a stronger wording as regards active dissemination of information. The main changes are as follows.

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[15] See for more details Ralph E. Hallo (ed), *Access to environmental information in Europe: the implementation and implications of Directive 90/313/EEC* see footnote 6; Jan H. Jans and Hans H.B. Vedder, *European Environmental Law. After Lisbon* (Europa Law Publishing, 2012).

[16] See C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat*, para 19, even administrative measures and environmental management programmes are included in the term.

[17] Ibid; C-316/01 *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen*.

[18] C-186/04 *Pierre Housieaux v Délégués du conseil de la Région de Bruxelles-Capitale*, on a mandatory deadline of 2 months under Art. 3(4), to ensure legal certainty.

[19] C-217/97 *Commission* v *Germany*, that stipulated amongst others that indirect costs cannot be charged.

[20] Jan H. Jans and Hans H.B. Vedder, *European Environmental Law. After Lisbon*, see footnote 16, 369.

[21] Commission, 'Report from the Commission to the Council and the European Parliament on the experience gained in the application of Council Directive (EEC) 90/313 on freedom of access to information on the environment' COM (2000) 400, OJ L151/18.

[22] European Parliament and Council Decision 2002/1600/EC laying down the Sixth Community Environment Action Programme, art 2, para 9.

General provisions

Articles 3 and 7 of Directive 2003/4/EC[23] cover both 'passive' (upon request) and 'active' dissemination of environmental information by national authorities, without prior request or application. A broader definition of environmental information was introduced covering a wider range of matters related to the environment.[24] Under Article 2(1) this covers any information, in any material form, on the state of the environment and its components, or referring to measures, policies, legislation, plans and programmes, data used in economic analysis, the state of human health and safety which might be affected by the state of environment.

More detailed provisions are included as to the form in which information is to be made available, including a general obligation to provide information in the format requested and the possibility to use electronic means. A more inclusive definition of the term public authorities in Article 2(2) covers natural or legal persons who perform public administrative functions.[25] This includes government authorities[26] at all levels, ranging from national and regional to local.[27] Recently the Court clarified the term of public authorities and how the function exercised by them relates to the obligation to disclose information. It clarified that once it is established that the entity in question is indeed a public authority, it must disclose all the environmental information which it holds relating to its public function.[28]

The deadline for making the information requested available is reduced to one month, with a possibility of extension by a further month if justified by special circumstances, such as the volume or the complexity of the requested information. Based on Article 4, requests for information may be refused only if disclosure would adversely affect one of the interests listed. Here again, grounds for refusal are to be interpreted restrictively, taking into account the

[23] See also the overview by Jan H. Jans and Hans H.B. Vedder, *European Environmental Law. After Lisbon*, see footnote 16, 369; Ralph Hallo, 'Access to Environmental Information: the Reciprocal Influences of EU Law and the Aarhus Convention' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten* (Europa Law Publishing, 2011) 55-65; Ludwig Krämer, *EU Environmental Law* 7th edition (Sweet & Maxwell, 2011) 135 ff.

[24] C-552/07 *Commune de Sausheim v Pierre Azelvandre* according to which information on GMOs are included in the term; see also C-524/09 *Ville de Lyon v Caisse des dépôts et consignations*, where the Court ruled that 'the EU legislature did not intend to make requests concerning trading data such as that at issue in the main proceedings subject to the general provisions of Directive 2003/4/EC'.

[25] In C-515/11 *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland*, the Court ruled that acts of lower ranking as that of laws are not covered by exception of legislative activity.

[26] Documents pertaining to legislative functions are excluded; however, in C-204/09 *Flachglas Torgau GmbH v Bundesrepublik Deutschland*, the CJEU took a narrow approach as regards the definition of legislative capacity.

[27] C-279/12 *Fish Legal and Shirley v Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd, Southern Water Services Ltd.*

[28] Ibid.

public interest served by disclosure, since in principle information should be disclosed. However, public authorities may refuse a request if it is too general or manifestly unreasonable, or concerns material in the course of completion, or internal communications. Public authorities may refuse disclosure of information if it would 'adversely affect' the course of justice, the confidentiality of commercial or industrial information as protected by national law;[29] intellectual property rights;[30] the protection of the environment to which such information relates or the possibility to receive a fair trial; international relations; confidentiality of personal data, etc. Limited and specific grounds for non-disclosure are foreseen. Under Article 5, reasonable charges for supplying information could be imposed.[31]

2.3 The way forward

As rightly observed by Ryall, the Member States' discretion under Directive 2003/4/EC is rather limited.[32] The interpretation provided by rulings from the CJEU concerning the Directive go further in the process of reducing this already limited discretion. A 2012 Commission Report reviewing implementation by Member States in terms of transposition indicates, however, that there is still some room for improvement by the Member States.[33]

Stronger active dissemination

Active dissemination of environmental information is also one of the requirements under the Aarhus Convention, i.e. there should be comprehensive systems and arrangements for organising relevant environmental information and establishing standards for its active dissemination. Article 7 of Directive 2003/4/EC urges Member States to take into account technological development of the field; they need to ensure that environmental information increasingly becomes available in electronic databases easily accessible by the public. This is reinforced by the better governance guidance given by the 2012 Commission's Communication (Implementation Communication) aiming at a better knowledge-base on the environment in the Member States.[34] This trend is also

[29] C-266/09 *Stichting Natuur en Milieu and Others v College voor de toelating van gewasbeschermingsmiddelen en biociden*, the balance between the right of public access to environmental information and confidentiality, where the CJEU confirmed a broad interpretation of access; C-204/09 *Flachglas Torgau v Federal Republic of Germany* on a reference for a preliminary ruling, definition of 'confidentiality of the proceedings of public authorities when acting in a legislative capacity'.

[30] C-71/10 *Office of Communications v Information Commissioner.*

[31] Ibid, covers the scope of a public authority's power to charge based on European Parliament and Council Directive (EC) 2003/4 art 5(2), OJ L41/26.

[32] For more detailed analysis see Àine Ryall, 'Access to Environmental Information in Ireland: Implementation Challenges', see footnote 6; Ludwig Krämer, *EU environmental law*, see footnote 24.

[33] Recently published Commission, 'Report on the experience gained in the application of directive (EC) 2003/4 on public access to environmental information' COM (2012) 774.

[34] Commission, 'Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness' COM (2012) 095 final.

obvious in the decision on the 7th Environment Action Programme (7th EAP).[35] An important cornerstone of this process is the Inspire Directive[36] creating what could be called the common electronic language for sharing and disseminating information.[37]

Other sectoral provisions

Besides the Inspire Directive the PSI Directives[38] and the SEIS[39] initiative also contributes in encouraging broad electronic access to certain information held by public bodies. Changes introduced in the SEVESO Directive[40] are also in line with this tendency of active dissemination by public authorities. They provide for a general framework which might still need to be streamlined in line with the objectives presented in the Implementation Communication and the 7th EAP.

Future perspectives of access to environmental information within the EU

The Implementation Communication and the 7th EAP all aim at strengthening access to information, in particular through active disclosure. The Commission's objectives include setting up information networks and making available more information on the state of the environment on-line. The Communication aims to explore possibilities to strengthen Directive 2003/4/EC and also to develop structured implementation and information frameworks (SIIFs) for all key EU environment laws. The background of these objectives are two-fold: first to provide citizens with the information; secondly, the EU also has an interest to have updated knowledge resources that would ensure well-informed decision- and policy-making.[41]

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35 Commission, 'Proposal for a decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet"' COM (2012) 710 final.

36 European Parliament and Council Directive (EC) 2007/2 establishing an Infrastructure for Spatial Information in the European Community (Inspire Directive).

37 UNECE, 'Access to Information' (Task Force meeting December 2014) available at <http://www.unece.org/env/pp/aarhus/tfai3.html#/> accessed 28 may 2016.

38 European Parliament and Council Directive (EC) 2003/98 on the re-use of public sector information.

39 Commission, 'Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 1 February 2008, Towards a Shared Environmental Information System (SEIS)' COM (2008) 46 final.

40 See European Parliament and Council Directive (EU) 2012/18 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC (Seveso III Directive) OJ L197/1.

41 See Commission, 'Report on the experience gained in the application of Directive (EC) 2003/4 on public access to environmental information' COM (2012) 774.

3 The second pillar: public participation

Public participation in decision-making is the second pillar of the Aarhus Convention. The 6th EAP also aimed to ensure this.[42] Public participation cannot be effective without access to information, as provided under the first pillar, nor without the possibility of enforcement, through access to justice under the third pillar. As envisaged by the Convention, public participation enhances the quality and implementation of decision-making, including planning, drawing up of strategies and programmes as it contributes to a higher level of public awareness of environmental issues. The EU legislators have to take into consideration participation both when adopting new rules and also when amending existing legislation. Due to the number of political compromises during the co-decision procedures leading to the actual inclusion of participatory provisions in any given piece of EU legislation, the provisions on scope and the strength of participation are not at all identical in different legislative measures. In some cases, we only encounter a 'simple' requirement of effective participation.[43] In other cases, the full set of procedural provisions can be found in the text.[44] In my view, the CJEU may yet surprise Member States who prefer to have limited requirements in secondary law and negotiate for more lenient rules during co-decision, in order to avoid alleged 'burdensome' procedural guarantees.

Given that there were already a number of rulings delivered by the CJEU before the ratification of the Aarhus Convention, effective participation has a very well established case-law basis in EU law. We can see that requirements such as 'timely' provision of information,[45] the appropriate quality of information provided in the context,[46] site location data,[47] accessible locations of information for the public during consultation periods,[48] taking due account of public comments in a meaningful way[49] along with the explicit requirement of having legal criteria for ensuring effective participation and providing reasons if comments are not taken on board,[50] had all already been addressed by the CJEU.

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[42] European Parliament and Council Decision (EC) 1600/2002 laying down the Sixth Community Environment Action Programme, art 10(2).

[43] See in SEVESO III, see footnote 41, Nuclear Waste, Lex offshore, EIA revision, Coastal management plans, etc.

[44] See Energy Information Administration - EIA - Official Energy Statistics from the U.S and Integrated Pollution Prevention and Control - IPPC.

[45] T-374/04 *Germany* v *Commission*.

[46] C-215/04 *Marius Pedersen A/S v Miljøstyrelsen*.

[47] C-416/10 *Križan and Others v Slovenská inšpekcia životného prostredia*.

[48] C-216/05 *Commission v Ireland*.

[49] C-227/01 *Commission v Spain*; see also with reference to participation related to incineration of waste: European Parliament and Council Directive (EC) 2000/76 on the incineration of waste, art 12(1), OJ L332/91; see also C-255/05 *Commission v Italy*.

[50] See for more detailed case analysis Gyula Bándi, Csapó Orsolya, Kovács-Végh Luca, Stágel Bence and Szilágyi Szilvia, *The Environmental jurisprudence of the European Court of Justice* (Szt István Társulat

In my view, these rulings along with the fact that the Aarhus Convention's requirements form part of EU law allow to assess whether Member States do ensure effective involvement of the public.

3.1 Public participation requirements at EU level, as applied by institutions and bodies

Public consultations held by the Commission are mainly based on a Communication adopted in 2002 "Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission".[51] Consultations are published on the EU website "Your voice in Europe".

The Aarhus Regulation EC/1367/2006 also contains in Title III rules on public participation in the process of adopting plans and programmes. Under Article 9 EU institutions, when drawing up plans and programmes, must provide effective opportunities for the public to participate when all options are open. Reasonable time-frames shall be provided allowing sufficient time for the public to be informed and to prepare and participate effectively. A time-frame of eight weeks is foreseen and if hearings are organised, prior notice of at least four weeks should be given. As an important guarantee, due account should be given to the outcome of the public participation and the reasons and considerations are to be communicated to the public upon which the decisions are based.[52] To a certain extent public participation is also provided for in Article 25 of Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC.

Under the scope of Article 8 of the Aarhus Convention, it is also worth mentioning that legislative proposals by the European Commission go through an impact assessment process,[53] which also includes 12 weeks of on-line consultation. The impact assessment may also involve meeting with expert groups and other stakeholders.[54]

2008) 193.

51 Commission, 'Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission' COM (2002) 704 final.

52 For more detailed critical analysis see Nicolas de Sadeleer, *Environnement et marché intérieur,* see footnote 9, 190.

53 Commission, 'Impact Assessment Guidelines' SEC (2009) 92.

54 See the Register of Commission and other similar entities, website available at <http://ec.europa.eu/transparency/regexpert/> accessed 28 may 2016.

3.2 Public participation at Member State level based on EU law

Directive 2003/35/EC

One of the key pieces of legislation in this context is Directive 2003/35/EC (PP Directive)[55] which provides for public participation in respect of environmental decisions and the drawing up of certain plans and programmes by amending the Environmental Impact Assessment (EIA) Directive[56] and the Integrated Pollution Prevention and Control (IPPC) Directive.[57] The PP Directive has a two-fold aim. On the one hand, it transposes Article 6 of the Aarhus Convention, which are aimed at giving participatory rights to citizens in the EIA and the IPPC field, namely for specific projects and permits having a significant or potential significant impact on the environment. The second target area is that of plans based on Article 7 of the Aarhus Convention. In Article 2 of the Directive, public participation is ensured with reference to certain sectoral areas listed in Annex I. These are as follows: Article 7(1) of the Waste Directive,[58] Article 6 of the Directive on batteries and accumulators containing certain dangerous substances,[59] Article 5(1) of the Directive on the protection of waters against pollution caused by nitrates from agricultural sources,[60] Article 6(1) of the hazardous waste Directive,[61] Article 14 on packaging and packaging waste[62] and Article 8(3) of the Directive on ambient air quality assessment and management.[63] It is true that a number of other areas where plans are drawn up in the field of the environment could have been included in the Directive.

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55 European Parliament and Council Directive (EC) 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L332/91.

56 After codification: European Parliament and Council Directive (EU) 2011/92 on the assessment of the effects of certain public and private projects on the environment (EIAD) art 11, OJ L26/1.

57 European Parliament and Council Directive (EC) 2008/1 concerning integrated pollution prevention and control, OJ L24/8. After recast: European Parliament and Council Directive (EU) 2010/75 on industrial emissions (the Industrial Emissions Directive), OJ L334/17. With effect from 7 January 2014, Directive (EC) 2008/1 will in turn be repealed and replaced by Directive (EU) 2010/75 on industrial emissions (integrated pollution prevention and control).

58 Council Directive (EEC) 75/442 on waste, OJ L194/39.

59 Council Directive (EEC) 91/156 amending Directive (EEC) 75/442 on waste OJ L78/32.

60 Council Directive (EEC) 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources Directive 91/676/EEC OJ L375/1.

61 Council Directive (EEC) 91/689 on hazardous waste OJ L377/20.

62 European Parliament and Council Directive (EC) 94/62 on packaging and packaging waste OJ L365/10.

63 Council Directive (EC) 96/62 on ambient air quality assessment and management OJ L296/55.

Special rules on public participation outside Directive 2003/35/EC

Specific provisions on participation were already in force before adoption of the PP Directive. This was for instance the case with the Water Framework Directive 2000/60/EC in the context of river basin management plans.[64]

The most robust piece of 'old' participation-related provisions for public participation in environmental decision-making may be found in Articles 6 and 7 of the SEA Directive 2001/42/EC. Early and effective participation as provided under those articles should now be interpreted in the light of the Aarhus Convention.[65] Article 7 of the Convention specifically provides[66] that some of the requirements laid down in Article 6 are applicable to participation in the drawing of plans.[67] When comparing these provisions with the SEA Directive, it seems that there are certain elements missing and eventually a future review of the Directive could introduce changes to further fine-tune these provisions. It can be safely assumed that as long as Member States are doing what is necessary to interpret EU law in light of the requirements of the Convention, the spirit and the requirements of the Convention are abided to and de facto effective participation can be ensured.

The PP Directive has some additional rules as compared to the SEA Directive. It requires Member States to ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes. Inter alia, the public shall be entitled to express comments and opinions when all options are open before a plan or a programme is adopted. Other important guarantees include the requirement of taking due account of the results of the public participation and the obligation to inform the public on the outcome of the process, along with stating the reasons for specific decisions taken and giving appropriate timeframes for the process. A common element of the Directives and the Aarhus Convention is that eNGOs are given standing and specific opportunities to exercise these rights.

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64 European Parliament and Council Directive (EC) 2000/60 establishing a framework for Community action in the field of water policy OJ L327/1.

65 See also Attila Tanzi and Cezare Pitea, 'Interplay between EU law and international law' in Marc Pallemaerts (ed), *Aarhus Convention at Ten*, see footnote 24, 374, ref to ACCC/C/16 and 17 para 35: „... Convention as an agreement concluded by the Council is binding on the Community's institutions and Member States and takes precedence over the legal acts adopted under the EC Treaty (secondary legislation), which also means that the Community law texts should be interpreted in accordance with such an agreement".

66 These obligations in Aarhus Convention are: providing appropriate information to the public, art 6(2) along with appropriate timeframes to practice these rights. The next reference made is to the art 6(4), that is to provide for early and effective public participation, when all options are open. The last element is to take due account of the opinion of the public art 6(8).

67 See also on discrepancies between EU law and the Convention: Jerzy Jendroska, 'Public Participation in Environmental Decision-Making : Interactions between the Convention and EU Law and Other Key Legal Issues in its Implementation in the Light of the Opinions of the Aarhus Convention Compliance Committee' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten*, see footnote 24.

To avoid duplication of obligations, the PP Directive specifically provided that where SEA Directive applies the PP Directive itself is not applicable.[68] As indicated above, under the provisions of the SEA Directive now in force, it would be advisable for Member States to always interpret the SEA Directive provisions in light of the Aarhus Convention.[69]

Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment is also relevant here. Important changes were introduced as regards the Aarhus-related elements and also aiming to incorporate certain case-law developments.[70] Member States now have an obligation to simplify their environmental assessment procedures. Timeframes are introduced for the different stages of environmental assessments: screening decisions should be taken in principle in 90 days and public consultations should last at least 30 days. Members States also need to ensure that final decisions are taken within a reasonable period of time.[71]

The issue of participation costs was addressed by the CJEU although before the entry into force of the Aarhus provisions of the EIA Directive. The Court held that introducing a participation fee was not against the provisions of the EIA Directive.[72]

3.3 Recent developments in public participation at EU and international levels

Transposing the public participation requirements of the Aarhus Convention is still on-going as there are new sectoral areas, where there

[68] European Parliament and Council Directive (EC) 2001/42 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive), OJ L197/30 and Directive 2003/35/EC.

[69] See also C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport,* Opinion of AG Kokott, para 107: 'However, provisions of secondary Community law must, so far as possible, be interpreted in a manner that is consistent with the international agreements concluded by the Community. Under Article 300(7) EC, those agreements are binding on the institutions. Secondary law may not infringe them. They have primacy over secondary law'. See also para 108: 'Accordingly, interpretation in conformity with international law must be given priority over other methods of interpretation. This requirement is limited only by rules and principles which take precedence over the Community's obligations under international law. Such rules and principles include, for example, general legal principles and in particular the principle of legal certainty. Therefore, an interpretation contra legem is not possible'.

[70] See in detail EIA case-law guide by European Commission (new updated version of 2013) available at <http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf> accessed 30 may 2016.

[71] For more information see the Eia Directive, 'The review process' available at <http://ec.europa.eu/environment/eia/review.htm> accessed 30 may 2016; Jan Darpö, 'The EIA Directive and Access to Justice' (2014) available at <http://www.jandarpo.se/upload/2014%20EIA%20and%20A2J_Final.pdf> accessed 30 may 2016.

[72] C-216/05 *Commission* v *Ireland*.

are individual decisions and plans with a potential effect on the environment. An example of these activities is in the context of new SEVESO establishments or the oil drilling activities for exploration purposes. These concerns are to be taken seriously, as it could be seen in the 2010 Macondo oil spill in the Gulf of Mexico that exploration activities do have potentially serious impacts on the environment.[73] It should also be noted that the citizens may draw attention to environmental concerns and may also know of some security issues eventually overlooked by authorities.

Seveso

The only provisions concerning participation in the Seveso II Directive were enacted to ensure appropriate consultation of the public on land-use planning policies.[74] In the revised Seveso II Directive, which subsequently became the Seveso III Directive, a number of important changes were introduced.[75] As regards public participation, there is an additional obligation for operators to provide sufficient information on risks for the purpose of land-use planning. Detailed procedural requirements for the public to participate in adopting specific individual projects are also laid down and a reference is included to Article 2 of the PP Directive for public participation on general plans and programmes. An additional topic is also addressed in that public participation is required when external emergency plans are adopted.

Evolution of the IPPC Directive from an Aarhus perspective

There were also very important developments as regards the Aarhus *acquis* within the framework of the IPPC Directive.[76] The original Directive was adopted in 1996 and already had some provisions on access to information, but only general requirements on public participation and no reference to access to justice at all.

In order to align it with the Aarhus Convention, new provisions were introduced in 2003. Concerning specifically participation, information on the possibilities for the public to participate had to be provided. Requirements were also introduced providing for early and effective opportunities for the public to participate in issuing new permits and in certain cases of permit update. As a

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73 The Deepwater Horizon Oil Spill (also referred to as the BP oil spill, the BP oil disaster, the Gulf of Mexico oil spill, and the Macondo blowout) began on April 20, 2010 in the Gulf of Mexico on the BP-operated Macondo Prospect. Following the explosion and sinking of the Deepwater Horizon oil rig, a sea-floor oil gusher flowed for 87 days, until it was capped on July 15, 2010.

74 Council Directive (EEC) 96/82 on the control of major-accident hazards involving dangerous substances, OJ L10/13.

75 European Parliament and Council Directive (EU) 2012/18 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC.

76 European Parliament and Council Directive (EU) 2010/75 on industrial emissions (integrated pollution prevention and control) OJ L334/17.

result of the 2010 recast of the IPPC Directive the Industrial Emission Directive (IED) came into force.[77]

Nuclear power

The Euratom Treaty based Community is not a signatory to the Aarhus Convention. However, there are a number of Aarhus requirements overlapping with the Convention. Given that all Member States are signatories to the Aarhus Convention, the process of transposing Aarhus-requirements in the nuclear field is already underway. EU secondary law – under the TFEU – implementing the Aarhus Convention also covers certain nuclear activities.[78] Council Directive 2009/71/Euratom establishes an EU framework for the safety of nuclear installations (requiring effective information in Article 8).[79] A recent proposal for its amendment also covers public participation in accordance with existing EU rules and international obligations.[80] Council Directive 2011/70/Euratom[81] on the management of spent fuel and radioactive waste regulates both public participation and access to information (Article 10 on transparency).[82]

Lex offshore

In 2011 the Commission tabled a proposal for a regulation on the safety of offshore oil and gas prospection, exploration and production activities.[83] In this proposal – based on the environmental chapter of the TFEU – a strong line of procedural guarantees on public consultation for both plans and projects was included. Article 5 of Directive 2013/30/EU on safety of offshore oil and gas operations refers to the public participation rules laid down in the EIA and SEA Directives when applicable, and provides for residual rules for those cases not covered under the mentioned directives.[84]

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77 Ibid.

78 See Council Directive (EEC) 85/337 on the assessment of the effects of certain public and private projects on the environment (EIA Directive) annex I, OJ L175/40.

79 Council Directive (EURATOM) 2009/71 establishing a Community framework for the nuclear safety of nuclear installations, OJ L172/18.

80 Commission, 'Document in Transparency' Com (2013) 343 final, art 8, para 3 as amended.

81 Council Directive (EURATOM) 2011/70 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste, OJ L199/48.

82 For further information see also National Association of Committees and Commission of Information - French 'Local Commissions of Information' (CLIs) and their national federation the (ANCCLI) active in the nuclear field, see for more details: <http://www.anccli.fr/> accessed 28 may 2016.

83 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on safety of offshore oil and gas prospection, exploration and production activities' COM (2011) 688 final; to follow co-decision: <http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=fr&DosId=200978#413858> accessed 30 may 2016; final text adopted under European Parliament and Council Directive (EU) 2013/30 on safety of offshore oil and gas operations and amending Directive (EC) 2004/35, OJ L178/66.

84 Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC OJ L 178/66.

Maritime spatial planning and coastal management plans

In line with the Commission's proposal Directive 2014/89/EU establishing a framework for maritime spatial planning follows another approach in complying with the obligations flowing from the Aarhus Convention.[85] Recital 21 refers to the PP Directive as a good example to follow in meeting those requirements while Article 9 simply refers to the relevant provisions established in Union legislation.

TEN-E Regulation

Regulation (EU) No 347/2013 also contains provisions on public participation in permit granting and in the implementation of projects of common interest.[86] It also addresses in a number of instances public participation requirements.

Alien invasive species and Directive 2003/35/EC

In 2014, the Regulation on invasive species was adopted where a specific reference was included on participation to the PP Directive on plans to be applicable to action plans pursuant to Article 13 and where management measures are put in place pursuant to Article 19.[87]

Air quality and Directive 2003/35/EC

A few years ago a proposal was adopted by the Commission as part of the air quality package.[88] Here we find yet another technique, namely the modification of the PP Directive, by way of introducing a new letter *(g)* in order to ensure that under Article 6, national air pollution control programmes are open for public consultation in accordance with the Aarhus Convention.[89]

Future perspectives of public participation in the EU

The above changes as regards participation in the drawing up of strategies and plans show that the legislators are aware of the Aarhus requirements in

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[85] Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning OJ L 257/135; see also Commission, 'Proposal for a Directive establishing a framework for maritime spatial planning and integrated coastal management' COM (2013) 133; to follow co-decision process see <http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=202463> point 1.2 of the Explanatory memorandum, accessed 30 may 2016.

[86] European Parliament and Council Regulation (EU) 347/2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009.

[87] European Parliament and Council Regulation (EU) 1143/2014 on the prevention and management of the introduction and spread of invasive alien species.

[88] Commission, 'Proposal for a Directive of the European Parliament and of the Council on the reduction of national emissions of certain atmospheric pollutants and amending Directive 2003/35/EC' COM (2013) 0920 final.

[89] Intra-institutional negotiations on the text are ongoing: see http://www.consilium.europa.eu/en/press/press-releases/2015/12/16-national-emissions-air-pollutants-council-agrees-position-on-new-limits/ accessed 30 may 2016.

the area and have a clear intention of complying with international obligations. Regarding plans under EU law having an effect on the environment in the context of drawing up the National Renewable Energy Action Plans[90] the ACCC sent a strong signal finding that the EU was in non-compliance with Article 7 of the Convention.[91]

4 The third pillar: Access to justice in the EU and its Member States in general

Access to justice is the guarantee element of the three pillars system of the Aarhus Convention. The first two pillars are interconnected with access to justice, the third pillar, meaning that in order to have an effective system of access to information and participation, there is a need to guarantee citizens' rights to go to court to remedy any breach of the Convention's requirements. One can see that in the third pillar there is also a three pillar structure: justice under the information pillar, justice under the participation provisions and justice covering anything that goes beyond the first two pillars.

Within the third pillar, there are also three very well distinguished procedural elements: standing (locus standi), effective procedures and effective remedies.

Concerning standing, the public concerned (persons affected, or likely to be affected, and their associations)[92] has the right to challenge administrative omissions, decisions and acts. Once in court, procedural guarantees need to be in place (the second element), i.e. fair and equitable procedures that should be timely and not prohibitively expensive (along with considering financial assistance mechanisms if need be). Injunctive relief should also be provided (as appropriate) and information on procedural rules are to be made available to the public. The final decision of the court should address the issue at stake in an appropriate manner providing for a satisfactory resolution of the case (effective remedies, the third element).

So far, the EU has adopted various legislative acts to ensure the implementation of the Aarhus Convention (including access to justice provisions) at both

[90] As required under European Parliament and Council Directive (EC) 2009/28 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L140/16.

[91] Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the EU; see also Daniela Obradovic, 'EU Rules on Public Participation in Environmental Decision-Making Operating at the European and National Levels' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten*, see footnote 24, 165.

[92] As defined in the definitions of the Convention and the EIA, IPPC, Seveso Directives.

Member State[93] and EU level.[94] However, access to justice has always been a very important component of EU law principles even before the ratification of the Convention. This is shown by the extensive case-law on the effective judicial protection doctrine[95] in the field of EU law.[96]

Whenever EU law confers rights to Member States citizens, these rights should be protected effectively while respecting the principle of equivalence under which those rights are to be protected in the same way as the rights derived from the national rules. The principle of effectiveness means that the exercise of rights should not be made excessively difficult or impossible. These criteria restrict the residual procedural autonomy of the Member States according to which the detailed arrangements for the protection of EU based rights are to be determined by the domestic legal order.

The procedural autonomy must be read along the obligations of the Member States when implementing EU directives. In an infringement procedure against Ireland the Court clarified some very important principles as regards appropriate transposition of a directive. It held that "the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner".[97] The Court further highlighted that there is an established line of cases requiring that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty. This requires that, in the case of a directive

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93 See European Parliament and Council Directive (EC) 2003/4 on public access to environmental information and repealing Directive 90/313/EEC and Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Directives 85/337/EEC and 96/61/EC.

94 See Aarhus Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

95 See detailed analysis of relevant case-law in Àine Ryall, *Effective judicial protection and the EIAD in Ireland* (Oxford, Hart Publishing 2009) 75 ff; also in Jan H. Jans and Hans H.B. Vedder, *After Lisbon, The leading monograph on European Environmental Law*, see footnote 16, 183 ff; Jean-Victor Louis and Thierry Ronse, 'L'Ordre Juridique de l'Union Européenne' [2005] Dossier de droit européen 13, 303; Sean van Raeppenbusch, *Droit Institutionnel de l'UE* (Larcier 2006) 501.

96 C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*; C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*; C-268/06 *Impact v Minister for Agriculture and Food and Others*; Joined cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornells van Veen v Stichting Pensioenfonds voor Fysiotherapeuten;* C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*.

97 C-427/07 *Commission* v *Ireland*, paras 54 ff, emphasis added; see, inter alia, C-32/05 *Commission* v *Luxembourg*, Opinion of AG Kokott, para 34.

intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights.[98]

Concerning specifically access to justice, the CJEU hold that leaving a decision to the unconstructed discretion of courts goes beyond what permissible under EU law. The CJEU held that –given the fact that the loser pays principle is merely a discretionary practice on the part of the courts –, it cannot be regarded as an appropriate transposition by the Member State concerned.

Of course, the above is to be interpreted in the light of a relatively broad room of manoeuvre that the Member States have in transposing directives. National procedural autonomy will apply as it has been highlighted by the CJEU[99] and the Advocates General.[100] However, in the Aarhus context, as emphasized by the Advocates General and also by a number of scholars, Member States discretion in transposing access to justice is considerably restricted by the spirit, the principles, the provisions of the Aarhus Convention and EU law itself.[101] As was pointed out most recently by the Court in the *Edwards* case, the objective of ensuring that the provisions of the directives are effective also limits the national judges' discretion to award costs. National courts need to ascertain that the costs are not prohibitive and that the objectives of broad access to justice are achieved.[102]

Other overarching principles in the field of justice include: first, that standing is to be awarded in a non-discriminative manner,[103] second, that the public exercising its rights should not be penalized for their rightful actions under law,[104] and third, information on the remedies available for the protection of rights should be made easily accessible[105] and, finally, that all the guarantees of access to justice must be applicable at all instances.[106]

The Lisbon Treaty has taken a further step by codifying the effective judicial and legal protection principles in Article 47 of the Charter of Fundamental Rights and in Article 19(1) TEU. However, the significant change brought about

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[98] See, inter alia, C-207/96 *Commission v Italy*, Opinion of AG Lenz, para 26.

[99] C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*; see also C-268/06 *Impact v Minister for Agriculture and Food and Others*, para 44; see most recently C-570/13 *Karoline Gruber v Unabhängiger Verwaltungssenat für Kärnten and Others*, para 38.

[100] See C-260/11 *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*, Opinion of AG Kokott, para 20.

[101] See Jan H. Jans and Hans H.B. Vedder, *After Lisbon, The leading monograph on European Environmental Law*, see footnote 16, 236.

[102] Case C-260/11 *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*, para 26.

[103] UNECE, 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' (Aarhus Convention) (25 June 1998), art 3(9).

[104] Ibid, art 3(8).

[105] Case C-427/07 *Commission* v *Ireland*.

[106] C-260/11 *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*.

by the Aarhus Convention is undeniable, namely that it started to broaden the concept of standing in EU law, in particular, by giving rights to environmental associations (eNGOs). Citizens and eNGOs as a result are recognized to have a privileged status and a right to act on behalf of nature and environmental protection interests.

As it is already obvious from this discussion, the picture is quite complex and this chapter requires a more detailed structure than the previous ones. Access to justice shall be explored as follows: (1) access to justice at EU level: the Aarhus Regulation; (2) first pillar and access to justice at Member State level; (3) second pillar and access to justice (Article 9 (2) and (4) of the Aarhus Convention), and its recent upsurge of the case law; (4) access to justice in the meaning of Article 9(3) and (4) of the Aarhus Convention; (5) the role of national courts.

4.1 Access to justice at EU level: the Aarhus Regulation

At EU level access to justice in environmental matters is based on the Aarhus Regulation EC/1367/2006.[107] It provides for a two-tier approach. The first instance is internal review of administrative acts or omissions. Specific criteria have to be fulfilled by NGOs.[108] Under Article 12 any NGO which is not satisfied with the reply to its appeal or did not get any reply may go to the CJEU after waiting 18 weeks.[109] During the co-decision procedure of the Aarhus Regulation the European Parliament proposed giving standing to individuals, but this was not retained.[110]

Relying on Article 263 TFEU, Article 2(I)(g) of the Aarhus Regulation specifies that legally binding acts of individual scope having an external effect may be challenged in front of the EU courts. A number of cases before the CJEU

[107] European Parliament and Council Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264/13; for further analysis see amongst others Marc Pallemaerts, *The Aarhus Convention at Ten*, see footnote 24, ch 10.

[108] See European Parliament and Council Regulation (EC) 1367/2006 on the application of the Aarhus Convention to Community Institutions and bodies, art 11: 'Criteria for entitlement at Community level 1. A non-governmental organisation shall be entitled to make a request for internal review in accordance with Article 10, provided that: (a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice; (b) it has the primary stated objective of promoting environmental protection in the context of environmental law; (c) it has existed for more than two years and is actively pursuing the objective referred to under (b); (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities'.

[109] See detailed critical analysis in Jan H. Jans and Hans H.B. Vedder, *After Lisbon, The leading monograph on European Environmental Law*, see footnote 16, 246 ff; Daniela Obradovic, 'EU Rules on Public Participation in Environmental Decision-Making Operating at the European and National Levels' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten*, see footnote 24, 172 ff.

[110] Marc Pallemaerts, *The Aarhus Convention at Ten*, see footnote 24, ch 10, 277.

specifically concerned the application of the Aarhus Regulation's provisions on access to justice.

Moreover an eNGO has filed a communication to the ACCC alleging breach of Aarhus Convention provisions on access to justice. The ACCC did not find the EU in non-compliance with the Convention's provisions. However, it went into a detailed analysis of the restrictive case-law stemming from the *Plaumann* doctrine.[111] A number of subsequent cases were analysed, including the *Greenpeace* case.[112] It was concluded that should the CJEU not change its doctrine (or were Commission administrative rules not adapted) a future case-law building on the Regulation and not taking into account Aarhus provisions would risk being found to be in non-compliance.[113] A number of scholars, joining forces with the Compliance Committee are calling for changes as regards the application of the access to justice provisions of the Convention to the EU institutions.[114] It should also be observed that there is a more lenient line of case-law even outside the scope of the Convention, diverging from the *Plaumann* doctrine, which was summarized in the Opinion presented by Advocate General Bot[115] in the *Sahlstedt* case.[116] As a possibly 'gentle' signal to eventually foster change in the jurisprudence, the ACCC reactivated its proceedings just before the upcoming Aarhus Regulation rulings.[117]

Two recent judgments are worth discussing here. In *Stichting Natuur en Milieu*,[118] and *Vereniging Milieudefensie* the General Court found that the right to administrative review by the EU institutions should also cover regulatory acts

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[111] C-25/62 *Plaumann v Commission*.

[112] C-321/95P *Greenpeace v Commission*.

[113] UNECE, Compliance Committee, 'Findings and recommendations on communication ACCC/C/2008/32' Aarhus Convention concerning compliance by the European Union (2008), available at <http://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html> accessed 8 june 2016.

[114] For detailed analysis see in Jan H. Jans and Hans H.B. Vedder, *After Lisbon, The leading monograph on European Environmental Law*, see footnote 16, 249; Ludwig Krämer, *EU environmental law*, see footnote 24, 147-149; see Marc Pallemaerts, 'Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention' (IEEP, UK/Brussels, Belgium june 2009); see Daniela Obradovic, 'EU Rules on Public Participation in Environmental Decision-Making Operating at the European and National Levels' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten*, see footnote 24, 173; Nicolas de Sadeleer, *Environnement et marché intérieur*, see footnote 9, 190; Charles Poncelet, 'Access to Justice in Environmental Matters — Does the European Union Comply with its Obligations?' [2012] Journal of Environmental Law; Marc Pallemaerts, 'Access to Environmental Justice at EU level' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten*, see footnote 24.

[115] C-362/06 P *Markku Sahlstedt and Others v Commission of the European Communities*, Opinion of AG Bot. However, finally the Court has not followed the line of argumentation.

[116] C-362/06 P *Sahlstedt* v *Commission*.

[117] Joined cases C-404/12 P and C-405/12 P *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*.

[118] T-338/08 *Stichting Natuur en Milieu, Pesticide Action Network Europe v Commission*.

of a general nature (legislation is, however, exempt).[119] The General Court held, in particular, that "in so far as Article 10(1) of Regulation No 1367/2006 limits the concept of 'acts' in Article 9(3) of the Aarhus Convention to 'administrative act[s]' defined in Article 2(1)(g) of that regulation as 'measure[s] of individual scope', it is not compatible with Article 9(3) of the Aarhus Convention".[120] The Commission appealed the judgments.[121] In both rulings, the CJEU came to the conclusion that the Aarhus Regulation is in line with the Aarhus Convention.[122]

It is submitted that the rulings have no bearing on the broad interpretation of access to justice at Member State level. One can criticize the current system, however, there are already different sets of access to justice rules at EU and Member State levels since the entry into force of the Aarhus Regulation. Actually, as the Commission claimed before the ACCC, the overall logic suggests that this system was set to ensure a symbiotic coexistence between the CJEU and national courts.[123] This implies that there is an important role played by the courts of the Member States in the EU system of judicial remedies, and in particular the possibility for those courts to make references for preliminary rulings. The (then) EC Treaty has established a complete system of remedies and procedures intended to ensure control of the lawfulness of the acts of the institutions by entrusting it to the Community judicature, acting in cooperation with national courts where appropriate.[124] The EU judicial review system is comparable to a funnel turned upside-down: before the CJEU access to justice is limited, and this is compensated by offering wider access at Member State. This implies that remedies at national level need to be judicial remedies, since administrative remedies will not allow further recourse to the CJEU through a preliminary reference under Article 267 TFEU.[125]

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[119] T-396/09 *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission.*

[120] T-396/09 *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission,* para 69, and T-338/08 *Stichting Natuur en Milieu, Pesticide Action Network Europe* v *Commission,* para 83.

[121] Joined cases C-404/12 P and C-405/12 P *Council and Commission* v *Stichting Natuur en Milieu and Pesticide Action Network Europe.*

[122] Joined cases C-404/12 P and C-405/12 P *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe.*

[123] UNECE, Compliance Committee, 'Findings and recommendations on communication ACCC/C/2008/32' Aarhus convention concerning compliance by the European Union, see footnote 114.

[124] See in particular para 52 of submission by the Party concerned in ACCC/32 on 11 June 2009 and para 2 of submission made on 14 March 2011; documents are available at http://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html accessed 30 may 2016.

[125] See the analysis in more detail on the EU level access to justice and its relation to the Slovak Brown Bear done by Peter Oliver, 'Access to information and to justice in EU environmental law: The Aarhus Convention' [2013] Fordham International Law Journal 36:1423, available at <http://fordhamilj.org/files/2015/10/Oliver_AccesstoInformationandtoJusticeintheEUEnvironmentalLaw.pdf> accessed 30 may 2016.

Moreover, the Aarhus Convention and the Aarhus Regulation award rights to NGOs and therefore they have a privileged status to challenge acts and omissions.

4.2 Access to information and its relation to access to justice at national level

The requirements of Article 9(1) of the Aarhus Convention are transposed by Article 6 of Directive 2003/4/EC. However, due to recent modifications, the Seveso III Directive[126] and also the IED (Industrial emissions or IPPC Directive) do cover access to justice in the information context. Since the scope of those directives is different but the main provisions are the same, the short summary below will focus on the provisions of Directive 2003/4/EC.

The general rule is to have at least two levels of appeal. In principle, one would be an administrative appeal followed by judicial review as provided in the majority of Member States. Concerning the first level, Article 6(1) requires an (internal) review of acts or omissions of a public authority by an independent and impartial body established by law. This review must be expeditious and free of charge or inexpensive. Instead, the procedural safeguards concerning judicial review are not defined in Directive 2003/4/EC, and no obligation of an in-expensive or timely procedure before a court of law or before another independent and impartial body of law is expressly spelt out. The key concepts of procedural guarantees are still awaiting interpretation by the CJEU.

4.3 Public participation and its relation to access to justice at Member States' level

The EU has transposed the requirements of Article 9(2) concerning public participation related decisions, acts, omission by public authorities mainly by Directive 2003/35/EC. Even though twofold in aim and scope, the directive addresses access to justice only as regards individual decisions under the EIA Directive and IPPC Directive. Article 9(2) is also transposed by the Seveso III Directive.[127] Since there is a large number of EU secondary law instruments bearing public participation provisions, they should also, in principle, provide for access to justice.[128] However, until now there has not been much of a sectoral-legislative enthusiasm to enlarge the scope of access to justice. For instance, during the co-decision procedure for the revision of the Seveso Directive there were some voices advocating for inclusion of plans under the scope of

[126] European Parliament and Council Directive (EU) 2012/18 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC, art 21 OJ L197/1.

[127] Ibid, art 22. It should be highlighted that the original proposal of the Commission covered also access to justice against more aspects of plans and the EP even went further.

[128] See above § 3.2.

access to justice provisions, in line with the jurisprudence of the CJEU.[129] The European Parliament specifically aimed at covering public participation as a whole. Compared to this, the Commission's original proposal can be considered modest. The final version of the text that has entered into force aims to cover both individual decisions and plans (Article 6 and 7 of the Aarhus Convention) by access to justice.

There is a robust body of case-law on the interpretation of the access to justice provisions. At the time of drafting this text, there were already 14 judgments linked to access to justice under the Aarhus *acquis*. Further infringement procedures are in the pipeline, and certainly more will follow if the Commission finds indications of restrictive practices or national transposing provisions.[130]

Even though the CJEU cannot take the role of the legislator, it often provides – albeit sometimes limited – guidance to national courts. Often the CJEU does not tell them what to do, only what not to do. For instance, considering the question at issue in *Djurgaarden*, the Court held that requiring 2000 members for an eNGO to have standing is too restrictive, but would 1999 be acceptable? Such a question remains unanswered.[131]

EU law and standing for citizens, their associations and eNGOs in front of national courts

The Convention requires that citizens and their associations (the public concerned) are given standing. It is important to highlight that the term has three components. It covers (1) individuals and (2) their associations, both having to prove that their rights were impaired or if at least that they have a sufficient interest in the matter at hand, and (3) eNGOs pursuing the objective of protecting the environment, having a privileged status to ensure their environmental watchdog role.[132] As indicated by Ebbesson already before the ratification of the Aarhus Convention, different Member States already ensured standing for environmental associations.[133] However, in view of the legislative framework created in 2003, the ratification process of the Aarhus Convention and the developing case-law of the CJEU, there was certainly a major impact on many national legal systems.[134]

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[129] See C-237/07 *Dieter Janecek v Freistaat Bayern*.

[130] Janez Poto'nik, European Commissioner for Environment, 'The fish cannot go to Court – the environment is a public good that must be supported by a public voice' (Seminar on Access to Justice and Organisation of Jurisdictions in Environment Litigation by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) Brussels, 2012) available at <http://europa.eu/rapid/press- release_speech-12-856_en.htm> accessed 30 may 2016.

[131] C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*.

[132] Article 12 of the EIA Directive, Article 25 IED and Article 22 of Seveso III Directive.

[133] Jonas Ebbesson, *Access to justice in environmental matters* (Kluwer Law International 2002) 29, 30.

[134] See to this effect the Jan Darpö, 'Effective Justice?' (Sixth meeting of the Task Force on Access to Justice, Geneva 2013).

According to the case law of the CJEU, the Member States have a substantial level of discretion to be used in accordance with the objective of broad access to justice. However, as the CJEU stressed in *Edwards*, there are limits to this and in particular associations are naturally required to play an active role in defending the environment, which again reiterates their privileged status in courts.[135]

Standing and the Djurgaarden ruling

The CJEU has gradually moved into the relatively broad sphere of Member States' discretion when transposing the access to justice requirements and qualified it. In *Djurgaarden*, the CJEU followed the Advocate General, who considered that the provisions of the Swedish system were such as to deprive local associations of any judicial remedy, given the fact that, at the time of the appeal, only two associations had at least 2000 members as required under national law.[136] Consequently, such provisions were held to be inconsistent with Article 11 of the EIA Directive.[137]

Standing and the Trianel ruling

The CJEU further nuanced its approach in *Trianel*. Faced with the question of the interpretation of the term 'public concerned' and even though it did not expressly award direct effect to this term, the Court used a rather special argument. As Advocate General Sharpston argued in her opinion, both the concept of eNGO and their exact rights were still unclear:[138] do NGOs have to show the impairment of a right (or to have an interest) to be granted standing, or may they simply rely on their special privileged status based on the Aarhus Convention and secondary EU law?

According to the Court, "It should be noted in that regard that, taken as a whole, Article 10a of Directive 85/337 [EIA directive] leaves the Member States a significant discretion both to determine what constitutes impairment of a right and, in particular, to determine the conditions for the admissibility of actions and the bodies before which such actions may be brought. The same is not true, however, of the provisions laid down in the last two sentences of the third paragraph of Article 10a of Directive 85/337. By providing that the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) of Directive 85/337 are to be deemed sufficient and that such organisations are also to be deemed to have rights capable of being impaired, those provisions lay down rules which are precise and not subject to other conditions".[139]

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[135] C-260/11 *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*, para 40.

[136] Ibid.

[137] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, para 50.

[138] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*.

[139] Ibid, paras 55-57 (emphasis added).

In the end, the Court found that "Article 1(2) of Directive 85/337 lays down rules that are precise and not subject to other conditions', although, in reality, Article 1(2) lays down rules that are explicitly subject to further national conditions ("in accordance with national rules"). The Court interpretation might be seen as going *contra legem*. The Court probably wanted to emphasize that there are limits to the discretion of the Member States in restricting standing rights, the implication possibly being that Member States do not have a possibility to set additional criteria for NGO standing, apart from the one of requiring them to be promoting environmental protection. This is a clear signal by the CJEU that there is a further limit to Member States' discretion, which was not so clearly detailed in the *Djurgaarden*.

Scope or standard of the review – scrutiny by the national court

There are widely diverging practices in the EU Member States on the extent courts review a challenged administrative decision.[140] The *Altrip* case addressed the Aarhus Convention requirement that both the procedural and the substantive legality are reviewed.[141] Actually the request for preliminary reference pointed to the core of the question as to what can be regarded as a procedural and what is substantive legality. In very simple terms, procedural legality would cover issues strictly related to participation, deadlines, or even competence, while substantive topics would refer to the actual content and possibly to the merits of the decision and to the facts of the case. The CJEU ruled that the defects which can be relied upon should affect the claimant in a certain way, and that the national courts should assess the seriousness of the defect invoked on a case by case basis. The national court should ascertain, in particular, whether that defect has deprived the public concerned of one of the guarantees foreseen under the law. The public should be allowed to have access to information and to be empowered to participate in decision-making. As Ryall pointed out, the principle of effective judicial protection is more likely implying a more intensive review.[142] As indicated in defence of the German Government in the *Trianel* case, the German legal system provides for a very intensive review, examining thoroughly the case at hand. This is the reason why Advocate General Sharpston, in her opinion in that case, referred to the German courts as Ferraris of very high quality, and intense scrutiny, but accessible only to a few.[143]

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[140] See for a detailed analysis: Jonas Ebbesson, *Access to justice in environmental matters*, see footnote 134, 34, 35; Jonas Ebbesson, 'Interactions and Tensions between Conventional International Law and EU Environmental Law' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten*, see footnote 24, 259, ref to Communication ACCC/C/2008 UK; on a different topic see Oda Essens, Anna Gerbrandy and Saskia Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Groningen, Europa Law Publishing) 2009.

[141] Case C-72/12 *Gemeinde Altrip and Others v Land Rheinland-Pfalz*.

[142] Àine Ryall, *Effective judicial protection and the EIAD in Ireland* (Oxford, Hart Publishing 2009).

[143] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, para 77. The AG even used a situational exercise, to demonstrate whether

Even after *Altrip* it is unclear to what extent the national courts have to review challenged administrative decisions: do they have to go into the merits of the case, for instance if certain environmental aspects were not considered? Probably one of the extremes would be that the court examines all aspects of the decision, going into the factual background and the merits of the case (what are the different elements assessed during the administrative procedure, on what basis, i.e.a full scrutiny). The other extreme would be that the courts would only review procedural errors. However, as the directives (based strictly on the wording) implementing the Aarhus Convention require scrutiny of "the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive", the latter interpretation would in my view not be suitable to ensure effective judicial protection, hence the truth must lie somewhere in between the two extremes.

Further hints were provided by the CJEU. In *Boxus* it held that the fact that a project is adopted by a legislative act which does not fulfil the conditions set out in Article 1(4) of the EIA Directive does not mean that it is not subject to a review procedure for challenging its substantive or procedural legality within the meaning of those provisions.[144] The Court went on to say that it is for the national court to control the legality of the legislative acts and to see if they were just adopted in the framework of a "showcase-exercise" with the only aim to avoid challenges to the project by ordinary judicial means. If no review procedure of the nature and scope set out above was available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous paragraph and, as the case may be, should draw the necessary conclusions by not applying that legislative act. Of course this would mean that the national court would have to embrace a very high level of scrutiny, which of course would only be possible if the facts and all circumstances were assessed.

Most recently, the CJEU also addressed the topic marginally in the *Clientearth case*.[145] It required national courts to look into the content of the plans, therefore asking for a more in-depth assessment than a mere procedural review, in order to establish whether or not the period when the limit values were exceeded are as short as possible and also that the authorities respect the substantive provisions of the Air Quality Directive.[146]

eNGOs have standing or not under German law. The exercise involved the construction of two power plants. The first had a village nearby and had some people affected by the potential pollution generated by the power plant. Based on the German system, as there was a direct impact on health, the eNGO could have standing. The second scenario as presented by the AG was, whereby there was no village near the power plant, in this case, as there was no potential effect on health, it was effectively demonstrated by her that there was no possibility for standing for NGOs under German law in certain circumstances contrary to EU law (in particular that based on German rules those environmental NGOs did not have locus standi, that could not demonstrate a personal interest in starting litigation).

[144] C-128/09 *Antoine Boxus and Willy Roua v Région wallonne*.

[145] C-404/13 *R* ex parte *ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs*.

[146] European Parliament and Council Directive (EC) 2008/50 on ambient air quality and cleaner air for Europe, OJ L 152/1, paras 56 and 57, arts 13 and 23.

While it is submitted it would be highly preferable to have a broad scope of review, it is important to point out that in some Member States separation of powers limits the depth of judicial review, and the expert-quality of the review may also raise some issues. If a court focuses too much on a given case, there might not be resources to cover other – not less important – cases, this also impacting the timeliness of the procedure.[147]

Injunctive relief, as appropriate

Based on the ground breaking *Factortame* ruling, injunctive relief is one important cornerstone of access to justice.[148] Injunctive relief is also an important element of the Aarhus Convention. Article 9(4) requires the Member States to "[...] provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive". The Implementation Guide of the Aarhus Convention can be a useful source of interpetation and guidance on the meaning of the term.[149] The CJEU also refers to the Guide as a source of inspiration, though underlining that the it does not have a binding force.[150]

Also concerning interim relief, the requirements stemming from the Aarhus Convention run in parallel with the EU general principle of effective judicial protection. In *Factortame*, the CJEU held that "the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule

[147] See, for the example of Germany, Bilun Müller, '....' in this book.

[148] Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, para 21.

[149] See UNECE *The Aarhus Convention. An Implementation Guide* 2nd (2014), at 200: "When irreversible damage from a violation has already occurred, a remedy often takes the form of monetary compensation. When initial or additional damage may still happen and the violation is continuing, or where prior damage can be reversed or mitigated, courts and administrative review bodies also may issue an order to stop or to undertake certain action. This order is called an 'injunction' and the remedy achieved by it is called 'injunctive relief'. In practice, use of injunctive relief can be critical in an environmental case, since environmental disputes often involve future, proposed activities, or on-going activities that present imminent threats to human health and the environment. In many cases the resulting damage to health or the environment would be irreversible. Compensation in such cases is often inadequate" (available at http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf - accessed 30 may 2016).

[150] C-260/11 *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*, para 34; C-616/10 *Solvay SA v Honeywell Fluorine Products Europe BV and others*, para 28.

of national law, is obliged to set aside that rule".[151] Based on the *Unibet* ruling[152] it may be said that effective interim judicial protection of rights is in fact a crucial element of the principle of effective judicial protection. The same two general conditions apply, namely effectiveness and equivalence.[153]

The Križan case

The predecessor to *Križan* was *Factortame* and interestingly enough in both cases over two decades apart the agent from the Commission Legal Service was Mr Peter Oliver. In *Križan*[154] Advocate General Kokott delivered her conclusions again showing acumen by linking the Aarhus-concept and the general principle of effective interim judicial protection in order to ensure full effectiveness of national judgments aimed at protecting rights. She made explicit reference to Article 9(4) of the Aarhus Convention provision on injunctive relief. Advocate General Kokott suggested that the access to justice rules of the EIA Directive and the IED implicitly provide for injunctive relief. Article 47 of the Charter of Fundamental Rights on access to justice and Art 19 TEU on effective legal remedies are also relevant in this context. The CJEU followed her reasoning and used the argument of irreversibility.[155] If there was no right for the public to ask the court or competent independent and impartial body to order interim measures such as to prevent that pollution, including, where necessary, by the temporary suspension of the disputed permit, this would lead potentially to an irreversible damage to the environment. However, the CJEU did not follow AG Kokott on the issue of *ex officio* powers. The CJEU concluded that courts have an obligation to award injunctive relief, but only on the basis of a specific request. In other words: going *ultra petita* is not (yet) an EU requirement.

In the environmental *acquis*, apart from the Aarhus Convention, there is no explicit reference to interim measures, although recently there was some tentative step in this direction.[156]

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[151] Joined cases C-143/88 and C-312/93 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn*; C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*.

[152] Ibid, para 67.

[153] Case 33-76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, para 5; Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State*, para 12.

[154] C-416/10 *Jozef Križan and others v Slovenská inšpekcia životného prostredia*.

[155] Ibid, paras 105-110.

[156] The Commission attempted to incorporate the requirement of injunctive relief in the text of the SEVESO III proposal, however, it did not survive Council negotiations. See in detail Commision, 'Proposal for a Directive of the European Parliament and of the Council on control of major-accidents hazards involving dangerous substances' COM (2010) 781 final. The European Parliament also took "(12) *[...] the view that the need to improve injunctive relief remedies is particularly great in the environmental sector; calls on the Commission to explore ways of extending relief to that sector*": European Parliament Resolution, 'Towards a Coherent European Approach to Collective Redress' (2011/2089 INI).

Costs

Article 9(4) of the Aarhus Convention requires that the justice-related procedures shall not be prohibitively expensive. Article 9(5) requires appropriate financial mechanisms to ensure this aim. The latter is a best endeavour clause, as the words 'shall be considered' are used, so one may presume that in fact there is no obligation on the parties to ensure financial mechanisms. This, however, is true only if there are no prohibitive costs involved. This interpretation is in line with the wording of the Charter of Fundamental Rights, which requires that legal aid is granted to further the effectiveness of judicial protection. Hence, one may conclude that in cases where the procedure is effective, meaning in particular that it is not costly, legal aid is not necessarily required by either the Convention or the Charter.[157]

The Darpö-study refers to a number of possible options to ensure that procedural costs are not prohibitive, such as cost-capping based on national salaries, to have an objective measurement, one-way cost-shifting, and so on. There are indeed a number of factors to be considered.[158]

In my view, the issue is extremely complex and it is difficult to see whether the procedures are actually prohibitively expensive or not and how this objective can be achieved. A number of important hints have been given, and some of them could be summarized as follows based on available jurisprudence, guidance and academic opinions.

In the Irish case the CJEU concluded that "*the procedures established in the context of those (i.e. the EIA Directive access to justice rules) provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures.*"[159] This is a very important indication which was further picked up by the Commission in *Edwards*.[160] The Implementation Guide provides also some elements for determining what can be considered prohibitively expensive. There have also been a number of findings and recommendations provided by the ACCC on the topic.[161] The Guide also highlights that in determining the exact term of prohibitive costs, clear criteria have not yet been set-up and the situation as a whole needs to be considered carefully when assessing the requirement of not prohibitively costly procedures.[162]

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[157] See also in this context C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, in particular paras 60-62, where the Court took a cautious approach.

[158] See Jan Darpö, 'On costs in the environmental procedure' (2010) available at <http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/Costs_JD_31012011.pdf> accessed 31 may 2016.

[159] Case C-427/07 *Commission* v *Ireland*, para 92 (emphasis added).

[160] C-260/11 *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*, para 27; C-427/07 *Commission* v. *Ireland*, Opinion of AG Kokott, para 93.

[161] Mr Morgan and Mrs Baker of Keynsham, 'Communication' (ACCC/C/2008/23 decision adopted in May 2011) 27, 33; Denmark in ACCC/C/2011/57.

[162] UNECE *The Aarhus Convention. An Implementation Guide* 2nd (2014), at 203 f (available at http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf - accessed 30 may 2016).

Along the lines suggested by the ACCC and the Commission, Advocate General Kokott emphasised that court costs in environmental proceedings in general may be considered to fall in the realm of public interest. It is therefore not acceptable to require public interest litigants to pay all the costs in relation to their tasks of pursuing protection of the environment. The Court followed her on this issue, holding that the national courts are to take into consideration all of the relevant legal provisions, including any cost protection regime, when assessing if costs are prohibitive or not.[163] As regards the question of the relevant criteria to be assessed, the CJEU found that both a subjective and an objective test is to be applied. Costs must not be objectively unreasonable, while there is need to take into account the individual situations and means available to the litigants. A very important aspect was also addressed, namely the need to consider that the context is public interest litigation with the aim of protecting the environment. As an active role is naturally recognized to eNGOs, they must not face costs that are objectively unreasonable and must not exceed their financial resources. The CJEU, however, drew the attention to the domestic courts' discretion in taking into account a number of issues, such as the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.[164] It should be underlined that this discretion has limits; Article 3(8) of the Aarhus Convention forbids penalising litigants just for exercising their rights under Convention.[165]

The CJEU affirmed *Edwards* in a more recent judgment against the United Kingdom.[166] What is definitely an additional element is that it was further clarified that cross-undertakings in damages are not prohibited under the Convention *per se*; however, costs incurred in relation to these should not be prohibitively expensive. It should also be underlined that there are some positive

[163] C-260/11 *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*, para 38.

[164] See also art 47 Charter of Fundamental Rights of the EU, and C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*: "The principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer"; see also art 9(5) Aarhus Convention, on financial assistance mechanisms.

[165] The very vague assessment criteria was immediately applied in the follow-up of the case in the UK. Supreme Court Judge Lord Justice Carnwath ruled that based on the subjective criteria, 25 000 £ was not considered to be prohibitively expensive in the specific case.

[166] C-530/11 *Commission* v *United Kingdom*.

changes in the UK on costs issues due to cost-capping rules introduced in relation to Aarhus cases.[167]

Effective remedies – guaranteeing an appropriate resolution of the administrative case

Article 9(4) of the Aarhus Convention specifically requires that effective remedies are provided.[168] Article 19(1) TEU also requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. Most recently the EIA Directive was amended in a way that remedies are available in case authorities do not fulfil their obligations.[169] This is a logical consequence of the effectiveness principle. The litigation cannot be a mere showcase exercise. National legal orders need to deliver justice to the parties to the procedures. This was already addressed by the case-law pre-dating the Aarhus Convention. In *Wells* the CJEU ruled on the consequences of a breach of European Union law.[170] It held that in order to remedy the failure to carry out an environmental impact assessment of a project within the meaning of the EIA Directive, it is for the national court to determine whether a consent already granted is to be revoked or suspended or alternatively, whether it is possible for the latter to claim compensation for the harm suffered. The issue was recently addressed again in the context of the EIA Directive in *Leth*.[171] The CJEU held that it is for the national court to determine whether the requirements of European Union law were applicable to the right to compensation, and in particular whether the existence of a direct causal link between the breach alleged and the damage sustained has been established.

Most recently the Court delivered a ruling on remedies in the *ClientEarth* case.[172] From the perspective of the development of the case-law, one of the most important results of this case was that the *Janecek* line of judgments was affirmed as a consistent line of interpretation by the CJEU.[173] This means, in particular, that whenever health is protected by a Directive, in this case the Air quality Directive, individuals should be in a position to protect their rights derived from EU law. The court took a small step further and held that legal

[167] The 60th Update to the Civil Procedure Rules that came into effect on the 1 April 2013. See specifically part 45 on cost capping (5000 £ for individuals and 10000 £ for NGOs).

[168] See on this topic and ACCC findings in Jonas Ebbesson, 'Interactions and Tensions between Conventional International Law and EU Environmental Law' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten*, see footnote 24, 260.

[169] See art 10a: "Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive". This provision was also inserted in the European Parliament and Council Directive (EC) 2008/50 on ambient air quality and cleaner air for Europe, art 30.

[170] C-201/02 *The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions*.

[171] C-420/11 *Jutta Leth v Republik Österreich and Land Niederösterreich*.

[172] C-404/13 *R* ex parte *ClientEarth* v *The Secretary of State for the Environment, Food and Rural Affairs*.

[173] See C-237/07 *Dieter Janecek v Freistaat Bayern*.

persons have the same rights, too, although in this instance – in my humble opinion – there should have been a reference made to the privileged status of eNGOs confirming that not only individuals (based on the effective judicial protection doctrine), but also NGOs have standing based on the aforementioned principle combined with the Aarhus Convention.

The future of environmental justice – Some of the topics still awaiting (further) clarification

The judgments discussed so far cannot be expected to represent the final word on delicate issues such as the level of scrutiny or costs, or standing for eNGOs, including foreign NGOs.[174] More cases are either in the pipeline or can be expected in the near future.

With regard to effective redress, one crucial topic is the interplay between timely adjudication and high quality of the review. Even the ancient Romans knew that time is crucial for litigants: *Bis dat qui celeriter dat*.[175] If rulings are delivered in an expeditious manner, this means lower costs, possibility more limited damage to citizens' (and developers') interests and to the environment itself. But perhaps the most crucial example is the decision on interim measures. If this is not taken in a timely manner, it may lead to irreversible damage. Regarding national practices on enhancing effectiveness, ACA-Europe has published a very important report which provides some guidance and overview of problems and good practices in the context of ensuring more effective judicial procedures, such as penalties in case of abuse of rights, special accelerated procedures, role of judges, and so on.[176]

Trends to enhance the effectiveness of environmental proceedings include national examples of specialised courts[177] and review bodies.[178] They include

[174] More in detail on this subject see Jonas Ebbesson, *Access to justice in environmental matters*, see footnote 134, 32 ff.

[175] See the European Parliament Resolution of 12 March 2013 on improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness, para 42: "Calls on the Commission and the Member States to explicitly define a specific timeframe in which court cases relating to the implementation of environmental law shall be resolved, in order to prevent the implementation of the environmental law and delays in court cases from being used as an excuse to avoid compliance and hinder investments; calls on the Commission to assess how many investments have been held back because of delays in legal proceedings relating to irregularities on the implementation of environmental legislation".

[176] Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, 'Preventing backlog in administrative justice' (Conference, Luxembourg 2010).

[177] Jan Darpö, 'Effective Justice?' (Sixth meeting of the Task Force on Access to Justice, Geneva 2013): the author considered that the Swedish, the Danish and the Finnish specialized courts for the environment would qualify as independent courts in the sense of ECHR, art 6.

[178] Richard Macrory and Michael Woods Modernising, *Environmental justice – regulation and the role of an environmental tribunal* (London 2003); see also Jan Darpö, 'Justice through Environmental Courts?

the Swedish Environmental Courts,[179] the Finnish administrative court with environmental experts, the Belgian specialised planning court in Flanders,[180] the specialised tribunal recently set up in Malta, the Environment and Planning Review Tribunal,[181] the Danish Nature and Environment Appeals Board,[182] the Irish "An Bord Pléanala", the United Kingdom's Environmental Tribunal,[183] or the Austrian *Umveltsenat*.[184]

A common element of the CJEU case law on access to justice in environmental matters is the fact that the national courts are given a very strong position in controlling national rules transposing EU law. If there is some degree of uncertainty, the CJEU prefers referring to national judges' competences in interpreting, controlling and even *horribile dictu* disapplying national law in the light of the obligations flowing from EU law.

As a recent study published by Darpö[185] indicated, there are still some problems in national systems when it comes to standing for eNGOs. For example, as was also highlighted by Commissioner Potočnik in his speech at the ACA-Commission Conference,[186] Slovenia[187] and Cyprus[188] both required eNGOs to have been active for five years before granting them standing. The old Commis-

Lessons Learned from the Swedish Experience' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press 2009) 176 ff.

[179] See Jan Darpö, 'Effective Justice?', see footnote 135.

[180] As highlighted by Luc Lavrysen at the Sixth meeting of the Task Force in Access to justice, see footnote 275.

[181] See the official site of the Maltese Planning Authority <https://www.mepa.org.mt/permits-appeals> accessed 1 june 2016.

[182] See Helle Tegner Anker, 'Study on the Implementation of Article 9.3 and 9.4 of the Aarhus Convention – Denmark' (The Aarhus Convention 2012/2013 access to justice studies) available at <http://ec.europa.eu/environment/aarhus/access_studies.htm> accessed 9 june 2016.

[183] Richard Macrory and Carol Day, 'Study on the Implementation of Article 9(3) and 9(4) of the Aarhus Convention in 17 of the Member States of the European Union, UK' (The Aarhus Convention 2012/2013 access to justice studies) see footnote 183.

[184] Operational until 2014, see the presentation by Verena Madner, 'More than the usual suspects. Public participation and Access to justice in Austria' (Environmental Democracy Conference, Budapest 2012) available at <https://jak.ppke.hu/karunkrol/palyazatok-programok/jean-monnet-programok/jean-monnet-kivalosagi-kozpont> accessed 1 june 2016.

[185] Jan Darpö, 'Study on the Implementation of Article 9(3) and 9(4) of the Aarhus Convention in 17 Member States of the European Union: Report on Sweden' (The Aarhus Convention 2012/2013 access to justice studies) see footnote 183.

[186] ACA-EUROPE, 'Access to Justice and organisation of jurisdictions in environmental litigation: national specificities and influences of European law (Connference, Brussels 23 November 2012) available at <http://www.aca-europe.eu/seminars/Bruxelles2012/Programme_en.pdf> accessed 1 June 2016.

[187] Amendments made on the 2 May 2014 in SI national law abolishing the 5 years criteria, see <http://www.uradni-list.si/1/content?id=117443> accessed 1 June 2016.

[188] Change in the legislation of Cyprus entering into effect as of 26.10.2012, based on EIA Act 137(I)/2012, abolishing the 5 years criteria.

sion proposal on access to justice required three years of existence for associations (two years for NGO).[189] It is not clear whether three years would be acceptable[190], or perhaps two years[191], or one year.[192]

Recently an Austrian court raised the issue of direct effect of certain provisions of the EIA Directive and whether it was possible to challenge negative screening decisions or not in particular by neighbours. The CJEU ruled that the notion of public concerned was to be interpreted broadly and that it is inconsistent with the EIA Directive's access to justice provisions to restrict standing for neighbours.[193]

The standing of citizens' associations, or ad hoc groups is also still unclear. Parties to the Aarhus Convention may well decide to give special privilege status to ad hoc groups. However, it is plain from the wording of the Convention that these groups – unlike eNGOs – do not enjoy more generous standing than the one given generally to individuals (interest-based or impairment of a right). One might also wonder if standing for these associations may be restricted based on the number of their members. For instance would a threshold of 200 members be compliant with EU law? There are pros and cons, but in principle it is again a matter for the Court to decide.

Another relevant problem is the issue of prior participation or preclusion. Some scholars tend to interpret *Djurgaarden* in a very straightforward way, namely that access to justice should be granted to the public concerned regardless of the role they might have played during the participations stage. In a recent ACCC finding the principle of preclusion was also found to be against the Aarhus Convention.[194] However, there are other opinions that tend to be more cautious, and would allow for certain well-defined cases of preclusion. As a result of the infringement action taken by the Commission against Germany it was clarified that under EU law this is not permissible.[195]

The CJEU has instead not yet dealt with the question of discrimination against foreign eNGOs.

4.4 Access to justice under Article 9(3) and (4) of the Aarhus Convention: options for reforming EU law

Access to justice based on Article 9(3) means that citizens and their associations, including eNGOs should be given the possibility to ask for

[189] Commission, 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters' COM (2003) 624 final.

[190] See in Germany, Belgium, Luxembourg, France and Sweden.

[191] See in Spain.

[192] See in Irish and Polish national legal systems.

[193] C-570/13 *Karoline Gruber v Unabhängiger Verwaltungssenat für Kärnten and Others.*

[194] See Aarhus Convention Compliance Committee (2012) ACCC/C/2010/50, para 78.

[195] C-137/14 *European Commission v Federal Republic of Germany*, para 80, 120, where thie Court affirmed the view of AG Melchior Wathelet holding that preclusion is not acceptable under EU law.

review of acts and omissions under all areas of environmental law. The scope of Article 9(3) extends to all areas that fall outside the scope of Article 9(1) and (2), namely outside areas of information and participation as regards individual´s decisions.

The EU legislative framework is far from being satisfactory. As was rightly pointed out by de Sadelaar, access to justice can in fact be perceived as a patchwork for the moment.[196] A framework of principles, fundamental rights, primary and secondary law provisions are all aiming to protect the citizens and the environment from injustice. The EU has legislated to a large measure already in the field, by the adoption of Regulation 1367/2006/EC, the environmental liability Directive[197], and also some provisions in the Seveso III Directive.[198] A soft law example is the Collective Redress Recommendation.[199]

A proposal was launched by the Commission in 2003 to provide access to justice in general covering Article 9(3) and (4) of the Convention.[200] The European Parliament delivered its opinion in first reading on the Proposal in March 2004.[201] The proposal was pending before the Council where no progress was made since 2005.[202] It was withdrawn in 2014 in the framework of the Refit Communication.[203] In 2015 the Environment, Public Health and Food Safety Committee of the European Parliament adopted an opinion on the application of EU law and calling for a Directive on access to justice.[204] Treaty changes, as well as important recent case-law have changed the legal context and probably

[196] Nicolas de Sadeleer, *Environnement et marché intérieur,* see footnote 9, 188.

[197] European Parliament and Council Directive (EC) 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L143/56.

[198] Making reference under the access to justice provisions to land-use planning in art 15(a).

[199] Commission, 'Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law' (2013).

[200] Commission, 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters' COM (2003) 624 final; see Charles Pirotte, 'L'accès à la justice en matière d'environnement en Europe: Etat des lieux et perspectives d'avenir', see footnote 2.

[201] European Parliament, Opinion of 31 March 2004, OJ C103, 451-626.

[202] The Member States in the WPIEI discussed access to justice at length on the 13 May 2013, where as a preliminary step towards the Impact Assessment, the Commission made a general presentation. The content of this discussion was reflected in the subsequent public consultation that took place in 2013. See <http://ec.europa.eu/environment/aarhus/consultations.htm> accessed 1 June 2016.

[203] Commission, 'Communication to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions' COM (2013) 685, OJ L316/46: the Commission identified this proposal in its Communication of 2 October 2013 Regulatory Fitness and Performance (REFIT): Results and Next Steps as one of the proposals that could be withdrawn, also considering alternative ways of meeting its obligations under the Aarhus Convention.

[204] European Parliament Committees, ENVI (Environment, Public Health and Food Safety), 'Opinion on the 30th and 31st annual reports on monitoring the application of EU law' (2015) available at <http://www.europarl.europa.eu/committees/en/envi/opinions.html> accessed 3 June 2016.

led to a tentative shift in the political climate as regards access to justice. Access to justice is also one of the topics of the Implementation Communication.[205] The European Parliament and the Council have already taken first positions on this. In its resolution the European Parliament has explicitly called for the adoption of the proposed Directive on access to justice in its decision on the 7th EAP.[206] The Council conclusions too called for the improvement of access to justice in line with the Aarhus Convention.[207] The Committee of the Regions is also supporting a directive on access to justice in environmental matters.[208] The wider context also includes a general trend towards recognising the rights to effective remedies as defined by Article 47 of the Charter of Fundamental Rights.[209] Also thanks to the Irish Presidency on May 13, 2013 the Commission presented to the Member States in the Aarhus Working Party on International Environment Issues – WPIEI of the Council the state of play and its views on the different options to proceed with access to justice at Member States level. The public consultation on the different options on access to justice concluded that the majority of the public concerned indeed feels that there is a need for a binding EU instrument.[210] The decision on the 7th EAP, as endorsed by both EP and Council, also calls for improved environmental access to justice.[211] Progress has

[205] Commission, 'Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness' see footnote 35. The Communication points out that "the wider context has changed, in particular the Court of Justice has confirmed recently that national courts must interpret access to justice rules in a way which is compliant with the Aarhus Convention. National courts and economic as well as environmental interests face uncertainty in addressing this challenge".

[206] European Parliament, Resolution of 20 April 2012 on the review of the 6th Environment Action Programme and the setting of priorities for the 7th Environment Action Programme – A better environment for a better life, para 68: "Underlines that the 7th EAP should provide for the full implementation of the Aarhus Convention, in particular regarding access to justice; stresses, in this connection, the urgent need to adopt the directive on access to justice; calls on the Council to respect its obligations resulting from the Aarhus Convention and to adopt a common position on the corresponding Commission proposal before the end of 2012".

[207] Council of the European Union, 'Conclusions on setting the framework for a 7th EAP' (3173rd Environment Council meeting, Luxembourg 11 June 2012) called for improving complaint handling at national level, including options for dispute resolution, such as mediation, and for improving access to justice in line with the Aarhus Convention.

[208] Committee of the Regions, Opinion on 'Towards a 7th Environment Action Programme: better implementation of EU environment law' (2012) OJ C17/19 January 2013, 30–36.

[209] Speech delivered by Commissioner Vice-President Viviane Reding, 'The binding EU Charter of Fundamental Rights: Key trends two years later' (2012) available at <http://ec.europa.eu/justice/fundamental-rights/files/viviane_reding__speech_16_04_2012_en.pdf> accessed 3 June 2016.

[210] Public Consultation on the 'Access to justice in environmental matters – options for improving access to justice at Member State level' (2013) available at <http://ec.europa.eu/environment/aarhus/consultations.htm> accessed 3 June 2016.

[211] European Parliament and Council Decision (EU) 1386/2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' OJ L354/17.

been made in regard to an impact assessment on the topic of access to justice in environmental matters.[212] After the new Commission took up office, a number of expert group meetings were held with Member States and national judges.

When comparing the environment with other policy areas of the EU, such as competition or employment, one might ask why there is a specific need for environmnetal access to justice. The answer is relatively straightforeward: specific international obligations stemming from the Aarhus Convention, that is integral part of EU law.[213] One will not find so specific and detailed access to justice requirements in other policy areas. Hence the special relationship of the environmental acquis to access to justice.

The position of the CJEU

In what is known as the *Slovak Brown Bear* case[214] the CJEU stipulated that Article 9(3) is to a large extent covered by EU legislation.[215] What is clear from that judgment is that the zero option is not open for Member States: not providing for any access to justice at all under Article 9(3) is not acceptable under EU law.

The very important difference between the principle of effective judicial protection as a principle of EU law and access to justice in environmental matters under Article 9(3) is that by virtue of the Convention, not only citizens but also eNGOs are given standing in courts to protect the environment. Whereas, under the effective judicial protection doctrine, NGOs would still have to prove a direct interest or an impairment of right to challenge decisions. The *Slovak Brown Bear* case lies at the intersection where the Aarhus concept and effective judicial protection come together. The Court actually applied the consistent interpretation doctrine in an international context requiring national courts to bend and stretch their national laws and practices in order to achieve the objective of judicial protection.

An important question is whether the procedural guarantees required should apply at all levels of appeal. For instance, in the Danish system the

[212] ClientEarth was refused copies of the Impact Assessment report and Impact Assessment Board's opinion. The refusal was upheld by T-424/14 and T-425/14 *Client Hearth* v. *Commission*; appeal is pending as Case C-57/16 P *Client Hearth* v. *Commission*.

[213] Treaty on the Functioning of the European Union, art 216.

[214] C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*.

[215] This is held to be true, even though the Court acknowledged the fact that the expression used "to a large extent" means mainly implementation of art 9(2) of the Aarhus Convention. Further discussions on this aspect of the ruling in Jan H. Jans and Hans H.B. Vedder, *After Lisbon, The leading monograph on European Environmental Law*, see footnote 16, 73 ff; Ludwig Krämer, *EU environmental law*, see footnote 24, 147; Marc Clément, *Droit européen de l'environnement: jurisprudence commentée* 3rd (Larcier 2016) 187 ff; Mariolina Eliantonio, 'Case note on case C-240/09 Lesoochranárske zoskupenie and case C-115/09 Trianel Kohlekraftwerk' [2012] Common Market Law Review, 767-791; Marcus Klamert, 'Dark Matter—Competence, Jurisdiction and "the Area Largely Covered by EU Law": Comment on Lesoochranárske' [2012] European Law Review, 340-350.

Appeals' Board is one of the instances of independent organs to exercise effective access to justice. Would it suffice to provide effective justice exclusively for one instance, while leaving it for further levels to have a more costly, less timely procedure? The *Edwards* judgment certainly answered this question very firmly.[216] The CJEU followed the AG Opinion[217] and ruled that the requirement of not having prohibitive costs should be assessed at all levels of appeals.[218] *Mutatis mutandis*, this would imply in my view that all procedural guarantees, in the meaning of Article 9(4) of the Convention, are to be applied similarly until final judgment is delivered.

Implications of the studies

A number of studies dealing with access to justice were often referred to in this chapter.[219] They show that there are still considerable gaps as in the implemention of Article 9(3) of the Aarhus Convention. The two most recent ones are the Darpö-study[220] covering the factual aspects and the Maastricht-study[221] on the economic implications of access to justice. These studies explored a number of options.

The first option assessed is to rely only on existing cooperation with judges and stakeholders and to draft some form of commentary or guidelines explain-

[216] C-260/11 *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others.*

[217] Ibid, Opinion of AG Kokott, para 58: "As a result, *contrary to the view taken by Denmark*, prohibitive costs must be prevented *at all levels of jurisdiction*" (emphasis added).

[218] Ibid, para 45: "The requirement that judicial proceedings should not be prohibitively expensive cannot, therefore, be assessed differently by a national court depending on whether it is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal".

[219] See inter alia Nicolas de Sadeleer, Gerhard Roller and Miriam Dross, *Access to Justice in Environmental Matters* (Europa Law Publishing 2005); Milieu Ltd, 'Inventory of EU Member States' Measures on Access to Justice in Environmental Matters' (2007) available at <http://ec.europa.eu/environment/aarhus/study_access.htm> accessed 3 June 2016; European Environmental Bureau (EEB), 'How far has the EU applied the Aarhus Convention' (2007); Chris W. Backes, Mariolina Eliantonio, C.H. (Remco) van Rhee, Taru N.B.M. Spronken and Anna Berlee, 'Comparative study on Legal Standing (Locus Standi) before the EU and Member States' Courts' (commissioned by the European Parliament's Committee on Legal Affairs 2012) available at <http://www.europarl.europa.eu/committees/fr/studies-download.html?languageDocument=EN&file=75651> accessed 4 June 2016.

[220] Jan Darpö, 'Synthesis Report of the Study on the Implementation of Article 9(3) and 9(4) of the Aarhus Convention in Seventeen of the Member States of the European Union' (2013) available at <http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf> accessed 4 June 2016; Jan H. Jans, Richard Macrory and Angel – Manuel Moreno Molina, *National Courts and EU Environmental Law* (Groningen, Europa Law Publishing 2013) 176.

[221] Maastricht University Faculty of Law, 'Possible initiatives on access to justice in environmental matters and their socio-economic implications' (DG ENV.A.2/ETU/2012/0009rl Final Report 2013) available at <http://ec.europa.eu/environment/aarhus/pdf/access%20to%20justice%20-%20economic%20implications%20-%20study%202013.pdf> accessed 4 June 2016.

ing the significance and implications of Treaty provisions and case law. This option would leave courts – with some level of support from the Commission – greater margins to decide individual cases; however, it would also not exclude a possible mix of all means available, meaning infringements, guidance and/or sectoral legislation.

The second option calls for addressing existing gaps in Member States provisions, whereby the Commission as Guardian of the Treaties is to use Article 258 TFEU to ensure access to justice.[222] This would in principle mean relying on CJEU case-law as it was the already the in *Janecek*[223] and *Slovak Brown Bear*[224] to force the Member States to comply with EU law. Of course this would also strongly rely on option one, that is enlisting the courts.

The third option is to draft a new proposal to replace the old access to justice proposal.[225] A new legislative proposal might rely more closely on access to justice provisions as stipulated in the Public Participation Directive.[226] Another possibility is to include mediation as a complementary instrument to access to justice. In this context it should be highlighted that the possibility to explore environmental mediation has been recently considered by both the Council and the Commission.[227]

It should also be highlighted that any of the above options, either individually or combined, would eventually deliver the expected result of better access to justice. Of course the time-span needed to achieve the objective varies depending on the option(s) chosen.

The Maastricht study also dealt with the question why clear rules on access to justice would be beneficial for business. Of course, based on the shelving of the earlier proposal, legislative options present the danger of producing 'Pavlovian' reflexes on the part of business and Member States authorities. However, the studies demonstrate very clearly why the present situation is untenable. The most interesting arguments for a legislative instrument can be summarized as follows. A binding instrument would ensure a level playing field as between different actors in similar dispute situations across the EU. This would be beneficial, in particular, for economic actors such as developers. It would potentially

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[222] Ibid.

[223] C-237/07 *Dieter Janecek v Freistaat Bayern*. See Nicolas de Sadeleer, *Environnement et marché intérieur,* see footnote 9, 187 and Chris W. Backes in Final Report, Maastricht University Faculty of Law, see footnote 223.

[224] C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.*

[225] Commission, 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters', see footnote 191, withdrawn in May 2014.

[226] European Parliament and Council Directive (EC) 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

[227] Committee of the Regions, Opinion on 'Towards a 7th Environment Action Programme: better implementation of EU environment law', see footnote 210.

also help to avoid distortions of competition and foster the functioning of the internal market by helping to discourage the phenomenon of 'pollution havens'.

It may just be a question of time before Member States undertaking reforms will realise that they have a strong interest in EU activity on access to justice, as they might become victims of the above described pollution haven phenomenon. They might ask why others should be exempt from the standards applied to them. Members of the vigilant public may try their luck in courts and might find 'pioneers' within the national judiciary willing to adapt the law.[228] Again this points to the need for clear rules on access to justice both at Member States and at EU level, be them through legislation or case-law.

The current situation with legal grey areas on the topic would most probably also increase costs linked to non-implementation and legal uncertainty.[229] For instance, it took two years for the CJEU to decide on the reference in the *Trianel* case, and this does not factor in the duration of prior national litigation and the aftermath in Germany. If the rules are clear, there is no need to introduce references or at least not an excessive number of them, given that the answers in principle are provided for by the legislator. As outlined in this section, the current situation is anything but clear and legally certain under Article 9(3) of the Convention. Of course, some argue about a possible risk of overloading the courts. Based on evidence presented by the studies this does not seem to be true.[230] There are no reports under the EIA Directive or the IPPC Directive that giving eNGOs standing has led to an abuse of rights. According to reports presented to the Environment, Public Health and Food Safety Committee of the European Parliament experts in Latvia and Portugal, where *actio popularis* is allowed, there is no report of courts overload. More specifically in Latvia, environmental cases remain below the number of twenty a year, usually. It also seems that in many cases – even though the relative numbers remain very low compared to other types of litigation – the success rate is fairly high in environmental litigation. This indicates that abuse of rights in this context remains rather the exception, and that most cases are taken to the courts only where there is a clear violation of law which is harming the environment.[231]

It should also be stressed that Member States have a very broad discretion in establishing safeguards to prevent vexatious, frivolous or abusive claims.

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[228] See most recently the second Slovak preliminary reference, with C-243/2015 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín*, initiated by the Slovak Supreme Court with the same NGO involved as in the C-240/09 case, see footnote 100.

[229] See for more details on economic implications in Maastricht University Faculty of Law, 'Possible initiatives on access to justice in environmental matters and their socio-economic implications', see footnote 223.

[230] Ibid; see also Nicolas de Sadeleer, Gerhard Roller and Miriam Dross, *Access to Justice in Environmental Matters*, see footnote 221.

[231] The reports have not been made public.

The risk of 'pop-up' judgments as a logical consequence of absence of clear rules on access to justice

As outlined above, the principle of effective judicial protection was introduced very early in the jurisprudence of the CJEU. This means that judicial protection became an implicit requirement of EU secondary law, even in the absence of specific, express provisions on access to justice requirements in secondary law. This principle was adapted to the environmental area with a great deal of care.

One of the first rulings adding to the requirements of secondary law in the spirit of Article 9(3), although not yet referring expressly to the Aarhus Convention, was *Janecek*.[232] The CJEU held that Article 7(3) of the Air Quality Framework Directive should be interpreted as meaning that, where there is a risk that the limit values may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan.[233] The importance of the decision is that the CJEU applies a broader interpretation of the concept of an 'impairment of a right' compared to the one used in the German system.[234] The CJEU recognised a citizen's entitlement to challenge the absence of an air quality management plan, even in the absence of standing according to the German rules in force, and even in the absence of specific access to justice provisions in EU secondary law. Although the CJEU did not rely on the Aarhus Convention, standing in this case would be based on Article 9(3). The arguments used by the CJEU to provide standing for individuals have a number of implications. On the one hand, using Article 9(3) of the Convention would mean that standing in air quality cases should be also be given to NGOs. The other implication is that the *Janecek* rationale may be used whenever health is a concern. The relevant policy areas include water,[235] waste,[236] and chemicals.[237] We can, of course, see other potential areas, such as the energy sector or the nuclear area.

The other very important consequence of the ruling is that also the issues stemming from Article 7 of the Aarhus Convention, including omissions relating to planning, are justiciable. In *ClientEarth*, which was already referred to, the CJEU affirmed *Janeck* and further held that legal persons should also be able

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[232] See C-237/07 *Dieter Janecek v Freistaat Bayern*.

[233] Council Directive (EC) 96/62 on ambient air quality assessment and management, OJ L296/55.

[234] Jan H. Jans and Hans H.B. Vedder, *After Lisbon, The leading monograph on European Environmental Law,* see footnote 16, 231; Chris W. Backes in Final Report, Maastricht University Faculty of Law, see footnote 223, ch 1, 14.

[235] Council Directive (EC) 98/83 on the quality of water intended for human consumption (Drinking water), OJ L330/32, preamble 6 ff.

[236] European Parliament and Council Directive (EC) 2008/98 on waste and repealing certain Directives, art 13.

[237] European Parliament and Council Regulation (EC) 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), OJ L312/3 preamble 1.

to challenge inaction to implement Directives by Member States.[238] Although the Convention was again not referred to, and only standing to individuals and legal persons with an individual interest was addressed, it is obvious, in light of the Convention, that eNGOs should be able to challenge omissions by Member States to adopt plans.

In the *Slovak Brown Bear* case the CJEU held that Article 9(3) of the Aarhus Convention "does not have direct effect".[239] As already recalled, it is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that Convention and the objective of effective judicial protection of the rights conferred by European Union law. The objectives are to enable eNGOs to challenge a administrative decisions potentially inconsistent with EU law before a court. Of course, there are some questions as the effects of this judgment. One is whether Article 9(3) standing rules would apply through the full breadth of European environmental law.[240] In my view, the judgment was a clear signal showing how legislative inaction affects environmental justice, namely it creates uncertainty. There are no clear instructions on eNGO standing requirements in the ruling. It simply holds that courts need to ensure standing for eNGOs, such as the Slovak eNGO. In the absence of more precise criteria, national courts will have to compare the Slovak NGO's statute with the one of the eNGO lodging a case with them to see if the precedent applies or not.

As the *Slovak Brown Bear* judgment only concerned the standing of eNGOs, it may be safely assumed that further rulings will 'pop up' quite independently from the existence of an EU secondary law basis and based purely on the case law of the CJEU and the Aarhus Convention.[241] These 'pop-up' rulings could potentially shed light on some new aspects such as, just to mention a few: what are the exact requirements of national eNGOs to be awarded standing? Are procedural guarantees in the sense of Article 9(4) of the Convention applicable for eNGOs having standing based on Article 9(3)? Would injunctive relief be applicable?

For the moment, EU institutions and Member States still have the chance to take action rather freely, but in my view if the CJEU proceeds on the path it has started on, in a couple of years the legislators will only be able to codify the case-law of the CJEU, without any real leeway, to determine the content

[238] C-404/13 *R* ex parte *ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs.*

[239] C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.*

[240] See Jan H. Jans and Hans H.B. Vedder, *After Lisbon, The leading monograph on European Environmental Law,* see footnote 16, 237; Maastricht University Faculty of Law, 'Possible initiatives on access to justice in environmental matters and their socio-economic implications', see footnote 223; Chris W. Backes in Final Report, Maastricht University Faculty of Law, see footnote 223; Jan Darpö, 'Synthesis Report of the Study on the Implementation of Article 9(3) and 9(4) of the Aarhus Convention in Seventeen of the Member States of the European Union', see footnote 222, s 4, 45.

[241] Chris W. Backes in Final Report, Maastricht University Faculty of Law, see footnote 223, ch 2.

of a binding instrument. The above judgments on Article 9(3) demonstrated effectively to decision-makers that indeed there is a lacuna and legal uncertainty. National courts in fact already take *Janecek* and *Slovak Brown Bears* standing requirements into consideration, even in the absence of explicit national rules giving a possibility to do so. There are national Swedish, German, Finnish and Belgian rulings, where Article 9(3) is relied upon by courts to provide standing for eNGOs.[242]

One might also argue that the CJEU and national courts playing their role and the EU co-legislators should not interfere: the ideal level of implementation will be achieved even without political compromises.

All in all, there are basically two scenarios. One is guidance, meaning reliance on CJEU and developments of national jurisprudence implementing the Aarhus Convention, Article 9(3) and (4) and eventually relying on Commission infringement action based on Article 9(3). The other scenario would be to produce a binding instrument.[243] There seems to be support from national judges[244] and also from eNGOs[245] for this latter scenario. There is also an interesting sub-scenario explored by the above referred studies, namely to use the provisions of Directive 2003/35/EC on access to justice in a possible new proposal on access to justice. One of the most important advantages of this would be that the CJEU's case-law on the topic could be used directly and many of the concepts would have already been well-established and clarified by the CJEU. The interpretation process by the CJEU would not have to be started all over again. Of course, the eventual decision on the options lies with the EU political institutions.

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[242] See the Belgian Court: Hof van Cassatie 11 June 2013 n P.12.1389.N, whereby it was ruled that eNGOs should be considered victims if facing environmental damages under the criminal code and should be given standing. For case reference in Sweden see M 2908-12, MÖD 2012:47 M 3163-12, MÖD 2012:48 4390–12; SAC 2011:49; for case reference in Denmark: BVerwG 7 C 21.12; for case reference in Belgium: Nr. P.12.1389.N.

[243] To this effect see studies prepared by Jan Darpö on Sweden (see footnote 178) as regards the lack of review possibilities of hunting decisions. Concerning Ireland, cfr Áine Ryall, 'Study on the Implementation of Article 9(3) and 9(4) of the Aarhus Convention in 17 Member States of the European Union: Report on Ireland' see footnote 184; the author points to the very high costs of judicial reviews.

[244] Werner Heermann, 'Reaction of the Association of European Administrative Judges (AEAJ) to the Milieu study' (Access to justice in environmental matters conference, Brussels 2 june 2008) available at <http://ec.europa.eu/environment/aarhus/conf2.htm> accessed 4 june 2016.

[245] Csaba Kiss, 'Hogyan segíthetik el' a civil szervezetek a joghoz való hozzáférésr'l szóló EU-irányelv elfogadását?' (How can a non-governmental organization to adopt an EU directive on the right of access?) [2012] Justice and Environment; see also presentation of John Hontelez, Secretary General European Environmental Bureau (EEB), 'NGO expectations of national administrations and legal systems', see footnote 246.

4.5 Role of national judges - different forms of interpretation requirements to ensure compliance with EU law

Should the EU legislators not take action, the effective judicial protection doctrine would still be available, and national courts – hand in hand with the CJEU – could further expand the case-law in the area. The summary below aims to outline the main trends of protecting citizens' rights by the national and EU judiciary in the EU legal order incorporating the Aarhus spirit.

Since very early the case law of the CJEU gave national authorities, in particular national courts, the responsibility to give full effect to EU law, whether by relying directly on Treaty and secondary law provisions,[246] and by setting aside conflicting national rules.[247] This approach was also embraced concerning environmental law. One of the first rulings was in the *Kraaijeveld* case.[248] During the decades the CJEU has addressed various concepts from the perspective of enforceability of citizens' rights. As summarized by Advocate General Leger in *Linster,*[249] pleadings for the EU-protection of EU-derived rights in the absence of appropriately transposed EU rules before national courts may cover, inter alia, pleading to ensure effectiveness of EU law,[250] pleading for substitution,[251] pleading for exclusion,[252] pleading for reparation,[253] pleading for consistent interpretation.[254] The reason these concepts are particularly relevant is the minimalistic approach of the wording of the Aarhus Convention. Courts, as was the case in the above referred rulings, are obliged to stretch their national rules in order to achieve the objectives of the Convention. In practice, this would entail three scenarios.

The first would come into play if there was some kind of national rule already in place. Courts would have to adapt to them in order to award standing. The second possibility, if there was no national rule in place on standing under Article 9(3), would be to fill in the gap by either applying directly the Aarhus Convention provisions, or the case law of the CJEU. Even though setting aside national provisions contradicting EU law requirements may result in a *de facto*

[246] C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen.*

[247] C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal Spa,* paras 18-23.

[248] C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland,* paras 56-58.

[249] C-287/98 *State of the Grand Duchy of Luxembourg v Berthe Linster, Aloyse Linster and Yvonne Linster.*

[250] C-106/77 *Italian Finance Admnistration v Simmenthal Spa,* paras 18-23.

[251] C-8/81 *Ursula Becker v Finanzamt Münster-Innenstadt,* para 25; C-287/98 *State of the Grand Duchy of Luxembourg v Berthe Linster, Aloyse Linster and Yvonne Linster.*

[252] C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland.*

[253] Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic.*

[254] C-14/83 *Sabine von Colson e Elisabeth Kamann v Land Nordrhein-Westfalen;* see also the concept of consistent interpretation and indirect effect in Paul Craig and Gráinne de Búrca, *EU Law. Text, Cases, and Materials* (6th edition Oxford 2015).

contra legem interpretation,[255] national courts have to ensure achievement of the objectives of effective judicial protection, which is a primary requirement of EU law, including to guarantee the full application of the Convention. Therefore, in my view, the last possibility would be to set aside national provisions contravening to the objectives of the Aarhus Convention and the objective of judicial protection.

The principle of consistent interpretation was applied most recently in the *Slovak Brown Bear* case with the CJEU holding that national rules are to be interpreted in line with EU law and Aarhus Convention requirements).[256] In this case the Grand Chamber went further than before, by applying the doctrine of consistent interpretation not just to benefit of EU law provisions but to give effect to and international source of law such as the Aarhus Convention. As it could not give direct effect to this specific provision of international law, as it did in other cases, the CJEU reverted to the concept of consistent interpretation[257] A common element in all these concepts is the crucial role of the national courts. In all cases of complaints regarding the implementation of EU law affecting citizens' rights, courts are the final decision-makers. National courts have to address these cases and provide effective access to justice and also control Member States' discretion in transposing EU access to justice rules. Since the EU has ratified the Aarhus Convention (see reasoning in the *Slovak Brown Bears* Case) and that there is an obligation to ensure access to justice in environmental matters under Article 9(3) of the Convention, the CJEU – in the absence of EU secondary law – will most probably broaden the scope of application to every single piece of EU environmental legislation affecting citizens' and their associations rights (both from an environmental and also from a health rationale) and require national courts to interpret their national law in accordance with these international and EU obligations. That, as already recalled, has recently become the line taken by national judges in (among others) Sweden, Germany, Finland, and Belgium.

In conclusion, the current level of (non-)implementation pushes national courts to rely on international and EU case law directly. Given the vagueness of these provisions, this in my view puts law application and interpretation into unchartered territory. Judges are in a certain sense persuaded to rely on a kind of natural law, or natural justice,[258] relying on their internal-universal value-based compasses showing what is right or wrong at a universal scale. In our context, this means representing the actual interest of the environment and the society in a very broad sense including present and future generations.

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[255] C-308/06 *International Association of Independent Tanker Owners (Intertanko) and others v Secretary of State for Transport*, Opinion of AG Kokott, para 107: "Therefore, an interpretation contra legem is not possible".

[256] C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.*

[257] C-213/03 *Commission v France (étang de Berre)*, para 47.

[258] See, in particular, Aristotle, *Ars Rhetorica*; Péteri Zoltán, *Természetjog-Államtudomány* (Budapest, Szent István Társulat 2003).

5 Recent developments and trends – a political opening for further environmental governance?

Recently the EU Institutions have sent out political signals on commitment to a strengthened environmental governance system. The Commission has published its 2012 Environmental Implementation Communication.[259] The first objective is to improve the knowledge-base for implementation in particular by enhancing access to information on the implementation of the environmental *acquis*. The second objective of the Communication is to improve responsiveness, meaning enhancing access to justice, inspections, complaint-handling and possibly addressing environmental mediation. The Council and the European Parliament as well as the Committee of the Regions have expressed positive opinions on promoting these better governance actions including the Aarhus principles, in particular by establishing better information systems and improving access to justice, complaint-handling and alternative dispute resolution. In 2016 the Commission published its Work Programme, where it undertook to „take forward work to clarify access to justice in environmental matters".[260] Most recent signals indicate that the step taken at this stage by the Commission is to issue an interpretative guidance on access to justice, building on the CJEU case-law.

In addition, there has been an upsurge in activity on the public participation aspect of EU environmental law; more and more new pieces of legislation are including commitments going beyond the usual requirement of effective participation.[261] There are various possible explanations for this change. One could be the very strong signal given by the Aarhus Convention Compliance Committee (ACCC) in a number of cases regarding participation under the EU *acquis*.[262] Another reason could be that after almost 15 years, the Aarhus Convention is delivering its fruits and the public has now perhaps been accepted as a potential factor in decision-making, able to contribute with substantial views and comments to decision-making.

However, it is not only in the environmental field that we can encounter a bigger appetite for access to justice. This is also demonstrated by the fact that one third of all the CJEU rulings delivered in 2011 concerned aspects of effec-

[259] Commission Communication "Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness" COM(2012) 95 final.

[260] Commission, 'Communication, Work Programme 2016' COM (2015) 610 final.

[261] See above headings under participation on Seveso III, Nuclear Waste, Lex offshore, EIA revision, Coastal management plans, and so on under section 3(3).

[262] See in particular Association Kazokiskes Community (Lithuania), 'Communication', ACCC/C/16 and 17, available at <http://www.unece.org/env/pp/compliance/Compliancecommittee/16TableLithuania.html> and <http://www.unece.org/env/pp/compliance/Compliancecommittee/17TableEC.html> accessed 4 june 2016.

tive redress covering all areas of justice.[263] In the competition and consumer protection fields, there is also movement as regards promoting collective redress mechanisms at national level.[264]

5.1 Complementary alternatives to meet the requirements of the Aarhus Convention

Mediation

An important further aspect to access to justice is the question of alternative means of ensuring more efficient handling of diputes. One option would be environmental mediation. As was pointed out by Ebbesson, mediation can only be percieved as a complementary mechanism, meaning that this cannot replace effective review mechanisms.[265] Recent studies have indicated that, in general, there is some form of system in place and some good practices, but we are still far from a well-established functioning framework in the environmental sector.[266] EU institutional documents presented earlier see a clear merit in taking action in the area, as it might be possible to have an alternative, less costly means of redress and, in some cases, a more effective procedure as compared to litigation.[267]

LIFE+

In the LIFE Multiannual Work Programme for 2014-2017 there is a new priority objective, namely that of Governance. Specifically on access to justice, programmes include awareness-raising and training in the field of environment, including on how to ensure and measure the efficiency and effectiveness of judicial review procedures. Target groups also include the judiciary, bodies responsible for the administration of justice, public administrations, and public

[263] Speech delivered by Commissioner Vice-President Viviane Reding, 'The binding EU Charter of Fundamental Rights: Key trends two years later', see footnote 211.

[264] Commission 'Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law' [2013] OJ L 201/60.

[265] Jonas Ebbesson, *Access to justice in environmental matters* see footnote 134, 41 ff.

[266] IEEP, Ecologic, Bio Intelligence Service, 'Study on Environmental complaint-handling and mediation mechanisms at national level' (2012) available at <http://ec.europa.eu/environment/aarhus/pdf/mediation_and_complaint-handling.pdf> accessed 4 june 2016; Regional Environmental Center (REC), 'Promoting environmental mediation as a tool for public participation and conflict-resolution' available at <http://archive.rec.org/REC/Programs/PublicParticipation/Mediation/> accessed 4 june 2016. For on-going work on ADR in the consumer prorection field, see recent new legislation: European Parliament and Council Directive (EU) 2013/11 on alternative dispute resolution for consumer disputes and European Parliament and Council Regulation (EU) 524/2013 on online dispute resolution for consumer disputes, OJ L165/6.

[267] Committee of the Regions, Opinion on 'Towards a 7th Environment Action Programme: better implementation of EU environment law', see footnote 210.

interest lawyers. This is an important opportunity for training centres, universities, NGOs to improve their capacities.

Green Ombudsman and complaint-handling

Another important aspect as highlighted by the Implementation Communication was the possible role of green Ombudsmen.[268] There were some very strong positive examples in the Hungarian[269] and Austrian systems, where the environment is attributed such a high political importance that a separate institution, the Ombudsman, was given very strong powers. An initial process of exploring possibilities to improve complaint-handling by the Member States was also started by the Commission. As outlined in the 2012 Communication, complaint-handling is understood in the context of improving the handling of complaints by Member States for competent authority intervention or complaints focusing on claims of administrative inaction or inadequacy in the field of environmnetal protection.[270]

Cooperation with judges

There are means other than binding instruments for ensuring a high level of protection for citizen's rights. One initiative is the Cooperation with Judges programme, launched by a the Commission in 2008. This has delivered a number of directly accessible training modules, including on access to justice most recently as a result of 5 seminars hosted jointly by ERA and the Commission in 2014-2015.[271] This special attention to the judiciary is justified, given the established case-law of the CJEU indicating that national authorities, in particular courts, have an immense and vital task of interpreting national law in accordance with EU requirements. The training activities can provide the essential information on what exactly can be regarded as effective EU law to be enforced by courts.

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[268] The session took place in the framework of Green Week, 'Can Ombudsmen better oversee administrative actions - and inactions - that impact on the environment of present and future generations?' (Brussels 25 May 2011) available at <http://ec.europa.eu/environment/aarhus/events_en.htm> accessed 6 june 2016.

[269] Sándor Fülöp, Hungarian Ombudsman for Future Generations from May 2008 to August 2012, 'The rights and interests of future generations and the Hungarian attempts to represent and protect them' (Budapest, Env Democracy Conference 2012). See also, criticising recent legislative changes in Hungary reducing the role of the Green Ombudsman, Sándor Fülöp, 'Clarification and Networking. Methodologies for an Institution Representing Future Generations' and Istvan Sárközy, 'The Hungarian Parliamentary Commissioner for Future generations' both in Gyula Bándi (ed), *Environmental Democracy and Law* (Groningen, Europa Law Publishing 2014) 155 ff and 273 ff respectively.

[270] Commission Communication "Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness" COM(2012) 95 final.

[271] European Commission and ERA, 'Seminars' available at <http://ec.europa.eu/environment/legal/law/judges.htm> accessed 6 june 2016.

eJustice

A further important initiative that can be mentioned is the eJustice portal,[272] which is conceived as a "one-stop (electronic) shop" for information on European justice and access to European judicial procedures. Information on environmental access to justice in different Member States is gradually being included in all official languages.

6 Conclusions

It can be observed that there is movement throughout the full breadth of the Aarhus EU *acquis*. Under the information pillar, the requirement of actively disseminating environmental information is in the process of becoming more and more the rule rather than the exception. The participation pillar is being implemented across the policy areas. As regards access to justice, the direction is very firmly determined by the CJEU by its well established and expanding case-law giving national courts a decisive role in controlling the implementation of EU law by Member States. It should also be highlighted that without a proactive civil society, "judges cannot make their own cases".[273] Of course, when looking at the ACCC communications one cannot call in question civil vigilance. The ACCC is doing all that is possible to protect the environment that cannot protect itself. It can be seen that there is also an upsurge in judges' events recently, which contribute to generating a knowledge-base on national systems embracing the Aarhus *acquis*.

The CJEU underpins this, and the judiciary is trusted with responsibilities of applying EU law and providing effective legal protection to citizens. Courts need to interpret EU law, and in case of doubt introduce preliminary references. They must also control Member States' discretion in transposing EU law. If the latter exceed the legal limits, courts may also have to disregard their national procedural rules contradicting EU law. We again come to the evergreen topic of where is the limit to the courts' remit? Do we expect them to rely on a kind of 'natural law' in the field of environmental protection? In my view it is not only the courts who need to rely on this law, but all of us, even in the current economic context of austerity and economic priorities. However, as indeed courts are the last resort when it comes to safeguarding the environment and related human rights, they have a heavier burden to bear. They need to rely upon their internal 'green compasses' and their 'green hearts' when passing rulings on nature and the environment that cannot protect and speak for itself.

[272] EJustice portal, available at <https://e-justice.europa.eu/home.do?plang=fr> accessed 6 june 2016.

[273] Luc Lavrysen, Belgian Constitutional Court Judge, 'National Judges and the Convention – How the Judiciary can further the Implementation of the Third Pillar' (The Aarhus Convention: how are its access to justice provisions being implemented, Brussels 2 june 2008) available at <http://ec.europa.eu/environment/aarhus/pdf/conf/lavrysen.pdf> accessed 8 june 2016; all presentations and recorded sessions are available at <http://ec.europa.eu/environment/aarhus/conf2.htm> accessed 8 june 2016.

In view of the foregoing, it can also be reasonably expected from EU decision-makers to at least rely on the integration principle of environmental protection, so very well defined in the Treaties, and to give a helping hand to the national and EU courts to ensure that a clear and legally certain legal framework is maintained for all the stakeholders, and that Aarhus-rights are effectively enforced.

CHAPTER 3

The Aarhus Convention – The Legal Cultural Picture

Country report for France

Giulia Parola, LL.M

1 Introduction

The Aarhus Convention was ratified in France on the 8th July 2002 and came into force on the 6th October 2002 by the Law n° 2002-285 of 28 February 2002.[1] The Convention was then applied by the Decree of 12 September 2002.[2] Generally speaking, the Convention did not bring about many legislative changes. Even before the Convention was adopted France had some provisions on what are known as the three pillars.[3] This notwithstanding, the rights provided in the Convention are still not fully enforceable in France and the report will outline some of the reasons for this.

One peculiarity of the French situation is that the courts had an important role to play. Indeed, citizens and eNGOs have seen the Convention as an opportunity to improve their rights and since the ratification they started to invoke it before the French courts.[4]

The *Conseil d'Etat* (State Council, the highest administrative court) plays an important role in terms of integration of both EU and international law into the domestic law.[5] The administrative courts have laid down the conditions under which an international provision is to be given direct effect, with a mechanism that resembles to the "direct effect" principle in EU. Since the 1989 *Nicolo* case,[6] the *Conseil d'État* changed its position and ruled that it was allowed to check the compliance of a measure with an international treaty, even if this measure was posterior to the treaty.[7] This offered the courts the occasion to interpret the Aarhus Convention and to define its legal impact on domestic law.[8] The Convention is a mixed agreement because it is an international law

1 Loi n. 2002 285 du 28 février 2002, that permits the approval of the convention on access to information, the public participation in the decision process and the access to Justice in environmental matters.

2 Décret n. 2002-1187, 12 September 2002, with the publication of Aarhus Convention (JORF 21 September 2002) 15563. 'Décret' is a regulation adopted by the government.

3 See the 1978 law on the access to administrative documents, the 1983 law of the democratisation of public enquiries and the 1995 law on the reinforcement of environmental protection "that implemented an approval procedure ('agrément') for nongovernmental organisations, notably to give them opportunities to accede to justice". Julien Bétaille, 'The direct effect of the Aarhus Convention as seen by the French Conseil d'État' [2009] Environmental Law Network International 64.

4 Michel Prieur, 'La Convention d'Aarhus, instrument universel de la démocratie environnementale' [1999] RJE 9 – 29 22.

5 See Louis Dubouis, 'Bref retour sur la longue marche du 'Conseil d'État ' en terres internationales et européennes', *Mélanges en l'honneur de Bruno Genevois, Le dialogue des juges* (2009) 391.

6 Conseil d'État 20 October 1989, Rec. Lebon, 190.

7 Conseil d'État (I) 1 March 1968, Rec. Lebon, 149.

8 Art 55 of the French Constitution determines the conditions for an international treaty to be integrated in the domestic legal system and the AC fulfils the art 55 conditions of ratification and publication. As the French legal system is monistic, the AC is supposed to be part of domestic law and have direct effect. In fact "treaties shall normally be presumed to produce direct effects in domestic law, which means creating legal rules that individuals are entitled to rely on before domestic courts": Yann Aguila,

instrument but it is also – to some extent – part of EU law. Without going into details, this basically means that many among its provisions are to be applied by the French courts, whether or not the legislation has been transposed and implemented.[9] As a consequence, according to the *Conseil d'Etat*, the provisions in the first and second pillars, which have been implemented by the EU Directive, can be invoked by individuals. On the contrary, individuals cannot avail themselves of the rights bestowed in the third pillar as long as the Directive on access to justice proposed by the European Commission is not enacted.[10] Moreover, the *Conseil d'Etat* has recognised direct effects to a few provisions of the Aarhus Convention only, having chosen "a soft interpretation of this treaty's requirements".[11] More specifically, the *Conseil d'Etat* recognises direct effect on the basis of the analysis of each individual paragraph in any of the Convention articles rather than taking any article as a whole.[12] So far, the *Conseil d'Etat* has held that the provisions of Article 6, paragraphs 1, 2, 3 and 7, of the Convention are directly applicable in the domestic legal order. The provisions of Article 6, paragraphs 4, 6, 8, and 9, and of Articles 7, 8, and 9, paragraphs 3 and 5, instead were held to merely establish obligations between the Member States. In other words, the provisions last listed have no direct effect in the domestic legal order and they can thus be invoked only by the claimant or by the defender.[13]

Finally, it has to be noted that French environmental policy has been strengthened thanks to a political process called the "*Grenelle de l'Environnement*" (Environment Roundtable). Among the outcomes from these environment roundtables are that the *Grenelle* I and *Grenelle* II statutes, each containing provisions collecting, modifying and, to some extent, strengthening the French Environment Code and addressing compliance with the Aarhus Convention.[14]

'Conclusions sur CE, 6 June 2007, Commune de Groslay, n. 292942' (Conclusions about Conseil d'État 6 June 2007, Commune de Groslay, 292942) [2007] AJDA 1533.

9 Mattias Wiklund, 'Access to justice in French Environmental Law', *Juridiska institutionen Vårterminen Thesis* (2011) 22.

10 Proposal for a directive of the European Parliament and of the Council 24 October 2003 on access to justice in environmental matters COM (2003) 624.

11 G.uillaume Le Floch, 'La Convention d'Aarhus devant le juge administratif" [2008] Les petites affiches 4 – 9 4.

12 See the table in Julien Bétaille (n 3), see footnote 3, 64.

13 Conseil d'État 28 July 2004, 5 April 2006 and 6 June 2007.

14 Mattias Wiklund, see footnote 9, 22.

2 Right to access to documents/information

2.1 Before the implementation of the Aarhus convention

The first albeit limited recognition of the right of access to information in France has been linked to Article 14 of the 1789 Declaration of the Rights of Man that identifies the access to information with the right to have free access to the information concerning the State budget: "All citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to what uses it is put."[15] Despite that good start, for long the French administration was reluctant to recognise a clear right to access to all relevant information. A step forward was taken with the 1978 Law on Access to Administrative Documents, which provides the right to access by all persons to administrative documents held by public bodies.[16] This statute refers to documents rather than information.[17] It provides that such documents shall be made available when requested. A request may be refused for a limited number of reasons listed in the same statute. The Commission for Access to Administrative Documents (CADA), analysed below, is in charge of giving legal advice to any person whose request for access to administrative documents has been refused by a public authority. The commission's advice is however not mandatory for the public authority, whose final decision may in any event be challenged in front of the administrative courts.[18] Finally, in April 2002 the *Conseil d'Etat* held the right of access to administrative documents to be a fundamental right under Article 34 of the Constitution.[19]

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[15] An English translation is available at <www.yale.edu/lawweb/avalon/rightsof.htm> accessed 18 February 2016.

[16] Loi n. 78-753 du 17 Juillet 1978 de la liberté d'accès aux documents administratifs (Law on Free Access to Administrative Documents); Loi n. 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public (Law on motivation of administrative acts and on the improvement of the relations between the Administration and the public) <www.legifrance.gouv.fr/texteconsolide/PPEAV.htm> accessed 18 February 2016.

[17] "Documents" means: "files, reports, studies, records, minutes, statistics, orders, instructions, ministerial circulars, memoranda or replies containing an interpretation of positive law or a description of administrative procedures, recommendations, forecasts and decisions originating from the State, territorial authorities, public institutions or from public or private-law organisations managing a public service.". They can be in any form. Documents handed over are subject to copyright rules and cannot be reproduced for commercial purposes.

[18] Frédérique Agostini, 'Article 9.1 of the Aarhus Convention, Some current issues under French law, Access to justice Regional Workshop for High-Level Judiciary' (2008) Tirana <https://www.unece.org/Art9.1inFrenchLaw.doc> accessed 18 February 2016.

[19] L'arret Ullmann, Conseil d'État 29 avril 2002. See David Banisar, 'Freedom of Information Around the World 2006', *A Global Survey of Access to Government Information Laws* (Privacy International 2006).

3 Implementation of access to environmental information

3.1 Subject matter of the right to access

The most important document concerning access to environmental information in France is the Environmental Charter, which is part of a statute having the same legal force as the Constitution which entered into force on the 1st March 2005.[20] Article 7 is devoted to access to environmental information and public participation. This provision, which has the same rank as the Constitution itself, states that "everyone has the right, at the conditions and to the extent provided in the law, to access environmental information held by public bodies and to participate in public decisions that affect the environment". This provision has a general applicability; however it is important to refer to it because it is the first time in Europe that the right of access to environmental information held by the public authorities and the right to participate in environmental decision making processes have been recognised in a constitutional provision. The *Conseil Constitutionnel* (Constitutional Council) has ruled that all the rights and duties laid out in the Environmental Charter have constitutional *status* and that they apply to all public and administrative authorities within their respective fields of competence.[21] The *Conseil d'Etat* however has held that the Charter principles applies "at the conditions and to the extent provided in the law" only, and has left it to the Parliament to determine these conditions and the extent to which these rights may be exercised.[22]

Access to environmental information is thus still based on the general framework dating from 1978, with specific provisions in the Environment Code relating to the definition of environmental information[23], the legitimate grounds for refusal and their interpretation,[24] complying with Article 4 of the Aarhus Convention and with the subsequent EU legislation.[25] Those special rules differ from the general provisions regarding both environmental information and the

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[20] See Loi constitutionnel n. 2005-205 relative à la Charte de l'Environnement (The Environmental Charter).

[21] Decision n. 2008-564 DC 19 June 2008.

[22] Appeal n. 297931 3 October 2008, Commune d'Annecy.

[23] Art L 110 1 II.4 of the Environment Code refers to the right of access to information on the environment in the general principles.

[24] Artt L 124-1 ff. and R. 124-1 ff. of the Environment Code, regarding the implementation of the rules about the rights of access to environmental information. The Environment Code is available in english. See also the Circulaire du 18 octobre 2007 relative à la mise en œuvre des dispositions régissant le droit d'accès à l'information relative à l'environnement (regarding the implementation of the provisions about the right of access to environmental information) <www.developpement-durable.gouv.fr>, accessed 19 February 2016.

[25] Council Directive (EC) 2003/4 on public access to environmental information, OJ L41/26. See also Frédérique Agostini, see footnote 18, 1.

grounds for the refusal. Contrary to the 1978 Law, the Environment Code indeed refers to information rather than to documents.

Moreover France has transposed the Directive 2003/4/CE on access to information through the following provisions:[26] Book I, title II of the Environment Code relates to public information and participation. Chapter IV of title II deals with the right to access information relating to the environment.[27] The Code sets forth a number of practical details following from both the Aarhus Convention and Directive 2003/4/EC. There are other provisions in the Code related to access to information on specific subjects such as chemicals, hazards, waste, air and water quality. Furthermore access to environmental information is regulated in decree n° 2005-1755 of December 30 2005 on freedom to access to administrative documents.

Under these provisions the public authorities have to provide the environmental information held by or for them to anyone on simple request. Everyone has this right without having to demonstrate an interest.[28] Article L. 124 1 stipulates that any request for information must receive an explicit response within a month of receipt. In exceptional circumstances where the volume or complexity of the information requested so requires the time limit can be extended to two months. In that case, the public authority shall inform the applicant of the extension, giving reasons, within one month.

The content of 'environmental information' under the Aarhus Convention is broader than in French domestic law. In France this notion refers on the one hand to Article 2(3) subparagraph a) of the Aarhus definition[29], on the other hand to factors, substances, measures and activities which affect or are likely to affect elements of the first category. Information which falls under this categorisation can be dealt with by the governmental agency or other public authorities competent with reference to the requested information. The classification of environmental information in French domestic law does not conform to the distinction found in Article 2(3) subparagraph a), b) and c) of the Aarhus Convention. As a consequence, requests which fit the Aarhus classification will have to be directed to the agency competent in that particular field. So it may be difficult to know in advance which agency deals with any specific information. This situation can lead to some confusion, but does not entail that France is fail-

[26] See the website of the French ministry for the environment: <www.toutsurlenvironnement.fr/aarhus/lacces-ducitoyen-a-linformation> accessed 19 February 2016. Pierre Emmanuel Laernoes, 'The Aarhus Convention: a partial solution for the Environmental and Democratic Crises?' (Sustainable Development Master Thesis, Utrecht 2011) 47.

[27] Arts L. 124 1 to L. 124 8 and R. 124 1 to R. 124 5.

[28] Book I, Title II, Chapter IV of the Environment Code and Act n. 78 753 17 July 1978.

[29] (a) The first category refers to natural elements, 'the state of elements of the environment' which includes things such as the quality of the air, of the soil, the atmosphere, water, land, landscapes, biodiversity, and the interaction of such elements, AC, Article 2 (3) (a)(b)(c).

ing in the implementation of the first pillar; on the contrary France is using its institutional autonomy in the implementation of these rules.[30]

3.2 The interaction of right of access with duties to make some information generally available and with Directive 2003/98/EC on the re-use of public sector information

The Environment Code provides that public authorities shall make sure that the information collected on the environment by them or on their behalf is precise, up to date and can be used in comparisons. As a consequence, much environmental information is constantly available, in particular over the internet, on websites of public authorities, ministries or local governments.

More specifically Article 5, paragraph 3, Article L. 124-8 of the Environment Code provides that some categories of information relating to the environment must be publicly disseminated. These categories and the conditions for their dissemination are specified in Article R. 124-5 of Environment Code. As a minimum they include reports by public authorities on the state of the environment; international treaties, conventions and agreements; European Community, national, regional or local laws or regulations concerning the environment. The official newsletter of the ministry responsible for the environment and the Official Journal are accessible via the Ministry's website, while the website www.legifrance.gouv.fr offers access to all legislation. Moreover, the information to be released also includes plans, programmes and documents defining the public policies relating to the environment.[31] The Environment Code provides that these are to be made available to the public in various formats, including the Official Journal, in accordance with the conditions laid down in articles 29 and 33 of Decree n° 2005-1755, and electronically in all other cases. Many other databases on specific topics, including water, air and hazardous materials, which are maintained by agencies with specific technical expertise, are accessible on their websites, or through links from websites focusing on specific issues.[32]

In order to facilitate active access to information, Article 52 of Act n° 2009-967 of 3 August 2009 on the programme for the implementation of the Grenelle Environment Roundtable provided for the creation of a portal that would assist internet users to obtain environmental information held by the public authorities.[33]

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[30] Pierre Emmanuel Laernoes, see footnote 26, 47.

[31] For example: the national strategy for sustainable development plans for water resources development and management.

[32] National Implementation Reports 2011 France, <http://www.unece.org/env/pp/reports_implementation_2011.html> accessed 27 february 2016.

[33] See <www.toutsurlenvironnement.fr>, accessed 19 February 2016.

With regard to the EU Directive on the re-use and commercial exploitation of public sector information (2003/98/EC),[34] a Government ordinance was adopted in June 2005 to amend the 1978 Law and to comply with the directive.[35] The same ordinance also introduced a number of other changes to the law including setting out the structure and composition of the CADA, requiring public law bodies to appoint a person responsible for dealing with request for environmental information, and allowing access in electronic form.[36]

3.3 User friendliness of the environmental information (Art. 5(2) AC)

French law provides some rules to improve the effectiveness of the right of access. Environmental data collected by the public authorities may be consulted by the public free of charge, either over the internet or in the documentation issued by the agencies concerned. Brochures are also distributed free of charge.

Article R. 124-2 of the Environment Code requires public authorities to name a person responsible for access to environmental information who is, in particular, responsible for receiving requests for information and appeals. Moreover Articles L. 124-7 and R. 124-4 of the Environment Code provide that public authorities shall establish directories or lists of categories of the environmental information they hold, which can be accessed free of charge, indicating where that information is made available to the public.[37]

To facilitate the access to information France has also developed new bodies such as the '*Service de l'observation et des statistiques*' (SOeS) which has as its principal task the implementation of the first pillar. This body is in charge of statistics in relation to the environment, energy, construction, housing and transportation and is responsible for collecting, producing and diffusing information in the fields of environmental information, sustainable development methods and data, energy statistics, housing and construction statistics, and transport statistics.[38] The SOeS publishes its results on internet on freely accessible documents.

The collected information is therefore easily accessible to anyone with access to a computer and internet, and in France "this is a relative large portion of the

[34] Ordonnance n. 2005-650 6 juin 2005 regarding freedom of access to administrative documents and the re-use of public sector information, <http://admi.net/jo/20050607/JUSX0500084R.html>, accessed 19 February 2016.

[35] Décret n. 2005-1755 du 30 décembre 2005, regarding freedom of access to administrative documents and the re-use of public sector information, adopted in implementation of law n. 78-753 17 juillet 1978.

[36] David Banisar, 'Freedom of Information and Access to Government Records Around the World' (2006), <www.freedominfo.org>, accessed 19 February 2016.

[37] National Implementation Reports 2011, see footnote 32.

[38] Pierre Emmanuel Laernoes, see footnote 26, 47.

population".[39] Nevertheless according to different eNGOs[40] there is still much room for improvement in terms of disclosing environmental information on internet and update the information.[41]

3.4 Information held by some private law entities (e.g. concessionaires)

In France the disclosure of environmental information held by private bodies has raised problems already long ago in the context of companies managing nuclear facilities. In general, 'public authorities' in French law are defined as central State authorities, local government, public establishments with an administrative statute, social security organisms, and other bodies in charge of the management of administrative 'public services' (services of general interest according to EU law).[42] As long as they act as public persons, these authorities can see their actions or omissions challenged in front of the administrative courts.[43] In 2006 the CADA ruled that producing energy was not to be treated as the provision of a public service,[44] and the companies generating nuclear power did not therefore qualify as 'public authority'. The issue is now solved because a statute was enacted to impose specific transparency obligations on these companies.[45] However, the intervention of the legislator has not solved the case where a private body refused the request concerning information about the environmental certification of a wood boiler plant providing heat for a town. The CADA affirmed the refusal and ruled that, despite the fact the company was providing heat as a public service under the control of a public authority, the information did not have to be disclosed. The commission held that the information related to an environmental study done prior to the establishment of an environmental management system was taken by the company itself without any demand from the public authority, as well as the documents regarding industrial and commercial information. The commission concluded that the public service consisting in providing heat was not a public service in relation to the environment.[46]

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39 Pierre Emmanuel Laernoes, see footnote 26, 47.

40 France Nature Environnement (FNE) explained this point with a press release on February 7th 2011.

41 Pierre Emmanuel Laernoes, see footnote 26, 47.

42 Art 1 Loi 2000-321, 12 avril 2000 on the rights of citizens in their relations with the administration.

43 Mattias Wiklund, see footnote 9, 22.

44 CADA, Commission d'Accès aux documents administratifs, n. 20062388, <www.cada.fr> accessed 19 February 2016.

45 Loi n. 2006-686 du 13 juin 2006, regarding transparency and national security.

46 CADA, Commission d'Accès aux documents administratifs, avis n. 2007/2789, <www.cada.fr>, accessed 19 February 2016. See also: Frédérique Agostini, see footnote 18, 1.

3.5 The exceptions to the right of access (with specific reference to the "confidentiality of the proceedings of public authorities")

As is the case with the Aarhus Convention, French law lists a number of exceptions to access to information. Articles L. 124 4, L. 124 6 and R. 124 1 II and III of the Environment Code as well as Articles 2, 6 and 9 of Act n° 78 753 of 17 July 1978[47], implementing Article 2(3,4), list the grounds for refusal. For example Article L. 124 5, II of the Environment Code provides that if the request relates to information on emissions into the environment, the public authority can reject the request only on grounds of French foreign policy, public security or national defence; judicial proceedings or investigations into offences that might lead to criminal penalties; or intellectual property rights.[48] As noted before in cases of refusal by a public authority, the interested party has the possibility to seize the CADA which rules on the legality of the refusal.

Nevertheless, there have been some problems on the interpretation of the Aarhus Convention's exceptions. A first example refers to the distinction between 'document in the process of being finished' and 'unfinished document'. The CADA and the administrative jurisdictions had earlier held that access to preparatory documents might be refused. In 2007 the *Conseil d'Etat*[49] changed the position and affirmed that preparatory documents, as long as they are completed, are to be disclosed, even when they are preliminary to a public decision that has yet to be taken.[50]

Another problem concerns the possible confidentiality of commercial and industrial information. The Aarhus Convention provides that "the grounds for refusal (...) shall be interpreted in a restrictive way".[51] Nevertheless, several

[47] See Loi n. 78-753 du 17 juillet 1978 regarding free access to administrative documents; Loi n. 79-587 du juillet 1979, regarding the motivation of administrative acts and the improvement of the relations between the Administration and the public. The 1978 Law on Access to Administrative Documents "provides also that "mandatory exemptions for documents that would harm the secrecy of the proceedings of the government and proper authorities coming under the executive power; national defence secrecy; the conduct of France's foreign policy; the State's security, public safety and security of individuals; the currency and public credit; the proper conduct of proceedings begun before jurisdictions or of operations preliminary to such proceedings, unless authorisation is given by the authority concerned; actions by the proper services to detect tax and customs offences; or secrets protected by the law. Documents that would harm personal privacy, trade or manufacturing secrets, pass a value judgment on an individual, or show behaviour of an individual can only be given to the person principally involved". David Banisar, see footnote 19.

[48] Art L. 124 5, II of the Environment Code.

[49] Conseil d'État 7 August 2007, 266668.

[50] The Council ruled that it was illegal for the prefect of Morbihan to deny the inhabitants of accessing information under the pretext that the document was preliminary. Frédérique Agostini, see footnote 18, 1.

[51] Art 4(3) of the Aarhus Convention.

members of the Local Information Commissions report a failure to apply this principle, particularly owing to an overly wide interpretation of confidentiality within the nuclear industry. The National Association of Local Information Commissions has recently started to experiment a system giving confidential access to classified documents of EDF (Électricité de France) and of the Flamanville Local Information Commission.[52]

Another way to overcome the difficulties related to the confidentiality is Article 6 III of Act n° 78 753 of 17 July 1978, which lays down a duty to supply partial information: if the information requested contains references that may not be disclosed because they are exempt under Article L. 124 4 I of the Environment Code, on protection of State or private secrets and interests, but it is possible to obscure or remove such references, the information must be supplied to the applicant after obscuring or removing those references. The public authority, under the control of the courts, decides which information may be cancelled and may ask the opinion of the company concerned by the industrial and commercial information.[53]

3.6 The costs for exercising the right to access

Consultation of information on site is free of charge, except where it is precluded by considerations relating to preservation of the document. For other information, if copying is technically feasible, it shall be charged to the applicant, provided that this charge shall not exceed the cost of reproduction. It is also possible for the interested party to obtain the requested document by e-mail and without charge if it is available in electronic format.[54] It has however been noted that the information is only rarely communicated via e-mail.[55] A statute adopted on October 1st 2001 determines the maximum costs of copying administrative documents which may not exceed €0.18 per A4 page for black and white printing, €1.83 for a diskette and €2.75 for a CD-ROM. Moreover Article 35 of Decree n° 2005-1755 of 30 December 2005 sets out the conditions for calculating the cost of reproducing documents to be charged to the applicant, as well as postage costs, where applicable. The applicant is informed of the total charge, and the administration may require payment in advance.

52 National Implementation Reports 2011 France, see footnote 32.

53 Frédérique Agostini, see footnote 18, 5.

54 Art 4 Act n. 78 753, 17 July 1978.

55 Comments of the "Associations amis de la terre france" and "France Nature Environnement" on the project of the French Report (Convention D'Aarhus-COP4-2011), par. 3, 4.

4 Public participation

4.1 Before the implementation of the Aarhus Convention

Public participation in environmental decision-making was already known in France prior to the ratification of the Aarhus Convention, if only from the 1970s.

France was well known for its centralised tradition of government and a top-down approach characterised administrative action, the only necessary form of public participation being through elections.[56] In the 1970s the system started to change under the pressure of two factors. First environmental and social movements began to ask for more decentralised decision-making.[57] Secondly, representative democracy was in crisis at the time and the development of participative mechanisms was seen as a way of improving relationships between the citizens and the public authorities. As a result, the period which lasted from the 1970s to the late 1980s saw the opening of some public decision-making spaces in the environmental field, although the only mechanisms were public inquiries on projects affecting the environment or participation in the planning decisions, which took place in the advanced stages of the decision-making process.[58]

During the 1980s the only improvement in participation was a reform of public inquiry which recognised the right of members of the general public to submit written comments on the environmental impacts of proposed projects. Since the 1990's, the scenario has changed: participatory tools have started to develop and participation has become the model for decision-making when the environment is at stake.[59] Local environmental action plans[60] were negotiated involving the general public, and laws were adopted to set up new procedures including public participation and stakeholder negotiation for planning

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56 Pierre Muller, *Le Technocrate et le paysan. Essai sur la politique française demodernisation de l'agriculture de 1945 à nos jours* (Paris, Editions ouvrières, 1984); Jean-Pierre Le Bourhis, 'De la délibération à la décision: l'expérience des commissions locales de l'eau', in Raphaël Billé and Laurent Mermet (eds), *Concertation, décision, environnement. Regards croisés*, (La Documentation Française Paris 2003), 1, 147 to 159.

57 Laurent Mermet, 'Between international standards and specific national contexts, initiatives and perspectives: teachings from a French research program on public participation and environmental governance', *Conference on Environmental Governance and Democracy Institutions, public participation and environmental sustainability: Bridging research and capacity development* (2008) Yale University, New Haven.

58 Cécile Blatrix, Laurent Mermet and Judith Raoul-Duval, 'Research on Public Participation in Environmental Decision-Making: Approaches, Contexts, Stakes and Perspectives Across Borders', *International seminar* (2011) Wadham College, Oxford.

59 Laurent Mermet, see footnote 56.

60 Plans Municipaux d'Environnement, Plans Départementaux d'Environnement.

programs.[61] Moreover, new bodies and mechanisms were created, such as the *Commission Nationale du Débat Public*.[62]

Today, there are three principal mechanisms of public participation in France: *débat public*, *enquête public*, and *concertation*.

The *débat public*[63] (Public Debate) was introduced by the Loi Barnier[64], and today the rules pertaining to it are collected in the Environment Code which also sets up the National Commission for Public Debate.[65] This body organises public consultations on large urban development or public works projects sponsored by the State, local authorities, public institutions, and private entities.[66] The public is invited to voice its views on the advisability of the project, its goals, and its features. The purpose of the Commission is to ensure that the public can participate in the whole phase of project planning, from the commissioning of preliminary studies to the end of the public inquiry, and to ensure that the public is properly informed about the projects.

Concerning the *enquéte Public*[67] (Public Inquiry) the Environment Code provides that "The public inquiry is mandatory for activities subject to an environmental impact assessment".[68] The *Préfet* is competent both for organising the enquiry and later for taking the decision. The inquiry is led by an inspector or an inspection committee which is in charge of informing the public and gathering comments and additional information. When the inquiry is completed the inspector or the committee send the *Préfet* a report summarising the steps of the inquiry, the public comments, and the detailed reasons why the project should be approved or not. Unfavourable opinions do not bind the *Préfet* not to grant the authorisation.[69]

The last tool is the *concertation* (Consultation), which can cover all sorts of situations where there is some degree of dialogue among the different actors in the course of the decision-making process.[70] Many local government entities

[61] Planning programs for example water management (Schémas d'aménagement et de gestion des eaux), waste management (Schémas départementaux d'élimination des déchets), air pollution (Plans d'amélioration de la qualité de l'air).

[62] National Commission for Public Debate. ADELS (Association for democracy and local – social education), 'Conseils de quartier, mode d'emploi' (2003); Anacej (National Association of youth and children councils), 'Comment créer son conseil d'enfants et de jeunes' (2007); Dominique and Daniel Boy, *Conférences de citoyens, mode d'emploi*, (Paris, Charles Léopold Mayer 2005).

[63] Cécile Blatrix, 'La loi Barnier et le débat public: quelle place pour les associations?', [1997] Ecologie et Politique 21 7792; Marion Paoletti *La démocratie locale et le référendum*, (Paris, L'Harmattan 1997) 235.

[64] Barner Law 101, 2 February 1995.

[65] Décret n. 2002-1275 du 22 octobre 2002, regarding the organization of public debate.

[66] See artt L. 121-1 to L. 121-15 and R. 121-1 to R. 121-16 of the Code.

[67] Cécile Blatrix, 'Vers une 'démocratie participative'? Le cas de l'enquête publique', in CURAPP, *La gouvernabilité* (Paris, PUF 1996), 299 to 313.

[68] Artt L123-1 ff. and L122-1 of the Environment Code.

[69] Article L123-12 of the Environment Code. See Mattias Wiklund, footnote 9, 30, 31.

[70] Laurent Mermet, see footnote 18.

have elaborated internally binding rules about having concertations when elaborating plans and programmes with effects on the environment.[71]

4.2 The implementation of participation rights granted by the Aarhus Convention

An important instrument in the implementation of Article 7 has been the organisation of the Grenelle Environment Roundtable.[72] The Roundtable brought together representatives of five sectors (the State, local authorities, environmental eNGOs, companies, and trade unions) to define a 'road map' for ecology and sustainable development and town planning. On the basis of the efforts of the working groups and after a consultation phase with the different stakeholders, the negotiation phase ended with roundtable discussions with representative from the same five sectors, which allowed the main thrust of action to be decided in all areas. The initial conclusions of the process were made public at the end of October 2007. This work was translated into Act n° 2009-967 of 3 August 2009 on the programme for the implementation of the Grenelle Environment Roundtable and Act n° 2010-788.

The right to environmental participation has been recognised as a principle by Article 7 of the Environmental Charter which states that, "everyone has the right, [...] to participate in public decisions that affect the environment." The principal legislative measures are in Title II of Book I of the Environment Code, "Public information and participation": in particular Articles L. 121-1 to L. 121-16 (public debate and other means of consultation prior to a public inquiry) and L. 123-1 to L. 123-19 (public inquiry). These articles have been supported by Act n° 2010-788 of 12 July 2010 on a National Commitment to the Environment.

4.2.1 Different participation rules applicable to specific activities, plans, programs and policies, and normative instruments

A public inquiry is always planned with reference to the implementation of project listed in Annex I of the Convention. The largest urban development or public works projects may also be subject to a public debate (Article R. 121-2 of the Environment Code) or consultation prior to a public inquiry.[73] Projects subject to an impact study must be assessed by a public inquiry[74] or, in the case of exceptions to this rule, made available for public examination.[75] Other procedures may be organised in exceptional cases, such as

[71] For more information and some adopted charters on concertations: <www.comedie.org/chartes.php>, accessed 20 February 2016.

[72] See <www.legrenelle-environnement.fr>, accessed 20 February 2016.

[73] See art L. 121-16 of the Environment Code.

[74] See art L. 123-1 of the Environment Code.

[75] See art L. 122-1-1 of the Environment Code.

public conferences, or on the initiative of local authorities, in particular *referenda*.

When a project is subject to an impact study, the public may be involved already from the stage of deciding the study's scope: Article L. 122-1-2 of the Environment Code allows the developer to ask the authority competent for taking the decision to organise a consultation meeting with local stakeholders interested by the project to allow everyone to share their views on the potential impact of the planned project. Act n° 2010-788 lays out arrangements for consultations taking place between the public debate phase and the public inquiry. It also allows for consultations prior to the public inquiry without, however, making them a requirement.

If the Commission recommends that developers should pursue or continue public consultation, they are obliged to do so and to comply with the consultation arrangements suggested by the Commission. For all projects that do not fulfil the criteria for referral to the Commission, Article L. 121-16 of the Environment Code allows the entity responsible for the project, plan or programme to conduct a consultation prior to the public inquiry, at the behest of the public authority competent for authorising or approving the project. The authority may also require a consultation exercise to be organised involving all the stakeholders (the State, local authorities, environmental eNGOs or foundations, and organisations representing employees and companies).

Concerning Article 7 of the Aarhus Convention, France has transposed both Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment[76] and Directive 2003/35/EC of 26 May 2003[77] providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, which apply the principles of the Aarhus Convention at the European Union level.

Finally, concerning the implementation of Article 8 of the Aarhus Convention, Article 244 of the *loi Grenelle* II of July 2010 lays out the arrangements for the public to participate in the regulatory decisions of the State and public institutions that have a direct and significant impact on the environment.[78] Drafts of such decisions must be published electronically for a minimum of 15 days in conditions that allow the public to make comments[79] or published prior to their referral to a consultative body comprising representatives of categories of persons concerned by the decision.[80] Notwithstanding this recent improvement,

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[76] Ordinance n. 2004-489, 8 June 2004, Decrees n. 2005-613 and n. 2005-608, 27 May 2005.

[77] Decree n. 2006-578, 22 May 2006.

[78] This right is codified by Artt L.120-1 and L.120-2 of the Environment Code.

[79] The website for publications is <www.developpement-durable.gouv.fr/-Consultations-publiques-.html>, accessed 20 February 2016.

[80] For instance a public consultation exercise was arranged at the end of 2006 on preliminary drafts of the law and decree transposing Council Directive (EC) 2004/35, concerning environmental liability, OJ L143/56.

according to the CRIDEAU[81] the absence of direct effect in France and of a clear European Directive regarding Article 8 make it impossible to invoke this provision before a French court.[82]

4.2.2 Participation beyond defence and consultation, as negotiation or co-decision, and compensation mechanisms to avoid NIMBY and facilitate compromise

Most of the largest construction projects such as highways, high-speed railways or airports are challenged before the *Conseil d'Etat*; eNGOs are sometimes seen by the State as an obstruction to each and every project because they systematically invoke the Aarhus Convention, and in particular Articles 6, 7 and 8. The issue is that participation in planning decisions is a frustrating exercise because it is still extremely difficult for the public to express its point of view in decision-making because it has always to "fight to have its views heard".[83] Also according to the European Environmental Bureau (EEB)[84] France grants the public a very limited time to participate.[85] This means that the issue in France is not to find mechanisms to avoid obstructions or NIMBY but to improve participation.

4.2.3 eNGOs participation rights (also considering Art. 7 – "public which may participate")

French law does neither define 'public' nor 'public which may participate', which allows anyone interested to participate, including the eNGOs. Nevertheless participation seems to be increasingly limited to the participation of eNGOs active in the environmental field. It is as if these organisations represented the public.

The Environment Code has introduced a system of accredited associations for environmental protection[86] which entails certain benefits. These associations have a privileged status for participation in environmental decision-making as the accreditation makes them a party that must be consulted in certain procedures.

Also, the accredited associations benefit from a presumption of legal standing to appeal any administrative decision that is directly related to their objectives and statutes and entails harmful effects for the environment. They also benefit from a specific regime concerning the geographical scale of action: a

[81] Interdisciplinary Research Center of Environmental Law of Territorial and Urban Planning.

[82] Pierre Emmanuel Laernoes, see footnote 26, 54.

[83] Cécile Blatrix, Laurent Mermet and Judith Raoul-Duval, see footnote 58.

[84] Ralph Hallo, 'How far has the EU applied the Aarhus Convention?' (2007) EEB <http://www.eeb.org/index.cfm/library/index.cfm?month=0&year=2007&Aarhus=1>, accessed 20 February 2016.

[85] Pierre Emmanuel Laernoes, see footnote 26, 51-53.

[86] In French: associations agrées de protection de l'environnement.

national association can contest an act that applies to any part of the national territory, and a regional association an act concerning a part of the regional territory, including municipal decisions.[87]

4.2.4 A reasonable timeframe for the different phases

Regarding the implementation of Art. 6(3) AC, the order establishing an inquiry specifies its duration, which must neither be less than 30 day nor exceed two months. According to L. 123-9 of the Environment Code the public inquiry commissioner may make a justified decision to extend the inquiry for a maximum of 30 days. It has been noted that "the difficulties in accessing the relevant files in time before the start of the decision making process render the full implementation of Article 6, paragraph 3 impossible".[88]

4.2.5 A comparison between the Aarhus convention requirements for participation and those of EU EIA and SEA

As already recalled, France has transposed both Directive 2001/42/EC of 27 June 2001 and Directive 2003/35/EC of 26 May 2003. These provisions enhance the dissemination of information to the general public and public participation at each stage of the development of a project, plan or programme which has an impact on the environment. The new Article L. 122-8 of the Environment Code, inserted by Article 233 of the Act on National Commitment to the Environment, specifies that where a draft plan, scheme, programme or other planning document subject to environmental assessment does not have to submitted either to a public inquiry or another form of public consultation, the entity responsible for drafting must make available to the general public, before its adoption, the environmental assessment, the draft document, an indication of the authorities responsible for taking the decision and an indication of bodies from which information on the draft document can be obtained as well as opinions delivered by administrative authorities on the draft document where these are binding. The comments and suggestions collected during the time when documentation is available to the general public must be taken into consideration by the authority competent to adopt the plan, scheme or document.

Despite the transposition of the mentioned provisions, France has not completely implemented Article 7. As it has been remarked by both legal scholars and public servants, the public inquiry takes place too late in the procedure.[89] According to Michel Prieur, "it would have been much better to

[87] Art 142-1 Environment Code.

[88] Pierre Emmanuel Laernoes, see footnote 26, 50.

[89] During the 'Grenelle de l'environnement' process one expert group wrote a report about environmental governance. The French ministry of the environment was part of this expert group. On page 69 of the report, the following is proposed: "To develop the consultation of the public [such as public debate] early

foresee an earlier participation of the public, when it is still possible to amend the project".[90] Another problem is that the inquiry does not provide neither early information nor public participation to the design of the project. The solution "for this kind of project is, for it to be submitted, in addition to the public inquiry, to the public debate or to an early consultation of the public".[91] Therefore, only when a public debate or a consultation is organised at the beginning of the process, French law complies with both the Aarhus Convention and Directive 2003/35/EC.

4.2.6 Taking into account the results of public participation

From a formal point of view Article 6, paragraph 8, has been duly implemented in French law even though in fact the outcomes from public participation are not very stringent on decision makers.

The Environment Code states that at the end of a public debate, the developer must take a decision, which is published. The developer indicates in the decision the principle of and conditions for the continuation of the project placed before the public, and where appropriate the main changes to be made. The developer also lists measures that he deems necessary to put in place to respond to the lessons drawn from the public debate.[92] Moreover at the end of a public inquiry, the public inquiry commissioner must draw up a report describing the process of the inquiry and considering the comments made. This report must include counterproposals made during the inquiry as well as any responses from the developer.[93] In a separate document, the public inquiry commissioner or the inquiry commission records the conclusions reached and the grounds thereof, specifying whether or not they are favourable to the operation.[94] The Act of 27 February 2002 introduced the project declaration, adopted by a local authority after the public inquiry, in which it expresses its view as to the public interest of the project, including in particular the main changes that have been made

in the elaboration procedure of plans, and not only at the end of the procedure [public inquiry]". See Group 5 report, *Construire une démocratie écologique: Institutions et gouvernance* (2007) 69 <http://www.grenelleenvironnement.gouv.fr> accessed 20 february 2016. This proposal has been notably made by the IGE, 'Inspection Générale de l'Environnement', which is the internal inspection department of the French ministry of the environment. It clearly shows that at present public inquiries come instead at the end of the procedure.

90 Michel Prieur, *Droit de l'environnement* (Environmental Law) (5th edn, Paris, Précis Dalloz 2004), 112; Michel Prieur and Armelle Guignier, 'État de l'art des questions soulevées par la participation du public aux travaux des instances internationales', in *Rapport pour le Ministère de l'Écologie et du Développement Durable, Centre International de Droit Comparé de l'Environnement* (2006) <http://live.unece.org/fileadmin/DAM/env/pp/ppif/Full%20Professor%20Prieur% 20report.pdf> accessed 24 february 2016.

91 Yves Jégouzo, 'L'enquête publique en débat', in *Etudes offertes au professeur René Hostiou* (2008) 280.

92 Art L. 121-13 of the Environment Code.

93 Art L.123-15 of the Environment Code.

94 Art R. 123-22 of the Environment Code.

following the public inquiry.[95] Articles 236 and 238 of Act n° 2010-788 specify that the decision and the project declaration must take into consideration "the result of public participation".

Despite the above referred provisions, the problem is that the opinion of the inquiry commissioner does not bind the final decision. Indeed permits can be granted against the opinion of the commissioner. Article L.126-1 of the Environment Code stipulates that the nature and the motives of the modification to a project may not alter the general economy of such a project. This means "that a project may never be altered completely which seems to be in contradiction with Article 6, paragraph 4 and paragraph 8 of the Aarhus Convention".[96] Moreover, as pointed out by two eNGOs[97] for a French administrative court 'taking into account' means that the competent authority may not deviate from 'fundamental orientations' of the documents to be taken into account.[98]

Concerning Article 6, paragraph 9 of the Aarhus Convention, the Act of 27 February 2002 stipulates that project declarations[99] and public interest declarations[100] must be accompanied by a statement of grounds. The same applies to decisions to grant or refuse permission to projects subject to impact assessments, which must be accompanied by a statement of grounds and made public.[101] The problem is that French law does not require the decision-maker to disclose the detailed reasons for her/his decision not to take into account the results of the public participation or the opinion of the inquiry commissioner, but it provides just a general principle: the official documents of the administration shall be published.

5 Access to courts

5.1 Pre-implementation

Generally speaking, the French system provides for mechanisms satisfying the requirements on access to justice of the Aarhus Convention. The French judiciary is divided into branches: On one hand, there are courts of ordinary jurisdiction which hear both civil and criminal cases, and on the other hand administrative courts which only hear administrative cases.[102] The *Cour de Cassation* is the highest court having ordinary jurisdiction, while

95 Arts L. 126-1 and R. 126-1 to R. 126-4 of the Environment Code.

96 Pierre Emmanuel Laernoes, see footnote 26, 50.

97 Comments of the 'Associations amis de la terre france' and of 'France Nature Environnement' on the project of the French Report. Convention D'Aarhus-COP4-2011, par 4, 10.

98 Conseil d'État 28 july 2004, BJCL 9 2004, 613.

99 Art L. 126-1 of the Environment Code.

100 Art L. 11-1-1 of the Expropriation Code.

101 Art L. 122-1 of the Environment Code.

102 Laws 16-24 August 1790 and 16 Fructidor Year III (1795).

the *Conseil d'Etat* sits at the top of the administrative jurisdiction. Moreover the *Conseil constitutionnel* is the constitutional court.

When challenging an administrative decision in France administrative appeal as well as judicial review are available. There are two types of administrative appeals: the *Recours gracieux* ("non-contentious appeal") to the same authority having taken the decision challenged or having failed to act, and the *Recours hierarchique* to a hierarchically superior authority.[103]

In general, the French system for appeal and review in environmental matters follows the general procedures or instances, no specific rules having been enacted for challenging violations of environmental legislation by public authorities, individuals or private bodies.[104] Environmental claims may be pursued in the three courts (civil, criminal and administrative) and the competence depends on the nature of the claim.[105]

A new procedure which is also applicable to environmental cases is Article 61-1 of the Constitution, added by Constitutional Act n° 2008-724 of 23 July 2008. It allows parties to a judicial proceeding to challenge statutory provisions infringing the rights and freedoms guaranteed by the Constitution. The principles and rules that may be invoked in a 'priority question of constitutionality' are enshrined in the 1958 Constitution and the texts listed in its preamble (the 1789 Declaration, the preamble to the 1946 Constitution and the Environmental Charter). Particularly important for the present contribution are the right of access to environmental information held by public bodies and the right to participate in public decisions that affect the environment (Article 7 of the Environment Charter, whose constitutional value has already discussed).[106]

5.2 Implementation of the third pillar

5.2.1 Alternatives to court procedures

Concerning denied access to information, French law distinguishes between administrative appeal and judicial review procedures. In some cases administrative appeals are a condition precedent to judicial review. This is

[103] Mattias Wiklund, see footnote 9, 25.

[104] Mattias Wiklund, see footnote 9, 22.

[105] Mattias Wiklund, see footnote 9, 25.

[106] This is a new remedy introduced on 1 March 2010 before all courts. In an interim order of 16 June 2010 (Conseil d'État , ordonnance de référé 16 June 2010, 340250), the Council of State held that a priority question of constitutionality may be raised before an administrative judge for interim applications ruling in first instance or appeal pursuant to article L.521-2 of the Code of Administrative Justice. In a plenary ruling of 3 October 2008 (Conseil d'État arrêt d'assemblée 3 October 2008, 297931, Commune of Annecy) the Council of State recognised the constitutional status of the Environmental Charter, infringement of which can be invoked to contest the legality of administrative decisions. See National Implementation Reports 2011 France, see footnote 32.

the case of complaints related to the access to information, where the CADA has to be consulted before the administrative courts can examine a complaint.[107]

As already mentioned, Article 20 of Act n° 78-753 of 17 July 1978 set up the CADA to ensure freedom of access to administrative documents and to hear appeals on decisions refusing access to documents.[108]

If the CADA finds the refusal illegal but the competent authority confirms it, the applicant may challenge the decision in front of the administrative courts. While it is mandatory to consult the CADA, its opinions and decisions are neither binding on nor enforceable against the administration.[109] In practice, however, the administration complies with favourable opinions from the Commission in 65 per cent of the cases.[110]

Article 6 of Act n° 73-6 of 3 January 1973 provides that persons who consider that the administration has not acted in accordance with its mission of public service may ask for the case to be brought to the attention of the French Ombudsman, the *Médiateur de la République*, who is an independent authority.[111] However, the claim must be lodged with a Parliamentary representative, who in turn will decide whether or not to submit the claim to the Ombudsman.[112] When the complaint is deemed to be justified, the Ombudsman issues any recommendations he or she believes will resolve the matter, in particular recommending to the body in question any solution allowing the claimant's dispute to be settled equitably. Prior to the complaint, the necessary procedures must be carried out with the relevant administrations and the complaint has no effect on deadlines for appeals. All administrative remedies must have been exhausted before submitting a claim to the Ombudsman. An inquiry to the Ombudsman does not suspend the statute of limitation for judicial review.[113] The Ombudsman too

[107] Mattias Wiklund, see footnote 9, 34-37.

[108] There are two distinct ways in which applicants can bring interim proceedings against the refusal: They can file an interim application for the decision refusing communication of a document to be suspended pursuant to article L. 521-1 of the Code of Administrative Justice. In this case, the interim application for suspension must be accompanied by an application for the annulment of a decision to refuse communication. For this latter application to be admissible, the matter must have been referred to the Commission on Access to Administrative Documents. The applicant has two months to apply to the Commission. The Commission sends an opinion to the competent authority on whether the information requested should be communicated. Within a month of receipt of this opinion, the administration informs the Commission how it intends to follow up the application for communication. The applicant can file an interim application for access under the so-called "useful measures" proceeding specified under article L. 521-3 of the Code of Administrative Justice. As this interim application is urgent, there is no need for the Commission to issue an opinion. See National Implementation Reports 2011 France, see footnote 32.

[109] Ralph Hallo, *How far has the EU applied the Aarhus Convention?* (Brussels 2007).

[110] National Implementation Reports 2011 France, see footnote 32.

[111] Art 1, loi n. 73-6 du 3 janvier 1973.

[112] Art 6, ibidem.

[113] Art 7, ibidem.

gives opinions (*avis*) recommending solutions to an administrative dispute, but these are purely advisory in nature, and as for the CADA, they lack any binding effect.

5.2.2 Standing, including of eNGOs

Any natural or legal person (with legal personality) including non-French citizens,[114] environmental groups and territorial authorities[115] has standing to bring proceedings before the French administrative courts.

In administrative courts standing of individuals follows the criteria set out in the *Code de Justice Administrative*. Basically the admissibility of a claim depends upon the nature of the contested measure and the interest of the claimant. The contested decision must be an administrative act and must affect the claimant's material or moral interests. The claimant must thus show that his or her interest is direct, certain and current.[116]

Concerning eNGOs already in 1906 associations were granted standing to bring actions on behalf of collective interests.[117] Since the 1970s, a stronger emphasis has been put on the role of interest groups active in the field of environmental protection.[118] French courts, both administrative or judicial, are usually generous on eNGOs standing.[119] eNGOs may introduce any claim as long as it is formed in accordance with the legal requirements.[120]

The rights and obligations of environmental eNGOs are clearly laid out in Articles L.141-1 and supplemented in the Environment Code. As it has been already remarked, the Environment Code has introduced a system of accredited associations for environmental protection. Articles L142-1 of the CE and L600-1-1 of the Urban Code have stipulated that in order to challenge an administrative decision, a NGO must have been created before the decision was adopted. Furthermore the NGO must have deposited its statutes before the decision was made public.

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[114] Conseil d'État 18 avril 1986. In this case the foreign province of Northern Holland, the City of Amsterdam and a Dutch environmental protection association initiated proceedings against a decree authorising a mine to dump waste into Rhine waters.

[115] Art L142-1 of the Environment Code.

[116] Conseil d'État 21 December 1906, Recueil Lebon, 962.

[117] Conseil d'État 28 December 1906.

[118] See for example Decree n. 71-45 du 2 avril 1971, art 61. Mattias Wiklund, see footnote 9, 34-37.

[119] The Court has ruled that an environmental NGO may bring a civil action not only before a criminal court, but also before a civil court (Court of Cassation 7 December 2006). It has also ruled that an association may bring legal action on behalf of collective interests, as long as such interests fall within the scope of its mandate, without reference to any requirement for authorisation (Court of Cassation 5 October 2006). See National Implementation Reports 2011 France, see footnote 32.

[120] Conseil d'État 31 october 1969, Rp, 462. Mattias Wiklund, see footnote 9, 34-37. Nicolas de Sadeleer, 'Access to Justice in Environmental Matters' (2002) ENV.A.3/ETU/2002/0030 Final Report, 4.1.1, 19, <http://ec.europa.eu/environment/aarhus/pdf/accesstojustice_final.pdf> accessed 24 february 2016.

Under Article L. 142-1, paragraph 1, any environmental NGO may bring proceedings in administrative courts for any complaint relating to its purposes. Article L. 142-1, paragraph 2, gives eNGOs standing in proceedings against any administrative decision having harmful impacts on the environment. Finally under Article L. 142-2, eNGOs have the right, under certain conditions, to exercise the same rights as those granted to private applicants to ask for damages in criminal cases.

5.2.3 The review of "substantive and procedural legality" as required by Art9(2) of the Aarhus Convention

The classification of legal actions before the administrative courts includes four types of proceedings, categorised by the nature and extent of the powers of the court: interpretation proceedings, repression proceedings, full jurisdiction proceedings, and annulment proceedings.[121]

In interpretation proceedings courts give an interpretation when an administrative decision is unclear; courts can also declare the measure illegal if so transpires after having interpreted it. In repression proceedings (*Contentieux de la repression*) the court has the power to levy penalties for contraventions with an administrative nature.[122]

In full jurisdiction proceedings (*Contentieux de pleine jurisdiction*) the court can annul the decision on the basis that it is illegal or substitute it by one of its own; it can also reform decisions laying down new technical standards for the subsequent administrative activity, and can order damages to be paid to the plaintiff. This procedure is used when a question is raised regarding the existence of a situation affecting an individual right. In the environmental area, this procedure is applicable for every legal action related to the liability of public authorities and for litigation on classified installations.[123]

The last type of legal actions – also available in environmental cases – is made up of annulment proceedings. The most common is *recours pour excès de pouvoir* which is used to ask the annulment of a decision due its illegality. Once declared the illegality, the court can either annul the decision or send it back to the original authority for a new decision.

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[121] In accordance with one of two major typologies. This one is Laferrière's, as presented in René Chapus, *Droit Administratif Général* (Tome I, Paris Dalloz 2001), 749.

[122] An example of type of repressive administrative procedure is called *Contraventions de grande voirie*, and concerns damage to the public domain, see Mattias Wiklund, see footnote 9, 34.

[123] The rules on classified installations (installations classées pour la protection de l'environnement) include the activities listed in the IPPC directive (Council Directive EC 2008/01). Mattias Wiklund, see footnote 9, 35,36.

5.2.4 The remedies available

Injunctive relief to prevent imminent harm or even to stop certain illicit activities can be sought before civil courts. Such injunctions may be ordered, subject to a constraint in an amount set by the court in the event of a delay in execution. Then, an injunction for redress may also be obtained, subject to a fine for non-performance, by filing an application to the competent court.[124]

With regards to administrative courts, Article L. 521-1 of the Code of Administrative Justice provides that in urgent cases and where there is a serious doubt as to the lawfulness of a disputed decision, the court can suspend the enforcement of a decision or of some of its effects. A negative decision may also be suspended. Furthermore, Articles L. 554-11 and L. 554-12 of the Code provide for two special suspension procedures to protect nature or the environment that obviate the need to demonstrate the urgency of the interim measure. The first may be used against permits wrongly issued without a prior environmental impact assessment. The second allows the suspension of a planning decision that is subject to a prior public inquiry but either no inquiry has been held or the inquiry commissioner has issued an unfavourable opinion. Similarly, Article L.123-16 of the Environment Code provides that an administrative court must grant the suspension of a decision taken after unfavourable findings by the inquiry commissioner if there is serious doubt as to the legality of this decision.

Book IX of the Code of Administrative Justice also provides remedies to beneficiaries of court decisions having become final, enabling them to secure their enforcement when administration fails to give them effect within a reasonable time.

The constitutional principle of the separation of powers is generally read as forbidding courts to take decisions in the place of the administration. However, in two cases the law allows administrative courts to call upon the administration to give effect to a *res judicata* at the request of the complainant: (a) when the *res judicata* 'necessarily entails' the adoption of a given implementation measure,[125] and (b) when it 'necessarily entails' the taking of a decision after completion of a fresh investigation of the case.[126] The court may give a deadline to the administration to give effects to the ruling, providing for a fine if the deadline is not met.[127]

Administrative courts may also award damages to compensate for non-economic harm suffered by the claimant. Claims for damages are possible in full-jurisdiction procedures (*Contentieux de pleine jurisdiction*). Individuals may claim damages when their interests have been violated by a public authority's

[124] See National Implementation Reports 2011 France, see footnote 32.

[125] Art L. 911-1 of the Code of Administrative Justice.

[126] Art L. 911-2 of the Code of Administrative Justice.

[127] Art L. 911-3 of the Code of Administrative Justice.

decision while eNGOs must show that the illegal measures taken impair the attainment of the objectives mentioned in their articles of incorporation.[128]

Compared to the civil liability, environmental damages present peculiar features: they include damages suffered by persons and/or properties but also those suffered by the environment *per se*. French civil law deals with environmental damages using the general principles of civil liability found in the Civil Code. The difficulty for the eNGOs has traditionally been to prove damages linked sufficiently to the interests they defend. Recently, however, a civil court has recognised the widest possibilities for the eNGOs to bring cases in order to obtain compensation for damages caused to the public interest they represent.[129]

5.2.5 Time and costs of judicial remedies and legal aid

There are no fees for initiating administrative judicial procedures. Certain costs are however connected to a judicial procedure even if they are generally not excessively high in France. The civil, administrative and criminal procedure codes contain provisions on lawyers and other fees, costs and the burden of costs.[130]

As a general rule, legal representation before judicial bodies is mandatory since June 24, 2003 (decree n°2003-543). In appeal procedures before the administrative appeal court and before the *Conseil d'Etat*, the plaintiff must hire the services of a senior lawyer qualified to plead before the higher courts (*avocat* au *Conseil d'Etat et à la Cour de Cassation*). Costs for inspections and other activities by the judges, experts, witnesses will be borne by the losing party if the court so decides. The court may also require the losing party to pay for the winning party's lawyer.[131] The lawyer's fees are around 160-200 EUR per hour. Experts, who are often needed in environmental procedures, are extremely expensive, for instance, an expert on noise may cost between 3000 and 15000 EUR.[132]

Under Act n° 91-647 of 10 July 1991, as amended, a system of financial aid may help applicants, including eNGOs, whose financial resources fall below certain thresholds. This guarantees them effective low-cost access to the courts.[133] The Decree n° 91-1266 of 19 December 1991, implementing the law, provided for two kinds of legal aid, one specifically to help with access to the

[128] Tribunal Administratif de Versailles 21 november 1986, Revue juridique de l'Environnement 1987, 79.

[129] Cour de Cassation (2) 7 December 2006 n. 05-20297 and Cour de Cassation (2) 5 october 2006 n. 05-17602. See Mattias Wiklund, see footnote 9, 37.

[130] Nouveau code de procédure civile, art 700; Code de procédure pénale, art 457-1; Code de justice administrative, art L. 761-1.

[131] On average 1000 € for the administrative court, 1,500 € for the Administrative Appeal Court and 2000 € for the Conseil d'État .

[132] See the report 'Inventory of EU Member States' measures on access to justice in environmental matters' <http://ec.europa.eu/environment/aarhus/study_access.htm>, accessed 24 february 2016.

[133] See National Implementation Reports 2011 France, see footnote 32.

courts and the other to facilitate the provision of legal advice and assistance in non-judicial procedures.[134]

6 Conclusions

Generally speaking, France has been somewhat proactive in ensuring its compliance with the Aarhus Convention and with the EU legislations by enacting legislation implementing the three pillars. However, some issues still persist. The Convention can only have a real impact if the exact content of the obligations is known beforehand and not if the *Conseil d'Etat* determines the direct effect of its provisions one by one.

Concerning the access to information, according to the European Environmental Bureau[135] France has taken effective steps to promote the first pillar to officials and to the general public. However at a closer look non compliance seems to be mainly due to the lack of awareness of such rights by members of the public and to the lack of resources of the public authorities.[136] The eNGOs also emphasise the need to improve access, and they have pointed out that there is a 'culture' of resistance to transparency in the French administration. The other difficulties are attributed to a lack of resources in some poorly staffed authorities and to requests that are badly drafted or that do not specify the competent department. The administration still needs to put into place systems enabling requests to be passed on to the competent department.

In addition, there are still obstacles in the implementation of Article 5 concerning the collection and publication of data. The main difficulties here are due to lack of data on some aspects.

Concerning public participation, the situation is more challenging: the French system for public participation at large offers many opportunities to participate in the procedures required by the Convention. However, certain tools appear to be weak. In France there is a deep-rooted feeling that public participation procedures have too often no impact on decision-making and just provide a cover for the authorities.[137]

The main obstacle is the way comments from the public are taken into account and implementation seems again to find a "certain reticence to transparency of the French administrative authorities".[138]

As it has been highlighted by many French authors[139] such as Jacques Chevalier, "public debate does not entail transfer nor real sharing of decision-making

[134] Mattias Wiklund, see footnote 9, 40, 41.

[135] EEB, feb 2011 powerpoint on http://www.eeb.org/index.cfm/search-results/?q=powerpoint+aarhus.

[136] National Implementation Reports 2008 France, see footnote 32.

[137] Ralph Hallo, see footnote 109.

[138] Pierre Emmanuel Laernoes, see footnote 26, 51-53.

[139] Pierre Lascoumes affirmes about the public inquiry: 'Cette enquête ne sert bien souvent qu'à légitimer artificiellement un choix déjà réalisé'. Elisabeth Joly-Sibuet, Pierre Lascoumes, Anne Guchan and

powers".[140] There is also a consensus among French scholars that the public inquiry is not a procedure adequate to meet the requirements laid down in Article 6 of the Aarhus Convention.[141] According to Michel Prieur, the public inquiry "often has the only role to artificially legitimate a choice that is already made".[142] Moreover, specialists of Planning Law stated that "the public inquiry often starts late in the planning process, when it is hard to come back on the initial choices already made".[143] As a consequence, when there is no substitution mechanism such as the public debate, the public inquiry, alone, is not sufficient to comply with the Aarhus Convention."[144]

Another problem is the limited direct effect recognised to the Aarhus Convention in domestic law because just few paragraphs of Article 6 and Article 7 are considered to be directly applicable.[145] The other paragraphs and Article 8 are held to create obligations between the signatories to the Convention only, and as a consequence, they can not be invoked as a ground to void the decision challenged.[146] This makes the effectiveness and applicability of those provisions very limited.[147]

The French system of access to justice, according to the European Environmental Bureau[148], puts France in the list of the Parties that have already reached a satisfactory situation in transposing and implementing the III Pillar with relatively generous standing criteria for both individuals and eNGOs. In fact France recognises and interprets in a non-restrictive way standing eNGOs and members of the public, a sufficient interest being required in the administratives courts.[149] However, costs seem to be a potential issue. Many of the

Raymond Leost, 'Conflits d'environnement et intérêts protégés par les associations de défense' [1988] SRETIE, Ministère de l'environnement 148.

[140] Jacques Chevalier, 'Le débat public en question', in *Pour un droit commun de l'environnement, Mélanges en l'honneur de Michel Prieur* (Paris Dalloz 2007) 505.

[141] See also Jacques Caillosse, 'Même réformée, l'enquête publique n'offre toujours pas les garanties d'une procédure démocratique' [1986] Revue Juridique de l'Environnement 166, quoted by Raphael Romi, *Droit et administration de l'environnement* (6ème édition, Paris Montchrestien 2007) 106.

[142] Michel Prieur, see footnote 90.

[143] François Priet and Henri Jacquot, *Droit de l'urbanisme* (Urbanistic law) (6ème édition, Paris Précis Dalloz 2008) 107.

[144] Yves Jégouzo, 'L'enquête publique en débat', in *Etudes offertes au professeur René Hostiou* (Paris Litec 2008) 275.

[145] National Implementation Reports 2011 France, see footnote 32.

[146] Conseil d'État 28 December 2005, n 267287, Rec Lebon 690.

[147] Pierre Emmanuel Laernoes, see footnote 26, 50.

[148] EEB 2010 powerpoint http://www.eeb.org/index.cfm/library/index.cfm?month=0&year=0&Aarhus=1. EEB, powerpoint on http://www.eeb.org/index.cfm/search-results/?q=powerpoint+aarhus.

[149] Furthermore, in 2006 the Court of Cassation has been favourable to civil action brought by environmental protection associations. The Court has ruled that an environmental protection association may bring a civil action not only before a criminal court, but also before a civil court (Court of Cassation 7 December 2006). It has also ruled that an association may bring legal action on behalf of collective

procedures available for jurisdictional review require the presence of legal, often expensive, professionals. This, "coupled with limited possibilities to receive legal aid for environmental associations could run risk of effectively limiting the possibility to review environmental decisions".[150]

interests, as long as such interests fall within the scope of its mandate, without reference to any requirement for authorization (Court of Cassation 5 October 2006).

[150] Mattias Wiklund, see footnote 9, 42.

CHAPTER 4

The Aarhus Convention, The Legal Cultural Picture: Country report for German

Bilun Müller

1 Introduction*

Rules and principles are at the core of the German legal order and are an important component of the local legal culture. While rules can be changed by enacting a new law, the legal culture that finds expression in underlying, often unwritten principles, is more difficult to change. The rights contained in the Aarhus Convention are still not fully enforceable in Germany. The implementation of the Aarhus Convention in Germany is still meeting resistance and this chapter will outline some of the reasons for this. One difficulty in describing the German situation is that Germany is a federal state with 17 legal orders, i.e. one federal state (the *Bund*) and 16 states (the *Länder*).

2 The right to access to environmental information

According to Art 4 para 1 of the Aarhus Convention, the Parties shall ensure that public authorities shall, upon request, make environmental information available to the public. This shall include copies of the actual documentation containing or comprising such information.

2.1 Pre-implementation

2.1.1 The right to access to environmental information

Firstly, the question shall be addressed as to whether the right to access environmental information has already existed in the German legal system, and if so to what extent.

Prior to the implementation of the Aarhus convention, the public had the right to access environmental information on the basis of § 4 para 1 of the first Environmental Information Act (*Umweltinformationsgesetz* or *UIG* of 1994[1]). The *UIG* 1994 was based on Environmental Information Directive 90/313/EEC.[2] Prior to 1994 a general right to access environmental information held by public authorities was not written into any German law. However, in Germany the right to access information can be distinguished in two forms: firstly, access to documents contained in a file that concerns oneself, and secondly, the right to access other information.

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[1] *Umweltinformationsgesetz* of 8 July 1994 [1994] BGBl I 1490. Now this right is contained in § 3 para 1 of the new *Umweltinformationsgesetz* of 22 December 2004 [2004] BGBl I 3704.

[2] Council Directive (EEC) 90/313 on the Freedom of Access to Information on the Environment [1990] OJ L158/56.

The right to access documents contained in a file held by a public authority that concerns oneself was known since 1 January 1977.[3] It is called *Anspruch auf Akteneinsicht* or *Akteneinsichtsrecht Beteiligter*, and contained in § 29 of the Federal Administrative Procedures Act (*Verwaltungsverfahrensgesetz des Bundes* or *VwVfG* of 1977).[4] While this code is only applicable to public authorities of the federal state (the *Bund*),[5] all the individual states (*Länder*) have provisions that have almost the same wording.[6] § 29 VwVfG would apply, for example, in cases where someone, say X, applied for planning permission and the administration would have a file "Application of X for a planning permission to build on site Y". Then X could apply to view the documents contained in his or her file. In Germany the right to access information contained in a file concerning oneself is perceived as a necessity flowing from the principle of a fair administrative procedure as demanded by the rule of law.[7] Some also argue that it is based on the principle of the protection of human dignity, i.e. the person involved in an administrative procedure must not be degraded as the object of administrative actions but must be respected as a subject in his or her own right who is put in the position of fighting the public authority on equal terms based on the principle of transparency regarding his or her own file.[8]

As stated above, there was no general right to access information held by public authorities until the enactment of the *UIG* 1994. Obviously, the *UIG* was only granting the right to environmental information. This right had only been introduced in order to comply with European legislation. It was not until 2005 that the federal state introduced a general Freedom of Information Act (*Informationsfreiheitsgesetz* or *IFG*)[9], making it a rule that individuals have a right to access information held by the administration unless listed exemptions applied, and without the need to show a personal interest. Interestingly, this truly general freedom of information legislation was not introduced by pressure from the European Union but because of changes in the German society that started in some of the *Länder*.[10]

The original *UIG* of 1994 granted everyone the right to access environmental information regardless of whether against federal authorities or those of the

3 See Michael Sachs in Paul Stelkens, Heinz Joachim Bonk and Michael Sachs (eds), *Verwaltungsverfahrensgesetz – Kommentar* (7th edition 2008) Introduction, para 41 in conjunction with Heinz Joachim Bonk and Dieter Kallerhoff in Paul Stelkens, Heinz Joachim Bonk and Michael Sachs, *Verwaltungsverfahrensgesetz – Kommentar* (7th edition 2008) § 29 para 1.

4 *Verwaltungsverfahrensgesetz* first enacted 25 May 1976 [1976] BGBl I 1253, now applicable in the version of the publication of 23 January 2003 [2003] BGBl I 102, as amended by statute of 14 August 2009 [2009] BGBl I 2827.

5 VwVfG, § 1.

6 Michael Sachs, see footnote 3, para 47.

7 Heinz Joachim Bonk and Dieter Kallerhoff, see footnote 3, § 29 paras 1 and 4.

8 Ibid, para 4.

9 *Gesetz zur Regelung des Zugangs zu Informationen des Bundes* of 5 September 2005 [2005] BGBl I 2722.

10 Dieter Kugelmann, 'Das Informationsfreiheitsgesetz des Bundes' [2005] NJW 3609ff.

Länder. However, this is no longer the case as the new *UIG* of 2004 restricts its scope of application to the federal administration only.[11] The European Community amended its Environmental Information Directive by enacting Directive 2003/4/EC[12] in order to implement the Aarhus Convention.[13] Germany, as a consequence, enacted a new *UIG* in 2004 to comply with this new directive.[14] However, this new statute is only applicable to the federal administration. Nevertheless, there is no gap of access to environmental information in the *Länder* as these have legislation granting access to environmental information themselves.[15]

In Germany the object of the right of access is environmental information, not the document in which it is contained as such.[16] The information can be provided by the public authority either by giving the information, or by letting the applicant have a look the files, or in any other way.[17] If the applicant applies for a specific type of disclosure, the public authority will usually grant this type of disclosure.[18] However, the public authority can deny the requested type of disclosure if there are substantial reasons for not doing so, one of which would be a significantly higher administrative burden.[19] If the authority grants access to the physical file it will usually also provide the applicant with the opportunity to make copies. These copies must be affordable.[20]

In conclusion it can be seen that the source for granting the public the right to access environmental information is legislation that is not endemic at all, but only introduced because of pressure by the EU. As a result, the model contained in the European environmental information directive has been followed.

There have been some cases from the ECJ forcing Germany to include certain provisions in its environmental information legislation, for example Case C-217/97[21] when the Court held that Germany must not exclude access to environmental information in ongoing administrative procedures if the information is already available in the public authority. Another important aspect of

[11] UIG, § 1 para 2.

[12] European Parliament and Council Directive (EC) 2003/4 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC [2003] OJ L41/26.

[13] See European Parliament and Council Directive (EC) 2003/4, Recital 5.

[14] See *Entwurf eines Gesetzes zur Neugestaltung des UIG*. Gesetzentwurf der Bundesregierung, Deutscher Bundestag [2004] BT-Drs 15/3406, 1.

[15] For a list of the provisions in all of the 16 Länder see Michael Zschiesche and Franziska Sperfeld, 'Zur Praxis des neuen Umweltinformationsrechts in der Bundesrepublik Deutschland' [2011] Zeitschrift für Umweltrecht 71, footnote 6.

[16] See UIG 2004, § 3 para 1.

[17] Ibid, § 3 para 2 first sentence.

[18] Ibid, § 3 para 2 second sentence.

[19] Ibid, § 3 para 2 second and third sentence.

[20] See Johannes Bohl, 'Der „ewige Kampf" des Rechtsanwalts um die Akteneinsicht' [2005] NVwZ 133, 137 ff.

[21] Case C-217/97 *Commission v Germany*.

that judgement was that the Court held that Member States are not authorised to pass on to those seeking information the entire amount of the costs (indirect costs, in particular) actually incurred from the State budget in conducting an information search. Another judgement was the so called *Mecklenburg*[22] case which was the result of a preliminary ruling of a German regional administrative court. It concerned the question what is comprised by the term information about the environment and the reason to refuse a request for information on the grounds of the information being under inquiry or which are the subject of preliminary investigation proceedings. As a consequence, in 2001[23] the *UIG* 1994 was amended accordingly.[24]

2.1.2 Interaction of the right of access with duties to make some information generally available

Secondly, it shall be examined how the right of access interacts with duties to make some information generally available (Art 5 of the Aarhus Convention, and specifically para 3) and with Directive 2003/98/EC on the re-use of public sector information (currently under revision) as well as with similar instruments.

Should the information requested already be publicly available under the provision providing for dissemination of environmental information,[25] the public authority may refer the applicant to any such publication.[26] Usually, the public authorities will publish basic environmental information online.[27] The *UIG* 2004 expressly imposes an obligation on the federal government to publish regularly (at least once every four years) a report on the state of the environment in the republic (the *Bund*).[28] The provisions on dissemination of environmental information serve the implementation of Art 7 of the Environmental Information Directive 2003/4/EC[29] which implements Art 5 of the Aarhus Convention. The German provisions on dissemination of environmental information by the public authorities comply with Art 5 para 2 of the Aarhus Convention. i.e they are usually sufficient, easily accessible and user friendly.

The public authority does not have to assemble or collect the information sought if the information is not already held by the public body. This becomes very clear when looking at the wording of the provision giving everyone access to environmental information which states:

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[22] Case C-321/96 *Mecklenburg v Pinneberg - Der Landrat*.

[23] By Law of 27 July 2001 [2001] BGBl I 1950.

[24] See Olaf Reidt and Gernot Schiller, *Landmann/Rohmer Umweltrecht* (65th edition 2012), Introduction, para 64.

[25] UIG 2004, § 10.

[26] Ibid, § 3 para 2 fourth sentence.

[27] Ibid, § 10 para 3 second sentence.

[28] Ibid, § 11.

[29] Olaf Reidt and Gernot Schiller, *Landmann/Rohmer Umweltrecht*, see footnote 24, § 10 para 3.

"Everyone has the right to free access environmental information according to this statute that is available in any office with a statutory duty to grant access to environmental information without having the need to demonstrate a legal interest."[30]

However, as a kind of preventive measure, public authorities shall collect environmental information in databases in order to ensure that they can comply with future requests for information.[31] As a consequence, an applicant cannot force a public authority to make information available in a certain format, i.e. a chart or a table if they do not have this information readily available in this format.

Directive 2003/98/EC on the re-use of public sector information[32] has been implemented in Germany by enacting a law on the re-use of public sector information (*Gesetz über die Weiterverwendung von Informationen öffentlicher Stellen*).[33] This statute makes clear that no claim on access to information can be based on it.[34] It just lays down conditions for the re-use of information and decisions of the public authority to allow the re-use.

2.1.3 The duty to provide information and private law entities

Thirdly, it shall be examined if the notion of public authority under a duty to provide information (Art 2 para 2 of the Aarhus Convention) is wide enough to cover some private law entities (e.g. concessionaires in relation to services of general economic interest – SGEI activities).

It should also be noted that not only public authorities must grant the public access to environmental information, but that the *UIG* 2004 also requires private natural and legal persons to provide access to environmental information. However, they must only do so if they are fulfilling public duties or provide public services that are of relevance to the environment and if they are, at the same time, under control of the federal state or a legal public entity that is controlled by the federal state.[35] This applies in particular, if they provide environmental services for the public.

The right to access information against a private entity is enforceable against the private entity holding that information, and not the public authority supervising the private entity. However, jurisdiction remains with the administrative courts to decide on allowing judicial review.[36]

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[30] UIG 2004, § 3 para 1.

[31] Ibid, § 7 para 1 second sentence.

[32] European Parliament and Council Directive (EC) 2003/98 on the re-use of public sector information [2003] OJ L345/90.

[33] *Gesetz über die Weiterverwendung von Informationen öffentlicher Stellen* (*Informationsweiter-verwendungsgesetz* or *IWG*) [2006] BGBl I 60.

[34] IWG, § 1 para 2a.

[35] UIG 2004, § 2 para 1 no 2.

[36] Ibid, § 6 para 1.

2.1.4 Influence of German legislation on the Aarhus Convention in the field of access to environmental information

Finally, the question shall be addressed whether German legislation influenced any provisions of the Aarhus Convention in the field of access to environmental information.

As the German legislation in this field came after the Aarhus Convention it did not find expression in the Aarhus Convention. It cannot be excluded, though, that some German legal thinking found its way indirectly into the Aarhus Convention, namely via the German position in the negotiations of the first Environmental Information Directive 90/313/EEC that served as an example for the wording of the Aarhus Convention.[37] This is possible particularly with reference to the list of exceptions.

2.2 Post-implementation

2.2.1 The right to access environmental information and the existing legal framework

Firstly the question shall be addressed whether the right to access environmental information fits easily into the existing legal framework. The answer is quite simple: The right to access information did not easily fit into the existing legal framework. Prior to the implementation of the EU Directive in 1994 German administration was ruled by the principle of secrecy, the so called *Arkantradition*, i.e. to keep everything that the state did secret.[38]

As a consequence, granting the right to access environmental information did require extensive reforms. A completely new statute had to be enacted, the *UIG*. However, if this research question would be understood as inquiring if the Aarhus Convention as such did require extensive reforms, the answer would be no, because the legal ground in Germany was already prepared by the implementation of the European Environmental Information Directive´s which was previous to the conclusion of the Aarhus Convention. Only slight adjustments had to be taken to comply with the new European Environmental Information Directive. While being a complete recast, the new *UIG* amended the old UIG only slightly content wise.[39]

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[37] Stephen Stec and Susan Casey-Lefkowitz, 'The Aarhus Convention: An Implementation Guide' (United Nations 2000) 65, available at https://www.unece.org/fileadmin/DAM/env/pp/implementation%20guide/english/part1.pdf accessed 5 October 2016.

[38] See Bernhard Wegener, *Der geheime Staat – Arkantradition und Informationsfreiheitsrecht* (Morango 2006).

[39] Major changes were that the scope of application was limited, due to constitutional reasons, to federal institutions only, and for example that the time limit in which the public authority had to answer the request was shortened from two months to generally one month (§ 3 para 3 *UIG* 2004). Another amend-

2.2.2 Reactions to the implementation

Secondly, the reactions to the implementation will be discussed. It will be dealt with the question if the amendments were seen as legal irritants, and if they met resistance, as well as whether the general public and NGOs are taking advantage of the rights conferred under the Aarhus Convention. Again, if one looks at the reforms made necessary by the Aarhus Convention itself the answer is no, as the first European Environmental Information Directive prepared the German ground. However, if the situation is compared to the one prior to 1994 the answer is yes. The rights introduced in 1994 met the resistance of civil servants and industry. As a result, they were not always applied correctly. Consequently there were numerous court cases.[40] This resistance can be explained by the underlying German principle of protecting the secrecy of the administration's files. Very often, however, the administrative bodies were relying on organisational reasons when denying requests, stating they would not be a body required to disclose information.[41]

More and more citizens take advantage of their information rights.[42] Also environmental NGOs are increasingly demanding information.

2.2.3 EU law as an important instrument in easing the implementation of the Aarhus convention

Thirdly, it shall be examined if EU law has been an important instrument in easing the implementation of the Aarhus convention. The simple answer is yes: EU law has been an important instrument in easing the implementation of the Aarhus Convention. As has mentioned above, Germany had introduced legislation to grant access to environmental information only because of the EU directives. Also, the role of the Court of Justice must not be underestimated. For example, the *Flachgas Torgau* court case of the ECJ[43] is very important, ruling that the Federal Environmental Protection Agency, *Umwelt-*

ment was that the grounds for refusal of a request were phrased in a more restrictive way in the interest of free access to information. In addition, privates are now obliged to provide access to information. For an exhaustive list of amendments see Olaf Reidt and Gernot Schiller, *Landmann/Rohmer Umweltrecht*, see footnote 24, paras 65ff.

40 See Matthias Rossi, 'Das Umweltinformationsgesetz in der Rechtsprechung – ein Überblick' [2000] Umwelt- und Planungsrecht 175 ff.; Armin Hatje, 'Verwaltungskontrolle durch die Öffentlichkeit – eine dogmatische Zwischenbilanz zum Umweltinformationsanspruch' [1998] EuR 33, 734 ff.

41 See only the case of the Federal Office of Justice (*Bundesamt für Justiz*) in front of the Federal Administrative Court, for example, in the area of application of the general Freedom of Information Act, BVerwG [2012] Zeitschrift für Umweltrecht 183ff.

42 See report of the German Data Protection and Freedom of Information Supervisor Peter Schaar, 'Bürger nutzen ihr Recht auf Informationszugang stärker!' [2012] Zeitschrift für Datenschutz-Aktuell 2900.

43 Case C-204/09 *Flachglas Torgau GmbH v Bundesrepublik Deutschland*.

bundesamt, had to release draft documents prepared for the Federal Ministry for the Environment.

2.2.4 The need for further reform

Finally, it shall be examined which further reforms would be needed and which are discussed. Moreover, the question shall be addressed in how far initiatives at EU level are relevant in this context.

A recent study showed that only 40% of all requests of granting access to environmental information have been answered content wise within one month.[44] The same study shows that as grounds for refusal of access to information, the public authorities usually rely on the fact that the information sought would not be available to them; that they do not see any obligation to publish the requested information; that the data requested would not fall into their jurisdiction; that the data sought would still be processed; that the request was not specific enough or that the data requested would not be environmental information.[45]

In Germany, legal disputes about the right of access to environmental information focus on whether the public authority the information is sought from falls within the scope of application of the legislation, i.e. if it is an office that has to grant access to information, or if the request for information can be denied on the grounds of an exemption provided for in the statute. Very often information is not disclosed for grounds of confidentiality; be it for confidentiality of the proceedings of public authorities (Art 4 para 4 lit a of the Aarhus Convention) or be it confidentiality of commercial and industrial information (Art 4 para 4 lit d of the Aarhus Convention). Sometimes the argument is raised that the standard for „confidentiality" should be clearly expressed in national law.[46]

Also, costs are often an issue for the citizen.[47] According to the *UIG* 2004 the information granting office can ask for charges, however, these must be calculated in a way that the right to access environmental information can be exercised effectively.[48] Usually, there will be no charge for simple written or oral information, for access to information *in situ*.[49] The maximum charge asked for

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[44] Michael Zschiesche and Franziska Sperfeld, 'Zur Praxis des neuen Umweltinformationsrechts in der Bundesrepublik Deutschland', see footnote 15, 74.

[45] Ibid 75.

[46] Matthias Hellriegel, 'Akteneinsicht statt Amtsgeheimnis – Anspruch auf Umweltinformationen gegen am Gesetzgebungsverfahren beteiligte Behörden' [2012] EuZW 456, 459.

[47] Michael Zschiesche and Franziska Sperfeld, 'Zur Praxis des neuen Umweltinformationsrechts in der Bundesrepublik Deutschland', see footnote 15, 76.

[48] UIG 2004, § 12, in particular para 2.

[49] Michael Zschiesche and Franziska Sperfeld, 'Zur Praxis des neuen Umweltinformationsrechts in der Bundesrepublik Deutschland', see footnote 15, 76.

by federal institutions is 500 Euro.[50] As the charges may not exceed a reasonable amount, and as the amount of charges asked for is specified in secondary legislation, the German provisions comply with Art 4 para 8 of the Aarhus Convention.

One could criticize that the German access to environmental information stands next to access to information under the general Freedom of Information Acts. Furthermore, there is a right to access information under the Consumer Information Law (*Verbraucherinformationsgesetz, VIG*)[51] regarding food and feedstuff. Moreover the nature of federalism leads to difficulty in explaining to the citizen the fact that there are in total 17 differing legal orders as regards access to information within Germany alone. The manifold possible legal bases for a claim are making it complicated for the individual to decide which provision to rely on. In the interests of transparency, the law of access to information should be unified and be made more consistent.[52] However, it does not seem very likely at the moment that the legislator will take any steps in this direction.

2.3 Participation rights

The Aarhus Convention provides for three different sets of rules about public participation. It makes a distinction between individual decision-making procedures, planning decisions and enacting generally applicable legally binding rules that may have a significant effect on the environment.

According to Art 6 of the Aarhus Convention the Parties shall provide for early public participation in decisions on specific activities that are listed in Annex I. Art 7 of the Aarhus Convention deals with planning decisions. According to this provision each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, while Art 8 of the Aarhus Convention concerns enacting regulations. It states that each Party shall strive to promote effective public participation at an appropriate stage and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. It is commonly understood that Art 8 of the Aarhus Convention is not binding.[53]

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[50] Regulation on the Cost of Environmental Information (*Umweltinformationskostenverordnung* or *UIGKostV*) [2004] BGBl I 3709.

[51] *Gesetz zur Verbesserung der gesundheitsbezogenen Verbraucherinformation* (*Verbraucherinformationsgesetz* or *VIG*) of 17 October 2012 [2012] BGBl. I 2166.

[52] Michael Zschiesche and Franziska Sperfeld, 'Zur Praxis des neuen Umweltinformationsrechts in der Bundesrepublik Deutschland', see footnote 15, 72; Friedrich Schoch, 'Zugang zu amtlichen Informationen nach dem Informationsfreiheitsgesetz des Bundes' [2012] JURA 203.

[53] Stephen Stec and Susan Casey-Lefkowitz, 'The Aarhus Convention: An Implementation Guide', see footnote 37, 119: "indicative rather than mandatory wording".

Therefore, only the implementation regarding public participation in relation to individual decision-making and to planning decisions shall be examined below.

2.3.1 Pre-implementation

Including the public in decision making prior to the implementation of the Aarhus Convention

Firstly, the question shall be answered whether the phenomenon of including the public in decision making has been already known with the same, a more limited or a more generous approach prior to the implementation of the Aarhus Convention.

Public participation concerning individual decision-making procedures has already been known in parts of Germany since the 19th century general Prussian industry law,[54] whereas an obligation to include the public at the planning level has not been known in Germany before.

Therefore, the public participation in granting individual licences having an environmental impact was provided for in legislation and can be considered as endemic in the German legal system.

The influence of national legislation on the Aarhus Convention

Secondly, it will be examined if the national legislation influenced any provision of the Aarhus Convention.

German legislation may perhaps have influenced the Aarhus Convention via the European Community law. It could be that Germany influenced the wording of the EIA Directive or the IPPC Directive of the EU. After all, the wording of Art 6 para 1 as a whole has been drafted with reference to Art 2 para 1 of the EIA Directive[55], its annexes, and the IPPC Directive.[56][57]

The definition of the „public concerned" in Art 2 para 5 of the Aarhus Convention was possibly influenced by German legal culture. It is defined

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54 General Industry Law for the Kingdom of Prussia (*Allgemeine Gewerbeordnung für das Königreich Preußen*) of 17 January 1845, Preußische Gesetzessammlung 1845, 41 ff. It contained in §§ 26 ff a licensing procedure for individual industrial installations that included public participation.

55 Council Directive (EEC) 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40, which has been replaced by European Parliament and Council Directive (EU) 2011/92 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1.

56 Council Directive (EC) 96/61 concerning integrated pollution prevention and control [1996] OJ L257/26, which has been replaced by the new IPPC Directive: European Parliament and Council Dicrective (EC) 2008/1 concerning integrated pollution prevention and control (Codified version) [2008] OJ L24/8. As of 6 January 2014 it the new IPPC Directive will apply, European Parliament and Council Directive (EU) 2010/75 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17.

57 Stephen Stec and Susan Casey-Lefkowitz, 'The Aarhus Convention: An Implementation Guide', see footnote 37, 92.

as „the public affected or likely to be affected by, or having an interest in, the environmental decision-making". According to the Aarhus Convention Implementation Guide the term „interest" is understood to encompass both legal and factual interest as defined under continental legal systems, such as those of Austria, Germany and Poland.[58] This is due to the fact that persons with a mere factual interest do not normally enjoy the same rights in proceedings and judicial remedies accorded to those with a legal interest under these systems. The Aarhus Convention, on the other hand, aims at creating the same status regardless of whether the interest is a legal or factual one.[59] Therefore, the wording of the Aarhus Convention took into account the fact that usually in Germany persons with a factual interest only had no right to be consulted and to access the courts.

Also, the Declaration the Federal Republic of Germany made upon signature of the Aarhus Convention was of course influenced by German legislation. It reads: „The Federal Republic of Germany assumes that implementing the Convention through German administrative enforcement will not lead to developments which counteract efforts towards deregulation and speeding up procedures."[60]

Regarding the participation of the public on the planning level, German legislation did not have any influence on the Aarhus Convention whatsoever, it can only be assumed that the German government opposed a stronger, more binding wording.

2.3.2 Post-implementation

The right to public participation and the existing legal framework

Firstly the question shall be addressed whether the right to public participation fitted easily into the existing legal framework or whether it required extensive reforms.

The rights transferred to the public by the Aarhus Convention did fit easily into the existing German legal framework in so far as individual decisions are concerned. One of the reasons being that in some areas public participation was endemic to the German legal system and this is partly due to the fact that the EIA and IPPC Directives of the EU had been transposed prior to the Aarhus Convention in Germany.

However, as far as public participation had to be introduced on the planning level as well, the Aarhus Convention required action in Germany. This did not easily fit into a legal culture within which the public were not involved in planning matters which did not concern individual planning decisions.[61]

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[58] Ibid 40.

[59] Ibid.

[60] Ibid 181 (Annex II).

[61] In Germany, some big infrastructure projects are not granted by a planning permission or a licence to construct and operate an installation but by a so called plan approval order (*Planfeststellungsbeschluss*),

Reactions to the amendments

Secondly, the reactions to the amendments will be discussed. The rules of the Aarhus Convention on public participation in individual decision-making were not perceived as legal irritants. However, even though the European Directives prescribing public participation like the EIA and the IPPC Directives, were not seen as complete legal irritants and did not meet much resistance, they were still not sufficiently implemented in time.[62] This might be due to the fact that in Germany the competency for environmental law is shared between the federal and the *Länder* level.[63]

The provisions of the Aarhus Convention on public participation at the planning level and the Strategic Environmental Assessment (SEA) Directive[64] of the European Union, however, were perceived as legal irritants and met a lot of criticism in doctrine.[65]

One aspect perceived as a novelty, however, is that Art 6 para 7 of the Aarhus Convention grants the right to participate in a decision-making procedure to the general public, and not only the public concerned.[66]

The general public and NGOs are clearly taking advantage of the rights conferred under the Aarhus Convention.[67]

Details of the participation procedures

Thirdly the details of the participation procedures shall be outlined.

The participation rules in Germany differ significantly. Participation in respect to specific activities (Art 6 of the Aarhus Convention) is like prescribed by the European Directives in that field.[68] This means it gives only "the public concerned" a right to make submissions,[69] whereas Art 6 para 7 of the Aarhus

see VwVfG, see footnote 4, §§ 72ff. However, they are individual decisions, and in drawing up a plan approval order the public would we involved, see for example VwVfG, § 73.

62 For example, the EIA Directive (EEC) 85/337 had to be implemented until 3 July 1988; however the German Law about Environmental Impact Assessment (*Gesetz über die Umweltverträglichkeitsprüfung* or *UVPG*) of 12 February 1990 [1990] BGBl I 205 only entered into force in 1990.

63 See Wilfried Erbguth, 'Der Entwurf eines Gesetzes über die Umweltverträglichkeitsprüfung: Musterfall querschnittsorientierter Gesetzgebung aufgrund EG-Rechts?' [1988] NVwZ 969, 976.

64 European Parliament and Council Directive (EC) 2001/42 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30.

65 Wilfried Erbguth and Mathias Schubert, 'Das Gesetz zur Einführung einer Strategischen Umweltprüfung und zur Umsetzung der Richtlinie 2001/42/EG (SUPG)' [2005] Zeitschrift für Umweltrecht 524.

66 See Christian Walter, 'Internationalisierung des deutschen und Europäischen Verwaltungsverfahrens- und Verwaltungsprozessrechts – am Beispiel der Århus-Konvention' [2005] 40 EuR 302, 330.

67 See for example the website of the NGO Independent Institute for Environmental Matters (*Unabhängiges Institut für Umweltfragen*) www.aarhus-konvention.de accessed 5 October 2016.

68 See for a detailed analysis for the rules comparing to the licencing of industrial installations Bilun Müller, *Die Öffentlichkeitsbeteiligung im Recht der Europäischen Union und ihre Einwirkungen auf das deutsche Verwaltungsrecht am Beispiel des Immissionsschutzrechts* (Nomos 2010) 206ff.

69 See UVPG, § 9 para 1 second sentence.

Convention provides that "the public" shall have the right to submit comments etc.[70]

Participation rules applicable to plans, programs and policies (Art 7 of the Aarhus Convention) were governed by the law enacted to comply with the SEA Directive, the Law about the Introduction of a Strategic Environmental Assessment (*Gesetz über die Einführung einer Strategischen Umweltprüfung*).[71] Recently, this has statute has been abolished and the rules on the strategic environmental assessment were included in the the Law about Environmental Impact Assessment (*Gesetz über die Umweltverträglichkeitsprüfung* or *UVPG*).[72] It does, basically, extend the application of the public participation rules concerning environmental impact assessment to plans and programmes which have an impact on decisions where an EIA would be necessary.[73] And again, only the public concerned shall have the right to submit observations etc.

Public participation to normative instruments (Art 8 of the Aarhus Convention) is not more than any participation of the public in the legislative process. In the legislative process on the federal level the public can usually access the legislative drafts and discuss them with the Members of Parliament either directly or through lobby groups. There exist no special rules concerning normative instruments that may have a significant effect on the environment.

In all three areas participation rights are also given to NGOs, not only individuals, as the public concerned includes NGOs. The public is usually given a month to consult the publicly available documents and a further two weeks to submit written observations.[74] These timeframes can be considered as "reasonable" in the sense of Art 6 para 3 of the Aarhus Convention.

After the public consultation, the public authority taking the decision has to take due account of the outcome of public participation.[75] This is in line with the necessity to do so following from Article 6 para 8 of the Aarhus Convention. The public authority has to publish its decision giving reasons and stating their considerations.[76] This is in line with Art 6 para 9 of the Aarhus Convention.

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[70] It can be considered as established that the EU directives on EIA and SEA do not correctly implement the Aarhus Convention in this respect, see Bilun Müller, *Die Öffentlichkeitsbeteiligung im Recht der Europäischen Union und ihre Einwirkungen auf das deutsche Verwaltungsrecht am Beispiel des Immissionsschutzrechts*, see footnote 71, 22; Jonathan Verschuuren, 'Public Participation regarding the Elaboration and Approval of Projects in the EU after the Aarhus Convention' [2005] 4 Yearbook of European Environmental Law 2004, 29, 38.

[71] *Gesetz zur Einführung einer Strategischen Umweltprüfung und zur Umsetzung der Richtlinie 2001/42/EG* (*SUPG*) of 25 June 2005 [2005] BGBl I 1746.

[72] See note 65.

[73] See §§ 14i, 14a of the German Law about Environmental Impact Assessment (*Gesetz über die Umweltverträglichkeitsprüfung* or *UVPG*) of 12 February 1990 [1990] BGBl I 205, as amended by Law of 17 August 2012 [2012] BGBl I 1726.

[74] See, for example, VwVfG, § 73 para 4.

[75] UVPG, § 12.

[76] VwVfG, § 39.

The extent of participation in German law

Fourthly, it will be discussed if participation in German law is going beyond defence and consultation, and leading up to negotiation or co-decision. The question whether there are compensation mechanisms available to avoid NIMBYism[77] and facilitate compromise will also be addressed.

In Germany, public participation in individual decision making procedures means that the public has a right to learn about the future project by consulting the plans and documentation provided to the public authority by the developer. It also means that the public has the opportunity to lodge remarks with the public authority. In some procedures, usually of big infrastructure projects, there will be an open discussion of the project (*Erörterungstermin*).[78] It will give those who raised written observations in time a right to be heard with their points in a meeting with the developer and the public authority. Usually there will be a negotiator. However, in practice at this point in time the developer will no longer be open to negotiate his or her project.[79] Therefore, it cannot be said that German law would lead to a situation of true negotiation or co-decision.

The need for further reform

Finally, it will be discussed which further reforms would be needed and which are discussed.

Often public administrations tend to publish so much data and so much detail for the public to comment on, that it is impossible to review the material. This produces tremendous costs for NGOs. This point has often been discussed by NGOs, by government and legal scholars too.[80] The suggestion is to include a right of the public to access summary documents, i.e. to force the administration to provide summaries and overviews pointing out the relevant data.

Moreover, the cost for the public is not only in the time and effort to scan the data but can also be that the administrations make data only accessible in hard copy and charge high costs for each paper copy in this way causing extra unnecessary effort for the public. Some German administrations were also known for making documents only accessible during very limited office hours, but this again changes from authority to authority.

It is very unlikely that the German government will facilitate the public's rights. Even the Declaration of the German Government given upon signature

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77 "Not in my backyard", the principle that no one wants pollution/development to happen close to their dwelling.

78 See for example VwVfG, § 73 para 6.

79 See, for example, Alexander Schink, 'Öffentlichkeitsbeteiliung – Beschleunigung – Akzeptanz' [2011] DVBl 1377, 1383.

80 See the conference proceedings of a workshop on participation of environmental associations, 'Unabhängiges Institut für Umweltfragen, *Tagungsband, Verbandsbeteiligung – Status Quo und Perspektiven – Dokumentation des Workshops vom 10 und 11.11.2005'* in Kassel (UfU 2006).

of the Aarhus Convention stated above[81] stresses the German efforts towards deregulation and speeding up administrative procedures. Since 1990 the governments tend to focus rather on deregulation and faster administrative decision-making procedures, shortening time-frames for comments and discussions about citizens' comments.[82] Therefore, it would be desirable if a provision on the need to provide summaries would be included at an EU level.

3 Access to the courts

The Aarhus Convention does not only give individuals substantive rights regarding access to environmental information or the right to participate in decision-making, but also judicial rights. Art 9 of the Aarhus Convention makes it possible for the public to enforce its rights.

While Art 9 para 1 is concerned with the right to access the courts when a request for access to environmental information has not complied with, its second paragraph contains the right of the public concerned to challenge a decision for which public participation should have been part of the specific decision-making procedure. Art 9 para 3 of the Aarhus Convention, on the other hand, establishes that the Parties grant access to the national courts to challenge acts which contravene provisions of its national environmental law.

According to Art 9 para 4 the Parties must ensure adequate and effective remedies, including injunctive relief. Moreover, it states that the procedures must be fair, equitable, timely and not prohibitively expensive. The last paragraph entails an obligation for the Parties to inform the public about access to administrative and judicial review procedures.

3.1 Pre-implementation

3.1.1 The system of judicial review

Firstly, the system of judicial review in Germany will be explained briefly. It will in particular be examined if there are alternatives to court procedures and whether there are there appeals systems which are a condition precedent to judicial review.

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81 See at n 63: Stephen Stec and Susan Casey-Lefkowitz, 'The Aarhus Convention: An Implementation Guide', see footnote 37, 181, Annex II.

82 Felix Ekardt, 'Zur Europarechtswidrigkeit der deutschen Hindernis-Kumulation für Umweltklagen' [2012] Zeitschrift für Europäisches Umwelt- und Planungsrecht 64. See for example the Programme on Cutting Red Tape and Better Regulation, '*Programm Bürokratieabbau und bessere Rechtssetzung*', Decision of the Federal Government of 25 April 2006, available at http://www.bundesregierung.de/Content/DE/_Anlagen/Buerokratieabbau/2010-09-17-Kabinettbeschluss-April-2006.pdf?__blob=publicationFile&v=5 accessed 5 October 2016.

Judicial review in Germany is governed by the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung* or *VwGO*).[83] In Germany, usually there is a two tier review system when challenging an administrative decision. Firstly the applicant has to request an internal review of the decision he or she wants to challenge, the so called pre-procedure (*Vorverfahren*). This usually takes place at the public authority that took the decision in the first place.[84] Only after the public authority has confirmed their decision can the applicant ask for a judicial review in front of the administrative court.[85] Usually there is the option to appeal to the higher administrative court. The higher administrative court´s decision can be challenged if need be and if certain requirements are met at the federal administrative court. There is a system provided for injunctive relief depending on the request of the applicant. If the applicant demands injunctive relief against an administrative decision challenged where the appeal has no suspensive effect he or she can ask the court to suspend the challenged decision.[86] If the applicant, on the other hand, wishes to trigger an action of the public authority, for example to provide him or her some information, the applicant may seek an interim order of the administrative court.[87]

The German review system hence does not leave any scope for alternatives to court proceedings if the very first internal review is unsuccessful. Of course, there is always the opportunity to lodge a petition with a parliamentary petition committee, either the federal parliament´s[88] or the competent *Länder* parliaments´ to bring a matter to the attention of the parliament. Equally, even though Ombudsmen do exist in the context of some public authorities,[89] addressing them is not a prerequisite to bringing a court case. Mediation within the administration does not usually take place.[90] In some much disputed public cases like that involving the main train station in the city of Stuttgart (the so called *Stuttgart21* project), the public authority have employed a neutral mediator.[91] However, this happened in this unique case only due to public pressure. In fact, the timeframes for challenging the administrative decisions authoris-

[83] Verwaltungsgerichtsordnung of 19 March 1991 [1991] BGBl I 686, as amended by Law of 21 July 2012 [2012] BGBl I 1577.

[84] VwGO § 70.

[85] Ibid, § 68.

[86] Ibid, § 80.

[87] Ibid, § 123.

[88] Art 45c of the German Federal Consitution (*Grundgesetz*).

[89] One of the few examples is the Parliamentary Commissioner for the Armed Forces (*Wehrbeauftragter*), see Art 45b *Grundgesetz*.

[90] Mentioning some exceptions Alexander Schink, 'Öffentlichkeitsbeteiliung – Beschleunigung – Akzeptanz', see footnote 81, 1377.

[91] Rüdiger Soldt, 'Die Chronik von Stuttgart 21' (2010) Frankfurter Allgemeine Zeitung, available at http://www.faz.net/themenarchiv/politik/stuttgart-21/die-chronik-von-stuttgart-21-nabelschau-in-schwaben-1582946.html accessed 5 October 2016.

ing the construction of *Stuttgart21* had long passed.[92] In conclusion, the notion of an impartial body in Art 9 para 1 of the Aarhus Convention is understood in Germany as being the administrative courts. There are no alternatives that could render decisions binding to both parties. This might be about to change, though, for a very recent new statute on mediation, the *Mediationsgesetz*[93], is also open for administrative mediation, even if it might not have this effect immediately.[94]

3.1.2 Access to justice by environmental NGOs

Secondly, the question shall be addressed whether access to justice by environmental NGOs has already been known in Germany, and if so to what extent.

Generally, in Germany only someone who can claim the infringement of his or her own right can bring a case in front of the administrative courts as only that individual would have standing. This finds its explanation in § 42 para 2 *VwGO*[95], according to which an action challenging an administrative measure will be admissible, only, if the applicant claims that the administrative measure or its denial or omission affects his or her rights. Therefore, an applicant has to contend an impairment of an individual public law right. In the past, this provision has been the obstacle that NGOs could not get past in bringing claims.[96] NGOs still managed to challenge some decisions with environmental impact in the courts. Their solution in the past was either to support a neighbour or to buy land to become a neighbour themselves.

Only in the area of natural protection law the federal state had introduced an exception in 2002. The Federal Nature Protection Act (*Bundesnaturschutzgesetz*)[97] provided for the possibility for environmental NGOs to challenge some decisions in judicial review.[98] However, this was very limited in scope as it was restricted to very specific administrative decisions related to nature protection areas and national parks. A similar exception was existent in the *Land* Bremen since 1979.[99]

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92 Ibid.

93 *Mediationsgesetz* of 21 July 2012 [2012] BGBl I 1577.

94 See Jan Malte von Bargen, 'Mediation im Verwaltungsverfahren nach Inkrafttreten des Mediationsförderungsgesetzes' [2012] Zeitschrift für Umweltrecht 468.

95 *Verwaltungsgerichtsordnung* of 19 March 1991 [1991] BGBl I 686, as amended by Law of 21 July 2012 [2012] BGBl I 1577.

96 Carola Glinski and Peter Rott, 'Private Enforcement of the Public Interrest and the Europeanisation of Administrative Law – The Trianel Judgement of the ECJ' [2011] 4 EJRR 607, 608.

97 *Gesetz über Naturschutz und Landschaftspflege* (*Bundesnaturschutzgesetz* or *BNatSchG*) of 29 July 2009 [2009] BGBl I 2542, as amended by Law of 6 February 2012 [2012] BGBl I 148.

98 Then § 61 *BNatSchG*, now § 64 *BNatSchG*.

99 Carola Glinski and Peter Rott, 'Private Enforcement of the Public Interrest and the Europeanisation of Administrative Law – The Trianel Judgement of the ECJ', see footnote 100, 608.

3.1.3 Influence of national legislation on the Aarhus Convention.

Thirdly, it will be examined whether the national legislation influenced any provision of the Aarhus Convention.

The German federal government influenced the wording of Art 9 para 2 of the Aarhus Convention. This provision takes into account of the fact that the Parties to the Convention follow two different legal systems in granting access to the courts:[100] Firstly the so called French model where an interest is sufficient to make a case, and secondly, the so called German model where the applicant has to contend the infringement of his or her own right by the challenged administrative decision. By referring to the "framework of its national legislation" and two different conditions, either (lit a) "having a sufficient interest" or (lit b), in the alternative, "maintaining impairment of a right" the Convention acknowledges in the alternative the German model. Also the remainder of the second paragraph takes into account the German model, in particular Art 9 para 2, subpara 2, last sentence of the Aarhus Convention, which makes clear that NGOs shall be deemed to have rights capable of being impaired.

Germany possibly also has influenced the fact that the Aarhus Convention allows a two-tier legal review in Art 9 para 2, subpara 3: firstly a preliminary review procedure before an administrative authority and secondly judicial review procedures in front of an independent body, usually a court, as according to the German *VwGO* a unsuccessful preliminary review procedure before the administrative authority is a requirement for the admissibility of a judicial review in front of an administrative court to challenge a decision.[101]

3.1.4 Compatibility of German law with Art 9 para 2 of the Aarhus Convention

Finally, the question shall be addressed if Germany provides for a review of "substantive and procedural legality" as required by Art 9 para 2 of the Aarhus Convention. It shall be discussed, as regards substantive legality, where the distinction (if any) between legality and merits lies, and how intense the review of discretionary decisions (including those concerning complex factual decisions) is. It will also be examined how probing the review of the reasons given is and, concerning procedural review, how relevant breaches of participation rules are.

If an action is admissible, the German administrative court – as well as the internal review – will examine the substance of the case. The legality of the challenged measure will be controlled. It should be noted that for German lawyers a measure is legal if it was enacted following the prescribed procedural provisions

[100] Stephen Stec and Susan Casey-Lefkowitz, 'The Aarhus Convention: An Implementation Guide', see footnote 37, 129.

[101] VwGO § 68.

(what English speakers would call "legality" as well as the substantive law (what English speakers would call the "merits of the case").

However, the standard of control is usually only the individual right of the applicant.[102] In other words applicants will only win their case if they have been infringed in one of their individual rights.

Procedural provisions that have to be followed in enacting the administrative decision, usually, do not constitute a provision giving the applicant an individual right.[103] In other words, in deciding the case, the merits of the case play a role for the court, and not so much the legality (in the sense English speakers use the word). There are exceptions like the right to be heard, but generally a challenge cannot successfully rely on the fact that public participation has not taken place where it should have been the case. This can be explained by § 46 of the *VwVfG* which provides that administrative decisions will not be repealed if rules about the procedure, the form or the local jurisdiction have been disregarded, if it is obvious that this misapplication of the law did not have any influence on the outcome of the substance of the case. § 46 of the *VwVfG* is usually extensively interpreted and widely applied.[104] In fact, in cases where an entire EIA has illegally not taken place an exception applies since the enactment of Environmental Remedies Act (*Umweltrechtsbehelfsgesetz or UmweltrechtsbehelfsG*).[105] However, this exception only applies when the whole of EIA was forgotten. It means that if the entire participation of the public was left out, or if the public participation procedure did not meet the legal requirements, the challenged administrative act will not be considered unlawful as a result.[106]

This is incompatible with Art 9 para 2 of the Aarhus Convention that requires the Parties to allow the challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Art 6 of the Convention.[107]

When it comes to the review of discretionary decisions, the courts have to examine if the administrative act is unlawful because the statutory limits of discretion have been overstepped or if discretion has been used in a manner not corresponding to the purpose of the empowerment.[108] In other words, the courts only have the power to examine (1) if there was a specific situation that limited

[102] Ibid, § 113 para 1 first sentence.

[103] Bilun Müller, *Die Öffentlichkeitsbeteiligung im Recht der Europäischen Union und ihre Einwirkungen auf das deutsche Verwaltungsrecht am Beispiel des Immissionsschutzrechts*, see footnote 68, 189.

[104] Ibid, 178ff.

[105] § 4 para 1 first sentence of the *Umweltrechtsbehelfsgesetz* [2006] BGBl I 2816. This provision has been introduced in order to comply with Case C-201/02 *Delena Wells v Secretary of State for Transport, Local Government and the Regions*.

[106] Bilun Müller, *Die Öffentlichkeitsbeteiligung im Recht der Europäischen Union und ihre Einwirkungen auf das deutsche Verwaltungsrecht am Beispiel des Immissionsschutzrechts*, see footnote 68, 171.

[107] Ibid. 222, 223; Felix Ekardt, 'Zur Europarechtswidrigkeit der deutschen Hindernis-Kumulation für Umweltklagen', see footnote 85, 70.

[108] VwGO, § 114 first sentence.

the discretionary power of the competent authority in a way that only one single decision would have been legal (*Ermessensreduzierung auf Null*) – this is a very exceptional situation – or (2) if there was one of three possible mistakes in exercising the discretion. It should be noted, though, that the court only has to consider these two aspects if all the requirements of the provision that provides for discretion of the competent authority, i.e. the legal basis, are met.

The first mistake in exercising discretion the authority could make, is not realising in the first place that the legal basis they were relying on gives them discretion. The second mistake is if they realise they have the power of discretion but if they do not exercise it correctly. In making their decision they either take into account aspects they are not supposed to consider or they do not consider aspects they were supposed to consider. The third mistake in taking a discretionary decision is that is not proportionate or that is not in line with the principle of equality.[109]

In case a provision empowers the authority to take a complex factual decision using an unspecified legal term (*unbestimmter Rechtsbegriff*) e.g. to only act in case there is a "danger", the courts have full control over this decision. Only if the factual decision has been transferred to a specific group of persons (e.g. an expert panel) by the empowering provision and these are given a certain specific discretion (*Beurteilungsspielraum*), then the courts´ control is limited.

However, the German system of judicial review has proven to be very successful in the past. There are moderate costs involved at each stage, even for the internal review. However, legal aid is available. There have been complaints with the duration of judicial proceedings, though.

3.2 Post-implementation

3.2.1 Openness of the existing legal framework for the right to access to the courts

Firstly the question shall be addressed whether the right to access to the courts fits easily into the existing legal framework.

After the Aarhus Convention was signed and after the European Directives have been accordingly amended by the Public Participation Directive[110] it was realized in Germany that change needed to come.

Firstly, the obligation to grant judicial review to the public regarding administrative decisions to grant environmental information did not pose much of a problem in Germany. The general rules on judicial review applied. As anyone

[109] See Robert Alexy,'Ermessensfehler' [1986] Juristenzeitung 701.

[110] European Parliament and Council Directive (EC) 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17, in the meantime amended by European Parliament and Council Directive (EU) 2011/92 [2012] OJ L 26/1.

whose request for environmental information was not granted was deemed to be possibly infringed in their own right, there were no questions regarding the admissibility of a court case. In particular, NGOs could access the courts.

Regarding the right to access the courts in order to let a decision be controlled that required public participation, things proved to be more difficult in Germany. This was a challenge in Germany, in particular as far as NGOs had to be given the opportunity to ask for a judicial review. The federal state decided to introduce a new act to live up to the challenge. As a consequence, § 2 of the new *UmweltrechtsbehelfsG* gave NGOs the power to ask for a judicial review. Also, some other provisions were adapted.[111]

By introducing this new statute as far as can be seen, no foreign model had been followed, but a simple solution was thought of: The German approach was that the Directives (more than the Aarhus Convention) required only a sectorial approach in the field of environmental law. As the general principle in administrative court procedure of the necessity of an infringement of an individual right should only be affected to the minimum extent possible, the idea was to have an extra statute for just these matters, i.e. only going so far as the scope of application of the European Directives. Therefore, legal scholarship and the government thought of possible solutions. While the government initially proposed to properly implement the Public Participation Directive by giving every NGO the right to bring an action regardless of any alleged infringement of individual rights,[112] the second governmental draft of an *UmweltrechtsbehelfsG* included a limiting provision as proposed previously by scholars funded by the electricity industry.[113] In the end, § 2 para 1 no 1 of the *UmweltrechtsbehelfsG* that was enacted contained a limitation to certain rights in that it requires the applicant environmental NGO to rely on a rule designed to protect interests of individuals (in contrast to a rule designed to protect the general public interest). Thus, *locus standi* of environmental NGOs depends on conditions that only other physical or legal persons can fulfil. They have to claim their property, life or health or similar rights conferred specifically to them are at risk.

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[111] The new § 64 *BNatSchG* and the § 11 Environmental Damages Act (*Umweltschadensgesetz*) both refer to § 2 *UmweltrechtsbehelfsG*.

[112] Legislative Proposal by the Federal Government of 21 February 2005 (Kabinett-Nr. 15 16 100 01, G I 4 – 42120-6/0), discussed by Jan Ziekow, 'Strategien zur Umsetzung der Aarhus-Konvention in Deutschland – Einbettung in das allgemeine Verwaltungsrecht und Verwaltungsprozeßrecht oder sektorspezifische Sonderlösung für das Umweltrecht?' [2005] Europäisches Umwelt- und Planungsrecht 154, 162; Lothar Knopp, 'Öffentlichkeitsbeteiligungsgesetz und Umwelt-Rechtsbehelfsgesetz' [2005] Zeitschrift für Umweltrecht 281, 283f; Bernd Ochtendung, 'Neuere Entwicklungen des Anlagengenehmigungsrechts nach BimSchG' [2006] Zeitschrift für Umweltrecht 184, 188.

[113] Thomas von Danwitz, 'Aarhus-Konvention: Umweltinformation, Öffentlichkeitsbeteiligung, Zugang zu den Gerichten' [2004] NVwZ 272, 279; Thomas von Danwitz, *Zur Ausgestaltungsfreiheit der Mitgliedstaaten bei der Einführung der Verbandsklage anerkannter Umweltschutzvereine nach den Vorgaben der Richtlinie 2003/35/EG und der sog. Aarhus-Konvention, Rechtsgutachten, erstattet dem VDEW* (Köln 2005).

As can be seen, the right to access to the courts did not fit easily into the existing legal framework at all but required extensive reforms.

3.2.2 Reactions to the new provisions

Secondly, the reaction to the new provisions shall be discussed.

The history of the drafting of that provision illustrates how disputed its contents were. The amendments are seen as legal irritants and met resistance by legal scholars who were on the side of industry, as well as industry itself,[114] and the courts and sometimes by civil servants.

As a consequence the provisions were only reluctantly applied and restrictively interpreted. The public could not enforce the rights granted to it under the Aarhus Convention. Consequently, there were many court cases.[115] Finally, with the European Court of Justice´s judgement in the case *Trianel*[116] it was established, that the German provision was not compatible with EU and international law.[117]

The general public and NGOs are taking advantage of the rights conferred under the Aarhus Convention as illustrated by the court cases.[118]

3.2.3 The need for further reform

Thirdly, it shall be examined which further reforms would be needed and which are discussed. Moreover, the question shall be addressed in how far initiatives at EU level are relevant in this context.

As it was established by the European Court of Justice in the *Trianel* case that the German provision granting NGOs access to judicial review is insufficient to comply with EU and international law, the German law had to be adjusted accordingly. The wording of § 2 of the *UmweltrechtsbehelfsG* has been amended by deleting the section requiring individual rights to be impaired. However, for fear that the corrected law would be going too far, in addition, new measures have been introduced to restrict judicial review: The general *VwGO* for administrative court procedures has been modified in the scope of application of the

[114] Jürgen Fluck, 'Impulsstatement aus Sicht der Wirtschaft' in Wolfgang Durner and Christian Walter (eds), *Rechtspolitische Spielräume bei der Umsetzung der Aarhus-Konvention* (Lexxion 2005).

[115] Cases before Art 10 a EIA Directive was enacted: BVerwGE 100, 238, 252; BVerwGE 98, 339, 362; BverwG, NVwZ-RR 1999, 429, 430; VGH München, NVwZ 1993, 906; OVG Lüneburg, NVwZ-RR 2005, 401, 402; VGH München, NVwZ-RR 2000, 661, 662. See also cases after the introduction of Art 10 a EIA Directive: OVG Koblenz, DÖV 2005, 615; OVG Koblenz, DVBl. 2009, 390; OVG Münster, NUR 2006, 320, 321; OVG Koblenz, NVwZ 2005, 1208, 1210. Not mentioning Art 10 a EIA Directive at all: OVG Lüneburg, NVwZ 2007, 356, 357 .

[116] Case C-115/09 *Trianel*.

[117] See Bilun Müller, 'Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law' [2011] Journal of Environmental Law 23, 505ff.

[118] See for example BVerwG, UPR 2014, 26 and those referred to in footnote 119.

UmweltrechtsbehelfsG in that the new § 4 a para 1 *UmweltrechtsbehelfsG* introduces a deadline for giving reasons for an application for judicial review. Any such application must be accompanied by reasons within 6 weeks (whereas the norm would be that the court could set any deadline it deems appropriate[119]). In addition, the judges' powers are restricted. Instead of being able to exercise full control to check if the law had been applied correctly, the court now is limited to check compatibility with procedural rules only.[120] Moreover, the general rules about injunctive relief become inapplicable. Instead, a new standard for injunctive relief is established[121] which makes it very hard for any applicant to be successful with any such application. The legislative proposal introducing these amendments justified the modifications of the general administrative court procedures with a need to balance environmental protection and the interests of those who are affected negatively by court proceedings, i.e. the developer.[122] This proposal has been criticized.[123]

In the light of the fact that the proposed Access to Justice Directive of the EU[124] has never been adopted, Germany and German scholars seem to think that this area would still be covered completely by their national law.[125]

It is also sometimes criticised that the time frames granted to the public are restrictively short.[126]

4 Conclusion

It has been shown that the implementation of the Aarhus Convention is still a challenge in Germany. It has met resistance in all three pillars. However, while it was easy with the right of access to information, more difficult with participation rights it was very difficult with access to courts.

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[119] VwGO § 82 para 2.

[120] § 4 a para 2 UmweltrechtsbehelfsG.

[121] § 4 a para 3 UmweltrechtsbehelfsG.

[122] Explanatory memorandum of the Legislative Proposal of the Federal Government of 10 October 2012, *Gesetz zur Änderung des Umwelt-Rechtsbehelfsgesetzes und anderer umweltrechtlicher Vorschriften*, Gesetzentwurf der Bundesregierung [2012] BT-Drs 17/10957, available at http://dipbt.bundestag.de/dip21/btd/17/109/1710957.pdf accessed 5 October 2016, 17.

[123] Alexander Schmidt, 'Zur Diskussion über erweiterte Klagebefugnisse im Umweltschutzrecht' [2012] Zeitschrift für Umweltrecht 211, 217.

[124] Commission, Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM (2003) 624 final.

[125] Helmut Lecheler, 'Infrastrukturplanung zwischen Beschleunigung, Öffentlichkeitsbeteiligung und Rechtsschutzerfordernissen' [2005] DVBl 1533.

[126] Felix Ekardt, 'Zur Europarechtswidrigkeit der deutschen Hindernis-Kumulation für Umweltklagen', see footnote 85, 65.

CHAPTER 5

The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?

Áine Ryall

1 Introduction

Delivering a high level of compliance with environmental law is challenging at the best of times, but all the more so when an economy is in crisis and public authorities face intense pressure to make the best possible use of increasingly scarce resources. In times of austerity, environmental protection is inclined to slip down the list of political priorities as government concentrates its efforts on achieving financial stability, restoring confidence and returning the economy to growth. The harsh implications of the unprecedented crisis that hit the Irish economy in 2008 continue to reverberate at every level of government and throughout society. Ireland's implementation of the Convention on *Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*[1] (the Aarhus Convention) falls to be assessed against this ongoing and very stark contemporary context, where environmental protection tends to be overshadowed by the intense drive to reinvigorate the Irish economy.[2] This chapter presents the reception of the Aarhus Convention into Irish law against the background of a complex legal, economic, social and cultural milieu.[3]

As is well-known, although Ireland signed the Aarhus Convention in 1998, it was the last Member State of the European Union (EU) to ratify it. Notwithstanding the many high-profile political commitments to deliver ratification of the Convention 'at the earliest opportunity', it was not until 20 June 2012 that Ireland's instrument of ratification was lodged with the United Nations in New York. The Convention entered into force as regards Ireland on 18 September 2012 (ninety days after the date of deposit of the instrument of ratification)[4] and the Aarhus Convention Compliance Committee will have jurisdiction to deal with communications from the public concerning Ireland as and from 18 September 2013.[5] The reasons behind the long delay in securing ratification

1 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (Aarhus Convention), available at <www.unece.org/env/pp/treatytext.html> accessed 4 April 2016.

2 See generally Áine Ryall, 'Delivering the Rule of Environmental Law in Ireland: Where do we go from here?' in Suzanne Kingston (ed), *European Perspectives on Environmental Law and Governance* (London: Routledge 2012).

3 This chapter was finalised in August 2013. It reflects the law as it stood at that time.

4 Aarhus Convention art 20(3). See further <www.environ.ie/en/Environment/AarhusConvention/> accessed 4 April 2016.

5 Members of the public may bring communications concerning Ireland before the Aarhus Convention Compliance Committee on the expiry of twelve months from the date of entry into force of the Convention with respect to Ireland (i.e. 12 months from 18 September 2012). See further Economic Commission for Europe, 'Review of Compliance', Decision I/7 (first meeting of the Parties, Lucca, Italy, 21-23 October 2002) with the annex 'Structure and Functions of the Compliance Committee and Procedures for Review of Compliance', s IV para 18. Text available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf> accessed 4 April 2016.

are many and complex, but essentially revolve around the serious implications of the expansive approach to access to justice articulated in the Convention for the Irish legal system. The Irish authorities appreciated that any attempt to ratify without first taking specific legislative measures to align Irish law with the Convention would be foolhardy. The high costs associated with litigation in Ireland were a particular cause for concern given the express (yet disappointingly vague) obligation in Article 9(4) of the Convention to ensure that the cost of access to environmental justice is not 'prohibitively expensive'. As will become clear below, delivering on this particular obligation continues to present major challenges for the Irish legal system.

Another significant feature of the Irish legal landscape is that it is difficult to disentangle the implications of ratification from the impact of the EU directives designed to give effect to Aarhus Convention obligations in the Member States. As a result of Ireland's dualist approach to international law, the most significant impact of the Aarhus Convention to date has come about primarily as a result of Ireland's duty under EU law to implement Directive 2003/4/EC on public access to environmental information[6] and Directive 2003/35/EC concerning public participation.[7] It is also important to note at the outset that Ireland's track record in implementing EU environmental directives is mixed, to say the least. It is well-known that the Court of Justice of the European Union (CJEU) has ruled on many occasions that Ireland failed to transpose and to implement its EU environmental obligations fully, including in the context of environmental impact assessment (EIA), habitat protection, waste and waste water treatment, to name but a few high profile contemporary examples.[8] It is also well-known that in December 2012 the CJEU imposed financial penalties on Ireland under Article 260 of the Treaty on the Functioning of the European Union (TFEU) as a result of the persistent failure to comply with obligations arising under both the EIA directive and the waste directive.[9] The imposition of stiff financial penalties for breach of EU environmental law served to highlight to the Irish public the (often over-looked) fact that breach of obligations imposed by the EU legal order carries serious consequences – even in a time of national economic crisis.

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6 European Parliament and Council Directive (EC) 2003/4 on public access to environmental information and repealing Council Directive (EEC) 90/313, art 4(2), OJ L41/26.

7 European Parliament and Council Directive (EC) 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/17.

8 See generally Liam Cashman, 'Commission Enforcement of EU Environmental Legislation in Ireland – a 20 Year Retrospective' in Suzanne Kingston (ed), *European Perspectives on Environmental Law and Governance* (London: Routledge 2012) and ibid, 'How to Ensure that the Commission Exercises a Role Complementary to the Roles of Government, Public Authorities, Citizens and the Courts' [2011] Irish Planning and Environmental Law Journal 11.

9 Case C -279/11 *Commission v Ireland* and Case C-374/11 *Commission v Ireland*.

The main issue then is whether the Aarhus Convention, and the related EU measures, is a force for change in Irish environmental law and policy? This fundamental question resonates with the wider issues under consideration in this collection: How do national legal systems respond to international and EU environmental obligations? How do these obligations become embedded in local legal culture and what pockets of resistance do they encounter along the way? What steps might be taken to deliver more effective engagement with obligations arising under international and EU law at the domestic level? With a view to addressing these questions in the specific Irish context, this chapter is divided into five parts. Part 1 opens by explaining the status of the Aarhus Convention in Irish law. This précis is followed in Part 2 by an account of the domestic impact of both the Convention and EU measures governing the right of access to environmental information. In similar vein, Part 3 examines public participation. The access to justice obligations articulated in both the Convention and EU law have already impacted significantly on Irish law and practice and Part 4 explores the ongoing attempts to give effect to these onerous and (potentially) highly invasive obligations at national level.[10] Finally, Part 5 sets out my conclusions on the questions posed above and charts likely future directions. In summary, the chapter argues that the impact of the Aarhus Convention, and of the EU measures designed to give effect to Aarhus obligations in the Member States, has been fairly limited in Ireland to date. This state of affairs is due to a combination of factors including: legislative inertia; weak judicial enforcement; limited public awareness of the rights conferred by the Aarhus Convention and a general lack of political will to champion environmental rights at a time of economic crisis.

2 Status of Aarhus Convention in Irish law

Irish constitutional law provides for a dualist approach to international law. Pursuant to Article 29.6 of *Bunreacht na nÉireann* (the Constitution of Ireland), no international agreement is part of the domestic law of the State except as may be determined by the *Oireachtas* (Parliament). Prior to ratification in June 2012, Ireland adopted legislative measures aimed at giving effect to certain provisions of the Aarhus Convention in domestic law and also provided for judicial notice to be taken of the Convention, but the Convention was never actually incorporated into Irish law.[11] As things stand, therefore, by

[10] Part 4 includes revised and substantially updated material from Áine Ryall, 'Beyond Aarhus Ratification: What Lies Ahead for Irish Environmental Law?' [2013] Irish Planning and Environmental Law Journal 19.

[11] The Department of Environment, Community and Local Government (DECLG) has published a very useful Implementation Table on its website. See The Aarhus Convention: Implementation Table in respect of Ireland's Implementation Measures (undated). This document states expressly that it is provided 'as an information guide only.' It does not purport to be a legally binding interpretation of the

virtue of Article 29.6 of the Constitution, the Convention, as such, is not part of Irish domestic law.[12] This remains the position notwithstanding that Ireland has now ratified the Convention. Essentially, ratification means that Ireland is bound by the Convention as a matter of international law. It does not mean that the Convention itself may be invoked *directly* in proceedings before the Irish courts. The position is complicated, however, because of Ireland's EU membership and the particular constitutional status of EU law.[13] Generally speaking, the EU Treaties, and acts adopted by the EU institutions, are binding on the State and form part of domestic law.[14] In the case of conflict, EU law take precedence over national law.[15] The CJEU has confirmed that the Aarhus Convention is 'an integral part' of the EU legal order.[16] It follows, therefore, that the Convention has legal force in domestic law by virtue of Ireland's obligations under EU law. As Hogan J of the High Court explained in admirably clear terms in *NO2GM Ltd v Environmental Protection Agency*[17] and *O'Connor v Environmental Protection Agency*:[18]

> [I]n so far as the [Aarhus] Convention has binding force as part of the domestic law of this State [Ireland], it is only by virtue of the force of and within the proper scope of application of European Union law.[19]

At a more general level, the Aarhus Convention may have an impact in the domestic legal order via principles of statutory interpretation. In *O'Domhnaill v Merrick*,[20] McCarthy J of the Supreme Court accepted 'as a general principle' that:

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relevant provisions. Text available at <www.environ.ie/en/Environment/AarhusConvention/AarhusLegislation/> accessed 4 April 2016.

12 *Klohn v An Bord Pleanála* [2011] IEHC 196 para 6.5; *Kenny v Trinity College* [2012] IEHC 77; *NO2GM Ltd v Environmental Protection Agency* [2012] IEHC 369 paras 11-14; and *O'Connor v Environmental Protection Agency* [2012] IEHC 370 paras 9-12.

13 Bunreacht na hÉireann (Constitution of Ireland) art. 29.4.3 - 29.4.6.

14 European Communities Act 1972 s2 as amended by European Union Act 2009 s3. See also *Pesca Valentia Ltd v Minister for Fisheries and Forestry, Ireland and the Attorney General (No 2)* [1990] 2 IR 305.

15 C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* and *Maher v Minister for Agriculture and Food* [2001] 2 IR 139.

16 C-240/09 *Lesoochranárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* para 30. The EC ratified the Aarhus Convention in February 2005 and has been a Party to the Convention since May 2005. See Council Decision (EC) 2005/370 [2005] OJ L 124/1.

17 *NO2GM Ltd v Environmental Protection Agency* [2012] IEHC 369.

18 *O'Connor v Environmental Protection Agency* [2012] IEHC 370.

19 *NO2GM Ltd v Environmental Protection Agency* [2012] IEHC 369 para 12 and *O'Connor v Environmental Protection Agency* [2012] IEHC 370 para 12. The position is the same in the United Kingdom. As Lord Carnwath explained in *Walton v The Scottish Ministers* [2012] UKSC 44 para 100: 'the Convention is not part of domestic law as such (except where incorporated through European directives')'.

20 *O'Domhnaill v Merrick* [1984] IR 151.

> [A] statute must be construed, so far as possible, so as not to be inconsistent with established rules of international law and that one should avoid a construction which will lead to a conflict between domestic and international law.[21]

It follows from this principle that domestic legislative provisions fall to be construed and applied in conformity with the Aarhus Convention, at least in so far as such an interpretation is possible, with a view to avoiding any conflict between domestic law and international law obligations. This principle of statutory interpretation may be deployed to address gaps in implementation of Aarhus obligations in the domestic legal order in certain circumstances. The interpretative obligation that arises here is similar in scope to the well-established obligation to interpret national law in conformity with EU law.[22]

3 Access to environmental information

Directive 2003/4/EC on public access to environmental information is one element in a package of measures designed to align EU law with obligations arising under the Aarhus Convention. This directive, which was modelled on the access to information obligations set down in the Convention, was due to be implemented in the Member States by 14 February 2005. In Ireland, regulations purporting to transpose Directive 2003/4/EC were eventually published in March 2007. The European Communities (Access to Information on the Environment) Regulations 2007[23] (the 'AIE regulations') entered into force on 1 May 2007, over two years after the deadline for transposition had passed.[24] The AIE regulations strengthened the rules governing access to environmental information held by public authorities and represented a long-overdue improvement on the relatively ineffective provisions that had applied in Ireland up to 1 May 2007.[25] The most significant innovation was the creation of a new body, in the form of the Office of the Commissioner for Environmental Information (hereafter 'the Commissioner'), which is charged with determining appeals where an information request is ignored, delayed or denied.[26] Prior

[21] *O'Domhnaill v Merrick* [1984] IR 151, 166. See also Henchy J at 159.

[22] Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* para 26 and Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* para 8.

[23] European Communities (Access to Information on the Environment) Regulations 2007, SI 2007/133.

[24] In C-391/06 *Commission v Ireland* the CJEU ruled that Ireland had failed to fulfil its obligations under Directive 2003/4/EC by failing to transpose the directive on time.

[25] For a critical overview of the AIE regulations see: Áine Ryall, 'Access to Information on the Environment Regulations 2007' [2007] Irish Planning and Environmental Law Journal 14, 57. On the previous provisions see: ibid, 'Access to Information on the Environment' [1998] Irish Planning and Environmental Law Journal 48.

[26] AIE Regulations art 12(2) assigns the role of Commissioner to the person who holds the office of Information Commissioner under the Freedom of Information Acts 1997 and 2003. Following the remar-

to the entry into force of the AIE regulations, individuals and environmental non-governmental organisations (eNGOs) had long complained about the lack of an independent, accessible and specialist review procedure to deal with environmental information disputes. The establishment of the Commissioner was therefore welcomed as a positive development, with considerable potential to reinforce the right of access to environmental information in practice.

It is notable that the AIE regulations run in parallel with Freedom of Information (FOI) law; it is possible to make a request under the AIE regulations and FOI either concurrently or sequentially. There are a number of significant differences between the two access regimes, however, particularly in terms of their scope, the exceptions to the right of access and the fees involved. In practice, individuals and eNGOs tend to apply for environmental information under the AIE regulations because no 'up-front' application fee applies and a wider range of public authorities are covered by AIE when compared with FOI. FOI legislation was first introduced in Ireland in 1997, following an intense and protracted campaign for greater openness in government.[27] By 2003, however, the government of the day had rowed back significantly on FOI. A plethora of restrictions, including an 'up-front' fee to make an FOI request,[28] plus hefty fees for internal review and for lodging an appeal with the Information Commissioner, were introduced pursuant to the Freedom of Information (Amendment) Act 2003. These regressive measures were motivated, in part, by the high number of FOI requests submitted to public bodies and the consequent drain on their resources. However, it is clear that one of the motivations behind the deeply unpopular amendments to FOI law was the desire to discourage journalists from making so-called 'serial' FOI requests or engaging in 'fishing-expeditions' which could unearth embarrassing revelations about the business of government, politicians and public figures. It is only now, in late summer 2013, that steps are being taken to reverse some of the highly objectionable restrictions to FOI introduced in 2003.[29]

Notwithstanding the introduction of the AIE regulations in 2007, and the inauguration of a dedicated appeals mechanism, there remain significant problems around effective and timely access to environmental information in Ireland. As regards the legislative framework, the AIE regulations have been the

kable High Court ruling in *An Taoiseach v Commissioner for Environmental Information* [2010] IEHC 241, there are serious doubts over the Commissioner's jurisdiction to enforce EU law in the event of alleged inadequate transposition of Directive 2003/4/EC. For commentary see Áine Ryall 'Access to Environmental Information in Ireland: Implementation Challenges' [2011] Journal of Environmental Law 24, 45.

[27] See Freedom of Information Act 1997, which was subsequently amended substantially pursuant to the Freedom of Information (Amendment) Act 2003. For an analysis of Irish FOI law see Maeve McDonagh, *Freedom of Information Law* (2nd ed, Dublin, Thomson Round Hall 2006).

[28] Under the Freedom of Information Acts 1997 and 2003, no fee applies in the case of a request for access to 'personal information' s47(6A). 'Personal information' is defined in s2(1).

[29] The Freedom of Information Bill 2013 was published on 24 July 2013.

subject of sustained criticism from individuals, eNGOs and the Commissioner[30] on the basis that they do not transpose certain aspects of Directive 2003/4/EC correctly.[31] Although a number of important amendments were introduced in 2011 in order to align the AIE regulations more closely with the directive,[32] they remain defective in a number of respects. Two striking points of inconsistency with Aarhus and EU law requirements are the insistence that a request for access must be made 'in writing' and the inclusion of 'mandatory' exceptions to the right of access. Beyond transposition issues, there are serious problems with practical implementation including: the disappointing lack of public awareness of the AIE regulations and of the rights guaranteed under Directive 2003/4/EC and the Aarhus Convention; the poor handling of requests for access by certain public authorities (including unacceptable delays and failure to apply the exceptions to the right of access and the public interest test correctly); and the long-running failure to provide the Commissioner with sufficient resources to ensure that appeals are dealt with in a timely fashion.[33] In her Annual Report for 2012, the Commissioner took the unprecedented step of highlighting 'the lack of adequate resources' available to her office and the 'considerable delays' in completing AIE appeals as a result.[34] The persistent inadequacy of the resources allocated to the Commissioner's office suggests a blatant lack of support for the right of access to environmental information at government level. Beyond resources, the Commissioner's annual reports confirm other problems with the current regime designed to implement Directive 2003/4/EC, including the 'low level of activity' under the AIE regulations and the fact that the regulations limit the Commissioner's role to dealing with appeals and fail to create an effective legislative framework to promote and support AIE.[35] A particularly problematic aspect of the AIE regulations is the fact that a significant fee applies to lodge an appeal with the Commissioner (€150).[36] The appeal fee has attracted vociferous

[30] Emily O'Reilly, Information Commissioner and Commissioner for Environmental Information, 'Office of the Information Commissioner Annual Report 2011' (2012) 73-74, available at <http://www.ocei.gov.ie/en/Publications/Annual-Reports/2011-Annual-Report/> accessed 4 April 2016.

[31] Áine Ryall, 'Access to Environmental Information in Ireland: Implementation Challenges', see footnote 26, 25.

[32] European Communities (Access to Information on the Environment) Regulations 2011, SI 2011/662.

[33] See generally Áine Ryall, 'Access to Environmental Information in Ireland: Implementation Challenges", see footnote 26, 24.

[34] Emily O'Reilly, Information Commissioner and Commissioner for Environmental Information, 'Office of the Information Commissioner Annual Report 2012' (2013) 66, available at <http://www.ocei.gov.ie/en/Publications/Annual-reports/2012-Annual-Report/> accessed 4 April 2016.

[35] Emily O'Reilly, 'Office of the Information Commissioner Annual Report 2011' and 'Office of the Information Commissioner Annual Report 2012' see footnote 31, 73-74 and footnote 35, 66.

[36] Under AIE regulations art 15(4), a reduced appeal fee (€50) applies in certain cases (i.e. where the appellant is a medical card holder; a dependant of a medical card holder; or a person, other than the applicant, who would be incriminated by the disclosure of the information at issue). There is also a number of

criticism from eNGOs, in particular, and the Commissioner has consistently identified it as a real obstacle to appeals to her office.[37]

The Commissioner's decisions to date have highlighted an alarming lack of awareness of, and regard for, the obligations arising under the AIE regulations in certain public authorities. These decisions confirm the importance of an effective redress mechanism, which, it will be recalled, is a fundamental aspect of the Aarhus Convention and Directive 2003/4/EC. By allowing a situation to develop where the Commissioner is stating publicly that her office does not have adequate resources to determine appeals in a 'timely' fashion, and that levels of awareness of AIE remain low, it seems very likely that Ireland is in breach of its obligations under the Aarhus Convention and EU law.[38]

4 Public participation in environmental decision-making

Somewhat curiously, the public participation obligations set down in the Aarhus Convention, and in Directive 2003/35/EC, have not attracted

limited situations where the Commissioner may waive or refund all or part of the appeal fee. See AIE regulations art 15(5), (6) and (7).

37 See, for example, Emily O'Reilly, 'Office of the Information Commissioner Annual Report 2011' see footnote 30, 73. At the time of writing, it appears that the current fees for internal review and appeal under FOI will be reduced substantially (from €75 to €30, and from €150 to €75, respectively), but, remarkably, no equivalent reductions are planned for the AIE appeal fee. Department of Public Expenditure and Reform Press Release, 'Minister announces Government approval for FOI reforms' (2013), available at <http://www.per.gov.ie/en/minister-announces-government-approval-for-foi-reforms/> accessed 5 April 2016.

38 In October 2012, a well-known eNGO, Friends of the Irish Environment (FIE), lodged a complaint with the European Commission alleging systemic breach of Directive 2003/4/EC. In brief, the complaint documented a wide range of alleged shortcomings in both transposition and implementation of the directive and provided vivid examples to support these allegations. The complaint articulated, by way of example: the alleged failure to transpose arts 3, 4 and 7 of Directive 2003/4/EC correctly; the poor handling of requests by public authorities; the lack of resources available to the Commissioner; the 'prohibitive' cost of appeals; the lack of consolidated environmental legislation in Ireland; the very limited active dissemination of information in practice; and the lack of publicity around the AIE regime. In March 2013, the Commission raised the issues set out in the FIE complaint with the Irish authorities (EU Commission, EU PILOT 4696/13/ENVI). The Commission received Ireland's response to the complaint on 16 July 2013 which is currently being assessed. As correspondence between the Commission and the Member State is treated as confidential while infringement proceedings are live, Ireland's response is, unfortunately, not available to the complainant or the public. It remains to be seen whether or not the Commission will issue a Reasoned Opinion and will subsequently decide to bring Ireland before the CJEU in relation to Directive 2003/4/EC. Given Ireland's track record in EU environmental law matters to date, and the significance of the right of access to environmental information in terms of improving compliance and enforcement, the Commission is likely to pursue this matter vigorously with the Irish authorities.

as much attention in Ireland to date as the provisions governing information rights and access to justice. This is probably because Irish planning and environmental law has traditionally made reasonably good provision for public participation.[39] The Local Government (Planning and Development) Act 1963 – which marked the inauguration of modern planning law – allowed members of the public to 'object' to draft Development Plans. Contemporary planning law provides that 'any person' (there is no standing requirement) may make a submission on a planning application. In the case of decisions made by local planning authorities, there is a right of appeal to *An Bord Pleanála* (the Planning Appeals Board) which was established in 1977.[40] Both first parties (the applicant for permission/the developer) and/or third parties (usually described as 'objectors') may appeal. A third party right of appeal is a distinctive feature of the Irish planning system and is of considerable practical value to objectors.[41]

Notwithstanding the long and proud tradition of public participation, and the well-established third party right of appeal, the Planning and Development Act 2000 introduced significant restrictions on the right to participate in the planning process. These regressive modifications were motivated by a desire to 'streamline' the planning process and to discourage frivolous and vexations interventions by individuals and eNGOs that might delay or hinder development. Most controversially, a so-called 'planning participation fee' came into effect in March 2002, with the result that any person who wishes to make a submission on a standard planning application must now pay €20 for the privilege.[42] Predictably, the legality of this unpopular fee (and the €45 fee payable to comment on a planning appeal) was challenged almost immediately by the European Commission on the basis of alleged incompatibility with the Environmental Impact Assessment (EIA) directive.[43] In a disappointing ruling, delivered in November 2006, the CJEU determined that the participation fee was not in breach of the EIA directive.[44] The Court noted that the EIA directive

[39] On Irish planning and environmental law generally see Yvonne Scannell, *Environmental and Land Use Law* (Dublin, Thomson Round Hall 2006) and Garrett Simons, *Planning and Development Law* (2nd ed, Dublin, Thomson Round Hall 2007).

[40] In 2011, 51% of planning appeals lodged with the Board came from third parties. See An Bord Pleanála, 'Annual Report and Accounts 2011' (2012).

[41] In 2011, in the case of appeals by third parties, only 1% of local planning authority decisions to grant permission were upheld with the same conditions, while permission was granted with revised conditions in 71% of cases and was refused in 29% of cases. See An Bord Pleanála, 'Annual Report and Accounts 2011', see footnote 40.

[42] There is a limited number of exceptions to the requirement to pay the fee. It is notable that, apart from An Taisce (the National Trust for Ireland), which has long enjoyed a privileged position under Irish planning law, there is no exception for eNGOs that wish to participate in the planning process. On the fee generally, see further Áine Ryall, 'The EIA Directive and the Irish Planning Participation Fee' [2002] Journal of Environmental Law 14, 317.

[43] Áine Ryall, 'The EIA Directive and the Irish Planning Participation Fee', see footnote 42.

[44] C-216/05 *Commission v Ireland*.

was silent on the question of a fee and that the contested fees were relatively low. It cautioned, however, that a fee could not be set at such a level as to amount to an 'obstacle' to the right to participate. The Court failed to provide any guidance as to what sort of fee would exceed the discretion the EIA directive leaves to Member States to regulate the 'detailed arrangements' governing public participation. The €20 fee remains payable to this day and is an insult to right to public participation.[45] Beyond participation fees, the Planning and Development Act 2000[46] also placed limitations on the right to appeal to *An Bord Pleanála* and tightened up the judicial review procedure considerably. A stricter *locus standi* (standing) test was one of the measures deployed in an attempt to reduce the number of judicial challenges and the consequent delays to projects, particularly those projects the government considered to be of strategic importance to the economy.[47] Further modifications were to follow during the so-called 'Celtic Tiger' years. The Planning and Development (Strategic Infrastructure) Act 2006 decreed that applications for development consent for specified 'strategic' infrastructure projects were to be made directly to *An Bord Pleanála*, effectively by-passing the local planning authority and eliminating the well-established right of appeal in such cases.

The relevant provisions of the Aarhus Convention, and Directive 2003/35/EC, demand *inter alia* 'early' and 'effective' opportunities for the public to participate in the environmental decision-making procedure. In Ireland, the main issue that has surfaced in this context is whether or not the time limits set for the participation stage of various decision-making procedures facilitate 'early' and 'effective' opportunities to participate. The periods in question vary considerably depending on the particular consent procedure at issue. In the case of a standard planning application, the public has five weeks to make a submission on the application, whereas the relevant period is a minimum of six weeks if the project in question qualifies as strategic infrastructure development. In the context of integrated pollution prevention and control (IPPC) licensing, the public has a period of 28 days within which to lodge an objection to the Environmental Protection Agency's proposed determination of a licence application.[48] While proposals for large and controversial projects usually give rise to an oral hearing, this is by no means guaranteed in all such cases and the decision whether or not to hold such a hearing rests with the decision-making authority. Strategic infrastructure development and IPPC licence applications tend to be

[45] See further Áine Ryall, 'EIA and Public Participation: Determining the Limits of Member State Discretion' [2007] Journal of Environmental Law 19, 247.

[46] An unofficial consolidated version of the Planning and Development Act 2000 (as amended) is available at <http://www.environ.ie/en/DevelopmentHousing/PlanningDevelopment/Planning/PlanningLegislation-Overview/PlanningActs/> accessed 5 April 2016.

[47] The rules governing judicial review, including *locus standi*, are considered in part 4 of this contribution.

[48] The public also has the opportunity to participate at an earlier stage in the licensing process by making a submission on the application for an IPPC licence. The applicable time period here is usually two months from the date the application is made to the Environmental Protection Agency.

complex and, by their very nature, controversial projects, and so it is questionable whether a six week or 28 day period (as the case may be) is sufficient in such cases. Another significant practical issue in the context of 'early' and 'effective' participation is the fact that individuals and eNGOs with limited resources often struggle to find funds to enable them to engage expert technical and legal expertise so as to participate effectively in the decision-making process. Under Irish law, civil legal aid is not available during the public participation stage of the decision-making process. In practice, there often tends to be a serious 'inequality of arms' between the local community who are objecting to a particular project and the (usually very well-resourced) developer.

Apart from the controversial planning participation fee, the other issues noted above have not been considered in any significant detail by the courts at either EU or national level to date. In sharp contrast, the public participation provisions in Article 7 of the Aarhus Convention have come into focus in both the Irish and EU context as a result of the findings and recommendations of the Aarhus Convention Compliance Committee in a communication alleging non-compliance by the EU.[49] In a communication lodged by Mr Pat Swords, the Committee determined that the EU had failed to comply with Article 7 of the Convention: (1) by not having a proper regulatory framework in place to implement Article 7 in the context of the adoption of National Renewable Energy Action Plans (NREAPs)[50] by the Member States under Directive 2009/28/EC;[51] and (2) by not having monitored properly Ireland's implementation of Article 7 in the adoption of its NREAP.[52] The Committee also found non-compliance with Article 3(1) in that the EU did not have a proper regulatory framework in place to enforce Article 7 with respect to the adoption of NREAPs in the Member States. The argument presented by Mr Swords in his communication concerning the EU's compliance with the Convention was based *inter alia* on the manner in which Ireland's NREAP was adopted, including alleged inadequate opportunities for public participation. The Committee found that the public consultation on Ireland's NREAP was conducted 'within a very short timeframe, namely

[49] Details of this communication are available via the data sheet published at <http://www.unece.org/env/pp/compliance/Compliancecommittee/54TableEU.html> accessed 5 April 2016.

[50] The Committee found that the NREAP constituted a plan or programme relating to the environment which was subject to art 7 of the Convention. It followed from art 7 that where an NREAP is prepared, the requirements for public participation set out in art 6(3), (4) and (8) apply.

[51] European Parliament and Council Directive (EC) 2009/28 on the promotion of the use of energy from renewable sources [2009] OJ L 140/16.

[52] 'Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union' (2012) available at <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Findings/C54_EU_Findings.pdf> accessed 5 April 2016. Note that Ireland was not a Party to the Convention at the time when this communication was made to the Compliance Committee and Ireland will not be subject to the Committee's jurisdiction as regards communications from the public until 18 September 2013.

two weeks.'[53] It added that '[a] two week period is not a reasonable time frame for "the public to prepare and participate effectively", taking into account the complexity of the plan or programme.'[54] The Committee proceeded to recommend that the EU adopt a proper regulatory framework for implementing Article 7 with respect to NREAPs. Such a framework would include ensuring that the arrangements for public participation in the Member States are 'transparent and fair' and that the necessary information is provided to the public. Moreover, the framework put in place must ensure that Article 6(3), (4) and (8) of the Convention are satisfied.[55] The Committee's findings and recommendations in this case confirm its robust approach to public participation and its concern to ensure that each specific element of the participation requirements set down in the Convention are delivered in practice at local level.

Relying in part on the Committee's findings and recommendations in communication ACCC/C/2010/54, Mr Swords subsequently initiated proceedings before the Irish courts alleging *inter alia* that Ireland adopted its NREAP in breach of both the Aarhus Convention and EU law.[56] At the time of writing, these proceedings are pending before the High Court. While it remains to be seen how the various arguments presented in *Swords* will be resolved by the Irish courts, it is interesting to see the public participation rights conferred by Article 7 of the Convention being deployed in litigation at national level.

5 Access to justice in environmental matters

Directive 2003/35/EC, adopted by the EU as part of its package of measures aimed at implementing the Aarhus Convention, introduced significant amendments to both the EIA directive[57] and the IPPC directive[58] to strengthen public participation and access to justice. Member States were required to implement this directive by 25 June 2005. The specific access to justice provisions inserted into the EIA and IPPC directives were modelled closely on Article 9(2) and (4) of the Convention. The initial position taken by the Irish authorities was that no new legislative measures were required to transpose the access to justice provisions introduced under Directive 2003/35/

53 Ibid, para 83.

54 Ibid.

55 Ibid, para 98.

56 *Swords v Minister for Communications, Energy and Natural Resources* 2013/4122P.

57 European Parliament and Council Directive (EU) 2011/92 on the assessment of the effects of certain public and private projects on the environment (codification) [2011] OJ L 26/1 – formerly Directive 85/337/EEC as amended.

58 Council Directive (EC) 96/61 concerning integrated pollution prevention and control [1996] OJ L 257/26. See now European Parliament and Council Directive (EU) 2010/75 on industrial emissions (integrated pollution prevention and control) (Recast) [2010] OJ L 334/7 - the Industrial Emissions Directive (IED).

EC. This conservative approach was grounded on the argument that the existing system of judicial review met the obligation to provide access to a review procedure to challenge certain planning and environmental decisions. Subsequently, however, amendments to the Planning and Development Act 2000 provided *inter alia* that environmental eNGOs that meet certain requirements did not have to satisfy the 'substantial interest' standing test in the specific case of a challenge to a decision that is subject to EIA.[59] It appears that this measure was prompted by the express requirement in the EIA directive (inspired by the Aarhus Convention) that environmental eNGOs that meet the criteria set down in national law are *automatically* deemed to have standing to challenge decisions that are subject to EIA. Notwithstanding this welcome amendment, the Commission did not share the Irish authorities' assessment that the existing judicial review procedure was compatible with Aarhus and EU access to justice obligations. Infringement proceedings ensued alleging that Ireland had failed to transpose correctly the access to justice clauses in the EIA and IPPC directives. In July 2009, the CJEU ruled *inter alia* that Ireland had failed to transpose the obligation to ensure that costs in cases involving the EIA directive and the IPPC directive were 'not prohibitively expensive.'[60] More specifically, the CJEU determined that a judicial discretion to depart from the general rule that costs follow the event (i.e. the 'loser pays' principle) did not constitute adequate transposition of the obligation that the costs involved in judicial review procedures must not be 'prohibitively expensive.' The CJEU also determined that Ireland had failed to fulfil the obligation to make practical information on access to administrative and judicial review procedures available to the public. In summer 2010, in response to this adverse ruling from Luxembourg, Ireland introduced legislation providing for a special costs regime for judicial review proceedings involving a challenge to a decision, act, or failure to act under any provision of Irish law that gives effect to the EIA directive, the IPPC directive, or the Strategic Environmental Assessment (SEA) directive.[61] In brief terms, the special costs regime established a general rule that each of the parties to the proceedings bears their own costs, subject to certain exceptions. The new costs provisions were inserted into the Planning and Development Act 2000 (as amended) via a new section 50B.[62] The net result is that the usual 'loser pays' principle does not apply in this particular category of proceedings. The special costs rule was subsequently refined, pursuant to section 21 of the Environment (Miscellaneous Provisions)

59 This amendment was introduced pursuant to s13 of the Planning and Development (Strategic Infrastructure) Act 2006. Note that the 'substantial interest' test has now been replaced with a 'sufficient interest' test as a result of an amendment introduced pursuant to the Environment (Miscellaneous Provisions) Act 2011.

60 C-427/07 *Commission v Ireland*.

61 European Parliament and Council Directive (EC) 2001/42 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/30.

62 Planning and Development Act 2000 (as amended) s50B was inserted by the Planning and Development (Amendment) Act 2010, s33.

Act 2011 ('the 2011 Act'), following sharp criticism of the potential negative impact on arrangements whereby lawyers traditionally agreed to act on a contingency fee basis in planning and environmental judicial review proceedings. Legal practitioners, environmental eNGOs and academic commentators took the view that the original section 50B, which provided that each party was to bear its own costs except in exceptional circumstances, effectively removed any incentive for lawyers to agree to act on a contingency fee basis.

Notwithstanding this refinement, the special costs rule remains problematic in that it still involves a considerable element of judicial discretion. A person contemplating judicial review proceedings cannot be certain at the outset as to how the court will ultimately exercise its discretion as to liability for costs. At the time of writing, the scope of the special costs rule, and its impact on access to environmental justice, still remains to be teased out in the Irish courts.[63] More significantly, although the special costs rule aims to eliminate the risk of an applicant for judicial review being liable for the costs of the respondent(s) and any notice parties, an applicant will usually require expert legal advice in order to mount a compelling challenge. The high price of legal services in Ireland, taken in conjunction with the limited availability of civil legal aid, means that the cost of engaging legal advice may well be 'prohibitive' in cases where an individual or eNGO has limited resources. The special costs rule does nothing to address this fundamental problem. As O'Malley J observed insightfully in *Stack Shanahan and Sheehan* (where the applicants had represented themselves throughout the proceedings):

Fear of an order of costs being made against one may be a serious matter, but so too is the inability to obtain representation, no matter how meritorious the case, unless one can pay for it "up front". It is hard to see how, from the point of view of legal practitioners, [section 50B] could not have a "chilling" effect on their willingness or capacity to provide their services. There is also the possibility that unmeritorious cases will take up the time of the courts where timely and effective legal advice could have stopped them.[64]

It will be recalled that in *Commission v Ireland*,[65] the CJEU also determined that Ireland had failed to transpose the obligation to 'ensure that practical information is made available to the public on access to administrative and judicial review procedures.' In response to this aspect of the CJEU ruling, Ireland introduced a range of legislative amendments to provide expressly that public authorities that take decisions falling within the scope of the public participation directive are obliged to provide practical information on the relevant review

[63] See generally Garrett Simons, 'New Rules on Legal Costs and the Aarhus Convention' [2012] Irish Planning and Environmental Law Journal, 19, 151.

[64] *Stack Shanahan and Sheehan v Ireland, the Attorney General, An Bord Pleanála, the Minister for the Environment, the Minister for Arts, Cork County Council and the National Roads Authority* [2012] IEHC 571 para 14. Note that the costs rule at issue in *Stack Shanahan* was s50B prior to its amendment by the 2011 Act.

[65] C-427/07 *Commission v Ireland*.

mechanism.[66] At a more general level, a certain amount of basic information on judicial review proceedings in the planning and environmental law context is now available on the Citizens' Information Board website.[67]

Notwithstanding the introduction of the special costs rule, and measures to provide for publication of practical information on review procedures, the Commission remains dissatisfied with Ireland's efforts to comply with the access to justice obligation in the EIA and IPPC (now IED) directives. A letter of formal notice issued to Ireland in June 2012 questioning both transposition and implementation of the access to justice obligation as regards *inter alia*: the scope of judicial review proceedings; the provision of practical information on access to justice; the requirement that review procedures be timely; the cost burdens and cost-related barriers to access to the Irish courts; and the recognition of environmental eNGOs.[68] At the time of writing, it remains to be seen whether the Commission will follow up with a Reasoned Opinion and whether it will ultimately decide to refer Ireland to the CJEU. Given the long-running problems with access to environmental justice in Ireland, and persistent calls from eNGOs for effective action on this fundamental issue, it is likely that a Reasoned Opinion will issue in the not too distant future.

5.1 Irish legislative measures aimed at implementing Aarhus obligations

According to the Department of Environment, Community and Local Government (DECLG) website, over 60 pieces of legislation are relied on to implement the Aarhus Convention in Irish law.[69] The various legislative measures outlined thus far in this contribution were adopted primarily to give effect to obligations arising under the EU directives on public access to environmental

[66] Waste Management (Licensing) (Amendment) Regulations 2010, SI 2010/350; Environmental Protection Agency (Licensing) (Amendment) Regulations 2010, SI 2010/351 and European Communities (Public Participation) Regulations 2010, SI 2010/352. It is notable that An Bord Pleanála has published a Judicial Review Notice on its website <www.pleanala.ie/> accessed 5 April 2016 which includes a general account of the special costs rule.

[67] See the website <www.citizensinformation.ie/en/environment/environmental_law/> accessed 5 April 2016.

[68] As is well known, both the Commission and the Irish authorities consider letters of formal notice and reasoned opinions to be confidential and therefore these documents not publicly available. See *Sweetman v An Bord Pleanála* [2009] IEHC 174. However, in June 2012, although no press release was issued, the Commission wrote to the complainants to inform them that a letter of formal notice had issued and to provide a summary of the main topics addressed in the letter of formal notice. As a result of the Commission's communication with the complainants, a general summary of the key points raised in the letter of formal notice has entered the public domain.

[69] DECLG, 'The Aarhus Convention: Implementation Table in respect of Ireland's Implementation Measures' (undated) text available at <www.environ.ie/en/Environment/AarhusConvention/AarhusLegislation/> accessed 5 April 2016.

information (Directive 2003/4/EC) and public participation (Directive 2003/35/EC). These two directives, in turn, aimed to implement specific Aarhus obligations in the Member States. In anticipation of ratification, Part 2 of the 2011 Act introduced a number of provisions that aimed to give effect to other obligations arising under the Convention, including the access to justice obligation in Article 9(3) and (4).[70] It also provided that judicial notice must be taken of the Aarhus Convention.[71]

The most significant element of Part 2 of the 2011 Act is that it extends the special costs rule (described above) to certain categories of civil proceedings aimed at enforcement of planning and environmental law.[72] The special costs rule established in section 3 of the 2011 Act follows the template set down in section 50B (as amended): in cases that fall within the scope of section 3, the default position is that each party must bear its own costs, subject to certain exceptions. Pursuant to sections 5 and 6, the special costs rule established in section 3 also applies to certain proceedings relating to the AIE regulations.[73] Section 7 makes provision for what could be described as an 'Aarhus certificate', whereby a party to proceedings falling within the scope of section 3 may apply to the court at any time before, or during, the proceedings, for a determination that section 3 applies. It is also open to the parties to agree that section 3 applies.

It is notable that Part 2 of the 2011 Act makes no attempt to extend the special costs rule to judicial review proceedings that involve a challenge to a decision that does not fall within the (limited) scope of section 50B (it will be recalled that section 50B only covers challenges involving the EIA, IPPC and SEA directives). The usual 'loser pays' principle continues to apply in judicial review proceedings that are not caught by section 50B. Another noteworthy feature of the special costs rule set down in section 3 of the 2011 Act is that it does not apply where court proceedings are brought to ensure compliance with planning or environmental law in a situation where no planning permission, consent or licence (as the case may be) has been obtained – in other words, in the case of unauthorised development or unlicensed activity.[74] It is

[70] For a detailed analysis of implementation of art 9(3) and (4) of the Aarhus Convention in Ireland see Áine Ryall, 'Study on the Implementation of Article 9(3) and 9(4) of the Aarhus Convention in 17 Member States of the European Union: Report on Ireland' (2012) European Commission, DG Environment, text available at <http://ec.europa.eu/environment/aarhus/access_studies.htm> accessed 5 April 2016.

[71] Environment (Miscellaneous Provisions) Act 2011 s8.

[72] Environment (Miscellaneous Provisions) Act 2011 ss3 and 4.

[73] SI 2007/133 as amended by SI 2011/662.

[74] The reasoning behind this approach is found in the Minister for Environment, Community and Local Government's written answers to Parliamentary Questions 588, 589 and 590 of 14 September 2011. It appears that a policy decision was taken to ensure that persons who proceed without any required planning permission, licence or other relevant consent should not have the benefit of the special costs rule. It is clear from the Minister's response, that the Irish authorities take the view that enforcement proceedings are a matter for the relevant regulatory authority.

also interesting to note that Part 2 of the 2011 Act does not create any express obligation on public authorities to provide practical information to the public on access to administrative and judicial review procedures to enforce planning and environmental law as required under Article 9(5) of the Convention.[75] These are striking omissions that create significant gaps in implementation of the Aarhus Convention and EU law obligations. Given the obvious legislative reluctance to tackle access to justice obligations in a robust manner, it falls to the national courts to deal with these implementation gaps pending full transposition. Following the ground-breaking CJEU ruling in *LZ*,[76] national courts are obliged to interpret domestic law, in so far as possible, to ensure that it is Aarhus-compliant. It follows that, in this scenario, a national court would be obliged to ensure that the cost involved in bringing proceedings to enforce national planning and environmental law is 'not prohibitively expensive', even in the case of proceedings that do not fall within the narrow scope of section 50B and section 3 of the 2011 Act.

Beyond the issue of the cost of proceedings, the 2011 Act also introduced a significant change to the standing test for judicial review proceedings. Previously, an applicant seeking leave to bring judicial review proceedings to challenge certain planning decisions was required to demonstrate that they had a 'substantial interest' in the matter to which the application related.[77] The concept of a 'substantial interest' was interpreted strictly by the Irish courts.[78] Under section 21 of the 2011 Act, the standing test was changed from one of 'substantial interest' to 'sufficient interest' (in other words, the test for standing has now reverted to that which applied prior to the enactment of the Planning and Development Act 2000). This welcome revision to the standing test was triggered by concerns that the restrictive 'substantial interest' test was likely to fall foul of the access to justice obligation in Article 9 of the Aarhus Convention and Article 11 of the (codified) EIA directive.[79]

5.2 Aarhus Convention in the Irish courts

The Aarhus Convention, as such, has had a fairly limited impact on the Irish jurisprudence to date. The most significant developments in the jurisprudence have come about primarily due to EU obligations and, in particular, Article 10a of the EIA directive (now Article 11 of the codified EIA

[75] It is notable that the recent DECLG publication, 'A Guide to Planning Enforcement in Ireland' (November 2012) does not contain any reference to the special costs rule created in s 3 of the 2011 Act.

[76] C-240/09 *Lesoochranárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* ('*LZ*').

[77] Planning and Development Act 2000 s 50A(3)(b), prior to amendment by the Environment (Miscellaneous Provisions) Act 2011.

[78] See, in particular, *Harding v Cork County Council* [2008] IESC 27.

[79] European Parliament and Council Directive (EU) 2011/92 on the assessment of the effects of certain public and private projects on the environment (codification) [2011] OJ L 26/1 – formerly Directive 85/337/EEC as amended.

directive). As a consequence of the persistent legislative failure to transpose Article 10a correctly (this obligation was to have been implemented by 25 July 2005), the judiciary was called upon to give effect to the right of access to a review procedure that is 'not prohibitively expensive.' The judiciary's response to arguments based on Article 10a was generally mixed and, overall, could be described as conservative and disappointing. The high water mark in this fascinating body of jurisprudence is probably the judgment of Clarke J in *Sweetman v An Bord Pleanála (No 1)*.[80] On this occasion, the High Court ruled that national standing rules should be interpreted in light of EU obligations with a view to delivering 'wide access to justice' and, furthermore, to the extent that EU law might demand a higher degree of judicial scrutiny in planning and environmental cases, any such requirement could be accommodated within the existing judicial review regime. Clarke J also determined that 'proper regard' should be had to the Aarhus Convention when interpreting the public participation directive.[81] Two subsequent rulings, *Sweetman v An Bord Pleanála (No 2)*[82] and *Hands Across the Corrib Ltd v An Bord Pleanála*,[83] witnessed the High Court apply well-established domestic rules on costs in such a way as to give effect to the ban on prohibitive expense. The extensive CJEU and Irish jurisprudence on the access to justice clause in the EIA directive is considered in detail elsewhere.[84] The focus here is exclusively on the Irish jurisprudence where the Convention has been directly in issue. At the time of writing, there are surprisingly few cases where the Convention has been deployed before the Irish courts.

In *NO2GM Ltd v Environmental Protection Agency*[85] and *O'Connor v Environmental Protection Agency*,[86] High Court confirmed, in the context of efforts to enforce the ban on prohibitively expensive costs under Article 9(4), that the Convention, in itself, is not part of Irish domestic law.[87] The applicants (who were not represented by a solicitor or counsel) sought an *ex ante* and *ex parte* order granting them what Hogan J described as 'a not prohibitively expensive costs order' on the basis of Article 9(4). The High Court concluded that it had no jurisdiction to make such an order without notice to the other parties who would be actually or potentially affected by such an order and it declined to grant the relief sought.[88] The High Court, per Birmingham J, had also refused an *ex*

[80] *Sweetman v An Bord Pleanála* (No 1) [2007] IEHC 153.

[81] *Sweetman v An Bord Pleanála* (No 1) [2007] IEHC 153 para 7.7.

[82] *Sweetman v An Bord Pleanála* (No 2) [2007] IEHC 361.

[83] *Hands Across the Corrib Ltd v An Bord Pleanála (No 2)*, unreported, High Court 21 January 2009 (ruling on costs).

[84] See, e.g., Áine Ryall, 'Access to Environmental Justice: Pulling the Threads Together' [2011] Irish Planning and Environmental Law Journal 152, 18.

[85] *NO2GM Ltd v Environmental Protection Agency* [2012] IEHC 369.

[86] *O'Connor v Environmental Protection Agency* [2012] IEHC 370.

[87] The status of the Convention, post ratification, was considered in Part 1 of this contribution.

[88] See also *In the Matter of Applications for Orders in Relation to Costs in Intended Proceedings by Stella Coffey et al* [2013] IESC 11 para 12.

parte application for 'a not prohibitively expensive order' in *Coffey v Environmental Protection Agency*.[89] Subsequently, in *Maher*,[90] the applicant (a lay litigant) sought an order *ex parte* protecting her against any liability for costs in proceedings she wished to bring to challenge a decision of the Environmental Protection Agency. The application was based on the argument that (in the words of Hedigan J), the High Court 'is a European Court and should give effect to the prohibitive costs prevention provisions of the Aarhus Convention.' The High Court referred to section 3 of the 2011 Act and concluded that the legislature had made no provision for the court to grant such an order *ex parte*. Hedigan J stated that it was not the court's role to legislate and that the correct way for the applicant to proceed was to seek the consent of the intended defendant that section 3 applied to the proceedings or, in the alternative, to bring a motion on notice for a declaration that section 3 applied. Following on from this determination, the applicant in *Maher* sought an order that no costs would be awarded against her should the motion on notice fail. Hedigan J was of the view that the court did not have jurisdiction to make such an order either (that was a matter for the judge hearing the motion), but the court acknowledged that the costs involved 'may amount to an insuperable obstacle to the applicant bringing a motion.' While expressing sympathy for the applicant, Hedigan J insisted that there was no legal authority to permit him to make the order sought by the applicant. Hedigan J observed, however, that:

> [It was] very arguable that the absence of some legal provision permitting an applicant to bring such a motion, without exposure to an order for costs, acts in such a way as to nullify the State's efforts to comply with its obligation to ensure that costs in certain planning matters are not prohibitive. As things stand, I have no power to change this.[91]

This interesting and insightful *obiter* comment from the High Court suggests that it may well be the case that Ireland has failed to transpose fully the obligation to ensure that the cost of access to a review procedure is 'not prohibitively expensive.' In late June 2013, the Supreme Court upheld the High Court's refusal to make any costs order on an *ex parte* basis in the proceedings mentioned above.[92] Delivering the judgment of a unanimous Supreme Court, Denham CJ was satisfied that the High Court was correct in law and under the Constitution in refusing the *ex parte* costs orders sought by the applicants. The Chief Justice explained that fair procedures 'are at the core of the law and the Constitution' and that notice of proceedings, or of orders against a party 'are basic to fair procedures and implicit in the administration of justice.' The

[89] *In the matter of an application by Stella Coffey*, unreported, High Court 14 August 2012.

[90] *In the matter of an application by Dymphna Maher* [2012] IEHC 445.

[91] *In the matter of an application by Dymphna Maher* [2012] IEHC 445 para 5.

[92] *In the matter of appeals to find a way that the appellants can take a legal challenge which is protected from prohibitively expensive legal costs by Stella Coffey, NO2GM Ltd, Derek Banim, Thomas O'Connor, Richard Auler, Theresa Carter, David Notely, Michael Hickey, Malcolm Noonan, Gavin Lynch, Danny Forde, Enda Kiernan and Dymphna Maher* [2013] IESC 31.

Supreme Court did not make any express reference to the Aarhus Convention or to the State's obligation to ensure that access to environmental justice is 'not prohibitively expensive.' Denham CJ did, however, refer to the CJEU's *Edwards*[93] ruling at the end of her judgment. The Chief Justice simply noted, without comment, that *Edwards* had been decided on 11 April 2013, and concluded by setting out paragraph 49 of the CJEU's ruling in its entirety.[94] In *Edwards*, the CJEU determined *inter alia* that when called upon to deal with the issue of costs in Aarhus cases, a national court must satisfy itself that the ban on prohibitive costs has been complied with, 'taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.'[95] It is hard to know what the Supreme Court was seeking to achieve with this brief and enigmatic reference to *Edwards*. Apart from simply highlighting the significance of this CJEU ruling for future litigation, the Court may also have seized the opportunity to subtly remind the legislature of its Aarhus obligations and of the national courts' duty to enforce those obligations.

Beyond the serious and persistent problems posed for prospective litigants by high legal costs, the issue of eNGOs' standing to bring judicial review proceedings has also surfaced recently in litigation at national level. In *Sandymount and Merrion Residents Association v An Bord Pleanála,*[96] the High Court ruled that the unincorporated club (i.e. a body that is not a legal person) in this case had standing and capacity to challenge the contested planning decision. Charleton J observed that 'the rightly liberal principles of access to justice and standing to bring a challenge related to environmental matters', which are articulated in the Aarhus Convention, applied in this case. Having set out the relevant provisions of the Convention[97] and EU environmental law,[98] the High Court turned its attention to the national measures designed to transpose the access to justice obligations. As noted earlier in this contribution, section 50A(3) of the Planning and Development Act 2000 (as amended) provides that environmental eNGOs that meet certain conditions enjoy *automatic* standing to bring judicial review proceedings in EIA cases. Essentially, the conditions currently in place require that the eNGO: (1) is a body or organisation whose aims or objectives relate to the promotion of environmental protection; (2) has pursued those aims or objectives during the period of 12 months preceding the date of application for leave (permission) to bring judicial review proceedings; and (3) satisfies any other conditions prescribed by the Minister for Environment, Community and Local Government regarding an eNGOs entitlement to appeal to *An Bord Pleanála*. No

93 C-260/11 *R (Edwards) v Environment Agency.*

94 Para 49 is the operative part of the *Edwards* judgment.

95 Ibid paras 35 and 39.

96 *Sandymount and Merrion Residents Association v An Bord Pleanála* [2013] IEHC 291.

97 Specifically, the definition of 'the public' and 'the public concerned' in art 2(4) and the access to justice provisions set down in art 9.

98 Specifically, the definition of 'the public' in art 2 of the EIA directive and 'the access to justice provisions' in art 10a.

such further conditions have been prescribed to date, for example concerning 'the possession of a specified legal personality.'[99] The eNGO in this case sought to rely on section 50A(3) as the basis for its standing to litigate. However, due to the fact that it did not have legal personality as an unincorporated association, Charleton J had to consider whether it had capacity to maintain the challenge. The High Court determined that unless and until any additional criteria are prescribed by the Minister, an eNGOs entitlement 'to avail of the special standing rules' depends on its aims and objectives and whether it has been active in promoting environmental protection for at least 12 months. In the Court's view, as a matter of statutory interpretation, section 50A(3) effectively 'conflated' the issues of standing (sufficiency of interest) and capacity. It followed that the eNGO in this case was entitled to continue with the litigation. This ruling demonstrates that the High Court is alert to the special rights conferred on eNGOs by the Aarhus Convention and EU law, and is prepared to uphold an ENGOs entitlement to litigate environmental matters, notwithstanding the fact that section 50A(3) failed to address the important practical issue of capacity to sue. At the time of writing, the High Court's ruling is under appeal to the Supreme Court.

The recent jurisprudence outlined above confirms a number of interesting developments post-Aarhus ratification. First, awareness of the ban on prohibitive costs under Article 9(4) of the Convention is gradually increasing and this trend is likely to intensify post *Edwards*. Second, more and more lay litigants are coming before the courts seeking *ex parte* pre-emptive protection from legal costs on the basis of Article 9(4). These *ex parte* applications have not met with any degree of success to date. Third, evidence is beginning to emerge of a growing judicial awareness of the significance of the access to justice obligations created by international and EU law and of the national courts' duty to enforce those obligations – notwithstanding any shortcomings in the national legislature's transposition efforts.

6 Conclusions and future directions

It is impossible to do justice to the complexity of the interaction between the Aarhus Convention, EU law and the Irish legal system in this brief contribution. The most significant legislative and judicial initiatives to date have been explained in general terms. At the time of writing, aligning Irish environmental law with the Aarhus Convention is an ongoing process, both in terms of formal transposition of Aarhus obligations and, of course, giving effect to those obligations in practice. As at summer 2013, serious problems remain with the practical implementation of the right of access to environmental information. Public participation in environmental decision-making is weakened by participation fees, lack of resources to engage expert legal and technical advice and

[99] See further Planning and Development Act 2000 (as amended) s 37(4)(c)-(f).

by the relatively short timeframes for participation that apply in certain cases. As regards access to justice, while Irish costs rules have been modified, there is still a significant problem with the high cost of legal services creating a practical barrier to access to the courts. Moreover, the vague manner in which the ban on prohibitive costs is presented in both the Aarhus Convention and the related EU measures has led to a high degree of ambiguity around the precise scope of this obligation. This inherent uncertainty obviously hampers efforts to enforce the right of access to affordable environmental justice. While the recent *Edwards* ruling provides a measure of guidance on how the CJEU expects national courts to interpret and apply the (Aarhus-inspired) EU rules governing costs in environmental litigation, many practical questions remain unanswered. In particular, the ban on prohibitive costs, and its implications in terms of civil legal aid, or similar financial support systems for litigants with limited resources, remains to be explored fully. It is interesting that this particular aspect of Aarhus has not attracted attention in Ireland to date. It seems obvious that if a compelling challenge is to be mounted to an environmental decision, then those bringing the proceedings will be at a significant disadvantage in the absence of expert technical and legal advice.[100]

Beyond the costs conundrum, the standard of judicial review where a challenge is mounted to an environmental decision remains a significant issue in practice.[101] The Aarhus Convention speaks of access to a review procedure to challenge 'the substantive and procedural legality' of a contested decision. Moreover, the review procedure must deliver an 'adequate and effective' remedy. The precise standard of judicial scrutiny required here is far from clear.[102] A particularly thorny question is whether or not the standard of review currently applied by the Irish courts is too restrictive to deliver effective judicial protection. In judicial review proceedings, the High Court reviews the legality of the contested decision. Such review will, therefore, involve a consideration of whether all statutory requirements were met and fair procedures observed. Under Irish law, there is very limited judicial review of the substance or merits of planning and environmental decisions. The court is not entitled to interfere with an administrative decision on the grounds that it would have raised

[100] The potential of art 47(3) of the Charter of Fundamental Rights of the European Union is also underexplored in the context of environmental litigation before the Irish courts. Art 47(3) provides: 'Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'

[101] See further Áine Ryall, European Commission, DG Environment, 'Study on the Implementation of Article 9(3) and 9(4) of the Aarhus Convention in 17 Member States of the European Union: Report on Ireland' (2012), ss C.3 and F, available at <http://ec.europa.eu/environment/aarhus/access_studies.htm> accessed 8 April 2016.

[102] C-72/12 *Gemeinde Altrip Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate*. The Opinion of Advocate General Cruz Villalón, delivered on 20 June 2013, set out a number of interesting conclusions on the art 10a review procedure and it remains to be seen how the CJEU will respond to the (potentially ground-breaking) issues raised in this particular reference for a preliminary ruling.

different inferences or conclusions from the facts, or because it is satisfied that the case against the contested decision was much stronger than the case for it. The classic authority on this point is *O'Keeffe v An Bord Pleanála*.[103] The courts tend to defer to the technical expertise of decision-makers such as planning authorities, *An Bord Pleanála* and the Environmental Protection Agency, largely because the courts are not generally experts on planning and environmental matters and the judiciary does not have independent planning or environmental expertise available to it. Moreover, the courts justify this deferential approach by placing considerable emphasis on the fact that under legislation Parliament (the *Oireachtas*) has vested the task of making planning and environmental decisions in these expert administrative bodies. Where the substance (or merits) of a planning or environmental decision is challenged in judicial review proceedings, the High Court will only intervene and quash such a decision where the applicant can prove that the decision in question is 'unreasonable' or 'irrational'. 'Unreasonable' or 'irrational' in this context has been interpreted very strictly by the courts. It is only where a decision is 'unreasonable' or 'irrational' in that sense that it will be found to be unlawful as a matter of Irish law. In order to succeed, the applicant must prove that the decision-maker had no relevant material before it to support its decision or, as one Supreme Court judge famously expressed the test for judicial intervention, whether the contested decision 'is fundamentally at variance with reason and common sense.'[104] This has proven to be a high threshold to cross in practice and it is very rare for the High Court to quash a decision taken by an expert planning or environmental authority on the grounds of 'unreasonableness' or 'irrationality'. It is important to emphasise, however, that 'unreasonableness' or 'irrationality' is only one of the grounds on which a planning or environmental decision may be challenged.[105]

It is difficult to reconcile the deference the Irish courts tend to show to the technical expertise of decision-makers such as planning authorities, *An Bord Pleanála* and the Environmental Protection Agency with the requirement that the review procedure must provide an effective remedy. Recent developments in the jurisprudence suggest that there is some movement towards a more interventionist approach on the part of the Irish courts and that the *O'Keeffe* principles may need to be recalibrated in light of Aarhus and EU access to justice obligations.[106] However, the law on the standard of review remains in an uncer-

[103] *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39.

[104] *State (Keegan) v Stardust Victims' Compensation Tribunal* [1986] IR 642.

[105] *Sweetman v An Bord Pleanála (No 1)* [2007] IEHC 153, especially paras 6.12 and 6.13. There are many grounds of judicial review including: breach of fair procedures or constitutional justice; breach of a procedural requirement; failure to provide adequate reasons; decision-maker had regard to an irrelevant consideration or failed to consider a relevant consideration; breach of EU law; or breach of the European Convention on Human Rights.

[106] *Sweetman v An Bord Pleanála (No 1)* [2007] IEHC 153; *Klohn v An Bord Pleanála* [2008] IEHC 111; *Cairde Chill an Disirt Teo v An Bord Pleanála* [2009] IEHC 76; *Usk and District Residents Association Ltd v An Bord Pleanála* [2009] IEHC 346; and *Hands Across the Corrib Ltd v An Bord Pleanála and Galway County*

tain state at the time of writing.[107] Furthermore, it must be questioned whether an evolving body of jurisprudence from the national courts constitutes adequate implementation of the obligation to provide an effective judicial remedy.

Delving more deeply into the Aarhus Convention's reception in Ireland, the following general conclusions may be drawn:

(1) The Convention is certainly a force for change in Irish environmental law and policy, although its impact will continue to be gradual rather than revolutionary. In similar vein to EU environmental directives, genuine disputes have arisen over the correct interpretation of many obligations articulated in the Convention, especially the access to justice provisions. The implications for the Irish legal system therefore remain to be teased out via litigation at national and EU level and also, of course, through the work of the Aarhus Convention Compliance Committee. The Commission and the CJEU continue to play a vital role in seeking to ensure that Ireland complies with its EU environmental obligations. As is well known, however, the enforcement machinery under Article 258 and Article 260 TFEU is notoriously slow, highly political and frustratingly opaque. The Commission's Environment Directorate General has limited resources and, at the time of writing, there are long delays in assessing complaints and pursuing them with the Irish authorities. It will be interesting to see how Ireland responds to communications submitted to the Aarhus Convention Compliance Committee as and from 18 September 2013. The Committee operates in a far more transparent manner than the Commission and it should provide an additional and potentially very significant oversight mechanism.

(2) The Aarhus Convention, and the related EU measures, raised high expectations in Ireland, particularly among individuals, local communities and eNGOs. The Convention was initially seen as a catalyst for fundamental reform of the system of judicial review in environmental litigation. These early expectations have not been met, however, and there is considerable frustration at the slow pace of change. The rules governing judicial review, the standard of judicial scrutiny and the role of costs in disciplining litigants, are deeply entrenched features of local legal culture and are most resilient to change. Irish judges are not expert in technical planning and environmental matters and they do not have neutral expertise available to them. Planning and environmental

Council [2009] IEHC 600. See also *An Taisce v Ireland, the Attorney General and An Bord Pleanála* [2010] IEHC 415 quashing permission to use a quarry granted by An Bord Pleanála.

[107] In *Stack Shanahan and Sheehan v Ireland and the Attorney General, An Bord Pleanála, the Minister for the Environment, Community and Local Government, the Minister for Arts, Heritage and the Gaeltacht, Cork County Council and the National Roads Authority*, unreported, High Court 19 July 2013, the judge refused to grant the applicants leave (permission) to appeal to the Supreme Court on a range of issues, including the appropriate standard of judicial review in a case where art 10a of the EIA directive is engaged. The High Court concluded that leave to appeal could not be granted on a point that had not been raised at first instance by the applicants (who had appeared before the court without legal representation).

law is evolving rapidly and is becoming even more specialised with the rapid pace of development of international and EU law. It is not surprising, therefore, to find that the judiciary is reluctant to become embroiled in the substance of planning and environmental decision-making. Beyond the issue of appropriate expertise, there is an even more fundamental issue regarding the role of the courts in a legal system where the Constitution provides for a rigorous 'separation of powers' between the executive, legislative and judicial branches of government. The persistent failure of the executive and the legislature to deliver on Ireland's Aarhus and EU obligations in a timely and effective manner leaves the judiciary in the difficult position of having to act to fill implementation gaps. The judiciary is plainly uncomfortable with this role, but EU law demands that the national courts act to ensure effective judicial protection of EU law rights. The position is similar as regards the rights conferred by the Aarhus Convention which is part of EU law. While the executive and legislature resist international and EU environmental law, and delay its consequences for as long as possible to avoid potential disruption at national level, the unelected judiciary is expected to act and fill the vacuum. A fundamental change of culture in how Ireland responds to its environmental obligations under international and EU law is required if modern environmental rights are to take hold in the national legal system. A more proactive, collaborative and consultative approach should be adopted when developing environmental law and policy. Such an approach would go some considerable way towards ensuring that international and EU environmental law is folded into the national legal order in a more considered and timely fashion.

Looking to the future, it is certain that exciting developments lie ahead. The Aarhus Convention and EU environmental law will eventually bring about fundamental changes to the system of judicial review in Ireland. The initial impact is already obvious with the recent modifications to standing requirements and the new costs rules. The full implications of Aarhus and EU law will evolve via litigation and for now, at least, the position remains fluid. An independent, expert review of the Irish Environmental Protection Agency published in May 2011 recommended that a wide ranging review of environmental governance in Ireland should be undertaken and that this review should consider *inter alia* the potential role of specialist environmental courts or tribunals.[108] In summer 2012, the Chief Justice of Ireland, speaking extra-judicially, suggested (unexpectedly) that consideration might be given to the establishment of specialist environmental courts.[109] There are currently no indications that the Govern-

[108] Environmental Protection Agency Review Group, 'Review of the Environmental Protection Agency' (Dublin, Department of Environment, Community and Local Government 2011) available at <http://www.environ.ie/sites/default/files/migrated-files/en/Publications/Environment/Miscellaneous/FileDownLoad,26491,en.pdf> accessed 8 April 2016.

[109] Susan Denham, 'Some thoughts on the Constitution at 75' (conference on The Irish Constitution: Past, Present and Future, University College Dublin, School of Law, 28 June 2012) available at <http://cdn.

ment intends to pursue the idea of specialist environmental courts, but a root and branch review of environmental governance is long overdue. As regards legal costs, it is notable that the Legal Services Regulation Bill 2011, which is currently working its way through the legislative process, contains a range of provisions designed to address the high cost of legal services in Ireland.[110] It is very unlikely, however, that this particular legislative intervention will solve the affordability problem that currently undermines the right of access to justice for potential litigants of limited means.

Overall Ireland's response to the Aarhus Convention, and the related EU measures, may be described as defensive, minimalist and tardy. The judiciary has been hesitant in embracing the EU measures designed to give effect to Aarhus obligations in the Member States, with a few notable exceptions, although it appears that this timid approach is gradually beginning to evolve into a more proactive stance to enforcing environmental rights. Post ratification in June 2012, the Aarhus Convention is steadily beginning to gain traction at national level. Much remains to be done, however, to deliver on Aarhus and EU environmental law obligations in Ireland. Given the experience in Ireland to date, it is certain that progress towards full implementation will continue to be slow and extremely challenging for all concerned.

thejournal.ie/media/2012/06/20120629cj-speech.pdf> accessed 8 April 2016.

[110] Details of the Legal Services Regulation Bill 2011 available at <www.oireachtas.ie> accessed 8 April 2016.

CHAPTER 6

The Application of the Aarhus Convention in Italy

Alessandro Comino

1 Introduction

Italy still has a long way to go in implementing the Aarhus Convention, albeit this international treaty was signed immediately at its opening and ratified and executed already with Law March 16, 2001, n. 108.

In environmental matters, the Italian legal framework is nowadays more influenced by EU law and by the judgements of the Court of Justice of the European Union rather than by any international obligation. Obviously, EU law and international law do not diverge much in environmental matters (on the contrary, it is possible to find many points of convergence), but if the target was to give the Aarhus Convention a significance going beyond mere declaration, this purpose was only partially achieved.

Further proof is given by the national case law. Italian courts are ready to gloss over the application and the effectiveness of the Aarhus Convention in the absence of specific EU or national provisions which explicitly give full implementation to the contents of the well-know "three pillars".

Actually, solemn statements regarding the environment and its importance within the legal and social framework do not lack in Italy: the Constitution, for example, provides specifically about the protection of the landscape (Article 9), the safeguard of the environment, the ecosystem and the cultural heritage (Article 117 (2) (s)). The Constitutional Court itself has afforded the environment an increasing importance,[1] by affirming that "the landscape, the environment and spatial planning all relate substantially to the same object. They weigh on a complex and unitary asset, a primary and absolute value",[2] "a material and complex good, which also includes the protection and the preservation of the balance of its individual components".[3]

However, what has been lacking is the capacity to go from theory to practice. Italy still struggles to tie down the cornerstones of "environmental democracy".

It is not always a problem of gaps in the law or bad rulemaking, since the reasons that affect this issue are manifold as will be shown below.

2 Right to access to information

2.1 Anticipating and implementing Aarhus and the EU rules

The right to access information is often linked in a very intuitive way – either with an antinomic, or with a synonymic meaning – to

[1] Mariaconcetta D'Arienzo, 'Valutazione d'incidenza ambientale e semplificazione procedimentale', <www.giustamm.it> accessed 11 February 2016.

[2] Corte Costituzionale (Constitutional Court) 24 October 2007, 367, Foro amm CdS 2007, 3005.

[3] Corte Cost 14 November 2007, 378, Foro amm CdS 2007, 3017.

expressions such as "secrecy", "publicity", "transparency", "impartiality", and "democratic control" of the administrative action.[4]

A similar pattern is also found in Italy, where the right to access information was introduced to overcome the logic of secrecy in the administrative action. In other words, the right to access information takes the form of a practical application of the principles of publicity, impartiality and transparency.[5]

Although the right of access to administrative documents (and not yet to information) was not unheard of earlier, it was acknowledged explicitly in Law August 7, 1990, n. 241 (the Administrative Proceedings Act 1990), becoming right away a key tool in a new web of relations between the administration and the private sectors.

However, the specialty of environmental legislation – also due to the special relevance of the rights protected – had an impact in the legislation relating to access in environmental matters. The *ad hoc* provisions adopted over the time – both before and after the Administrative Proceedings Act 1990 – laid down specific rules for the right of access in environmental matters deviating from those provided under the general rules, but they also expanded the horizon of the right of access, making it both more penetrating and effective.

Already with the enactment of Law July 8, 1986 n. 349, which set up a specific State department responsible for the environment, the Italian Parliament anticipated some of the fundamental rules later enacted in secondary European law and international environmental law.

By applying the well known distinction between (a) "passive" access, and (b) "active" access – similar to what could be done today considering Articles 4 and 5 of the Aarhus Convention – Law n. 349/1986 stated that: (a) every citizen had the right to access to environmental information known to the public administration, and could obtain a copy of the relevant documents upon reimbursement of the costs of reproduction and other office expenses, and (b) the widest dissemination of environmental information by the Ministry of Environment was to be ensured.

Regarding dissemination of information, it is therefore to be remarked that the Italian Parliament – which, as it will be seen again and again, has been much more an "importer" than an "exporter" of legal innovations in environmental matters – introduced legislative provisions aimed at promoting an active

4 In relation of access to EU documents, the connection between "transparency" and "democratic control" is accurately highlighted by AG Tesauro in his opinion of 28 November 1995, Case C-58/94 *Netherlands v Council*.

5 According to the administrative courts (see e.g. Consiglio di Giustizia Amministrativa Sicilia (Board of Administrative Justice, Sicily) 16 November 2011, 846), the right of access is part of a more general overhaul of administrative practices based on the principles of participatory democracy, publicity and transparency of administrative action; it constitutes a "general principle" that fits at EU level in the more general right of good administration, as a means of preventing and fighting social abuses and unlawful acts of public agencies.

diffusion of environmental information in 1986, well ahead of the EU legislation and the Aarhus Convention itself.

Four aspects deserve to be highlighted:

- on the subjective level, a wide definition of the those entitled to access was adopted;[6]
- on the objective level, the concept of "information" – which is very different from that one of mere "document" – was outlined;
- on the level of methods and tools, a discussion on "disclosure" was started;
- finally, first steps were taken towards the construction of a right to access in the environmental law in terms of specialty in relation to the more general right to access laid down in more general provisions.[7]

Although the right to access to environmental information was still in an embryonic version not defined in its most typical elements, its roots were already firmly planted in the ground by L. n. 349/1986. The process of growth happened in stages, the first being Legislative Decree February 24, 1997, n. 39, which gave effect to the principles laid down by Council Directive 90/313/EEC.

Legislative Decree n. 39/1997 is not significantly innovative compared to the EEC directive, being rather a reproduction, sometimes word by word, of the same directive.

Conceived in terms of "freedom" rather than of "right", access extends to any available information in written, visual, audio or database form about the state of water, air, soil, fauna, flora, land and natural sites, as well as activities, including harmful ones, or measures affecting or likely to affect the abovementioned environmental components and activities or measures designed to protect them, including administrative measures and environment management programs. Access must be provided by the public authority to anyone who requests it, regardless of the evidence of his/her own interest.

Compared to the *general* discipline of the right of access, the *special* one in the field of the environment limits the discretion of public administrations since they must allow the access on a mere request, without any subjective reason needing to be adduced by those requesting access.

European and, by consequence, Italian legislation aimed at ensuring broad access in environmental matters, free from restrictions based on the personal qualities of those requiring the information or based on the kind of information

6 There were however some limitations to the exercise of the right to access: Italian citizenship was required from individuals and the enrollment in a special ministerial list was required from environmental associations. Tribunale amministrativo regionale TAR (Regional Administrative Court) Toscana Firenze (1) 21 July 1994, 443, Foro amm TAR 1994, 2487.

7 TAR Emilia-Romagna Bologna (2) 20 February 1992, 78, Trib amm reg 1992, I, 1498. Giuseppe Morbidelli, 'Il regime amministrativo speciale dell'ambiente', *Scritti in onore di Alberto Predieri* (Milan GIUFFRE' 1996 II) 1122. Francesco Fonderico, 'Il diritto di accesso all'informazione ambientale' [2006] Giorn dir amm 676, speaks about "autonomy" of the provisions about the right to access to environmental information.

requested. However, the national case law has not always been working to this end, especially for what concerns the breadth of the notion of environmental information.

In fact, the administrative courts showed signs of resistance while facing the concept of environmental information, choosing to interpret this term restrictively and allowing access only at information "relating to activities at least potentially harmful to the environment".[8]

For instance, an application for access to a series of building permits grounded on the circumstance that they referred to a protected area (like a national park) has been rejected. According to the court, in order to get the environmental information it is necessary to show potential detrimental effects on the environment or on the legal values protected by environmental law.[9]

Fewer issues were faced in extending the range of persons entitled to access. Some scholars have spoken of the "de-subjectivated" nature of the right of access to environmental information.[10] Basically, the access to environmental information takes the form of an unconditional right and becomes incompatible with any selection among different individual interest; this both simplifies the procedure, one less requirement having to be checked,[11] and strengthen the public nature of environmental information.[12]

It is no coincidence that some judgments stated that Legislative Decree n. 39/1997 had introduced into environmental matters the so called *actio popularis*, which is generally not accepted in Italian administrative law.[13]

All these considerations lead to shape the right to environmental information in terms of expression of an autonomous interest (the environmental interest) which is part of every human being.

It is worth emphasizing that Legislative Decree. n. 39/1997 included in the concept of "public authorities" a large number of entities, which goes beyond what is required under the implemented Directive and includes for instance the concessionaires of public services (services of general economic interest/SGEI).[14] However, it was held that volunteer associations – with legal personality under

8 Cons Stato (State Council) (5) 22 February 2000, 939, Giur it 2001, 666, with comment by Roberto Caranta, 'L'accesso alle informazioni in materia ambientale'.

9 Cons Stato (5) 14 February 2003, 816, Giur it 2003, 1486.

10 Giovanna Landi, 'Diritto di accesso alle informazioni ambientali' [2000] Riv Giur Ambiente 342.

11 TAR Lombardia Brescia 30 April 1999, 397, Urbanistica e Appalti 1999, 669; TAR Lazio (2) 1 July 2002, 6067; TAR Veneto (3) 18 November 2003, 5731, Foro amm TAR 2003, 3206; Cons Stato (4) 7 September 2004, 5795, Foro amm CdS 2004, 2517.

12 TAR Lazio Roma (3 quater) 16 January 2012, 389, with reference to art 3 (1), Decreto Legislativo D.lgs (Legislative Decree) n. 195/2005, which does not innovate Decreto Legislativo n. 39/1997 in this specific case.

13 TAR Lazio Roma (3) 15 January 2003, 126, Foro Amm TAR 2003, 164; more recently, Cons Stato (4) 11 January 11 2010, 24.

14 For a practical application of the principle, Cons Stato (6) 6 June 2012, 3329, albeit with reference to Decreto Legislativo n. 195/2005, which, however, does not provide substantial novelties.

private law and financial resources deriving from the proceeds of the activities and the contributions of the participants – could not be considered public authorities merely because of the public relevance of their mission.[15]

Directive 2003/4/EC, which was implemented in Italy by Legislative Decree August 19, 2005, n. 195, had the goal of making environmental information accessible to anyone in order to enhance cooperation between citizens and the public authorities. Both were affected by the spirit of the Aarhus Convention, which both the European Community and Italy had previously adhered to.

The EC directive – and the same is the case with Legislative Decree n. 195/2005 – right from the beginning highlights the terminological transformation of access from "freedom" to "right". The change has been seen as a sign of transition from a perspective in which the public authorities forced themselves not to oppose citizens' demand for access to information, to one in which the public authorities have to make environmental information available to citizens and to facilitate its acquisition.[16] Indeed, the importance placed on the *availability* and the *dissemination* of environmental information is clear: both are fundamentals tools in increasing the awareness of public, in exchanging views, in promoting a more effective public participation in decision-making and, eventually, in improving environment.

Today public administrations have more and more responsibilities, duties and obligations in this regard.[17] They are required to provide environmental information in an easy-to-read form even before the same information is requested through a specific application.

Environmental information has a broad meaning. It is all available knowledge, regardless of its material form, about: the state of the elements of the environment (air, soil, water, land, landscape, biodiversity etc.); the factors (substances, energy, noise, radiations, waste etc.), measures, public and private activities (laws, plans, programs, agreements etc.) which affect or may affect, positively or negatively, these elements and factors; health, living conditions and human security, cultural heritage (influenced by elements and factors and, consequently, by measures and activities); reports on the implementation of environmental legislation; the cost-benefit analysis and similar activities used as part of the above mentioned measures and activities (Article 2, par. 1, Directive 2003/4/EC; Article 2, c. 1, Legislative Decree n. 195/2005).[18]

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[15] TAR Emilia-Romagna Bologna (2) 16 October 2002, 1516, Foro amm TAR 2002, 3173.

[16] Margherita Salvadori, 'Il diritto di accesso all'informazione nell'ordinamento dell'Unione Europea', <www.evpsi.org>, accessed 11 February 2016.

[17] More general duties of disclosure of information have been recently introduced in Italy: see generally Annamaria Bonomo, *Informazione e pubbliche amministrazioni, dall'accesso ai documenti alla disponibilità delle informazioni* (Bari Cacucci 2012).

[18] The distinction between document and information has led to consider that in environmental matters one may even request the public authority to process data in its possession. TAR Lombardia Milano (4) 20 November 2007, 6380, Foro amm TAR 2007, 3387; TAR Veneto Venezia (3) 7 February 2007, 294, Foro amm TAR 2007, 452; TAR Lazio Roma (3) 28 June 2006, 5272, Foro amm TAR 2006, 2112.

2.2 The case law on the right of access

On the one hand, applications for access to documents have been considered admissible when relating to the management of the maritime domain,[19] the evaluations of emissions of industrial organic pollutants,[20] the documents concerning the function and/or the existence of sewage treatment plants,[21] or the documents (such as the final project) for the construction of a pipeline.[22]

On the other hand, applications concerning the information on measures about the maintenance of kennels and the phenomenon of stray dogs have been rejected. According to the first instance administrative courts, the wide meaning of environmental information cannot be stretched to the point of covering the phenomenon of stray dogs which may harm hygiene, public health, and animal welfare, but not the environment.[23]

Additionally, the balance sheets (which are mere accounting and financial instruments) of a public authority were considered not accessible because of the absence of a specific functional link between them and the environmental interest of the eNGO.[24] In other cases, acts and documents (i.e. tender dossiers and transcripts) of procedures for the award of public procurements were not considered as environmental information.[25] Similarly, during the execution of an innovative local public transport line, access was restricted to the design and execution plan of the project, with the exclusion of the technical documents referring to the building and the transcripts of the bidding procedure. According to the court, the design and execution plan of the project were sufficient to satisfy citizen's right to know about the impact of the planned intervention on the environment and the personal health.[26]

The limitations on confidentiality of personal data, commercial, industrial or internal deliberations or restrictions imposed for reasons of order, defense or public safety have instead stayed in the background and do not represent a significant obstacle to access.[27]

Somewhat in continuity with the (arguable) case law developed under Legislative Decree n. 39/1997, the limits to access to environmental information have

[19] TAR Sicilia Palermo (1) 27 April 2005, 652, Foro amm TAR 2005, 1250.

[20] TAR Lazio Roma (3) 28 June 2006, 5272, Foro amm TAR 2006, 2112.

[21] TAR Calabria Reggio Calabria (1) 29 May 2009, 378, Foro amm TAR 2009, 1590.

[22] TAR Venezia Veneto (3) 7 February 2007, 294, confirmed by Cons Stato (5) 22 December 2008, 6494.

[23] TAR Abruzzo Pescara 18 November 2006, 714, Foro amm TAR 2006, 3598; TAR Puglia Bari (2) 27 January 2006, 265.

[24] Cons Stato (6) 8 May 2008, 2131, Foro amm CdS 2008, 1526.

[25] TAR Calabria Catanzaro (1) 6 February 2009, 122.

[26] TAR Abruzzo Pescara (1) 11 April 2007, 450, Giur it 2007, 2342: the tender dossier and the determination to contract were excluded from access, as they represent procedural documents not related to the concept of environmental information.

[27] Aarhus Convention, art 4 (4); Decreto Legislativo n. 195/2005, art 5.

been modulated case by case: sometimes by focusing on the type of the document/measure for which access was requested, sometimes even by investigating the subjective profiles of the application.

As to the latter, it is worth recalling the evolution of the national legislation enshrining the duty of public administration to provide the information without an interest having to be stated.[28] This fits perfectly with the notion of "public" *tout court* identified by the Aarhus Convention.

However, this principle has been restrictively interpreted by the national courts, that ruled that not every request, just because headed "access to environmental information", should open the way to access the information in the absence of any interest to that purpose.[29] In other words, although the *interest* does not have to be explicitly stated there must exist an *environmental interest*.

In this context, the courts have given indications as to how each request of access must specifically refer to the connection between the acts and activities to which it is referred and the environment. For instance, a design and construction company was denied to access to the final project documentation of a motorway north of Milan because the application did not contain any reference to environmental interests.[30] According to the court, the reasons for the refusal would be rooted in the evident lack of a "*true environmental concern*" that only justifies the application of environmental legislation; indeed the provisions on right of access cannot be misused to serve purposes which do not have as specific goal the protection of the environment but the pursuit of private (i.e. economic) gain. In that case, the company requesting access was acting to protect its economic interests as the promoter having unsuccessfully competed to be awarded the works in question.[31]

Moreover, according to a recent judgment, the environmental interest must be actual and concrete at the time of the submission of the application, so that the party having submitted an application based on the general legislation on

[28] Decreto Legislativo n. 195/2005, art 3(1), is a mere reproduction of Decreto Legislativo n. 39/1997, art 3. Art 3-sexies of the Italian Environmental Code (Decreto Legislativo 3 April 2006, n. 152) is also similar.

[29] Massimo Occhiena, 'I diritti di accesso dopo la riforma della legge n. 241/1990', in Francesco Manganaro and Antonio Romano Tassone (eds), *I nuovi diritti di cittadinanza: il diritto all'informazione* (Giappichelli 2005), deals with "objective interest of the application in environmental matters". The Commission for access to administrative documents' interpretation is very strict (see paragraph 3); according to it the environmental regulation "is intended to ensure maximum transparency on the environmental situation and to allow a widespread control on the quality of the environment, even through the elimination of all obstacles, in order to a complete access to information on the condition of the environment". In such a way "if an instance is aimed at getting vision and copy of a public facilities project which have an effect on the environment, legitimacy of access to the applicant must be recognized regardless to its legal position" (Commission for access to administrative documents, opinion sessions January 14 2009 and February 24 2009, <www.commissioneaccesso.it/media/33215/massimario.xiii.1.pdf> accessed 12 February 2016).

[30] Cons Stato (5) 18 October 2011, 5571, Foro amm CDS 2011, 3141.

[31] TAR Lazio Roma (1) 8 March 2011, 2083, Foro amm TAR 2011, 827.

access to public documents (and rejected by the public authority) is precluded from amending the qualification of the application during the judicial review procedure to try and present it under the more benevolent environmental legislation.[32]

Can such an interpretation requiring an 'environmental interest' be regarded as conflicting with the Aarhus Convention? It is suggested that it could be based on the fundamental principle of reasonableness that is expressly enshrined both in the Aarhus Convention and in Legislative Decree n. 195/2005.[33] Reasonableness may otherwise be expressed as a criterion of logical consequentiality between premises (formulation of the instance for environmental access) and conclusions (the pursuit of environmental goals).

It is true that reliance on reasonableness may bring with it the risk of giving a very wide discretionary power to the public authorities and then to the courts that review their action (in this way reasonableness could become an indirect parameter for the assessment of the interest of the applicant). Nevertheless, on the basis of the cases just referred to there seems to be no reason for concern. Up to now reasonableness has not been used to weaken the right of access to environmental information as it is guaranteed by the Aarhus Convention.

The judgments referred to above rather show the will not to allow the right of access to environmental information to be abused.

It should also be noted that uncertain or doubtful cases should all to be solved in favour of the applicant. In such situations, the applicant should always be able to get full satisfaction: restrictions to the detriment of the access, in fact, are exceptions and shall be interpreted strictly.[34] This is the case – in this writer's opinion – of the owner of a hotel who was denied to access to public documents concerning building operations. The administrative court annulled the denial and stated that any question about the request was barred because of the specific reference to environmental protection made in the request itself.[35]

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[32] Cons Stato (5) 15 October 2009, 6339. This approach might lead to some inefficiencies when, for instance, the environmental interests do really exist existed from the beginning, even if they were not explicitly referred to in the application. However, if we look at the administrative judicial review, and precisely to access to information, the court reviews and has to explain specifically the denial to access in relation to the legal grounds quoted in the application. Therefore, the reason why no changes of qualification are allowed during the trial might be comprehensible because it impinges the concept of fair-play between parties in legal proceedings.

[33] Respectively in art 4 (3) lett c) and in art 5 (1) lett b).

[34] Francesco Fonderico, 'Il diritto di accesso all'informazione ambientale' [2006] Giorn dir amm 676, see footnote 7; Francesco Fonderico, 'La giurisprudenza della Corte di giustizia in materia di ambiente', in Sabino Cassese (ed), *Diritto ambientale comunitario*, (Milano 1995) 123 ff.; Roberto Caranta, 'Il diritto di accesso in materia ambientale secondo il diritto comunitario', in Rosario Ferrara and Piera Maria Vipiana (eds), *I "nuovi diritti" nello Stato sociale in trasformazione: La tutela dell'ambiente tra diritto interno e diritto comunitario* (Padova CEDAM 2002) 151 ff.; Case C-233/00 *Commission v France*.

[35] TAR Campania Napoli (5) 25 February 2009, 1062. This judgment overturns the content of Cons Stato (5) 14 February 2003, 816, (see n 9). When applications relates to subjects such as building and

That said, no one can ignore the imperfect convergence between the international (and European) environmental standards and their applications in Italy. Some statements from the Constitutional Court do not help this convergence. Indeed, in 2006 the Constitutional Court held that the regulation of access to environmental information is not strictly related to environmental protection, but rather to the protection of the citizens' right of access to environmental information as a specification of the more general issue of the right of public access to data and documents held by public authorities.[36] However, the outlook of the Aarhus Convention is different: it provides that the right of access to information is an indispensable tool to ensure "the right to live in an environment adequate [...], and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations".[37]

Finally, under the Aarhus Convention, environmental information could not be considered truly accessible if there are high and unreasonable costs in order to access it beyond the limitations and exceptions strictly required by legislation. In Italy there are no significant concerns about this: the perusal of documents containing environmental information is free, while reasonable fees are paid for copying. Lawsuits before the courts in case of denial of access to environmental information are also free from taxes and other contributions.[38]

3 Participation

3.1 The general rules and their application to environmental cases

Participatory democracy should be obligatory in our legal system. Increasingly inadequate answers are indeed given through the usual channels of representative democracy to the ever increasing demands for greater

city planning, courts seem more benevolent in recognizing a collateral environmental interest. For a wide interpretation of the environment, which impinge numerous fields of human activity (historical, cultural heritage, city planning, landscape), see: Cons Stato 11 November 2011, 5986 and Cons Stato 9 October 2002, 5365.

[36] Corte Cost 1 December 2006, 398 and 399, Foro amm CdS 2006, 3263. See also Alessandra Battaglia, 'Accesso all'informazione o tutela dell'ambiente?' [2007] Giorn dir amm 719 ff.

[37] Incipit of Aarhus Convention: "to be able to assert this right and observe this duty, citizens must have access to information".

[38] The special discipline on environment is more favorable than the general regulation on access to public documents, with the fee for applying for judicial review set at 300 EUR (Decreto del Presidente della Repubblica DPR (Decree of the President of the Republic) 30 May 2002, 115); see also below, chapter 4.

social control (especially) on the choices that affect the environment and the human health.[39]

The history of the past twenty years, while showing a clear emergence of participatory forms and tools, is marked by more or less significant false starts and hiccups.[40] Most scholars received with little enthusiasm the 'participatory change' brought about by the administrative procedure reform of 1990.[41] Later they read the principle of the *right to be heard* more in a defensive ("cross-examination")[42] than collaborative ("participation")[43] way.[44] In Italy, defensive participation is still the dominant model.[45]

Full acceptance of effective participatory practices has yet to take place because of resistances which are not always easy to be read or explained.

First of all and focusing on the environmental matters, in the European and Italian legal framework a general all encompassing regime for participation of the type existing for access to environmental information is still missing. There are in fact no general rules governing the participation in environmental proceedings, whereas specific forms of participation are provided in the special legislation on EIA and SEA which will be discussed below.[46]

Moreover, according to most scholars, the most recent provisions are a partial disappointment. Legislative Decree April 3, 2006, n. 152 (the Environmental Act 2006) could and should have strengthened some participatory tools, for instance by implementing forms of public inquiry instead of insisting with the traditional model of written observations present in the urban planning legislation since 1942.[47]

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[39] Giuseppe Manfredi and Stefano Nespor, 'Ambiente e democrazia: un dibattito' [2007] Riv giur ambiente 293; see generally Silvia Mirate and Simona Rodriquez, 'The Dialogue Model in the Italian Legal System' in Roberto Caranta and Anna Gerbrandy (eds.), *Traditions and Change in European Administrative Law* (Europa Law Publishing Groningen 2011) 237.

[40] Filippo Satta, 'Contraddittorio e partecipazione nel procedimento amministrativo' [2010] Dir amm 299. Ibidem.

[41] Ibidem.

[42] As a principle deriving from judicial proceedings, which puts the parties in antagonistic positions. See, among others, Emiliano Frediani, 'Partecipazione procedimentale, contraddittorio e comunicazione: dal deposito di memorie scritte e documenti al "preavviso di rigetto"' [2005] Dir amm 1003.

[43] As a technique of collaboration in the decision-making and rule-making processes of the public authority for a better understanding of all the interests involved.

[44] Francesco Trimarchi, 'Considerazioni in tema di partecipazione al procedimento amministrativo' [2005] Dir proc amm 627.

[45] Stefano Battini, Bernardo Giorgio Mattarella and Aldo Sandulli, 'Il procedimento' in Giulio Napolitano (ed), *Diritto amministrativo comparato* (Milano GIUFFRE' 2007) 107 ff.

[46] Scholars are critical: see Massimo Occhiena, 'Forza, debolezza e specialità della partecipazione ambientale' in Gregorio Arena and Fulvio Cortese (eds), *Per governare insieme: il federalismo come metodo. Verso nuove forme della democrazia* (CEDAM 2011) 328, 333.

[47] Giovanni Manfredi and Stefano Nespor, 'Ambiente e democrazia: un dibattito' [2010] Riv giur ambiente 293, see footnote 39. The public inquiry is provided as a mere possibility exclusively in relation to the

The Aarhus Convention itself has not been very helpful, not having been referred to by the Italian courts in order to widen participation in administrative proceedings. The only cases when the Convention was referred indeed to concerned environmental information.[48] Since the entry into force of the Administrative Proceedings Act 1990, the courts have enhanced the right of access and the right to be informed of the eNGOs rather than their right to participate in the administrative proceedings. In doing so they have let slip away a good chance to afford the civil society with a place in the decision making processes.[49] Only occasionally the courts have held that the contribution of individuals and eNGOs in the proceedings should be enhanced not only in terms of mere cooperation in the adoption of measures that affect them, but also with the aim of involving them in the same exercise of administrative power to make it more suited to the public interest pursued.[50]

The general provisions about participation are laid down in the Administrative Proceedings Act 1990, already referred to. Article 9 thereof provides that "any person, who bears a public or private interest, as well as associations or committees representing a general interest, which can be harmed by an administrative measure under discussion, have the right to intervene in the proceedings". Under Article 10, participation entails the right of access to the document of the file of the procedure and the right to submit written pleadings and documents; the public authority is under a duty to assess whether this material is relevant to the proceedings and must give reasons to this effect.

This provision turns out to be interesting mostly for the recognition of procedural rights of public interest organizations under the sole requirement that they are set up as associations or committees under the Civil Code. As it has been noted, in order to take part into the proceedings public interest associations need not to reach a high level of representativeness, but they should at least operate effectively to protect the interests of those purportedly represented and act solely in the interests of all the represented parties.[51]

Environmental Impact Assessment, but not even with reference to the Strategic Environmental Assessment.

48 Massimo Occhiena, 'Forza, debolezza e specialità della partecipazione ambientale' in Gregorio Arena and Fulvio Cortese (eds), *Per governare insieme: il federalismo come metodo. Verso nuove forme della democrazia* (CEDAM 2011) 333, see footnote 46: when the implementation happened, it was related to environmental information issues. So, distinguishing between "visual-participation" and "voice-participation", it was related to the first. An isolated example of "voice-participation" implementation comes from TAR Toscana Firenze (2) 30 July 2008, 1870: the mere communication about the building of an offshore plant for converting gas into energy (without a real disclosure of the essential elements of the project) and the short terms for submitting observations (30 days) do not let citizens able to express their opinions fully. Therefore participation in decision making process is not satisfied.

49 Stefano Nespor and Alda Lucia De Cesaris, *Codice dell'ambiente* (Milano GIUFFRE' 2009) 465.

50 TAR Genova Liguria (1) 18 March 2004, 267, Foro amm TAR 2004, 642.

51 Roberto Caranta, Laura Ferraris and Simona Rodriquez, *La partecipazione al procedimento amministrativo* (Milano GIUFFRE' 2005) 188.

Restrictions to participation can however be identified at an early stage of the administrative procedure.[52] Under Article 7 of the Administrative Procedure Act, notice of the start of the proceedings must be served to the would-be addressee of the final decision and to any persons – known to the decision maker or easily identifiable – who might be adversely affected by the measure. This provision has been interpreted strictly and to the detriment of environmental associations. In fact, according to the case, environmental NGOs neither may be directly affected by the decision to be taken nor are they "easily identifiable".[53]

Moreover, the participation rights provided by the Administrative Proceedings Act 1990 are not applicable with reference to the enactment of rules, general administrative acts (e.g. tender notices), plans and programmes, to which special provisions are applicable.[54]

This does not mean that no participation rights are given in the proceedings leading to the adoption of such measures. Actually specific legislation, often taken at Regional level, frequently provides for a participatory model which compares well with the general legislation. And this is especially so in the environmental matters.[55]

If the applicability of participatory rights has been excluded in relation to the procedure for the delimitation of the boundaries of National Parks in Tuscany and Marche Regions,[56] a recent judgment by the Sicilian administrative court came to an opposite conclusion. The court annulled the decisions taken to lay the boundaries of a park because of the infringement of the provisions on participation in the regional legislation applicable; more specifically, the Region

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[52] Ibidem 383.

[53] Cons Stato (4) 4 December 2009, 7651, Foro amm CdS 2009, 2827; TAR Friuli Venezia Giulia Trieste 3 November 2005, 847, concerning the case of a landscape authorization and a building permit. Angelo Maestroni, 'I recenti orientamenti dei giudici amministrativi sulla partecipazione al procedimento amministrativo e sulla legittimazione ad agire delle associazioni ambientaliste' [2001] Riv giur ambiente 307, and case-law cited therein: "the municipal authority is not under a duty to give to environmental associations notice of the proceedings concerning the issuance of a building permit, as such associations do not have a qualified subjective position about the existence of a prejudice emerging, with adequate certainty and precision, from the measure adopted".

[54] Art 13, Law n. 241/1990.

[55] The case law has restrictively interpreted the exclusion set by art 13: see TAR Abruzzo L'Aquila 3 March 2006, 205. According to Marco D'Alberti, *Lezioni di diritto amministrativo* (Torino Giappichelli 2012), stronger and more uniform basis for participatory rights are needed with reference to general administrative acts, plans or programmes. According to Monica Cocconi, *La partecipazione all'attività amministrativa generale* (Milano Wolters Kluwer Italia 2010) 230, grounds of participatory duties contained in sectorial and regional legislation are recognised by the case law directly in the constitutional principles of administrative action (impartiality, equality, reasonableness).

[56] Cons Stato (6) 14 January 2000, 235, Foro amm 2000, 107; TAR Marche Ancona 5 November 1999, 1262, Foro amm 2000, 1880.

completely failed to take into account the comments submitted by local public bodies and private individuals whose interests were affected by the decision.[57]

3.2 Participation in EIA and SEA procedures

International obligations and EU law obviously influenced this process of dissemination of participatory rights. Forms of public participation are contained in the environmental assessment procedures: the Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA). These two instruments differ considerably: EIA relates to the assessment of the effects of specific works on the environment while SEA relates to the assessment of the effects of certain plans and programmes on the environment.[58]

Both assessment tools are provided by EU Law: Directive 85/337/EEC introduced EIA; Directive 2001/42/EC concerns the SEA.[59] In Italy, EIA and SEA are now regulated by the Environmental Act 2006.[60]

Generally speaking, participation should play an important role in these procedures. The "consultation" – intended as a set of forms of information and participation by the public in data collection and evaluation of plans, programmes and projects – is a central moment in both instruments.

Participation is achieved primarily through the submission of written observations. The public authority is under a duty to give reasons in the final decision so that due account is taken of the outcome of the public participation.[61] However, according to the Italian courts "the observation on works subject to EIA, considered as a *collaborative contribution* to the public administration, do not require, in case of rebuttal, a detailed refutation, it being sufficient for the public administration to show that the observations have been taken into account and to briefly state the reasons for a negative evaluation".[62] On another occasion the highest administrative court limited the depth of judicial review on the results of the environmental evaluation because of "the public authority

[57] TAR Sicilia Palermo (1) 24 February 2011, 356.

[58] See also Corte Cost 22 July 2011, 227, Giur cost 2011, 2903.

[59] Emanuele Boscolo, 'La valutazione degli effetti sull'ambiente di piani e programmi, dalla VIA alla VAS' [2002] Urbanistica e appalti 1121. Giovanni Manfredi, 'VIA e VAS nel codice dell'ambiente' [2009] Riv. giur. ambiente 63.

[60] Decreto Legislativo 29 June 2010, 128 specified that Administrative Proceedings Act 1990 is applicable to all verifications and authorizations regulated by the Environmental Act 2006 (Art 9 (1) Decreto Legislativo n. 152/2006).

[61] See arts. 6(8) and 7 of the Aarhus Convention and art 17 and 26 of the Environmental Act 2006 (which relates to SEA and EIA). According to Stefania Valeri, 'La valutazione di impatto ambientale dopo il Decreto Legislativo n. 4/2008' (2008) <www.lexitalia.it> accessed 18 February 2016, the EIA final decision – which declare the environmental compatibility of the project – must be reasoned with evaluations which are able to overcome the disapprovals and observations against the achievement of the project.

[62] Cons Stato (6) 23 February 2009, 1049, Foro amm CdS 2009, 520; TAR Veneto Venezia (3) 13 April 2011, 616.

cannot be forced to discuss dialectically all the proposals submitted once the final decision is logical and coherent".[63]

Finally, public inquiries too are struggling to find a place in the Italian national legislation. In fact, they are provided as a mere possibility left to the choice of the public administration in case of EIA, while they are not envisaged at all in the case of SEA.[64]

However, some more positive examples can be found in the legislation enacted at regional level, which makes it popular with the academic literature for its ability to anticipate the national legislation and to promote collaboration/participation between public and private sector in the choices of the same environmental impact procedure to be followed.[65]

This is the case - in this writer's opinion - of a recent Regional statute, which introduced the public inquiry into the procedure of SEA, to be followed under a simple reasoned request by a concerned e-NGO. According to this provision "The competent authority, giving adequate publicity and upon reasoned request from the concerned municipalities or environmental groups recognized by the Ministry of the Environment, shall set up a public inquiry to examine the environmental report, the opinions submitted by public administrations and the comments coming from the citizens".[66]

4 Access to justice

The third pillar of the Aarhus Convention plays a decisive role in securing the effective application of the other two. Assorted with effective judicial protection, both the right of access to environmental information and participation rights can significantly contribute to the protection of the environment. It all very much depends on the actual interpretation given by the courts to the provisions in this pillar.[67]

To assess the degree of effective judicial protection in environmental matters three topics are particularly worth investigating: locus standi, the intensity of the judicial review on discretionary decisions, and costs and timing of the proceedings.

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[63] Cons. Stato (6) 28 December 2009, 8786, Riv giur edilizia 2010, I, 562.

[64] Art 24 (6), Decreto Legislativo 3 April 2006 n. 152.

[65] Simona Rodriquez, 'Accesso agli atti, partecipazione e giustizia: i tre volti della Convenzione di Aarhus nell'ordinamento italiano' in Adolfo Angeletti (ed), *Partecipazione, accesso e giustizia nel diritto ambientale* (Napoli ESI 2011) 104.

[66] Art 11, regional Law of Liguria, 10 August 2012, n. 32.

[67] And this in the absence of ad hoc European and national legislation. In fact, the proposal for a Directive of the European Parliament and of the Council of October 24, 2003, about the access to environmental justice, have not been followed up. Commission, 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters' COM (2003) 624.

Anticipating the conclusions, while the national legal framework does not include a specific legislation concerning access to justice in environmental matters, the protection of environmental rights has reached a sufficiently adequate stage of advancement, although always perfectible.

4.1 Locus standi

Locus standi has to be analyzed with reference to both public interest organizations and concerned members of the public.

Under l. n. 349/1986, those environmental associations which have been found to be representative enough by ministerial decree[68] may both seek the annulment of unlawful acts and intervene in court proceedings for environmental damage.[69]

The problem of eNGOs that do not meet the criteria just mentioned, is hotly debated in the case law. In some judgments the administrative courts – actually, mostly the courts of second instance – have offered a narrow interpretation, giving locus standi only to national environmental organizations and not even to their territorial chapters or to any other local associations.[70]

A more advanced approach that pays more respect to international obligations argues instead that the standing of national and ultra-regional environmental groups does not rule out the standing of local associations which represent a well-defined geographical area.

This approach distinguishes between "*ex lege*" and "factual" standing. Although D.Lgs. n. 349/1986 seems to give standing to associations listed by Ministerial Decree only (standing "*ex lege*" or "by law"), some administrative courts have developed a mechanism to give standing based on the fulfillment of certain conditions: namely the inclusion of the pursuit of environmental protection purposes in the charter of the association (that bars associations acting only

[68] Presently Ministerial Decree July 9, 2012 n. 480 lists 68 such environmental associations. Criteria for the recognition of environmental associations have been laid down by the National Council for Environment through the interpretation of art 13, Law n. 349/1989. See 'Documento e criteri per l'individuazione delle associazioni di protezione ambientale di cui all'Articolo 13 della legge 349/86 approvati dal Consiglio Nazionale per l'Ambiente nella seduta dell'11 gennaio 1988' and the Opinion of the General State Attorney's Office, October 11, 2011, <http://www.minambiente.it/pagina/associazioni-di-protezione-ambientale-legge-8-luglio-1986-n-349>, accessed 24 february 2016. Criteria required are: *i)* the associative nature of the organization (for instance, foundations are not allowed); *ii)* the presence of democratic internal rules (i.e. freedom of enrolment, absence of unreasonable forms of expulsion, lack of restrictions in members' rights to vote etc.); *iii)* the specific aim of environmental protection; *iv)* the presence of the association in at least 5 Regions.

[69] Art 18 (5), Law 8 July 1986 n. 8.

[70] E.g. Cons Giust Amm Sicilia 22 November 2011, 897, Foro amm CdS 2011, 3544; Cons Stato (4) 28 March 2011, 1876; Cons Stato (6) 9 March 2010,1403; Cons Stato (4) 10 October 2007, 5453, Foro amm CdS 2007, 2861; Cons Stato (4) 14 April 2006, 2151, Giur it 2006, 1743; Cons Stato (5) 17 July 2004, 5136, Foro amm CdS 2004, 2192.

occasionally on behalf of the environment) and a sufficient degree of representativeness and stability in the area in which the potential damage to the environment is taking place.[71]

This kind of interpretation is particularly important for groups set up *ad hoc* in order to protect the environment, the health and/or the quality of life of residents within a specific area because of some development or project which is perceived as threat. The areas and the populations threatened by activities possibly affecting the environment or public health would otherwise not have any way to defend themselves in case of inaction from national environmental groups authorized to bring actions by ministerial decree.[72] Hopefully this perspective might lead to a definitive reassessment even regarding standing of the territorial branches of eNGOs.[73]

Furthermore this approach – relying "on territorial proximity of the association to the rights impaired by the contested administrative measures" – appears more consistent with the general principle of access to justice provided by the Aarhus Convention.[74] Finally, if the measures taken do not only affect the environment but may affect also other sensitive interests (such as fundamental rights), the choice should always be oriented in extending, rather than restricting, the standing.[75]

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[71] Cons Stato (6) 23 May 2011, 3107, Foro amm CdS 2011, 1663; Cons Stato (4) 16 February 2010, 885, Foro amm CdS 2010, 305; TAR Puglia Bari (3) 15 April 2009, 866, Riv giur edilizia 2009, 1626. TAR Piemonte Torino (1) 21 December 2012, 1340, talks about a "case-by-case" standing. See Giovanni Tulumello, 'Access to Justice from the point of view of a judge', provisional texts of the report to the Conference "Enforcement of EU Environmental Law: Role of the Judiciary" organized by the European Commission on November 2011 (2012) <www.giustiziaamministrativa.it>, accessed 12 February 2016.

[72] Cons Stato (6) 23 May 2011, 3107. E.g. Cons. Stato (6) 17 March 2000, 1414, Foro amm 2000, 944; TAR Puglia Bari (3) 19 April 2004, 1860, Foro amm TAR 2004, 1167; TAR Veneto Venezia (3) 1 March 2003, 1629; TAR Marche Ancona 30 August 2001, 987, Riv giur edilizia 2001, 1204. More recently Cons Stato 29 February 2012, 1185, confirms standing of local Commitees. According to Fulvio Cortese, 'La partecipazione procedimentale e la legittimazione processuale in materia ambientale' [2010] Giorn dir amm 498, this solution would be more in line with the principle of "horizontal subsidiarity" spelt out in art 118 of the Italian Constitution.

[73] TAR Sicilia Palermo (1) 23 March 2011, 546, Foro amm TAR 2011, 1008, which regards the challenging of the 2009/2010 hunting season calendar in Sicily, is already following this trend. This is also one of the very few cases in which the administrative courts referred to the Aarhus Convention in order to strengthen their final judgment, by mentioning the principle of "wide access to justice". More lately Cons Stato 15 February 2012, 784, Foro amm CdS 2012, 274.

[74] The need for a "wide access to justice" also underlies the case law by the Court of Justice (Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*). See Luca Mezzetti, 'La Convenzione di Aarhus e l'accesso alla giustizia in materia ambientale', in Attila Tanzi, Elena Fasoli and Lucrezia Iapichino (eds), *La Convenzione di Aarhus e l'accesso alla giustizia in materia ambientale* (Milano CEDAM 2011) 84.

[75] TAR Puglia Lecce (2) 29 December 2008, 3758.

The latter explains why in principle it is easier for individuals than for associations to prove their interest in seeking the review of possibly illegal administrative measures. This applies even when individuals are not the direct addressees of the decision, for instance because they are simply residents in the area affected by the alleged environmental harm or just because they are "neighbors" ("*vicinitas*" is the Latin word used in the case law) of the place where environmental harm is allegedly taking place.[76]

However, even on this topic, the case law is rather fluctuating. Indeed, the argument concerning the *vicinitas* has often been discussed before the administrative courts.

According to a more restrictive interpretation, for instance, neighbors of landfills or other facilities for the treatment and disposal of waste are not empowered to challenge the approval of these projects. They must provide further evidence about the detriment they fear to their interests e.g. because the location of the plant reduce the economic value of their nearby properties, or because the rules laid down by the public authority for the management of the plant are not suited to the protection of public health.[77]

In this line of cases, it was held that it is not enough to produce evidence attesting that plaintiffs' houses are nearby to the site where an energy production plant using biomass is to be built on, because what is needed is evidence that harm will flow from the way the specific plant is to be operated. What is required is the existence of actual and immediate harm arising directly from the challenged measure; on the contrary, generic allegations supported by data of common experience or by generic statements about healthy life and liveable environment are not sufficient.[78]

According to a different approach, the proof as to the existence of actual and immediate harm is not necessary because fears as to the impacts on the area in relation to which the plaintiffs have a qualified interest (as residents, owners or holders of other relevant legal interests) are sufficient.[79] Therefore, subordinating the right to judicial review to the submission of a specific evidence of the actual dangerousness of the plant is not allowed; indeed, it is sufficient to

[76] The principle is used in relation to planning and building permits, where residents are entitled to challenge the measures taken by the municipalità. Cons Stato (4) 30 November 2009, 7491, Cons Stato (5) 7 May 2008, 2086, Foro Amm CdS 2008, 1471; Cons Stato (6) 26 July 2001, 4123, Riv giur ambiente 2002, 751, with comment by Angelo Maestroni, 'La legittimazione delle associazioni ambientaliste all'impugnazione di atti urbanistici con valenza ambientale: il contrasto interno al Consiglio di Stato e il criterio dello stabile collegamento come fonte di legittimazione attiva di associazioni e privati' .

[77] Cons Stato (5) 14 June 2007, 3192, Giur it 2007, 2861; the latter argument seems to collapse an issue on the merits of the case in one of standing.

[78] TAR Toscana (2) 31 August 2010, 5144.

[79] Cons Stato (6) 5 December 2002, 6657, Foro amm CdS 2002, 3243, concerning of the decision on the location of a landfill and a polluting industrial plant.

emphasize that the challenged measures might infringe rules established to safeguard the environment.[80]

A third and last approach can be discerned in those judgments that, while affirming the principle of *vicinitas*, require the applicant to show in a very precise and rigorous way his/her position as a real property owner or at least as a person living on a more than occasional basis in the area concerned, so that he/she might actually be held to fall under the scope of application of the administrative decisions taken.[81]

In this writer's opinion, locus standi should be reconsidered following criteria much more based on the extent and incisiveness of the interventions on the environment. Anyhow, such a perspective might not be sufficient in order to respect the principle of broader access to justice stated by the Aarhus Convention. That being said, by using data of common experience, one may select and distinguish the interventions potentially capable of impacting the environment, either because of their size or because of their very nature. Therefore, since an environmental damage as a result of a wrongly conceived or executed environmental reclamation would not normally be in the cards, standing to challenge measures concerning decisions to this effect could be narrowly construed.[82] On the contrary, standing to challenge the approval of a project for the construction of a landfill or a waste disposal plant (e.g. incinerator) should be given more generously.

4.2 The effectiveness of judicial review

Coming to the issue of the intensity of judicial review, the starting point is the acknowledgement that most administrative decisions concerning the environment imply complex factual assessments, which in Italy fall under the label of "discrezionalità tecnica".[83]

According to a 1999 leading case, in case of "discrezionalità tecnica" the administrative courts can both fully review simple factual decisions and check whether the assessment of complex factual situations followed established proce-

[80] Cons Stato (6) 15 October 2001, 5411, Foro amm 2001, 2851, concerning the construction of a waste to energy plant.

[81] It is the case of TAR Piemonte Torino (1) 21 December 2011, 1340, where the lawsuit was held inadmissible because of a missing documentation on who the "residents" (providing the property titles of the apartments and residence certificates) were, which were owners and were residing in the apartments located within the affected area, and in which street these apartments were located. The dispute concerned the construction of a plant for the production of electricity from renewable sources. See also TAR Campania Salerno (2) 21 October 2010, 11912, Foro amm TAR 2010, 3322.

[82] TAR Toscana Firenze (2) 1 September 2011, 1367.

[83] See Elio Casetta, *Manuale di diritto amministrativo* (GIUFFRE' 2011) 463; Fabio Cintioli, *Giudice amministrativo, tecnica e mercato* (Milano GIUFFRE' 2005).

dures in the different areas of scientific and technical expertise.[84] This judgment marked the transition from the so called "extrinsic" judicial review (which allows the courts to review the documents explaining the reasoning followed for the adoption of the measure and to check for apparent inconsistency and irrationality in the procedures followed) to the so called "intrinsic" review. The latter has been further specified by distinguishing between "strong" control, which allows the courts to substitute their own assessment to the one of the public authority, and "weak" control, which only allows the courts to review of the decisions in terms of reasonableness, adequacy, correctness and reliability, but does not allow the courts to take the decision in the place of the administrative authorities. The latter is the approach normally followed.[85]

When administrative authorities whose decisions may affect the environment make complex factual assessments – which are usually "assessment characterized by objective complexity, related to the importance of primary interests"[86] – the so called "intrinsic" judicial review has been narrowed.[87] Indeed some scholars write that in the environmental matters judicial review is still some sorts of "extrinsic" review.[88]

This is manifest from the case law concerning the Environmental Impact Assessment, where "discrezionalità tecnica" and merits often overlap and merge, thus reducing the depth of the judicial review. Indeed, it is clear from the case-law[89] that regarding EIA public administration enjoys "a very wide discretion that is not limited to a simple technical assessment, as such susceptible to verification on the basis of objective criteria of measurement, but presents particularly intense profiles of administrative discretion in relation to the trade-off of public and private interests involved; the purely discretionary nature of the final decision reflects therefore its assumptions on both the technical and the administrative side. [...] the control of the administrative court on discretionary assessments must be extrinsic and limited to obvious errors".[90]

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[84] Cons Stato (5) 9 April 1990, 601, Foro it 2001, III, 9, with comment by Aldo Travi. Cons Stato (5) 5 March 2001, 1247, in Urbanistica e appalti 2001, 866 ff., with comment by Mariano Protto, 'La discrezionalità tecnica sotto la lente del g.a.'.

[85] See generally Roberto Caranta and Barbara Marchetti, 'Judicial Review of Regulatory Decisions in Italy; Changing the Formula and Keeping the Substance?' in Oda Essens, Anna Gerbrandy and Saskia Lavrijssen (eds) *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Groningen Europa Law Publishing 2009) 145.

[86] Cons Stato (4) 6 October 2001, 5287, Giur it 2002, 1084, with comment by Silvia Mirate, 'Giudici amministrativi e valutazioni tecniche tra nuove conquiste e antiche resistenze'.

[87] Alberta Milone, 'Il sindacato del giudice amministrativo sulle valutazioni tecniche delle amministrazioni preposte alla tutela dell'ambiente' [2003] Riv giur edilizia 1342.

[88] Cristina Videtta, 'Le valutazioni tecniche ambientali tra riserva procedimentale e self restraint del giudice amministrativo' [2005] Foro amm TAR 1359.

[89] Cons Stato (6) 13 June 2011, 3561, Resp civ e prev 2011, 1895; Cons. Stato (4) 5 July 2010, 4246, Foro amm CdS 2010, 1419; Cons. Stato (5) 12 June 2009, 3770, Foro amm. CdS 2009, 1482.

[90] Cons Stato (5) 22 March 2012, 1640.

Concerning costs and duration of legal proceedings and leaving aside actions for the vindication of the right to access to environmental information,[91] the costs of legal actions before the administrative courts may be quite high. In addition to taxes on civil and administrative proceedings,[92] plaintiffs usually have to bear lawyers' fees. Indeed the general formula according to which the loser pays is often derogated, even if less so than in the past, with courts ordering each party to bear their own costs; the reason usually adduced is that of the complexity or novelty of the questions addressed.[93]

A way to overcome these "barriers" to access to justice certainly comes from the provision of the so-called "State legal aid" ("*legal aid*"), which however cannot be accessed by eNGOs.[94]

Although proceedings for judicial review are characterized by a greater rapidity and efficiency when compared with civil or criminal ones, time before a final judgment is handed down might be quite long. The provisions allowing the granting of interim measures based on the assessment of the *periculum in mora* (the risk of serious and irreparable damage arising from the execution of the administrative act) and the *fumus boni iuris* (presumption of sufficient legal basis) partially mitigate the problem.[95]

Judicial review by the administrative courts on administrative decisions is not the only legal recourse for the protection of the environment. Depending on the interests at stake, civil and criminal courts might also have jurisdiction as well as the court of Auditors, which in Italy hears action brought for damages due to the misconduct of public servants and assimilated entities.

Civil courts have jurisdiction on claims for environmental damages caused by the misconduct of private individuals or public bodies when performing non-authoritative functions (such as for instance in the management of a waste treatment plant. Environmental damage is defined as any "significant and measurable, direct or indirect, deterioration of a natural resource or utility provided

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91 See above, chapter 2.

92 See Decreto del Presidente della Repubblica, 30 May 2002, n. 115, art 13. Concerning legal trials before the administrative Courts, fees amount generally at 600 euro.

93 Frivolous lawsuits are provided by art 26, Decreto Legislativo 2 July 2010, n. 104 'Codice del processo amministrativo'. They are subject to a specific sanction.

94 Art 119, Decreto del Presidente della Repubblica, 30 May 2002, n. 115. See Matteo Ceruti, 'L'accesso alla giustizia amministrativa in materia ambientale in una recente sentenza della Corte di Giustizia e la lunga strada per il recepimento della Convenzione di Aarhus da parte dell'Italia', [2010] Riv giur ambiente 114.

95 According to Matteo Ceruti, in 'L'accesso alla giustizia amministrativa in materia ambientale', see footnote 94: "It is well known how in Italy very often happens that, except rare cases in which the interim measure is granted, the judgment of the administrative courts in environmental matters is given when the legal situation is substantially affected, the challenged actions of territorial transformation has already taken place, the public or private infrastructure is already realized, the industrial plant has already entered in function".

by the latter".[96] The State only, through the Ministry of the Environment, may bring actions for environmental damages.[97] Local government entities (as Regions, provinces and municipalities), as well as individuals or legal persons may only play a collaborative role and cannot ask for the compensation of environmental damage as such.[98]

Criminal courts have jurisdiction in relation to criminal offences affecting the environment. The Public Prosecutor with the criminal court is charged with bringing the case against potential offenders. Those (local public bodies, eNGOs, individuals) harmed by the criminal behavior may bring a civil claim in the criminal proceeding asking for damages.[99]

The Court of Auditors has developed a very articulated case law concerning environmental damages often enough calling public servants to undo the damage, for instance by paying for remediation.[100]

4.3 Non-judicial proceedings

In line with the provisions of the Aarhus Convention, the Italian legislation also provides for non-judicial appeal proceedings.[101]

Different appeal proceedings to challenge unlawful administrative decisions are foreseen (the so-called *hierarchical administrative appeals* and *extraordinary appeal to the Head of State*). However, these remedies are often perceived as ineffective and even futile attempts to obtain a reconsideration of the final administrative decision. That is why judicial review is much more preferred.

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[96] Art 300, Decreto Legislativo 3 April 2006 n. 152, which refers to the definition contained in the Directive 2004/35/EC.

[97] Art 299 (1), Decreto Legislativo 3 April 2006 n. 152. In Italy, civil actions have only a compensating function; punitive/exemplary damages do not exist. See Giuseppe Spoto, 'Danni punitivi e il risarcimento del danno ambientale' in Francesco Alcaro, Concettina Fenga, Enrico Moscati, Francesco Pernice, Raffaele Tommasini (eds), *Valori della persona e modelli di tutela contro i rischi ambientali e genotossici* (Firenze Univesity Press 2008) 349 ff.

[98] Under art 309 of Decreto Legislativo 3 April 2006 n. 152, they may submit complaints and comments, together with documents and information. They also may require State to act to protect the environment. These parties may however act under the general principle of *neminem laedere* and seek compensation for the harm they themselves, rather than the environment, have suffered (e.g. costs for restoration activities, reclamation, removal of waste): see Corte Cass (3) 22 November 2010, 41015, Cass pen 2011, 2763.

[99] Among the most recent judgments, the Corte Cass (3) 17 January 2012, 19437, held that a Municipality was harmed by the burial of iron dust in the ground; similarly Corte Cass (3) 28 October 2009, 755. Corte Cass (3) 26 September 2011, 34761 and Corte Cass (3) 26 May 2011, 21016, held that the eNGOs are entitled to be part of the criminal trial when they have suffered direct damages such as losses in the prevention and protection of the environment (see above footnote 97).

[100] E.g. Corte dei Conti Toscana Sez. giurisdiz. 27 May 2009, 35; see also art 313(6) of Decreto Legislativo 3 April 2006 n. 152.

[101] Art 9(1).

The situation is different for access to environmental information, where the applicant may demand the review of administrative decisions to the local ombudsman (when decisions are taken by the municipal, provincial and regional bodies) or to the Commission for the Access to Administrative Documents (when decisions are taken by the State).[102]

The Commission for the Access to Administrative Documents (CAAD) was set up by the Administrative Proceedings Act 1990 following the model of the *Commission d'Accès aux documents administratifs* active in France since l. 78-753 of July 17th 1978. The CAAD is responsible for the supervision on the implementation of the principle of full disclosure and transparency in public administration; both private citizens and public administrations can lodge their complaints with it. Action before the CAAD is not an alternative to judicial review: indeed the right to institute a legal proceeding is only suspended.

The Commission lacks coercive powers to ensure the exhibition of documents/information and relies very much on persuasion; for this to work with the most reluctant public administrations and public servants a process of growth in terms of prestige and quality of the CAAD is still needed.

Finally, the Ministry for the Environment could activate an alternative administrative procedure (which pertains to the so-called "administrative self-defense"), aimed at the reparation of environmental damages by way of orders/injunctions against those responsible of any breach of environmental legislation.[103]

5 Conclusion

The full implementation of the Aarhus Convention is facing obstacles in Italy and this is true with reference to all the three pillars.

For instance, as for the first pillar, information provided for by the public authority should be more easily understandable for the common citizen. Data is often available in a language which the layman is not able to understand; often the data is incomplete and discontinuous; sometimes the information provided is contradictory. The superabundance of data might in fact discourage even the most daring explorers of the web who soon get lost in the maze and give up.[104]

As for the second pillar, the Environmental Act 2006 requires genuine cooperation between all parties providing that "the protection of the environment must be guaranteed by all public and private entities and natural and legal persons both public and private, through an appropriate action that is informed by the principles of precaution, prevention, correction of the environmental

[102] Art 7, Decreto Legislativo 19 August 2005 n. 195.

[103] Art 312 ff., Decreto Legislativo 3 April 2006 n. 152.

[104] Salvatore Settis, *Paesaggio, costituzione, cemento. La battaglia per l'ambiente contro il degrado civile* (Torino 2010) 3.

damage".[105] In other words, the Environmental Act 2006 requires for *a)* a reduction of the role of the State and of authoritative approaches, *b)* a constitutional recognition of horizontal subsidiarity, *c)* a consolidation of the transparency, information and public participation principles.

All these factors can push towards a modern model of environmental governance. Sharing of decisions, rather than command, and prevention of conflicts, rather than cure, are trends and characteristic features of this new governance model, while the tradition is still one of authoritative and centralized decision-making process. Surely, as for public participation, the adoption of a comprehensive legal instrument aimed at regulating with greater clarity and simplicity the active role of civil society in the decision-making processes could be a contribute to this end.

As for the third pillar, costs and length of the judicial proceedings are the fields where significant improvements would be most appreciated.

Hopefully, a new approach might lead to reversing or at least halting the process of environmental degradation that any Italian could see leaning out of an imaginary window opened on the Country: "terraced houses where yesterday there were dunes, beaches and pine forests; lofts badly perched on roofs once harmonious. They would see forests, meadows and fields receding back every day before the invasion of buildings; bright green coasts and hills devoured by soulless buildings and houses; they would see cranes rising threateningly everywhere. They would see what was once the 'Bel Paese'[106] overwhelmed by concrete".[107]

[105] Art 3, Decreto Legislativo 3 April 2006 n. 152.

[106] "Beautiful Country", as Italy is usually called.

[107] Salvatore Settis, *Paesaggio, costituzione, cemento. La battaglia per l'ambiente contro il degrado civile*, see footnote 104.

CHAPTER 7

The Aarhus Convention in the Netherlands

Barbara Beijen

1 Introduction[1]

Environmental law in the Netherlands is law in motion. The Nuisance Act (Hinderwet) from 1875 is regarded as the first environmental act. In the 1960s and 1970s compartmental environmental legislation was developed in the form of for example the Water Pollution Act (Wet verontreiniging oppervlaktewateren) and the Act on Air Pollution (Wet inzake de luchtverontreiniging). This spreading of environmental rules in different acts led to the need of different permits, each with their own procedures. In order to streamline this, in 1979 the Act containing general provisions on environmental hygiene (Wet algemene bepalingen milieuhygiëne, Wabm) was introduced. This Act did not contain substantive rules or permit systems, but it did coordinate procedures, public participation and judicial review.[2]

In 1993 the Wabm was replaced by the Environmental Management Act (Wet milieubeheer, Wm). This act formed a framework to contain both substantive rules concerning for example waste and the obligation to have an environmental permit and procedural rules concerning environmental impact assessment, the procedure to obtain an environmental permit, enforcement and judicial review.[3] The Wm is accompanied by many orders in council (*algemene maatregel van bestuur*) and ministerial decrees (*ministeriële regeling*) for which the Wm creates the legal basis. Many substantive rules however are to be found in delegated legislation.

In 1994 the General Administrative Law Act (Algemene wet bestuursrecht, Awb) entered into force. This act contains definitions of the basic terms of administrative law, such as administrative authority (*bestuursorgaan*), interested party (*belanghebbende*), order (*besluit*) and administrative decision (*beschikking*, being an order which is not of a general nature but applicable to a specific situation, such as a permit (*vergunning*)). It contains general rules for judicial review and for the preparation of administrative decisions and some general principles of good governance.[4] This led to adaptations in the Wm and other administrative acts, because it was now possible to rely on the general rules of the Awb. Only exceptions to those general rules had to be laid down in specific acts.

The Wm only covers environmental law in a narrow sense, limited to environmental hygiene. For many projects, apart from an environmental permit, several other permits are required as well, such as a building permit, a permit to fell trees et cetera. In order to streamline a large number of permits in the

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[2] René J.G.H. Seerden and Michiel A. Heldeweg, 'Public environmental law in the Netherlands' in René J.G.H. Seerden, Michiel A. Heldeweg and Kurt R. Deketelaere (eds), *Public Environmental Law in the European Union and the United States. A comparative Analysis* (The Hague: Kluwer Law International 2002) 347-348.

[3] Ibidem, 348-350.

[4] Ibidem, 346-347.

broader field of environmental law (projects relating to the physical environment, including spatial planning and building), in 2010 the Environmental Licensing Bill (Wet algemene bepalingen omgevingsrecht, Wabo) entered into force, introducing the Wabo license (*omgevingsvergunning*). This new license replaces the environmental license from the Wm and about 25 other licenses relating to the environment in a broad sense. However, this act did not replace the Wm or other acts; it only integrates the permitting system. For the Wm this means that part of chapter 8 concerning the environmental permit was repealed and moved to the Wabo, but other parts of the Wm were not affected.

An even more recent development is the discussion about a new Act on the physical environment (Omgevingswet). The draft of this act is not yet publicly available, but was sent to the Dutch Council of State for advice in July 2013. This act is supposed to integrate environmental law much further than the Wabo, by not only integrating permits, but other instruments as well, and by replacing the Wm and other acts in the broader field of environmental law. As a future development it should be mentioned here, but since the details are not yet clear, I will limit the discussion of the implementation of the Aarhus Convention to the current legislation.

The Netherlands signed the Aarhus Convention on 25 June 1998 and ratified the Convention on 29 December 2004. From the beginning, the Netherlands saw the Aarhus Convention as a very important treaty and played an active role in the conclusion of the treaty.[5] For the ratification of a treaty that already entered into force, Dutch law requires approval of the Dutch Parliament and the adoption of all necessary measures to implement the treaty. This explains the delay in ratification.[6] This was done by the Act on the approval of the Aarhus Convention for the Kingdom of the Netherlands[7] and the Act on the implementation of the Aarhus Convention.[8] The most important amendments concerned the Environmental Management Act[9] and the Freedom of Information Act.[10] Because of the introduction of the Wabo license, today the Wabo is relevant as well.

In this chapter, the implementation of the three different pillars of the Aarhus Convention in the Netherlands will be discussed. After the ratification of the Aarhus Convention, there have been tendencies in Dutch administrative law towards speeding up complex decision making procedures and limiting involvement of the public. Some of these are somewhat contrary to the general spirit of the Aarhus Convention. This tension had to be dealt with as the obliga-

5 Kamerstukken (Parliamentary Papers) II, 2002/03, 28 835, n 3, 2.

6 Ibidem.

7 Wet betreffende de goedkeuring van het Verdrag van Aarhus voor het Koninkrijk der Nederlanden (Act on the approval of the Aarhus Convention for the Kingdom of the Netherlands) Stb 2004, 518.

8 Wet houdende tenuitvoerlegging van het Verdrag van Aarhus (Act on the implementation of the Aarhus Convention) Stb 2004, 519.

9 Wet milieubeheer Wm (Environmental Management Act) Stb 1992, 414 and Stb 1993, 31.

10 Wet openbaarheid van Bestuur, Wob (Freedom of Information Act) Stb 1991, 703.

tions of the Aarhus convention take precedence and have to be accommodated. These issues will, when relevant, be mentioned in the following subsections on the different pillars.

2 Access to documents

The first pillar of the Aarhus Convention concerns access to environmental information. It is this pillar that gave rise to most of the changes in Dutch legislation.[11]

2.1 Pre-implementation

The right of access to information can be found in the Wob. This is a general act which is not only applicable to environmental information, but to all kinds of information. However, the Wob already contained some specific clauses for environmental information in order to implement Directive 90/313.[12] Article 10(3) and (4) Wob contained some minor exceptions which limited the use of grounds for refusal if environmental information was concerned. Chapter 19 of the Wm contained some further provisions concerning access to environmental information.

2.2 Post-implementation

The Wob was not in line with the Aarhus Convention nor with Directive 2003/4,[13] which was the European implementation of the provisions concerning access to environmental information from the Aarhus Convention. This led to adaptations of the Wob in order to broaden the right to access, both substantively and procedurally.[14] In addition, the specific chapter in the Wm on environmental information was amended.

2.2.1 General remarks

The Wob uses in some provisions the term 'information', and in others the term 'documents'. A general provision is to be found in Article 2, which states that public authorities are to disclose 'information' in accordance with this act. The Wob orders in Article 3 that anyone can make a request for

[11] Unece, 'Implementation Report by the Netherlands' (2011), available at <http://www.unece.org/fileadmin/DAM/env/pp/reporting/NIRs%202011/Netherlands_NIR_2011.pdf> accessed 9 april 2016.

[12] Council Directive (EC) 90/313 on the freedom of access to information on the environment, OJ 1990 L 158/56.

[13] European Parliament and Council Directive (EC) 2003/4 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ 2003 L 41/26.

[14] Kamerstukken II, 2002/03, 28 835 and Kamerstukken II, 2004/05, 29 977.

'information laid down in documents'. However, the chapter concerning provisions on active disclosure of information again states in Article 8 that public authorities must provide 'information' on their own initiative. Thus, there is a difference between active and passive publication of information. The obligation to publish information upon request is limited to documents. There is no right to demand the authorities to collect or elaborate information which is not already available. When the active publication of information is concerned, this is not limited to documents, but may involve other kinds of information as well.

If information has already been disclosed by the public authority itself, on its own initiative or because there is a statutory duty to do so, the authority is still obliged to grant access upon request. However, the authority may use the form in which the information is already available and is not obliged to use the form in which the applicant requested the information (Article 7(2)(b) Wob). Directive 2003/98/EC on the re-use of public sector information has been implemented by the introduction of a definition of re-use in the Wob and by the introduction of a new chapter concerning re-use of information.[15] This chapter is only applicable to information which is already publicly available, so there are no grounds to refuse a request for re-use of information.

Apart from the disclosure of information upon request, the Wob also contains an obligation to publish information spontaneously, when that is in the interest of good and democratic governance (Articles 8 and 9 Wob). The authorities are under an obligation to release that information in an intelligible form (Article 8(2) Wob). The Wm contains further obligations concerning the active publication of environmental information in Articles 19.1c and 19.2. These provisions broaden the obligation for administrative authorities to actively publish information concerning the environment, which can be regarded as an addition to Article 8 Wob. These obligations in the Wm were introduced to implement the Aarhus Convention.

The costs for access to information have been laid down in a general administrative order based on Article 12 Wob, the General administrative order on tariffs for access to information.[16] This general administrative order only applies to authorities belonging to the central government. The tariffs which may be charged are fairly reasonable: a copy of less than 6 pages must be given for free, for more pages a tariff of € 0,35 per page may be charged. If a summary or excerpt is provided to the applicant, € 2,25 per page may be charged. This higher tariff makes sense, because it requires more work to manufacture such a summary than to simply copy an existing document. Municipalities and provinces may set their own rules in an ordinances about tariffs for access, but it is clear that they may only charge for copies, not for handling the request for information and searching for the information.[17] Information is in principle publicly

[15] Wet openbaarheid van Bestuur, Wob (Freedom of Information Act) Stb 2006, 25.

[16] Besluit tarieven openbaarheid van bestuur (Statutory order on tariffs for open administration) Stb 1993, 112.

[17] HR 8 February 2013, LJN BZ0693, available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2013:BZ0693> accessed 9 april 2016.

available (Article 2 Wob). Publication serves a general interest and those costs may not be charged to the person requesting the information. Only the form in which information is provided to the applicant serves a personal interest, as the applicant has the right to ask for a certain form of information (i.e. copies, summary et cetera, Article 7(2) Wob). This right is the implementation of Article 4(1)(b) of the Convention.

The Wob is applicable to administrative authorities as defined in Article 1:1(1) Awb and as specified in Article 1a(1) Wob. The latter articles allows to exclude certain administrative authorities from the Wob, but not when environmental information is concerned (Article 1a(2) Wob), so in those cases the Wob is applicable to all administrative authorities. Article 3(1) Wob further specifies that anyone can address a request for information to an administrative authority or an institution or company working under the responsibility of an administrative authority. For example companies in the field of energy or water do provide services of general economic interest, but do not normally fall under the responsibility of administrative authorities, unless administrative bodies own a majority of shares or the company has public powers. In most cases, the companies are not subjected to the rules from the Wob, unless they perform public tasks under the control of a government authority. This is a proper implementation of Article 2(2)(c) of the Convention.

2.2.2 Procedural changes

The procedural changes in the Wob are based on the Aarhus Convention, but are applied to requests for all kinds of information, in order to keep the system as uniform as possible.[18] Many of these changes were already part of practice, but were now given a legal basis. A distinction between requests for environmental information and other requests was deemed unnecessary and unpractical.[19] Such a distinction would complicate matters for citizens as well as administrative authorities, as the judgment whether or not environmental information is concerned would be relevant immediately after receiving a request if different procedures were to be followed. The procedural requirements of the Aarhus Convention are thus applied to all requests for information.

Until the implementation of the Aarhus Convention, the Wob only had a deadline of two weeks for the decision upon the request, but not for actually giving access to information.[20] However, the Convention requires that the environmental information is made available within one month after the request (Article 4(2)). This led to the introduction a new provision in Article 6(2) and (3) Wob. A deadline of 4 weeks after the request, with the possibility to extend that period with 4 more weeks in extensive or complex cases, was introduced in

[18] Kamerstukken II, 2002/03, 28 835, n 3, 9-11.

[19] Kamerstukken II, 2002/03, 28 835, n 3, 10-11.

[20] Kamerstukken II, 2002/03, 28 835, n 3, 10.

Article 6(2).[21] This procedural provision was applicable to all sorts of information requests and the deadline given is in conformity with the period of one month and extension with one more month given in the Aarhus Convention. However, in 2009 a small differentiation between requests for environmental information and other requests was introduced. At that time, new rules were introduced in the Awb, granting applicants the right to a penalty payment in case the administrative authorities do not decide in time. Decision periods can vary between different administrative acts, but a regular decision period is 8 weeks (Article 4:13 Awb). The two weeks' period in the Wob was thus rather short, which increases the risk of late decisions and of penalty payments. Such a short decision period did not fit into a system with penalty payments for late decisions, because it is not realistic to always expect such a fast decision, so the decision period was extended to 4 weeks.[22] However, Directive 2003/4 and the Aarhus Convention require the publication of environmental information within a month after the request. In order to give interested parties the opportunity to object to the publication, a specific provision was added which requires administrative authorities to decide upon requests for environmental information within two weeks if they want to grant the request and an interested party might object to that.[23] This allows interested parties to ask for injunctive measures. Although the starting point for the implementation of the Aarhus Convention was to have the same procedure for all requests for information, the introduction of a penalty payment for late decisions led to a differentiation in decision periods after all in 2009.

Article 3(2) of the Convention was implemented in Article 3(4) Wob, containing the obligation for administrative authorities to help applicants specify their request. Article 3(3) Wob explicitly states that the applicant does not have to state a specific interest for his request (Article 4(1) of the Convention). *Anyone* has the right to apply for information and the interest of the applicant cannot play a role in the decision upon the request. Articles 10 and 11 lay down the grounds upon which access may be refused (as the default rule is disclosure). These grounds do not refer to the person of the applicant.

Article 7(2) Wob contains the obligation to grant access to information in the form requested by the applicant. The only exceptions to this rule are in line with the exceptions allowed in Article 4(1)(b) of the Convention. It is only allowed to make the information available in another form than requested if the requested form places an unreasonable burden on the administrative authority, or if the information is already available in another form.

[21] Kamerstukken II, 2002/03, 28 835, n 3, 30.

[22] Kamerstukken II, 2002/03, 31 751, n 3, 3-4.

[23] Kamerstukken II, 2002/03, 31 751, n 3, 4-5.

2.2.3 Substantive changes

The substantive changes, mostly with regard to grounds for refusal of access to information, are limited to environmental information.[24] The right of access to information is not absolute; the Wob contains grounds to refuse access. The general framework for access applies for all kinds of information. The exceptions and limitations to the right of access to documents can be found in the Articles 10 and 11. Article 10(1) contains some absolute grounds for refusal; when these grounds occur, the information must be refused. These grounds include threats to national security and confidential commercial and industrial information or personal data. Article 10(2) contains relative grounds for refusal: the interest of public access must be balanced against other interests, so access may be granted if the interest of disclosure is more important than the ground for refusal. These grounds are, amongst others, international relations, economic and financial interests of the State, investigation and prosecution of offenses and inspections by administrative authorities. Article 11 contains some limitations: information may be made publicly accessible, but personal opinions on policy may be left out, or only published in an anonymous form.

However, in order to implement the Aarhus Convention, stricter rules apply to environmental information. Not all grounds for refusal listed in Article 10(1) and (2) are in conformity with the Aarhus Convention, so for environmental information, exceptions to these grounds are made in Article 10 (4)-(8). Some of the grounds of refusal are not applicable for environmental information, or must be balanced against the interest of disclosure. The Wob thus guarantees a broader right of access to environmental information than to information on other subject-matters, as there are fewer exceptions for the authorities to invoke.

Article 4(4)(a) of the Aarhus Convention provides for an exception for the 'confidentiality of the proceedings of public authorities'. In Dutch law, Article 11(1) Wob concerns the proceedings of public authorities. More specifically, personal opinions on policy should be left out of documents for internal deliberation. In documents not meant for internal deliberation, it is allowed to anonymize such opinions. However, again Article 11(4) is more stringent for environmental information. The importance of protection of personal opinions must be balanced against the interest of disclosure. This means that the possible exception of the Aarhus Convention cannot be applied very broadly when it concerns environmental information.

2.2.4 Directive 2003/4

The European Union enacted Directive 2003/4/EC in order to implement the Aarhus Convention.[25] After the implementation of the Con-

[24] Kamerstukken II, 2002/03, 28 835, n 3, 11-13.

[25] European Parliament and Council Directive (EC) 2003/4 on public access to environmental information and repealing Council Directive 90/313/EEC.

vention itself, for the implementation of the Directive only minor adaptations were necessary.[26] The definition of environmental information and the absolute access to information instead of a balancing of interests was broadened and some general requirements concerning the quality of environmental information were introduced.

2.2.5 Future developments

There are discussions concerning a reform of the Wob. Sometimes administrative authorities feel that some citizens abuse the right of access to information in order to annoy the administration or to receive a compensation from the administration if their request was not handled in due time, especially so since the introduction of the penalty payment. This compensation can amount up to € 1.260,- for a late decision. When revising the Wob, of course it must be borne into mind that specific rules for environmental information are necessary. The Convention for example does not allow a limitation of the right of access to interested parties only. However, for other types of information, such a limitation might be an option.

3 Participation

3.1 Pre-implementation

There is no specific act in the Netherlands governing participation in the decision-making process. Article 3:2 of the Awb does make a duty of public authorities to gather the necessary information before issuing an order, but it does not prescribe how to gather that information. This means that each act of Parliament regulating a specific subject-matter may design its own procedures. However, for the preparation of complicated or high-impact decisions there is a uniform procedure, to be found in section 3.4 of the Awb. This section is only applicable if the specific act states so (Article 3:10(1) Awb). In this uniform public preparation procedure, it is mandatory to deposit a draft decision for inspection (Article 3:11(1) Awb). Documents must be made available to the public for inspection for at least a six weeks' period. Members of the public may state their views within the same period of time (Article 3:11(4) and 3:16 Awb). In specific legislation, a longer (but not a shorter) period may be prescribed, but the most relevant environmental legislation does not contain such provisions, so the general period of six weeks is regarded as sufficient. In order to allow the public to effectively use the six weeks' period, an announcement that the documents have been made available for inspection must be published beforehand. The addressees of a decision must be informed in person of the draft decision and of the possibility to state their views (Article 3:13 Awb). The right to state views on

[26] Kamerstukken II 2004/05, 29 877, n 3.

the draft is granted to Interested parties (Article 3:15(1) Awb). Their views must be taken into consideration for the final decision, as part of the careful preparation of the decision. The procedure leaves open the possibility that specific acts allow others than interested parties to state their views (Article 3:15(2) Awb).

For the environmental permit based on the Wm, the uniform public preparation procedure was already applicable before the Aarhus Convention (Article 8:6 Wm, now repealed because of the Wabo). In addition to the general procedure, which allows interested parties to state their views, Article 13:3 Wm grants *anyone* the right to state his views.

3.2 Post-implementation

In particular for environmental permits, the public was given ample opportunity to participate in decision making procedures even before Aarhus. However, for the adoption of plans and programmes, participation was not always part of the procedures. Most of the changes thus relate to procedures for plans and programmes and to access to information made available for inspection during the preparatory phase of decisions.

Under Article 19:6b Wm Article 10 Wob must be applied to the decision on making available for inspection documents concerning the preparation of a decision. This means that the strict grounds from the Wob to refuse access to environmental information have to be applied for participation as well, thus establishing a link between access to information and participation. The same link is to be found in Article 6(6) in conjunction with Article 4(3) and (4) of the Convention.

3.2.1 Permits

As already mentioned in the introduction, since 2010 the Wabo applies to licencing proceedings in the field of environmental law.[27] This act created a new environmental permit, integrating some 26 permits in the field of environmental law, for example the permit for an installation, the building permit, the permit to fell a tree et cetera.[28] This act also led to integration of the decision-making process. For 'simple' activities, a regular procedure applies. The deadline for the decision is 8 weeks and there is no right to participate in the process. For more complex activities, such as starting an industrial installation, a more extensive procedure must be followed. In this procedure, the uniform public participation procedure from the Awb as described above is applicable, so there is a possibility to participate. In addition to the rules from the Awb, *anyone* has the right to state his view on the draft decision (Article 3.12(5) Wabo); this is not limited to interested parties. In the legislative procedure, the Second Chamber of Parliament amended the original proposal for the act, which

[27] Wet algemene bepalingen omgevingsrecht, Wabo (Environmental Licensing Bill) Stb 2008, 496.

[28] For an overview see Kamerstukken II 2006/07, 30 844, n 3, 148-149.

opened participation to anyone,[29] so as to limit participation to interested parties only.[30] However, the Council of State gave an advice on the obligations from the Aarhus Convention, in which it concluded that a limitation of participation to interested parties only would be contrary to the Aarhus Convention.[31] Based on this advice, the amendment of Parliament was made undone and participation was again opened to anyone.[32] Article 2:14(1)(a)(4) obliges the competent authority to take the views submitted by the public into account in their decision upon the request.

A limitation to public participation can however come from the fact that an environmental permit is required for less and less activities. Before 2008, the main rule was that a permit was required for each installation which could affect the environment, unless general rules were applicable for the specific sector. However, since 2008, as a rule activities have to comply with general rules laid down in an order in council, the *Activiteitenbesluit*. Only those activities for which it is explicitly stated in another order in council, the Bor (*Besluit omgevingsrecht*), an environmental permit is required (Article 2.1(2) Bor in conjunction with Article 1.1(3) and 2.1(1)(e) Wabo). This limits environmental permits to installations within the scope of the Industrial Emissions Directive (IED)[33] and other activities with a heavy environmental impact, which only comprises about 10% of all activities actually playing at least some effects on the environment.[34]For activities under the scope of the general rules, no permit is required, so there is no possibility for public participation. Another limitation to public participation can be found in Article 3:10(3) Wabo: if someone applies for an environmental permit for a change in his installation, but a permit for the original installation was already granted and the change does not lead to other or a greater adverse impact on the environment, the regular preparatory procedure may be applied instead of the uniform public preparation procedure. The regular procedure does not allow for public participation. However, since the original permit must have been prepared with the uniform public preparation procedure, public participation is still guaranteed. The new permit does not have further consequences for the environmental impact of the activity.

With these provisions concerning public participation, Article 6 of the Aarhus Convention is properly implemented in Dutch legislation.

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29 Kamerstukken II 2006/07, 30 844, n 2, art 3.12(4).

30 Kamerstukken II 2007/08, 30 844, n 16 and Handelingen TK 2007/08, n 34, 2617-2618.

31 Council of State, Advice W08.09.0005/I/A 12 March 2009.

32 Kamerstukken II 2008/09, 31 953, n 3, 56-57.

33 European Parliament and Council Directive (EU) 2010/75 on industrial emissions (integrated pollution prevention and control), OJ 2010 L 334/17.

34 SPPS Consultants, 'Aantallen vergunningplichtige inrichtingen' (2010) 21, available at <http://webcache.googleusercontent.com/search?q=cache:7h1ihVrORSwJ:www.infomil.nl/publish/pages/76358/rev100914-aantal-vergunningplichtige-inrichtingen-2010-versie-1-3_1.pdf+&cd=1&hl=it&ct=clnk&gl=it> accessed 9 april 2016.

3.2.2 Plans and programmes

Article 7 of the Aarhus Convention requires public participation with respect to plans, programmes and policies. In Dutch legislation, this was often not required, so changes were necessary. Chapter 4 of the Wm covers several environmental plans and programmes. In the Articles 4.4 and 4.7 Wm concerning the procedure for the national environmental policy plan (*nationaal milieubeleidsplan*) and the national environmental programme (*nationaal milieuprogramma*) an extra paragraph was added, in which the uniform public participation procedure is declared applicable, with the addition that anyone can state his views. For the provincial and municipal environmental policy plans (*provinciaal en gemeentelijk milieubeleidsplan*), no changes were necessary. The Wm already contained a reference to provincial and municipal ordinances regarding participation in the Articles 4.10(3) and 4.17(3). However, for the provincial and municipal environmental programmes (*provinciaal en gemeentelijk milieuprogramma*), public participation was limited or non-existent. In order to comply with the Aarhus Convention, this was remedied by introducing a reference to the procedure for the environmental policy plans (Articles 4.15(1) and 4.21(2) Wm). The Aarhus Convention has a broader scope than the Wm, so the procedure for plans in some other acts had to be adapted as well. Examples are the nature policy plan (*natuurbeleidsplan*) and the national and regional water plans (*nationale en regionale waterplannen*). The Nature Protection Act (Natuurbeschermingswet 1998) and the Water Act (Waterwet) provide for public participation.

Article 4.1b was introduced in the Wm in order to comply with the obligations from Directive 2003/35/EC, which is an implementation of the Aarhus Convention.[35] For the plans mentioned in Annex I of the Directive, a strategic environmental assessment is necessary. This procedure in Dutch law contains a possibility to participate (Article 7.9(2)(a), Article 7.11(1) and Article 7.14(1)(c) Wm). For other national plans, the procedure from section 3.4 Awb is applicable, with the possibility for anyone to state his views. For the national environmental policy plan, this is laid down in Article 4.4(2) Wm and for the national environmental programme in Article 4.7(4) Wm. Provinces are under an obligation to involve residents in the adoption of their environmental policy plan and environmental programme, but they can apply their own regulation on participation (Article 4.10(30 and Article 4.15(1) Wm). The same goes for municipalities when it concerns their (voluntary) environmental policy plan and their (obligatory) environmental programme (Article 4.17(3) and 4.20(2) Wm). The only plan mentioned in chapter 4 Wm for which participation is not required, is the municipal sewage plan. This cannot be seen as an environmental plan, so there is no tension with the Aarhus Convention.

Article 8 of the Aarhus Convention was implemented through Article 21.6(4) Wm, which allows for anyone to state a view on the draft of a general administrative order.

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[35] Kamerstukken II 2004/05, see footnote 25.

Although the details may vary, the Articles 6, 7 and 8 of the Aarhus Convention were implemented by opening participation to anyone. This also allows NGOs to state their view on the draft documents.

The Council of State in its advice on the rights of participation under the Aarhus Convention states that the European Directives, such as EIA and SEA, have to be consistent with the Aarhus Convention, since the European Union is a party to the Convention.[36] The Council did not pay specific attention to possible differences and limits itself to the Aarhus Convention.

As to the question which weight has to be given to the views stated by the public (Article 6(8) and (9) of the Aarhus Convention), the principles of good governance must be applied. Article 3:2 Awb obliges the administrative authority to 'gather the necessary information concerning the relevant facts and the interests to be weighed'. According to Article 3:4(1) Awb, when issuing an order, the interests directly involved must be weighed, unless there is a limitation in a statutory regulation. It is also mandatory that an order is based on proper reasons and that these reasons are stated with the notification of the order (Articles 3:46 and 3:47 Awb). Article 2.14(1)(a)(4) Wabo specifically orders the administrative authority to involve the views stated by the public in their decision-making process for environmental permits. However, given the general rules from the Awb, this provision seems redundant. In an appeal case, the administrative judge could quash an administrative decision if it has not been properly motivated.

Most of the participation rights mentioned in this section already existed before the Aarhus Convention. For the preparation of permits for activities in the field of environmental law, the uniform public preparation procedure must be followed. For the implementation of Article 7 of the Aarhus Convention, it was necessary to declare the uniform public preparation procedure applicable for the preparation of a number of plans from the Wm, the Nature Protection Act 1998 (Natuurbeschermingswet 1998, Nbw 1998) and the Water Act (Waterwet).[37] The Aarhus Convention thus did not have major consequences with regard to public participation. The changes which were necessary fitted well in the existing system.

3.2.3 Future outlook

The Omgevingswet will have consequences for both permits and plans in the field of the environment. The coverage of environmental permits will be broadened and several sectoral plans will be integrated into just one environmental plan. However, in order to comply with the Aarhus Convention, no substantial changes in the decision making procedures are to be expected.

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[36] Council of State, Advice W08.09.0005/I/A, see footnote 30.

[37] Kamerstukken II 2002/03, 28 835, n 3, 21 and Unece, 'Implementation Report by the Netherlands', see footnote 10.

Most probably, the uniform public preparation procedure will be applied with the possibility to state views for anyone.

4 Access to courts

Dutch law already granted broad access to justice, so no changes were necessary for the implementation of the third pillar of the Aarhus Convention.[38] Therefore, this section will not be divided in a pre-implementation and post-implementation phase. The general rules from the Awb concerning legal protection and some specific provisions for environmental law will be discussed here. Some recent developments are worth noting. They do not have a direct relation with the Aarhus Convention, but the question may be raised whether they are in line with the obligations from the Convention.

Article 8:1 Awb states that interested parties may appeal against an order. Article 1:2 Awb defines the notion of 'interested party' as 'a person whose interest is directly affected by an order'. In case law and literature, this has been elaborated as meaning that a directly affected interest is necessary.[39] This should be one's own interest, and not someone else's. The interest should be personal, which means that one should be distinguished from others. If it concerns a permit for a tree to be felled, persons living close to that tree and having a view on the tree are interested parties, but persons who only use the street where the tree stands on a regular basis cannot be regarded as interested parties, because they cannot be distinguished from the indeterminable group of people using that street. In addition, the interest should be objectively determinable and there should be a direct causal link between the decision and the infringed interest. For example, the owner of property is not an interested party if he only fears that his tenant may terminate his contract because of an order (no direct link, but a choice by the tenant),[40] but he may be an interested party if he can make plausible that the value of his property would be diminished because of that order (direct causal link between the order and the drop of the value, and the financial loss may be objectively determined).[41]

In environmental law, the question whether one is an interested party has to be decided on a case-by-case basis. For installations, it is decisive whether one is actually affected by the effects of the installation on the environment: does one hear the noise, smell the odour, experience significant effects on air quality et cetera from his house? For building projects, the main criterion is visibility: can

[38] Kamerstukken II 2002/03, 28 835, n 3, 8.

[39] René J.G.H. Seerden and Daniëlle Wenders, 'Administrative law in the Netherlands' in René J.G.H. Seerden (ed), *Administrative law of the European Union, its Member States and the United States* (Antwerpen: Intersentia 2012) 141-142.

[40] Afdeling bestuursrechtspraak Raad van State (ABRvs) (Administrative Jurisdiction Division of the Council of State) 27 March 2013, 201109106/3/R3.

[41] Afdeling bestuursrechtspraak Raad van State (ABRvS) 17 October 2012, 201111825/1/A3, AB 2013/24.

you actually see the building from your house? There are no standard distances to determine one's interest, because the effects depend on the circumstances: a large installation may have environmental effects over a longer distance, the visibility of an object depends on the open or built-up space between the object and residents et cetera.

For NGOs, there is a separate rule concerning their standing. Article 1:2(3) Awb states that as regards legal entities, their interests are deemed to include the general and collective interests which they particularly represent in accordance with their objects as defined in their articles and as evidenced by their actual activities.[42] This provision used to be interpreted fairly broadly, thus granting broad access to justice for NGOs. In 2008 however, the Administrative Jurisdiction Division of the Dutch Council of State (the highest court in administrative cases) limited access to justice by NGOs by interpreting the requirements of Article 1:2(3) Awb more strictly.[43] In the first place, the objects in their statutes must be more distinctive, both with regard to the territory and to the contents. In the second place, the actual activities are considered more important, thus limiting access of NGOs whose main purpose is litigation. The court stated that merely bringing legal proceedings cannot be regarded as actual activities as required by Article 1:2(3) Awb.[44] It is interesting to note that the provision concerning NGOs has not been changed, but it has been interpreted more strictly in the case law. This does not seem to conflict with the Aarhus Convention, as Article 9(2) allows national requirements to be set in order to decide on the existence of a 'sufficient interest'. The requirement of actual activities and specific objects in the statutes are such national requirements. The only possible tension could be that a limitation of access to justice for NGOs is not in line with the spirit of the Convention, but it is not clearly forbidden.

The Crisis and Recovery Act (Crisis- en herstelwet, Chw) limited the right of administrative authorities which do not belong to the central government to appeal to an administrative court (Article 1.4 Chw). The municipality of The Hague tried to get access to justice despite this provision, calling in the Aarhus Convention. However, the Council of State judged that legal protection is still available with the civil court.[45] This does not constitute a breach of the Aarhus Convention or of the principle of effective judicial protection. The Court did not go into the question whether or not administrative authorities can been seen as part of 'the public', but the district court answered that question in a negative way and the Court at least did not contradict this statement.[46] In another

[42] Hanna Tolsma, Kars J. De Graaf and Jan H. Jans, 'The Rise and Fall of Access to Justice in The Netherlands' [2009] JEL 309-321.

[43] Afdeling bestuursrechtspraak Raad van State (ABRvS) 1 October 2008, AB 2008/348.

[44] Hanna Tolsma, Kars J. De Graaf and Jan H. Jans, 'The Rise and Fall of Access to Justice in The Netherlands', see footnote 41, 317-319.

[45] Afdeling bestuursrechtspraak Raad van State 29 July 2011, ECLI:NL:RVS:2011:BR4025 and 7 December 2011, ECLI:NL:RVS:2011:BU7093.

[46] Rechtbank Rotterdam 13 May 2011, ECLI:NL:RBROT:2011:BQ5002.

case, an applicant argued that the Articles 1.6 and 1.6a Chw were contrary to the Aarhus Convention. These provisions state that the appeal must contain the grounds on which it is based and that it is not possible to add new grounds after the deadline for appeal. These provisions are stricter than the general rules in the Awb and are meant to speed up procedures. The Council of State judged that such limitations are allowed, as Article 9(3) of the Aarhus Convention explicitly allows limitations laid down in national law.[47]

It must be noted that this judgment of the Council of State would allow for a very broad limitation of access to the administrative court.[48] In the Dutch legal system, a limitation of access to the administrative court automatically opens access to the civil court, and the Aarhus Convention does not prescribe access to an *administrative* court. However, the administrative court offers an easier, cheaper and faster procedure than the civil court, so it could be argued that switching legal protection from the administrative to the civil courts would constitute a breach of the Convention, which aims at broad access to justice. At the moment, there are no such plans to limit standing for individuals and NGOs, so this is mainly an academic discussion.

As from 1 January 2013, the legislator introduced a *Schutznorm* in the Awb, after having experimented with a similar provision in the Crisis and Recovery Act (Crisis- en herstelwet, Chw) since 2010. This norm implies that the administrative judge may only annul a decision if the legal provision which has allegedly been violated is meant to protect the person invoking that norm.[49] This has no consequences for the right to standing as such, but it limits the grounds one can invoke before a court. A decision may only be annulled when it was taken contrary to norms meant to protect the interests of the person calling in those norms. For instance, if one wants to stop a new housing project from being built because the new houses will block the open view from his own house, it will not be successful to invoke a provision concerning the amount of permissible noise from a freeway which may have been breached in the design of the new houses. After all, that norm is meant to protect the people living in the new houses, not to protect the view of the appellant. On the other hand, the restriction will probably be less far-reaching for NGOs, as they usually defend a general interest which will often coincide with the interest protected by the allegedly violated norm.[50] However, the actual effects of the *Schutznorm* remain to be seen.

47 Afdeling bestuursrechtspraak Raad van State (ABRvS) 17 November 2010, ECLI:NL:RVS:2010:BO4217.

48 Chris B. Backes in his comments on Afdeling bestuursrechtspraak Raad van State, ABRvS 29 July 2011, AB 2011/281.

49 René J.G.H. Seerden and Daniëlle Wenders, 'Administrative law in the Netherlands', see footnote 38, 142.

50 Ibidem.

The introduction of the *Schutznorm* fits in a more general development towards speeding up legal proceedings, final settlement of disputes and more of a *recours subjective* approach.[51]

Until 2005, the Environmental Protection Act (Wet milieubeheer, Wm) granted broader access to justice in cases concerning environmental permits, the so-called staged *actio popularis*. Drafts of environmental permits had to be deposited for inspection (as discussed in the section on participation), and anyone could express their views concerning these drafts. After the decision had been taken, taking into account the views expressed, anyone who had expressed his view had standing before the court.[52] However, this exception to the general rule from the Awb has been cancelled from the law. Nowadays, it is still possible for anyone to express views concerning draft permits, but only interested parties have standing before the court. This is in line with the Aarhus Convention, which prescribes participation for 'the public' and access to justice for 'the public concerned'.

The general appeals system requires an applicant to lodge an objection with the administrative authority which took the contested decision (Article 6:13, 7:1 and 8:1 Awb). This system of objections is meant to give administrative authorities the possibility to rectify their decision if they made a mistake or did not have access to all relevant facts. However, as described in the section on participation, for some decisions, especially in the field of environmental law, a more extensive procedure has to be followed in the decision-making process, allowing for participation with regard to the draft decision. In such cases, the decision cannot be objected by appealing to the decision maker (art. 7:1(1) sub d Awb) and there is direct access to the administrative court. The reason for this is that interested parties already had a chance to inform the authorities on their interests and relevant facts. After the uniform public preparation procedure, the objection procedure would be redundant, because all information should have become available during that procedure.

The administrative court will focus on the grounds of appeal brought by the complainant. These grounds may concern substantive as well as procedural norms. When the court finds that a norm was breached, it may apply the so-called administrative loop (*bestuurlijke lus*). Before the introduction of the administrative loop, a court could annul a decision and order an administrative authority to take a new decision taking the judgment in due account. If for example the decision was not properly motivated, or a rule on participation was not followed correctly, chances were that the new decision would be substantively the same as the annulled decision and that this decision would

[51] Jan Robbe and Paulien A. Willemsen, 'The influence of Union law on national standing requirements in France, the Netherlands and Germany' in Dacian C. Dragos, François Lafarge and Paulien A. Willemsen (eds), *Proceedings of the EGPA Study Group Law and Public Administration* (Boekarest: Editura Economica 2012).

[52] Hanna Tolsma, Kars J. De Graaf and Jan H. Jans, 'The Rise and Fall of Access to Justice in The Netherlands', see footnote 41, 317.

be appealed again. With the administrative loop, the administrative authority gets a chance to remedy the flaw in the decision and have the court rule on the amended decision in the same court procedure. This contributes to a final settlement of the dispute.

The Awb allows courts not annul an illegal decision if the breach did not harm the interested parties (Article 6:22 Awb). This provision used to apply only to procedural requirements,. If for example there was a flaw in the notification a draft decision had been made available for inspection, but the complainant who brings this about was aware in time of the draft decision and was able to state his view, and there is no evidence that other interested parties were harmed by the flaw, the procedural flaw will not be a reason for the judge to annul the decision. On 1 January 2013 the provision was broadened to substantive norms as well. An example of a substantive norm is a case in which the changes to a building plan were so substantive that in fact a new application should have been required, but the administrative authority decided upon the original application, taking into account the changes. The Council of State concluded that neither the complainant nor other residents were harmed by this flaw, so there was no reason to annul the decision.[53] The first experiences with a similar provision in the Chw show that courts are rather reluctant to apply this provision to important substantive norms, as a breach of most of these norms will be harmful to an interested party.[54]

Otherwise, if the court considers the appeal well-founded, this will lead to a complete or partial annulment of the decision and either an order to the administrative authority to take a new decision or a declaration that the judgment of the court will replace the annulled decision. The complainant may also ask for damages (Article 8:73 Awb). He must however prove which damages he suffered.

A complainant may ask for injunctive remedies (Article 8:81 Awb). These will only be granted if there is an urgent interest (i.e. actions which cannot be undone, such as felling a tree) and the court thinks that the complainant is likely to be successful in the substantive proceedings.

The judicial procedure before the administrative court is deemed to be fairly accessible and effective in terms of time and costs, while procedures before a civil court are more expensive and more complicated. This is so because in procedures before the administrative court there is no obligation to have legal representation and the objections procedure is free of charge. A registry fee (griffierechten) has to be paid for access to an administrative court (Article 8:41(3) Awb). The fee is € 42,- in social security cases, € 156,- in other cases if the appeal is lodged by a natural person and € 310,- for appeals lodged by legal persons. When the appeal is well-founded, the registry fee will be reimbursed by the administrative authority (Article 8:74 Awb). The Awb also contains a possibility for the court to order the administrative authority to reimburse costs made

53 Afdeling bestuursrechtspraak Raad van State, (ABRvS) 21 March 2012, LJN BV9450.

54 Kamerstukken I 2012/13, 32 450, n G, 4.

by the complainant if his appeal was well-founded (Article 8:75 Awb). A General administrative order contains specific rules to determine the level of the reimbursement (Besluit proceskosten bestuursrecht). This compensation usually does not fully cover the costs. However, for persons with a low income, there is a right to legal aid with only a low contribution to the costs (Wet op de rechtsbijstand). Registry fees at civil courts are higher than at administrative courts.

No changes were made to Dutch administrative procedural law in order to implement the third pillar of the Aarhus Convention.[55] National legislation was deemed to already comply with the Convention. However, independent from the Convention, there were some relevant changes in national law, most importantly the abolishment of the *actio popularis* in environmental law, the stricter norms for allowing NGOs standing and the introduction of a *Schutznorm*. All of these developments led to discussions in legal literature concerning the question whether this was allowed under the Aarhus Convention.[56] However, the main conclusion is that even with these limitations, Dutch law still complies with the obligations from the Convention, even though one may wonder whether limiting access to justice isn't at odds with at least the spirit of the Convention.

5 Conclusion

The effects of the Aarhus Convention in the Netherlands were fairly limited. The first pillar concerning access to information led to some changes, granting broader and easier access to environmental information than to information on other subjects. For the second pillar concerning participation in decision-making procedures, Article 6 did not call for major adaptations since the uniform public preparation procedure already complied with the requirements from the Convention and was already applicable to most environmental permits. For some plans, the possibility to participate had to be created. In the field of access to justice, no changes were necessary. However, over the past few years, access to justice and legal protection has been somewhat limited by setting stricter norms for standing for NGOs and by the introduction of a *Schutznorm*.

The norms of the Aarhus Convention fitted well into the existing legal framework and the discussion in Parliament was limited.[57] Only small changes were made in the original proposal.

EU law has not been very important in the implementation process. The EU directives were deemed to be in line with the Convention, so only minor

[55] Unece, 'Implementation Report by the Netherlands' (2011), see footnote 10.

[56] Ben J. Schueler, 'Tussen te veel en te weinig. Subjectivering en finaliteit in de bestuursrechtspraak' in Ben J. Schueler, Bart J. van Ettekoven and Jaap Hoekstra, *Rechtsbescherming in het Omgevingsrecht* (Preadviezen voor de Vereniging voor Bouwrecht 37, IBR 2009); Femke de Lange, *Er is meer tussen EVRM en Awb* (TO 2004) 216.

[57] Kamerstukken 28 835.

adaptations were necessary to implement the directives.[58] The focus was on the implementation of the Convention.

Although the Aarhus Convention did not require many adaptations of national law, the Convention did prove its value over the last few years, especially in the area of access to justice. The Convention was an obstacle for attempts to limit access to justice and played an important role in parliamentary discussions on this subject.

[58] Kamerstukken II 2004/05, see footnote 25.

CHAPTER 8

Mimicking Environmental Transparency

The Implementation of the Aarhus Convention in Romania

Bogdana Neamtu & Dacian C. Dragos

Outline of the chapter

This chapter investigates the implementation status of the Aarhus Convention in Romania by a) examining if the provisions of the national legislation are in line with the requirements of the Convention; and b) empirically analyzing how implementation is either hindered or helped by the existing legal and administrative culture and practices surrounding access to information, participation, and access to justice in environmental matters. The main conclusion of the authors is that by examining the legal provisions in place, the reader will likely get only half the story – despite the fact that Romania seems very progressive in terms of its legislation in this field, numerous challenges occur during implementation. Public authorities view participation as a hassle, something they need to comply with by doing the minimum required by law and not being proactive. Citizens' demand for transparency and openness in government is weak, as they lack trust in state institutions, including courts, and harbor the belief that they cannot change the course of governmental affairs. Courts, in their turn, aggravate this situation by means of lengthy court proceedings and lack of a proper remedy system. In order to enhance implementation the authors argue that the role of environmental NGOs is critical – they need to continue to be involved in identifying deficiencies in the application of the Convention, coupled with more severe sanctions for the institutions that do not comply.

Reflection of the Aarhus Convention in the national legislation

Romania signed the Aarhus Convention on 25 June 1998 and ratified it through Law no. 86/2000[1], which entered into force on 11 July 2000. According to article 11(2) of the Constitution international treaties ratified by Romania are part of the national legal order. Thus, at least in theory, since its ratification, the Aarhus Convention's provisions were directly applicable. Another relevant article from the Constitution, art 20, states that the constitutional provisions concerning the rights and liberties of the Romanian citizens are applied according to the Universal Declaration of Human Rights and to all the other treaties to which Romania is party. The ratified treaties concerning fundamental human rights prevail when there is a discrepancy between them and the national legislation, with an exception when the Romanian laws comprise more favorable provisions. Article 31 of the Constitution regulates the person's right to access to information, while article 35 stipulates the right to a healthy environment as a fundamental right. Aside from this general framework the main provisions of the Aarhus Convention have been effectively transposed into the national legislation over a period of several years, approximately from

[1] Law n 86/2000, OJ of Romania 22 May 2000, 224.

2000 and until 2005. In 2005 the framework law on the protection of the environment was modified as to reflect some of the changes brought by the Aarhus Convention – article 3 of the Governmental Emergency Ordinance no. 195/2005[2] states as one important principle in environmental matters the access to information, public participation and access to justice. Some of the provisions concerning SEA and EIA were not fully transposed until 2010 and in some areas the process continues. A specificity of the Romanian legislative process is to have – instead of laws adopted by the Parliament – government emergency ordinances (GEOs) which are acts issued by the government with the same force as laws which later on need to be approved by the Parliament. In many cases the EU Directives are transposed through GEOs. The advantage is clear – the legislation is adopted more quickly, changes are easier to make, but this results in legislative instability and the chance to have the GEO amended in Parliament after a couple months or even years. In some cases, this leads to errors and mistakes – when an important act is changed it is difficult to amend all the subsequent legislation, so deficiencies occur in practice.

1 Right of access to documents/information

1.1 Background

Among the former communist countries from Central and Eastern Europe, Romania is one of the countries with the most advanced legislation regulating openness and transparency in public administration. Despite state of the art legislation, numerous problems occur with regard to implementation, which appears to be the missing link – weak administrative capacity and expertise, especially at the local level and in the rural areas, apathy on the behalf of citizens, who place very little, if any, pressure on the public authorities to be more transparent and open, distrust in the justice system which leads to very few illegal decisions of the administration being challenged before a court.

With regard to the first pillar of the Aarhus Convention, free access to environmental information, there is a little bit of confusion at the national level concerning the legal acts applicable. As already mentioned, Romania ratified the Aarhus Convention in 2000 through Law no. 86/2000; however, it wasn't until 2005 that the 2003/4/CE Directive and the Aarhus Convention were fully transposed into the national legislation through Governmental Decision no. 878/2005. In the 2000-2005 interval, Romania made important steps toward creating a general regime concerning free access to public information, transparency in the decision-making process of public bodies, protection of private data (Law no. 677/2001[3]) and the legal regime of classified information (Law no. 182/2002[4]). The confusion stems from having at the national level two

[2] Governmental Emergency Ordinance n 195/2005, OJ of Romania 30 December 2005, 1196.

[3] Law n 677/2001, OJ of Romania 12 December 2001, 790.

[4] Law n 182/2002, OJ of Romania 12 April 2002, 248.

legal acts with different legal power and with somewhat different provisions concerning free access to environmental information - Governmental Decision no. 878/2005[5] and the Romanian Freedom of Information Act (FOIA), Law no. 544/2001.[6] Governmental decisions represent secondary legislation; such acts can be issued according to the Constitution only for the execution of superior normative acts (laws of governmental ordinances), which means that they cannot apply with priority or modify a law issued by the Parliament. The problem with the above legislation is that the FOIA offers more favorable provisions with regard to access to information (environmental one included) than G.D. 878/2005 (shorter deadlines for obtaining the requested information, for instance).

1.2 Scope of the right of access to information

When it comes to to the object of the right of access to information the Romanian legal acts grant the right to access *information* and not to *documents*, similar to the text of the Aarhus Convention. Environmental information is defined broadly as any type of information in written, audio, visual, and electronic form concerning the state of the components of the environment; factors that can affect the components of the environment; measures, including administrative measures, such as legislation, public policies, programs etc.; reports concerning the implementation of environmental legislation; cost-benefit analyses used to develop various measures (as defined above); status of population health and safety (G.E.O. no. 195/2005).

As a general rule, article 6 of G.D. 878/2005 states that if the applicant requests the public authority to provide the environmental information in a certain format, the authority must comply with the request, except when: the information is already available to the public as the result of the institution's own pro-active dissemination strategy, and the format in which it exists is easily accessible to the public; it is convenient for the public authority to offer the information in a different format, and in this situation the institution gives reason concerning why the information is offered in a different format than the one requested. The law also stipulates that public bodies have to store the environmental information in a format that is easily to reproduce and is accessible by means of using computerized telecommunications and other electronic means.

In practice however public authorities have been inclined to reject requests for public information (environmental one included) on the ground that the required format implies additional work/costs for the organization. During interviews carried out for the purpose of this study we were told by public servants that most public institutions do not have a clear strategy and explicit procedures concerning who is responsible for aggregating all the public information of potential interest to the public. When asked to collect data, all public organiza-

5 Governmental Decision n 878/2005, OJ of Romania 22 August 2005, 760.

6 Law n 544/2001, OJ of Romania 23 October 2001, 663.

tions usually consider such requests as unreasonable and exceeding the provisions of the FOIA. Environmental NGOs involved in court cases concerning environmental matters declared that often public organization try to discourage them from pursuing certain information by giving them unsorted piles of documents they need to search through in order to obtain what they need. Most of the interviewed public servants seem to consider that if the applicants need certain information, it is their own job to compile it.

1.3 Duty to make some information generally available

The FOIA stipulates in article 5 that public authorities need to make certain information generally available to the public. the FOIA alone covers some of the requirements from the Aarhus Convention (article 5(3)): programs and strategies developed by the public authority; a list comprising documents of public interest (legislation specific to the area in which the authority operates could fall into this category); a list comprising categories of documents produced and/or managed by this institution, according to the law. Other info that needs to be made available includes: the normative acts which regulate the organization and the functioning of the public institution; the organizational structure and responsibilities for each department; names of the person(s) responsible for managing access to public sector information; contact data for the institution and office hours for the interaction with the public; availability of access to justice for persons harmed by a decision of the public authority; budget and financial information; an informative report containing the information listed previously as well as an annual report concerning their activity. It is true however that the FOIA does not mandate that this information is made available electronically – public authorities need to post it in a visible place at their headquarters or to publish it in a local/national newspaper, or on their website, etc. Studies[7] monitoring the implementation of the FOIA mention that very often public authorities make no efforts to identify which of the communication venues permitted by law are relevant for their public – for example in rural communities the annual report is published in the Official Journal of Romania (a specific section) but the average citizen does not have access to it. Law no. 52/2003[8] concerning transparency in the decision-making process of public bodies also comprises requirements for publicity in cases when normative acts are drafted or public meetings are announced. In this case the use of electronic communications (Internet) is mandatory. Again, studies show however that numerous authorities comply only with certain requirements – usually by posting the notice in a visible place at their headquarters and by publication in the

7 Pro Democracy Association, Transparency International Romania, 'Raport privind liberul acces la informatii de interes public in Romania – o analiza comparativa 2003-2007' (2007) available at <http://www.apd.ro/files/publicatii/Raport%20privind%20liberul%20acces%20la%20informatiile%20de%20interes%20public%20in%20Romania.pdf> accessed 16 april 2016.

8 Law n 52/2003, Official Monitor of Romania 3 February 2003, 70.

media. Differences in implementation are also pointed out with regard to public bodies from rural and urban areas.[9]

Romania also has in place a Law for the reuse of public sector information – Law no. 109/2007.[10] Article 9 states that public institutions should strive to facilitate access to the documents available for reuse, especially by compiling lists and directories comprising the most important documents available for reuse, provided that electronic communications are used. This law, similar to the FOIA, does not have a requirement toward the gradual digitalization of archives or toward forcing public authorities to develop their websites as a means of communication. Generally speaking public bodies, even those which comply fairly well with other transparency-related requirements, do nothing in what it concerns their lists of documents/information held.[11] These directories can be in practice very helpful for applicants interested in finding specific information and not just for those interested in reuse, mainly because of the poor organization of the websites (see below) of public authorities (see next section for more details).

For the next section, the webpages of the competent authorities for the protection of the environment from Romania were analyzed in order to determine how well they make generally available environmental information (as opposed to this section where the focus was broader).

1.4 Format/manner in which environmental information is made generally available

Article 7(c) from G.D. no. 878/2005 states that public authorities should make available to the public the registers/lists comprising the environmental information they hold or they should establish info points offering precise information with regard to where the environmental information can be held. NGO representatives are of the opinion that very often when looking for such registers/lists, they are told by public authorities to come to their headquarters or to make a request for public information according to the FOIA. It is obvious that in these cases the attitude of the public institutions/public servants represents the main problem. From the institutions responsible for environmental protection (see them below) only the Ministry of the Environment has such a list posted on its website.

Article 20 states that public authorities have to actively, progressively and systematically update their websites. This is the first provision which explicitly

9 Dacian Dragos, Bogdana Neamtu and Bianca Cobarzan, 'Procedural transparency in rural Romania: Linking implementation with administrative capacity?' [2012] International Review of Administrative Sciences 78(1), 143-144.

10 Law n 109/2007, OJ of Romania 5 May 2007, 300.

11 Dacian Dragos, Bogdana Neamtu, 'Reusing Public Sector Information - Policy Choices and Experiences in some of the Member States with an emphasis on the Case of Romania' (2009) European Integration online Papers 13.

emphasizes the use of webpages and other similar tools for communication. In order to determine a) how well environmental information is organized and b) what information is made generally available, we looked at the webpages of several public institutions responsible for the protection of the environment: Ministry of the Environment; National Agency for the Protection of the Environment; 41 county branches of the National Agency for the Protection of the Environment; Administration of the Natural Reserve Danube Delta, and the National Environmental Guard. Some of the findings include:

- Public authorities comply only partially with the law. They offer some of the information required by the law, reluctantly in some cases (we discovered this through phone interviews), their main concern being not to be criticized in the media or by NGOs for not complying with the legal requirements. Less emphasis is placed on how useful and user-friendly the information is provided. This is mainly due to the fact that in highly publicized cases the NGOs and the media tried to expose all the deficiencies in how publicity and transparency is managed. There have been recently at least several high profile cases at the national level (*Rosia Montana* gold exploitation is perhaps the one best known[12]).
- The main problem with the websites is not so much the absence of information but rather the poor organization of the information. While in many cases the information is available, the user has to thoroughly search for it. For example, on the website of the Ministry of the Environment, under the heading legislation, the EU legislation is posted. Someone looking for the national legislation will first need to figure it out that this is posted separately for each of the areas the Ministry is responsible for (air quality, water quality, waste, etc.). In many cases a map of the site or an index could help with finding the information.
- The quality of the data presented is also sometimes poor. The public authorities for the protection of the environment place on their websites or in so-called reports a huge volume of environmental data; however the data is highly technical and for the average citizen it does not offer any meaningful information with regard to the quality of the environment. No pro-active efforts are made to compile the data into user-friendly charts that show a trend or into short announcements explaining to the citizens what are the most important environmental indicators that they should monitor. During interviews we were told by NGOs that sometimes the data concerning the

[12] This highly publicized case is about the intention of a Canadian company to exploit gold using extraction methods (allegedly based on cyanide) with a high negative impact on the environment. The development process started in December 2004 (though the intention of the company have been known previously) when the company Rosia Montana Gold Corporation (RMGC) submitted the so-called 'Project Presentation Report' (PPR) together with a request for an environmental accord for the Rosia Montana gold mine proposal to the environmental authorities. This officially launched the EIA procedure for the Rosia Montana gold mine proposal. The process, still ongoing, is extremely complex and full of legal complications.

quality of the air for example is collected by entities which had been placed in strategic positions – near forests, near the course of a river, or in areas that are less polluted than the average neighborhood from the city.

- With regard to the National Agency for the protection of the Environment we noticed significant differences between the national office and the regional branches. While the national institution strives to comply with the minimum legal requirements, the regional branches do not. For example, we specifically searched for the national and regional reports regarding the state of the environment. We were able to identify it at the national level, however when we looked at the websites of the county offices of this national institution such reports were found only for certain counties. Moreover, the web pages of the different counties, though meant to be organized similarly (the format and graphical design of the websites is similar for all 41 institutions), had very different information under the same heading/label. This could be confusing for a user looking for a certain type of information in all 41 counties.
- Some improvements can be seen from previous years and monitoring studies. For example in earlier reports one of the problem mentioned in relation to the notices inviting the public to comment during the SEA/EIA provisions was the fact that they did not mention the date when the notice was posted.[13] This has been corrected in most cases by now.
- In many cases there are sections of the website where it says *"under construction"* or the information is not up to date. It is questionable therefore how systematically public authorities update their webpages.
- There are no monthly press releases as mandated by law concerning a brief summary of the environment-related activities. Some institutions told us that they do press releases from time to time but not on a regular basis. When we looked on the website, the press releases are more about specific events and not updates on their regular activities.
- With regard to the specific categories of information that should be available we found out to be missing (in most cases):
- Progress reports concerning the implementation of legislation and specific strategies and plans. During a phone interview we were told that the Ministry of the Environment conducts such studies when there is a requirement from the EU bodies. We identified several such analyses on the Internet but we could not find them on the website of the institution.
- Data resulting from the monitoring of activities that can impact the environment.
- Notices, agreements, and authorizations for activities with impact on the environment.
- Impact studies on the environment and risk evaluations concerning the key components of the environment.

[13] Catalina M. Radulescu, *Guide for the public participation in the decision making process on environmental matters* (Bucuresti: Editura Didactica si Pedagogica 2009) 20.

1.5 Bodies having the duty to provide information

The notion of *public authority under the duty to provide information*, both according to the FOIA and G.D. 878/2005 is broad enough as to cover also private law entities which carry out activities that are related to the environment. According to article 2(2) of the notion of public authority covers: the Government, other bodies of public administration, including their consultative public organs, established at the national, regional, or local level; any natural or legal person which carries out administrative pubic tasks in accordance with the national legislation, including tasks, activities or services related to the environment; any natural or legal person which fulfills public duties or provides public services related to the environment and which is under the control of an organism or person mentioned above. In addition, the law also stipulates that the rules apply also to the situation when the environmental information is held by natural or legal person in the name of a public authority. This broad definition of public authorities was in the majority of the cases also upheld in court. Previous studies show that the way in which requests for public information are treated by private entities (such as national companies – for railways, roads, etc.) which operate under the supervision of administrative bodies (such as ministries) greatly depends upon the organizational culture of that institution and its leadership. Similar institutions with the same subordination responded differently to a similar request for public information – one acknowledged that Law no. 544/2001 applies to its activities and therefore complied with its provisions while the other wrote a lapidary response, stating that it cannot be considered a public institution.[14]

1.6 Exemptions from free access

With regard to the public information exempted from disclosure we need to take into consideration both the provisions of Law no. 544/2001 and G.D. no. 878/2005. Table 1 below presents comparatively the categories of exemptions – cells highlighted in light grey represent common exemptions both under the FOIA and the special legislation on access to environmental information. Cells marked with a star (*) represent exemptions which have been wrongly interpreted by the public authorities and are detailed at the end of this section.

Table 1: Categories of information exempted from free access

Exemptions according to the FOIA (article 12)	Exemptions according to environmental legislation (article 11)

[14] Usaid and Aba Ceeli, 'Accesul la informatiile de interes public – Legea 544/2001. Ghid theoretic si practic pentru judecatori' (2005) available at http://dialogcivic.gov.ro/wp-content/uploads/2016/03/05_06_xx-abaceeli-rom_foi_seminars_06.2005_rom.pdf.

Information pertaining to national security and public safety if it represents classified information according to the law.	Disclosure can impede international relations, public safety or national defense.
Information concerning judicial proceedings, if their publicity impedes the delivery of a fair trial or legitimate interest of any of the parties involved in the trial.	Disclosure can impede judicial proceedings, the opportunity of a person to be the subject of a fair trial or the possibility of a public authority to conduct a criminal or disciplinary inquiry.
Information concerning the proceedings of public authorities, as well as those concerning the economic and political interests of Romania, if they are part of the category of classified information, according to the law.	Disclosure can impede the confidentiality of the proceedings of public authorities, provided it is stipulated by law.
Information pertaining to commercial or financial activities, if their publicity breaches the principle of loyal competition.	Disclosure can impede the confidentiality of commercial or industrial information, provided this is stipulated by national or EU law concerning the protection of a legitimate economic interest, including public interest with regard to keeping the statistical confidentiality and the tax secrecy.*
Information pertaining to personal data.	Disclosure may violate the confidentiality of personal data or files belonging to a natural person, provided that person did not consent to have them disclosed and when confidentiality is stipulated by the national or the community legislation.*
Information concerning the proceedings taking place during a criminal or disciplinary investigation, provided that the outcome of the investigation is jeopardized, confidential sources are disclosed or the life and corporal integrity of a person are threatened following the investigation.	Disclosure may affect the interest or the protection of a person who offered voluntarily the requested information, without a legal obligation to do so, with the exception of the case when the person consented to have the information disclosed.
Information which upon publication is detrimental to the youth.	Disclosure affects intellectual property rights.*
	Protection of the environment implies information concerning the localization of rare species.
	The requested information is not held by the institutions which was approach with the request. If possible, the institutions should either send the request to the competent authority or notify the applicant with regard to which the competent authority might be.
	The request is manifestly unreasonable.*

	The request is drafted in a very general/imprecise manner. The authority, even in this case, should first try to clarify with the applicants, what exactly they are looking for.
	The request concerns material that is not finalized yet. Even in this case, the applicant should be informed with regard to the estimated date of finalization.
	The request concerns the internal communication system, taking into consideration the fulfillment of the public interest accomplished through the disclosure of information.

* In Romanian *acord de mediu* – administrative act issued by the competent authority for the protection of the environment in which the conditions and/or the measures for the protection of the environment that need to be followed upon the development of the project are outlined.

As it can be seen, there are several exemptions that are common under both regulations as they refer to the most common exemptions. Exemptions are to be interpreted in a restrictive sense – public authorities should not broaden their scope beyond what the law stipulates. Also, public authorities will assess for each situation, separately, the public interest fulfilled through disclosure; they should also carefully weigh the public interest fulfilled through disclosure against the interest fulfilled through maintaining the confidentiality of the information.

There are several problems with either the wording of the exemptions or with their implementation.[15] Some of them are discussed below:

- Intellectual property rights might be considered one of the exemptions that has caused tremendous issues in Romania. Numerous environmental studies/reports are drafted during EIA procedures by natural/legal persons and are paid by the developer of the project which is being evaluated. When environmental NGOs requested these studies (more exactly copies), they were refused on grounds that these studies belong to the experts (individuals or companies) that produced them. In some cases they were allowed to access them at the headquarters of the public authorities (some of them had hundreds of pages). The National Protection Agency for the Environment even requested an opinion from the public body responsible for intellectual property rights in order to support its own decision that such studies should be not disclosed. The courts have not ruled in a similar manner on this issue; however there were cases when the court forced the public body to release the environmental report (the case of a factory for bottling mineral

[15] Catalina M. Radulescu, *Guide for the public participation in the decision making process on environmental matters,* see footnote 13, 22-27; Catalina M. Radulescu, ‚The Aarhus Convention in Romania' (presentation delivered at International Symposium Access to Environmental Information – Freedom of Information in favor of Environmental Protection, Postdam, 18-19 June 2009).

water in Neamt County, where the construction of the factory was permitted in a Natura 2000 site).

- There are cases when the concept "manifestly unreasonable request" from the Aarhus Convention was interpreted in an abusive manner by public authorities. For example, one request which asked for the public authority to compile certain information was deemed unreasonable on grounds that it exceeds the legal responsibilities of the public institution. Environmental NGOs and legal think thanks have criticized the way in which the Romanian legislator understands to transpose EU Directives and other international documents, by using the exact wording, without going however into detail. It was argued that perhaps some examples of what does not represent an unreasonable request might help during implementation, in light of the cultural and organizational challenges that exist in public administration in Romania with regard to openness and transparency.
- Somewhat similar to the situation described above, in certain cases the authorities refused to disclose the name of the natural person/company conducting and drafting a certain report. Environmental NGOs requested this information because in certain cases they doubted the quality of the environmental assessments.
- The Romanian legislator failed to fully transpose into the Romanian law the provisions of article 4(d) of the Convention, which states that despite the fact that commercial information may be exempted from disclosure, information on emissions which is relevant for the protection of the environment should be disclosed. Courts have refused in this case to force public authorities to block the information that is considered confidential and disclose the portion relevant for the environment. This situation is not uncommon in other areas as well; public institutions make no effort to block the data with personal and/or commercial character and disclose the rest of the document. In their view, this is not their job. Even when such responsibility is mandated by law, there are still breaches (for example the National Council for Solving Legal Disputes, an administrative-jurisdictional body competent for public procurement cases, has to post on its website the motivations of its decisions, after the names and identification data of the parties have been removed; very little has been dome toward convincing the Council to comply with the provisions of the law).
- One issue invoked by environmental NGOs refers to the fact that all documents are in Romanian, even in cases when we are talking about major strategic documents (Energetic Strategy) (in the framework of SEA procedures). This is an issue in cases when international NGOs such as Greenpeace get involved in supporting the local communities. The courts have held that according to the law there are no such requirements, despite the fact that this would definitely make access more effective. In SEA procedures, provided that a transboundary interest exists, the initiator of the plan, with the help of the central level public authority supporting the plan, has to send

> the draft plan and the environmental report drafted for it, in English, to the central level environmental authorities from the states likely to be affected by the plan (in 20 days from the completion of the environmental report).[16]

There are no reported problems regarding the confidentiality of the proceedings of public authorities. In the years after the adoption of the transparency law, some public authorities had tried to prevent citizens from participating to meetings of the Local Council but this is in the past in most cases. There are however more subtle ways to restrict access to public proceedings – scheduling the meetings where sensitive areas are approached late on Fridays, during the summer months (holidays), etc. If we are talking about the minutes of the meetings, they may not be secret but difficult to obtain.

During our interviews, several of the representatives of the environmental NGOs told us that the easiest way to discourage people is not necessarily to refuse them access to documents but to make sure that access is extremely complicated. They told us that very often it takes dedication and a lot of resources (time and money) to keep being involved in supporting free access to environmental information.

1.7 Costs for exercising the right of access

In principle access to public information is free of charge according to both the FOIA and G.D. no. 878/2005. The FOIA makes reference to one situation under which public bodies can charge applicants a fee for access to public information – the applicants have to pay the price of hard copies or the support used for transmitting the information, a CD for example (article 9). In practice, public authorities have proved to be 'inventive', using the provision of article 9 in order to determine applicants to renounce their requests for public information. Thus, there were public bodies which established a very high cost per copied page; if the requested document had several hundred pages the costs were usually found to be prohibitively expensive by applicants.[17] Other authorities claimed that there was no legal act in place which allowed them to take money from applicants and, on the other hand, it was not possible for them to use their own CDs or paper because such expenditure was not in the budget. In this situation, no matter how absurd it seems, the public authority argued that there is "no way how to provide the applicant with the public information".

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[16] Elena Giurea, Alexandru Nicoar', Florentina Florescu and Carmen Sandu, 'Ghid de aplicare a procedurilor EIA/SEA/EA' (2010) available at <http://natura2000.ro/wp-content/uploads/2014/10/Ghid.aplicare.proceduri.EIA.SEA.EA.pdf> (in Romanian) accessed 20 April 2016.

[17] Zsolt Gábor Burjan-Mosoni, 'Cost of public information: A case study on research-related information requests' in Dacian Dragos, Bogdana Neamtu and Roger Hamlin (eds), *Law in action: Case studies in good governance* (East Lansing, Michigan, US 2011) 168-169.

2 Participation rights

2.1 Different participation rules applicable to activities, to plans, programs and policies, and to normative instruments

In the Romanian legal system we have three separate basic regulations which cover the procedural rules applicable to public participation in environmental matters. First, there is a framework law on transparency in the decision-making process of public administration bodies – Law no. 52/2003 which deals with two major categories of procedural requirements – publicity rules to be followed during the adoption/drafting of administrative normative acts and the public participation to public debates organized by public administration bodies (regular proceedings of the local councils for example, as well as meetings dedicated to consultations on various issues of interest for the public or public debates organized in order to discuss the draft of a normative act). In addition, there is Governmental Decision no. 1076/2004 concerning the environmental evaluation for plans and programs and Governmental Decision no. 445/2009 concerning the evaluation of the environmental impact of certain public and private projects (accompanied by a joint ministerial order from 2012 concerning the approval of the implementing methodology). The two governmental decisions transpose the provisions of the EU Directives on SEA and EIA procedures. In some cases the framework law on transparency and the special legislation work together, though with a different purpose. For example, according to SEA rules, the environmental assessment is conducted during the drafting/preparation of the plan or program and is finalized before its adoption or before sending it for adoption to the Parliament. If it is adopted by the government or a ministry (administrative act) the public body needs to comply with the publicity and participation rules which are generally requested before the adoption of an administrative act. In this case, we have procedural participatory rules concerning the SEA procedure, which refer explicitly to determining the environmental impact of the program or plan before its adoption; subsequently, the applicable rules concern the discussion of the act in its entirety and not just with reference to its environmental impact.

What is different with regard to participation rules applicable to normative instruments, plans and programs, and specific projects? One main difference refers to the participation of both the initiator of the plan or project and of the developer to the process of obtaining feed-back from the public as opposed to the situation when the authority responsible for issuing an act or making a decision conducts public participation procedures by itself. With regard to the first situation, numerous NGOs have argued that they should be involved in organizing the public debates (possibly replacing the developer whose interest in obtaining feedback from the public is limited).

2.2 Purpose of participation

Generally speaking, participation is limited to defense and consultation. It is in most cases seen as something that needs to be done by both public authorities and developers before the actual development activity can start or the plan/program can be adopted. The limits of this minimalistic approach with regard to participation were discovered during highly controversial development projects (Rosia Montana gold exploitation being one of them). In the absence of compensation mechanisms, public participation, including media coverage, turned into an adversarial confrontation between the supporters of the developers and the public/NGOs.

In order to have meaningful participation, the entire process surrounding the determining of the environmental impacts of plans, policies, or specific projects needs to change. One of the major aspects that needs improvement refers to the quality of the environmental reports (implicitly the quality of the accredited technical experts) as well as the assessment of the quality of the environmental report performed by the public authorities. Developers have no incentives to produce high quality environmental impact assessments – according to the legislation in place all experts, once accredited, based on minimal requirements, enjoy the same level of recognized qualification. Very often developers are interested in hiring the expert who facilitates the issuing of the development permit and not necessarily the one who does the best job in terms of assessing the environmental impact. This situation should be counterbalanced by an in-depth scrutiny of the authorities for the protection of the environment. In many cases the studies do not meet the requirements from the law but however they pass the evaluation done by the public authorities. Without increasing the quality of the assessment process in its entirety, public participation cannot go beyond defense and consultation.

2.3 NGO participation

Generally speaking, NGOs are regarded as part of the public and enjoy broad participation rights. According to the SEA legislation the public who can participate is defined as to include one or more natural or legal persons, and in accordance with the national legislation and practice, the associations, organizations or groups they might form. A different piece of legislation also gives NGOs broad participation rights during the SEA process. For example, according to G.D. no. 564/2006[18] regarding the establishment of the framework for the public's participation to the drafting/adoption of certain plans and programs concerning the environment, the decision-making public authorities are competent to identify the relevant public for a certain decision. NGOs which support environmental protection are regarded as part of the relevant public. Criteria which can be used by the public authorities to identify the relevant

[18] Governmental Decision n 564/2006, OJ of Romania 10 May 2006, 405.

public include with explicit reference to NGOs: the mission of the NGOs, other than those protecting the environment, among the objectives of the plan or program; and the representativity, from a geographic point of view, of the NGOs by reference to the coverage of the plan or policy. With regard to the later requirement, public authorities have tried to limit for example the participation of an NGO registered in one county to the SEA procedure taking place in a different region, arguing that the said NGO has no interest in the plan that will cover a completely different area than the one where its activity and place of incorporation are.

For EIA procedures we have a distinction between the *public*, defined as above, and the *interested public* which is in fact able to participate. Interested public is defined (G.D. no. 564/2006) as to include the public affected or potentially affected by the assessment of the environmental impact, which has an interest in the said procedure. NGOs which promote the protection of the environment are considered to have an interest.

As already mentioned, NGOs tend to be more active than individuals due to a lack of participatory culture among community members, apathy and distrust in public authorities. Therefore it is important to allow them the right to participate without too many limitations.

2.4 Timeframes for the different phases

When researching if timeframes for public participation are reasonable we were interested in two separate aspects: a) how many days/weeks the public has for participation to different phases; b) what the total length of the various stages is. This later aspect was mentioned by NGOs as relevant – the longer a certain stage takes the fewer NGOs and individuals will constantly keep their involvement in the case. On the other hand, very short timeframes, in cases when for example the impact upon a certain species is assessed, leads to incomplete evaluations.

In the textbox below there are certain provisions concerning various timeframes for public participation. They represent just a selection from the framework law on transparency in decision-making in public administration as well as from the specific national legislation on EIA and SEA procedures. This brief selection of legal provisions enables us to draw several conclusions concerning whether or not the timeframes can be deemed to be reasonable.

Selected legal procedures concerning publicity and participation in environmental matters

Transparency in the decision-making of public administration bodies

Every time public administrative authorities draft normative acts/instruments, a notice regarding their intention should be communicated to the public, at least 30 days prior to its discussion and adoption. The notice should also include the possibility of the public to respond – it is necessary to allow at least 10 days for receiving written recommendations from the public. If public debates are organized during the adoption of the normative act, they should take place in no more than 10 days from the moment of the publication of notice comprising the place/date for the public debate.

EIA procedure

During the screening stage the competent public authority for the protection of the environment needs to identify the interested public within 15 days from the date when it was approached with a request for issuing the environmental agreement[1] by the developer of the project, through publication on its website and on the premises of its main building. In three days after a decision is reached with regard to the screening of the project, the public authority posts on its website the draft of the decision and informs the developer about the obligation to inform the public. In its turn, the developer of the project has 3 days to publish the announcement in the local and/or national press, to place it in a public space at their headquarters as well as in the public authority's main building, and to post it on their webpage. The public has then 5 days to make comments concerning the draft project of the screening stage.

During the quality analysis of the environmental report stage, the notice regarding the opportunities for the participation of the interested public is posted on the websites of the public authorities responsible for the protection of the environment and those responsible for issuing the approval for development and placed in a visible spot at their headquarters with at least 20 days prior to the date when the public meeting is scheduled. The developer, in its turn, needs to publish in 3 days upon receiving the notice mentioned earlier, in the national or local press, to post it on their website/at their headquarters or the headquarters of the authority for the protection of the environment, and/or on the billboard placed at the project's site. The interested public can make recommendations up until the date of the public meeting (the public has at least 20 days). There are also shorter deadlines for the public to respond during this stage – 5 days to make comments regarding the notice for the granting of the environmental agreement to the developer.

SEA procedure

During the screening procedure, the initiator of the plan publishes in the mass media, twice, at a 3 days interval, and posts on his website the initial version of

the plan, its nature, the starting of the screening procedure, the place/hour where the initial version can be found, and the possibility to make comments in writing at the headquarters of the authority for the protection of the environment, no later than 15 days from the date of the last/second notice. The competent authority for the protection of the environment also notifies the public about the starting of the screening phase by a post on its website and the possibility to make comments in the 10 days following the posting of the notice. The final decision is notified to the public by posting it on the website of the competent authority for the protection of the environment and by its publishing by the initiator of the plan in mass media (in no more than 3 days after the decision is made).

During the completion stage of the plan and the drafting of the environmental report, the initiator of the plan publishes in the mass media, twice, at a 3 days interval, and posts on his website the draft plan, the completion of the environmental report, the place/hour where the public can review them and the possibility for the public to issue written proposals to both the initiator's and the competent authority's headquarters in 45 days from the date when the last notice was published. The initiator has the same publicity obligations as described previously with regard to organizing a public debate on the draft plan, including the environmental report. The debate cannot be held any sooner than 45 days (60 if the plan has a transboundary effect) from the moment the notice is published.

There seems to be a relative correlation between the various timeframes for publicity and public participation in relation to environmental matters. According to both the framework law on transparency and the special legislation on EIA and SEA procedures, public bodies in general, competent authorities for the protection of the environment, the initiator of a plan/program and the applicant of an environmental agreement for certain projects have short deadlines to comply with publicity obligations – usually 3 days to notify the public with regard to a certain decision made or to post a draft version of a specific documents on their webpages and at their headquarters. The public usually has 15 (in certain cases 10) days to make comments. Public debates are announced way in advance – between 20 and 45 days.

During interviews we were told that the main problem is not represented by the deadlines themselves but rather by how public authorities/developers fulfill publicity obligations. One strategy is to publish the notice in obscure local newspapers – there is no special section dedicated to these types of notices/adds. Often they go together with notices about funerals, weddings, or other types of events.

There are studies conducted at the national level which look at the length of SEA/EIA procedures as well as the length of each phase. One particular study[19]

[19] United Nations Development Programme Romania (UNDP Romania) 'Effectiveness of environmental impact assessment in Romania and simple means to improve it' (UNDP-GEF Project PM5 PIMS 3069 2011) available at <http://www.undp.ro/libraries/projects/Effectivness_of_EIA_in_Romania_01.pdf> accessed 16 April 2016.

looked at the total number of SEA procedures conducted from 2004 to 2010 and which are listed in a centralized data base. Table 2 and Table 3 below summarize this information. For EIA studies study, a sample of authorities and projects was examined within the framework of the same Results are also discussed below.

Table 2: Number of SEA procedures with a time period greater than one year (for each development region, which at their turn include 4-5 counties)

Length	Bucur-esti	Cluj	Bacau	Craiova	Pitesti	Galati	Sibiu
>1 year	4	9	8	13	11	46	39
>2 years	0	0	1	1	3	5	11
>3 years	0	0	0	0	0	0	3
>4 years	0	0	0	0	0	0	2

Source: Effectiveness of environmental impact assessment in Romania and simple means to improve it, [Online] at http://www.undp.ro/libraries/projects/Effectivness_of_EIA_in_Romania_01.pdf, pp. 27-28.

Table 3: Mean values for the time periods necessary for the completion of different stages in the SEA procedure

Stages	Average number of days								
	Bucur-esti	Bacau	Cluj	Craiova	Galati	Pit-esti	Sibiu	Timis	National
From notifica-tion to public debate	337	196	320	283	201	216	263	290	263
From public debate to environ-mental approval	33	67	42	62	78	33	87	40	55,7
The entire proce-dure	370	264	362	345	272	253	348	297	314

Source: Effectiveness of environmental impact assessment in Romania and simple means to improve it, [Online] at http://www.undp.ro/libraries/projects/Effectivness_of_EIA_in_Romania_01.pdf, p. 28

Based on a sample of EIA procedures the average duration for completing the EIA procedure (from notification to the issuance date of the environmental permit) is 237 days. For specific projects we have the shortest timeframe – 37 days, at the regional branch of the National Agency for the Protection of the Environment in the region Bacau; the branch also registers the project with the highest duration of EIA, 766 days. The highest average duration was registered in Bucharest (311 days). The timeframes are relevant only if we compare them with what happens in other countries as well – generally speaking we have timeframes shorter than the average EU 27 (pp. 31-32).

Developers usually complain that these procedures take very long; NGOs argue the same but only in some cases; in others, especially when the impact upon certain species should be assessed, longer timeframes might be necessary. The main idea is to have timeframes which allow for a diligent and thorough evaluation of the environmental impact.

2.5 Utilization of the outcome of public participation

This information was obtained during the interviews we conducted for the purpose of this study. Generally speaking, under the transparency law in public administration, participating NGOs and citizens stated that during public debates, the public authorities compile in writing all the comments coming from the public; however, when the decision is made, there is seldom a discussion with regard to how comments were integrated or a motivation with regard to their rejection. This also happens in relation to public participation during SEA/EIA. One interviewee told us that during a public participation meeting, while the public was discussing about ways to amend the layout of bicycle lanes, the public authorities were already printing the final report. Generally, the perception among the participating NGOs and citizens is that the decision is made well in advance and that the public consultation/debate is just a formality public authorities need to comply with.

Another issue with regard to the outcome of public participation refers to how the information generated through various EIA procedures in an area is then used towards creating a body of knowledge regarding the environmental state (we are referring mostly to areas where cumulative impacts are likely to occur). With regard to past EIA procedures in an area there is no information available with regard to the concerns of the public and the questions asked during debates or with regard to how the quality of the EIA report assessed by the Agency for the Protection of the environment was.[20]

As stated in a different section of the paper most of the case law is generated through breaches of procedural rules. Courts of law are rarely approached to review issues regarding how the outcome of public participation actually was integrated into the adoption of the final decision of the public authority.

[20] Ibidem, 36.

3 Access to courts

3.1 Administrative appeal. Alternatives to court proceedings

With regard to access to the justice system, again a distinction needs to be made between the provisions of Law no. 544/2001 and G.D. 878/2005. According to Law no. 544/2001 if the applicants consider that their rights were breached by the action/inaction of the public body, they can lodge a complaint before a court of law. The judicial action is not conditioned upon the completion of an appeal before the administrative body which issued the act or refused to answer to the request for public information. The administrative appeal can be described as optional and it does not have a suspensive effect on the deadline for lodging a complaint before the court of law (30 days from the moment when the refuse was communicated or from the expiration of the legal deadline for answering a request (10 or 30 days depending on the complexity of the information requested)). In order to encourage applicants to go before a court of law with an alleged breach of their rights to public sector information, Law no. 544/2001 exempts such an action from any type of court fees and stipulates that the proceedings should be expeditious (article 22). Despite this last provision, court proceedings are relatively lengthy even in these cases. It is also possible for applicants who are dissatisfied with the answer of the public body to lodge a petition with the Ombudsman (People's Advocate in Romania). The applicant has to be however an individual, it cannot be a company, NGO, or any other type of legal person. The Romanian Ombudsman is a Parliamentary Ombudsman, which a few extra attributions, which determined some authors to label him as a hybrid Ombudsman.[21] It is in any case an autonomous and independent body from any other authority which reports only before the Parliament. In 2011, according to the annual report of the Ombudsman, 92% of the total complains have been related to petitions (365 complaints) and free access to public information (281 complaints).[22] Though we do not know how many of these requests (if any) concern environmental information, it is clear that public bodies still face challenges with regard to the implementation of the FOIA and also that citizens are becoming more and more aware of their rights. The effectiveness of the Ombudsman's intervention greatly depends upon the prestige the Ombudsman himself/herself enjoys in relationship to public administration. In Romania the Ombudsman is perceived at least by citizens as a last resort instance (although not an effective one), an institution you approach when other

[21] Dan Balica, 'The institution of the Romanian Ombudsman in a comparative perspective' in Dacian Dragos, Bogdana Neamtu and Roger Hamlin (eds), *Law in action: Case studies in good governance* (East Lansing, Michigan US 2011) 338-346.

[22] 'Romanian People's Advocate Annual report' (2011) available at <http://www.avp.ro/rapoarte-anuale/raport-2011-avocatul-poporului.pdf> 22 accessed 16 April 2016.

venues where exhausted or when deadlines applicable for certain court proceedings were missed.[23]

Aside from the optional appeal under the FOIA, in all other situations the provisions of the general law on administrative review (Law no. 554/2004) apply – access to a court is conditioned upon lodging an administrative appeal with the head of the public body which was initially approached with the request for environmental information. The court action regulated by Law 554/2004 is not exempted from court fees (which are not significant though).

The only situation in which the appeal is not mandatory is when it is introduced by the Ombudsman or be the Public Ministry (Prosecutor's Office). In the case of the Ombudsman, for example, the inquiry undertaken as part of his/her initial investigation is considered as an equivalent to an administrative appeal. This exemption also has to do with the fact that these institutions are seen as guarantors of the public interest.

Of course, it is important to discuss if the mandatory appeal is effective – do complaints get solved during appeal or does this step represent a hindrance applicants need to overcome in order to go to court? In theory, the assumption is that the administrative appeal will offer the public body the chance to reconsider its decision. In practice however, NGO representatives told us that there are very few cases, at least in environmental matters, when the appeal solved the problem. This only happens in their opinion if there was an honest mistake of the administration. In other cases, especially when a refusal to disclose information is involved, the decision rarely changes. There are very few studies which look at the effectiveness of administrative appeals from an empirical perspective. According to one study[24], evidence from practice is mixed – there are certain areas where the appeal leads to effective solution of the complaint before going to court.

3.2 Standing

G.E.O. 195/2005 introduced the system of *actio popularis* in environmental matters, thus giving NGOs standing to sue public authorities for breaches of the environmental legislation. Article 5 states that the Romanian government acknowledges the right of every person to a healthy and ecologically balanced environment. In order to fulfill this goal, the government guarantees the right to access to environmental information, the right to association in organizations for the protection of the environment; the right to participate in the decision-making process concerning the development of environmental policies and legislation, in the issuing of implementing regulations, in the drafting

[23] Laura A. Hossu, Radu Carp, 'Access to public information: A critical assessment of the role of the Ombudsman' in Dacian Dragos, Bogdana Neamtu and Roger Hamlin (eds), *Law in action: Case studies in good governance* (East Lansing, Michigan, US 2011) 368-372.

[24] Dacian Dragos, Bogdana Neamtu, 'Effectiveness of administrative appeals – Empirical Evidence from Romanian Local Administration' [2013] Lex Localis 1(1), 75-85.

of plans and programs; the right to lodge an administrative appeal or a court action, directly or through organizations for the protection of the environment, irrespective of the fact that the damage has already taken place or no; the right to compensation for the harm suffered. According to article 5 for the only condition for an NGO to gain standing is to have in its charter, as its mission, the protection of the environment. It should be mentioned in this context that in the situation regulated by G.E.O. NGOs are representing the rights and legitimate interests of determined natural persons.

Law no. 544/2004 which is the framework law on the review of administrative acts goes a step further than G.E.O. 195/2005 and stipulates in article 2 that *social entities* have standing and they can invoke either the harm/breach of the public interest through the challenged administrative act or they can act in their quality as representatives of determined natural persons whose rights or interests have been affected. Public interest refers to the state of law and constitutional democracy, the guarantee of fundamental rights, liberties and obligations of the citizens, the fulfilling of community needs, and the completion of the public authorities' competencies. According to article 35 of the Constitution environment-related rights fall under the category of fundamental rights, therefore all NGOs (social entities) can gain standing, no matter how their mission is defined in the charter.

The law is progressive in that it offers standing also to groups of natural persons who are not organized as a legal person, which are the holder of private rights or interests. We can easily imagine that a group of neighbors, all affected by development projects, will be allowed to have standing to sue, without the requirement of them becoming part of a legal entity, process that would add to the obstacles people face when going to court.

3.3 Review by the courts

The review by courts is limited to procedural aspects; they seldom go into the merits of the case. The intensity of the review of discretionary decisions is weak. Complex factual decisions exceed the knowledge of the judges who rule on these cases. During interviews we were told by various lawyers that judges are not very familiar with the environmental legislation and therefore are tempted to 'filter' everything through the civil procedure rules. In a recent decision of the High Court for Justice and Cassation[25], a closer scrutiny was paid to factual circumstances of a request to suspend the execution of a decision issued without the proper consultation of the public. The court stated that the first instance did not check if public consultations actually took place, despite a program being attached as a means of proof.

[25] Înalta Curte de Casație și Justiție, Decision 13 January 2012 n 106, available at <http://www.iccj.ro/cautare.php?id=67660> (in Romanian) accessed 19 April 2016.

One main limitation discussed in doctrine[26] in connection with the transparency law (Law no. 52/2003) refers to the fact that, aside from the disciplinary sanction of the civil servant responsible for fulfilling those obligations, there are no legal consequences for breaching participation rights – for example the annulment of the act. The courts have been relatively reluctant to annul administrative acts, considering that most participation-related breaches do not represent sufficient grounds for the annulment of the act. In SEA/EIA procedures, breaches of procedural law seem to carry more serious repercussions.

3.4 Remedies available

According to Law no. 544/2004, the court of law while ruling on the complaint can:

- Annul in part or in its entirety the administrative act, force the administrative authority to issues an administrative act or a certificate, permit, etc. The court of law can also decide upon the legality of acts or administrative activities based on which an administrative act was issued.
- Grant material and moral damages if the claimant requests this. When requesting damages, the claimant can also go against the public servant who is responsible for not positively solving his/her request or for not responding at all. If the action is admissible, the public servant (and possible the hierarchical superior) will pay for the damages granted together with the public authority. The deadline for asking for damages through a separate action is one year from the moment the complainant has found out the dimension of the damage suffered.
- If the subject matter of the complaint is an administrative contract, then the court can: annul it, in part or in its entirety; force the public authority to fulfil the contract with the claimant who is entitled to this; impose upon one of the party the fulfillment of an obligation; replace the consent of one of the parties when public interest is at stake; force parties to pay for moral and material damages.

It is important to note that if the complainant brings an action before the court based on the breach of a public interest, the only remedies that can be obtained are: the annulment of the act or the forcing of the public authority to issue an administrative act or another document or to undertake a certain administrative operation, under the sanction of penalties for delays or fine. It has to be said that in the past there were NGOs which asked for damages in the amount of 1 RON (symbolic amount). The courts had been, even before this legal provision, reluctant to grant them.

[26] Dacian Dragos, Bogdana Neamtu and Bianca Cobarzan, 'Procedural transparency in rural Romania: Linking implementation with administrative capacity?' [2012] International Review of Administrative sciences 78(1), 152-153.

Under Law no. 544/2004 (articles 14 and 15) it is possible to request as an injunctive relief the suspension of the execution of the administrative act whose annulment is requested by the claimant but only under well justified circumstances and in order to prevent an imminent damage from happening. The claimant can lodge a complaint with the court either when he/she lodges the administrative appeal with the issuing administrative body or alongside with the court action in which the annulment of the administrative act is required. Until the judicial case is solved, the claimant has the possibility to approach the court with a separate action regarding the granting of an injunction. The Public Prosecutors' Office (Public Ministry) can also lodge such an action for obtaining the suspension of the execution of the act provided that a major public interest is at stake, capable of disturbing the functioning of a public service of national importance.

The problem with injunctive relief is that its effectiveness depends upon how quickly the courts of law decide with regard to the request for the suspension of the execution of the administrative act. Though in theory such cases shall be dealt with in an expeditious manner (Law no. 544/2004), this does not happen always in practice. For example, there are cases when the court needed two years to rule on a request for injunctive relief.[27]

In order to prevent any abuses of public authorities, the law states that if the public authorities issue a new administrative act similar in content to the one challenged, the new act is automatically/*de jure* suspended. In this case the administrative appeal to the issuing authority is no longer mandatory.

An important provision regarding remedies refers to the possibility of the claimant to go against the civil servant who contributed to the drafting of the act, refused to issue an act or did not respond in any way to a request, provided that the claimant is also suing for damages. If the court action is admissible then the civil servant can be forced to pay damages together with the public institution. The civil servant can bring as a party to the law suit his or her hierarchical superior who gave him/her the order to act in a certain way. While Law no. 554/2004 refers to the financial responsibility of the civil servant, Law no. 544/2001 makes reference also to possible disciplinary sanctions against the public servants who are responsible for not disclosing the requested public information or for forbidding interested persons from taking part in the public meeting or from participating in the process of drafting normative acts of public interest. Thus, the unsatisfied applicant of public information can lodge a complaint with the head of that public institution. If his/her complaint is well founded, then the applicant will receive both the requested information as well as a notification comprising the sanctions taken against the public servant who was found to be guilty.

[27] Catalina M. Radulescu, 'Selected problems of the Aarhus Convention application in Romania' in European Network of Environmental Law Organizations, *Access to justice in environmental matters* (2010) available at <http://www.justiceandenvironment.org/_files/file/2010/05/JE-Aarhus-AtJ_Report_10-05-24.pdf> 82 ss accessed 19 April 2016.

One issue of paramount relevance refers to how court rulings, once they are final (the ruling of the first instance court can be challenged in front of the Appellate Court, whose ruling is final), are executed. If following the ruling, the administrative authority is forced to close, to replace or to modify the administrative act or to issue a certificate or any other document. It needs to this within the timeframe given in the ruling or a maximum of 30 days from the moment the ruling was final. In case the deadline for the execution of the ruling is not complied with, a fine can be applied in the amount of 20% of the minimum gross salary per day of delay. The head of the public authority or the public servant found guilty are the ones who have to pay the damages. The complainant is also entitled to damages for delays. The claimant has to go to court and ask for both damages and the application of the sanction. Provided that the public authority is still not executing the ruling after paying this fine (it has no more than 30 days after paying the fine to comply), criminal charges can be brought against the guilty parties (jail time from 6 months to 3 years or a fine ranging from 2,500 to 10,000 RON).

Because this book is about the legal culture in the Member States, it has to be noted that there have been numerous cases in which public authorities decided not to execute a court ruling without any repercussions. This has not only happened with regard to environmental matters but also in other contexts. Such a practice creates distrust among citizens who no longer understand why a court ruling in their favor does not automatically translate into obtaining the annulment of an act or the requested information. Eventually the public authorities comply but in the meanwhile they have again the possibility to stall a decision from being made even if this means money from the institution's budget is being spent on the fine.

3.5 Effectiveness of judicial remedies; Legal aid

Generally speaking, court proceedings are lengthy in Romania, even when the law mandates an expeditious procedure. There is no sanction for judges who invoke in their defense the numerous cases they have to rule about. During interviews complainants told us that in many cases the intention of the authorities is not necessarily to win the case but to drag on the court proceedings for as long as possible. Their reasons are twofold: In the first place in some cases a project gets executed in the meanwhile and after its completion a sanction such as the demolition of a building is perceived as excessive. Secondly, public authorities hope that complainants will give up, discouraged by the lengthy proceedings. Some lawyers are hoping that under the New Civil Procedure Code due to enter in force in summer 2013 the court actions will be a lot faster due to a restructuring of the phases of the court proceedings.

In terms of costs, the fees for starting a court action are not very high, environmental cases are, however, expensive in terms of the technical expertise they can sometimes require. During interviews we were told by NGOs that one strat-

egy used by the public authorities (Ministry of the Environment) to discourage NGOs from going before a court is to hire expensive lawyers. According to the Romanian law, the complainant, upon losing the case, will have to reimburse the other party for all the legal expenses incurred during the court action. Just the possibility of losing the case represents a gloomy perspective for the environmental NGOs – countrywide almost all of them are small organizations, which, except members' fee, donations, in some cases some grants, do not have a lot of resources.

Limited financial resources represent the main reasons why NGOs as well as individuals usually try to find procedural breaches of the environmental regulation. If one person would be interested in challenging an environmental report on its merits, this means that a counter-expertise would be needed, which is costly. NGOs have been often accused in this context that they are only trying to identify small procedural breaches but, in their turn, they argue that this is the only chance they have in some cases to be able to ask for the annulment of a certain act.

Legal aid is available but only for natural persons with limited financial means whose place of residence is in Romania or in other Member State of the European Union. With the exception of criminal proceedings, legal aid is available for all other types of proceedings and it can go toward paying lawyer's fees, interpreter's fees, judiciary executor's fees, etc. Legal aid is limited in its amount – for one calendar year one person cannot receive legal aid for any or all of the above mentioned items accounting for more than the sum of 12 minimum national gross salaries[28] (the reference year is the year when the request for legal aid was drafted) (in 2012 the maximum amount was 1866, at an exchange rate of 1Euro=4,5Ron). It is important to note that NGOs are not eligible for legal aid. It is argued that numerous environmental NGOs are willing to get involved in cases concerning access to environmental information but have limited resources. In this way the full standing for NGOs is somewhat annihilated by the fact that they cannot financially afford to go to court. In general, the amount available as legal aid is also considered to be very low, given the fact that in some environmental cases the required expertise may cost a lot.[29]

[28] Government Emergency Ordinance n 51/2008 concerning public legal aid in civil matters, published in the Official Monitor of Romania 25 April 2008, 327.

[29] European Network of Environmental Law Organizations, Justice & Environment Legal Analysis, 'The price of justice' (2009) available at <http://www.justiceandenvironment.org/_files/file/price-of-justice_romania.pdf> 6-8 accessed 19 April 2016.

4 Discussion of the main findings

4.1 Pre-implementation

The perception of the Aarhus Convention, in terms to its contribution to a better legal regime concerning access to information, participation and access to justice in environmental matters is not necessarily positive. During interviews, NGO representatives told us that it is perhaps for the first time that an international treaty was perceived as introducing less favorable provisions compared with the ones existing in the national legislation. Of course this mostly applies to free access to environmental information and to a lesser degree to the other two pillars of the Convention.

By 2000, when the Convention was ratified by Romania, the adoption of a law on free access to information was underway. The NGOs active in the field of transparency and civic participation, the media, as well as the European institutions as part of the preparation for adhesion were pressing for the adoption of this law. Through this law, adopted by the Parliament in 2001, article 31 from the Constitution which stipulates free access to public information had finally become operational.

With regard to public participation in environmental matters, the second pillar of the Convention, there were several minimal acts in place prior to the ratification of the Aarhus Convention and the subsequent transposition of the SEA/EIA Directives. Early on, Order no. 619/1992 on the procedure for establishing the minimum content of the studies and the environmental impact assessment included also requirements regarding public information and consultation. In 1995 a new law regarding the environmental protection was adopted, including provisions regarding the EIA procedure in Romania and a procedure for the public debate. The specific procedural provisions regarding EIA were regulated through the Environmental Ministry Order no. 125/1996 that approves the procedure for the evaluation of social and economic activities with impact on the environment. Order no. 278/1996 establishes the procedure for the certification of the experts to perform EIA reports and environmental audits.[30] The current provisions in place for SEA/EIA are the result of transposing the EU directives in this field.[31] All improvements in this area have been made under the influence of the EU law.

In 2002, openness and transparency in government were further enhanced through the adoption of Law 52/2003 which is the framework law regulat-

[30] For a more detailed presentation of the history of environmental regulations see: United Nations Development Programme Romania (UNDP Romania), 'Effectiveness of environmental impact assessment in Romania and simple means to improve it', see footnote 20, 7-8.

[31] European Parliament and Council Directive (EC) 2001/42 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive), OJ L197/30; Council Directive (EEC) 85/337 on the assessment of the effects of certain public and private projects on the environment (EIA Directive) as amended by Directives 97/11/EC and 2003/35/EC, OJ L175/40.

ing participation to the decision-making process of public bodies. It is worth mentioning that starting with 2006 there were several legislative efforts in the direction of creating a code for administrative procedure. Its proponents argued that it was highly needed in light of the legislative instability. At that time one proposal was to include the procedural aspects of transparency into the code – basically to abrogate the transparency law and to maintain as special legislation only the FOIA. NGOs had issued numerous protests, arguing that the FOIA and transparency laws are the result of the struggle undertaken by the civil society in their quest to promote democracy and transparency and they should be left as such – special legislation separate from other procedural laws.

The Law on the review of administrative acts (Law no. 554/2004) was among the first laws to be adopted immediately after the fall of the communist regime, before even the adoption of the new democratic Constitution. Of course the law has suffered numerous amendments (changes concerning remedies were made in late 2012) which reflect the evolutions taking place both within doctrine and in the practice of the courts, as well as the influences coming from the EU law.

4.2 Post- implementation

A distinction needs to be made with regard to the three different pillars of the Aarhus Convention in what it concerns the legal integration of the Aarhus provisions within the existing national legal framework. With regard to access to environmental information, it can be easily observable that no efforts were made to synchronize the provisions from the FOIA (the framework law) with the provisions from the Governmental Decision (G.D.) no. 878/2005 (on access to environmental information). The issue is further complicated by the fact that the two pieces of legislation do not have the same legal power – the framework law has superior legal power because it is a law voted by the Parliament where the governmental Decision is secondary legislation, whose purpose is to execute the provisions of the law and not to regulate *de novo* and in contradictory with a law. Because G.D. 878/2005 is not as 'generous' as the framework law with regard to deadlines (one key aspect) most public authorities were quick to take into consideration the provisions of the governmental decision as opposed to the FOIA. It took several years and court cases to have this practice sorted out - the courts via case law had clarified, ruling that the FOIA applies, even when the requested information concerns environmental matters. After all, this is more a problem of mindset than anything else. During interviews public servants revealed to us that sometimes they are instructed by their superiors not to respond to a request very quickly, even if they have the information ready, because this approach creates an expectation for similar treatment of future requests and/or applicants. The confusion concerning different pieces of legislation coexisting together also impacts implementation with regard to the third pillar, access to justice. In most cases (including SEA and EIA procedures), the special legislation makes reference to the general framework law on the

review of administrative acts. According to this law, a mandatory administrative appeal is in place before the issuing authority. There is however one exception: the FOIA allows applicants who consider themselves harmed to go directly to court, irrespective of the type of information requested. With respect to this later situation, the majority of the courts have ruled that the more advantageous provisions of the FOIA apply. In the rest of the cases, the integration of the access to justice clause in environmental matters had proved relatively easy. The problem is however related to the lack of training of the judges. Some of the SEA/EIA procedures are highly technical and involve in-depth knowledge of the secondary special legislation which is very detailed but also subject to numerous changes. Because of how specific the special legislation is, there is a tendency to apply general procedural rules in environmental matters as well. In a highly publicized case, namely the gold exploitation from Rosia Montana, a permit for exploration procedures was requested. In this case, the EIA procedure would have been applicable. However, invoking the provisions of a regulation which applies in ordinary cases – the silence of the competent public administration equals approval, the developer and the competent authority responsible for the protection of the environment considered the permit granted once the legal period for receiving a response from the competent public authority expired. It took a long battle in court and a lot of negative publicity for the authorities involved to finally acknowledge that such a provision cannot apply when we are talking about projects with a potential harmful impact on the environment (some corruption allegations were mentioned as well). With regard to the participation pillar, two different sets of regulations needed to be adopted – one for transposing the provisions of the EU SEA directive and one for the EIA directive. With the adoption of these two legal acts several older ones were abrogated, however for the most part they represented relative novelties within the framework of the Romanian environmental regulations (at least with regard to the level of details).

What are the post-implementation problems? As mentioned earlier, implementation failures due mainly to a weak administrative capacity at different levels represent a significant problem. Most countries in Central and Eastern Europe (especially in the context of the European integration process), during the public policymaking process, focus on adopting a state of the art legislative framework and forget about the importance of implementation, which becomes the 'missing link' of the process.[32] Makinde[33] also argues that barriers to policy implementation such as corruption, lack of continuity in government policies as well as inadequate human and material resources lead to an implementation

[32] William N. Dunn, Katarina Staronova and Sergei Pushkarev, 'Implementation: The missing link', in William N. Dunn, Katarina Staronova and Sergei Pushkarev (eds), *Implementation: The Missing Link in Public Administration Reform in Central and Eastern Europe* (Bratislava: NISPAcee 2006).

[33] Taiwo Makinde, 'Problems of policy implementation in developing nations: The Nigerian experience' [2005] Journal of Social Sciences 11(1), 63–69.

gap, i.e. the widening of the distance between stated policy goals and the realization of such planned goals. In environmental matters this tends to be even more problematic – very often in developing countries environmental aspects are considered secondary in relation to economic development opportunities. The concept of capacity is often mentioned by numerous authors in connection with policy implementation challenges. According to them, effective implementation should perhaps start by developing administrative capacity at various levels – not just central but also regional and local. By administrative capacity we mean all the different types of resources, human, material, mentalities;[34] otherwise, by focusing exclusively on the development of the legal framework, the premises for a 'strained transparency or openness' are created – inability to cope with transparency and free access to information due to an absence of resources or misunderstanding of information.[35]

Another possible explanation that could clarify challenges in the implementation of otherwise good regulations refers to how social change applies to the institutional/administrative reform process. Most of the reforms in the former communist countries took place in a context guided by international actors who provided the principles for good governance and 'exported' models of best practices regarding democratic governance, transparency, and citizen participation. The environmental field is a highly sensitive one, with numerous media scandals in the last years opposing on the one hand developers willing to offer jobs to the local population, very often from poor, under-developed areas, and the transnational NGOs and the environmentally conscious elite 'preaching' to the poor the importance of the environment. Very often the countries in transition saw the reforms as an end in themselves (meeting the requirements of international organizations; the EU in the case of new candidate countries), and less as a means toward achieving a more efficient government.[36]

This type of arguments explains perhaps best the manner in which EU Directives- including the ones in environmental matters are transposed. In most cases the Romanian transposing legislation mimics the provisions of the Directives. However, in many cases it would be necessary to go beyond the general wording of the EU law and to try to regulate in-depth certain areas where implementation challenges are bound to take place. As described above, the goal should not be to have a similar piece of regulation in national law but rather one that is useable. Very often public authorities have room for discretion and implicitly for abuse because of too general and/or unclear legal provisions.

Perhaps the biggest resistance with regard to the implementation of the provisions of the Aarhus Convention comes from the public authorities. Especially in highly technical matters there is still the mentality that the technocrats know best what needs to be done. Of course, this mentality is gradually

[34] Beth W. Honadle, 'Theoretical and practical issues of local government capacity in an era of devolution' [2001] Journal of Regional Analysis and Policy 31(1), 77–90.

[35] Martial Pasquier and Jean-Patrick Villeneuve, 'Organizational barriers to transparency: A typology and analysis of organizational behavior tending to prevent or restrict access to information' [2007] International Review of Administrative Sciences 73(1), 147–162.

[36] Amanda Frost, 'Restoring faith in government: Transparency reform in the United States and the European Union' [2003] European Public Law, 9(1), 87–104.

changing through the interaction of public institutions with the NGOs, the media, especially in highly publicized cases, the requirements of the EU law/institutions, and sometimes even with the citizens. In general in Romania it is the NGOs that take advantage of the provisions which allow them access to environmental information as well as participation rights. If we look at government statistics (National Agency for the Protection of the Environment), we can see that the majority of applicants for access to environmental information are NGOs. In some cases NGOs are able to also mobilize few interested citizens (neighbors for example).

The best way to illustrate the attitude of public authorities with regard to environmental matters is by means of an example. In recent years municipalities as well as rural communities have been under tremendous pressure to close down garbage dumps that do not comply with the requirement of the EU legislation. In rural areas steps toward compliance had been made but in rural communities, where financial resources and expertise are lacking, public authorities are silently encouraging the citizens to deposit the garbage on vacant plots at the outskirts of the communities. One public servant informally declared to us that the public institutions had done its part of the job, namely closing down of the dumping site, but the institution cannot be hold accountable for what the citizens do. Of course, the missing part of the story is that the public authority can give sanctions and more importantly, has the duty to provide the citizens with a new dumping facility. This story shows the fact that very often public authorities forget the role of environmental laws – they do not represent an end but rather a means toward protecting the environment and making sure that the best developments occur in a community.

CHAPTER 9

The Implementation and Influence of the Aarhus Convention in Spain

Jorge Agudo González

1 Introduction

Spanish administrative law shares a common legal culture with continental administrative law. In fact, Spanish administrative law has evolved under foreign influences, mainly from French and German law. In contrast with those States with a strong administrative law tradition, Spanish administrative law is in a better position to receive further influences due to its own idiosyncrasy. The implementation of the Aarhus Convention (AC) is clearly a further example of new inputs, in this case from international/European law.

The principles underlying the Spanish legal order concerning the three pillars of the AC have a different depth in the Spanish legal system. To start with access to information, this right has traditionally been limited to a defensive perspective related to the '*audi alteram partem*' principle and progress is evidently related to a top-down influence: In this regard the Spanish legal system has been 'Europeanized'.

Regarding participation, there is an old tradition not only linked to the right to be heard, but to public participation in and of itself. Mandatory participative proceedings have been a part of Spanish administrative procedures for more than one hundred and fifty years. Progress in this respect has to do with the substantive relevance of these proceedings. Traditionally, participation has been considered as a formal compulsory requirement with no substantive transcendence.

Finally, with regard to access to justice, the Spanish legal order underwent major development after the Constitution of 1978 was enacted. A broad legal standing had been recognized by case-law before the new Administrative Justice Act of 1998 was passed. Collective interests, including environmental ones, could be protected before courts due to a comprehensive acknowledgement of legal standing. In this regard, issues arose from a deficient understanding of the AC or, possibly, the deliberate intention of reducing access to justice.

2 First pillar: the right of access to information

2.1 The pre-implementation phase: Early and limited acknowledgement connected to a defensive approach

Very limited rights of access to documents, rather than information, were provided in an ample set of rules enacted in the first decades of the 20th century and even earlier. Nevertheless, this was not a right generally recognized in the Basis Act of 19 of October 1889, named as '*Ley Azcárate*' –

Azcárate's Act –[1], but specifically assumed in certain regulations that developed the Act.[2]

The granting of this limited right has been a constant in Spanish administrative law even during Franco's dictatorship when the Administrative Procedure Act (APA) of 1958 was passed. In other words, access to documents was recognized very early by Spanish law, but this right was assumed in a very limited approach, accordingly with the necessities of a proper defence of interested parties' rights and interests.

The step forward occurred when the Constitution of 1978 was enacted. According to Article 105(b) of the Spanish Constitution, Article 35(h) APA of 1992 stated the right to access of all citizens to public records and archives. Article 37 developed the terms in which this right can be implemented, but this article was criticized for the limits it established which are neither present in

[1] Spain is probably one of the first State in the world to approve an Administrative Procedure Act. The particular codification of the Spanish process started on 31 December 1881 with the approval of the '*Ley Camacho*', a Basis Act on Tax Claims. Francisco López Menudo, 'Los principios del procedimiento administrativo' [1992] Revista de Administración Pública (RAP) 129, 38, stated that this regulation confirmed the constant anticipative sense of tax law in relation to administrative action, imposing shifts to the general rules and introducing new techniques for administrative law. In 1889 a general Basis Act was passed on 19 October, named '*Ley Azcárate*'. The Act had just five articles, reflecting an embryonic procedural law and embodied the general absence of concern about procedural law in that era. It is interesting to note the lack of deep legal treatment of this topic in the publications in the final of the 19th century and the beginning of the 20th century – *e.g.* Manuel Colmeiro, *Derecho Administrativo Español* (vol. II, E. Martínez 1876) and Vicente Santamaría Paredes, *Curso de Derecho Administrativo* (Ricardo Fé, 1891) – where it can be observed that administrative procedure is not assumed as a system of rules and principles with its own substantivity. The aim of the legislature in approving Azcárate's Act was to fix the basis for the subsequent approval of specific regulations governing the different areas of administrative action. According to Sabino Álvarez-Gendín, 'Estudio de la nueva Ley de Procedimiento Administrativo' [1958] RAP 26, 176-177, more than a dozen of regulations were passed, giving rise to a negative diversification. Contrary to civil procedure, the accessory meaning of procedures linked to substantive rules spoiled any possibility of uniformity because of the need for a connection between the procedure itself and the material subject: a single *modus procedendi* might not be valid for the Administration as a whole, several procedures being used depending on each mode of administrative action.

[2] The regulations passed for the Ministry of Justice, of 9 July of 1917, the regulation on economic-administrative claims, of 29 July 1924, as well as the one passed for the Government Ministry, of 31 January 1947, established that the interested parties had the right to be informed by the officials in charge about the state of the administrative file. The regulation for the Government Ministry also established the right to knowledge of all the documents included in the file and to obtain certified copies of these documents. More important is the way case-law interpreted these rights. Enrique Serrano Guirado, 'El trámite de audiencia en el procedimiento administrativo' [1951] RAP 4, 165 ff., affirmed the extent of these rights to the entire file because if the interested parties have the right to allege, they must necessarily have access to the file in all its extent in order to make proper allegations.

European law, nor in other national legal orders, and has been questioned by legal scholarship.[3]

In fact, when the Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment was passed, the Spanish Government reported to the Commission that the abovementioned Article 37 was the provision that implemented such a Directive in Spain. Due to the restrictive terms of this article, the European Commission began a non-compliance procedure against Spain. Thus, in order to comply with the Directive, Act 38/1995 of 12 December was enacted.

2.2 The post-implementation stage: Extensive development of this right through top-down influence

Compliance with the AC, and therefore with Directive 2003/4/EC, was carried out by the Spanish Kingdom with the enactment of Act 27/2006, of 18 July on access to information, public participation and access to justice rights (IPJ Act). The new Act regulates the right to access information, participation and justice. With regard to access to information, the IPJ Act revokes the former rule in this area, the aforementioned Act 38/1995. The right of access to information strictly speaking is provided in Article 3(1) and has been stated in a broader sense than the APA of 1992 and Act 38/1995.

Before going into a detailed analysis, it is necessary to highlight that progress always stems from the execution of European rules rather than the evolution of interior regulations. This constant process probably explains the lack of a systematic construction of the right of access to information. There are at least three provisions whose aim is linked to the implementation of this right. Article 37 of the APA enacted in 1992 maintained the same content as was mentioned before until it was derogated by the new APA of 2015;[4] Act 37/2007, of 16 November, on the re-use of public sector information, which implements the Directive 2003/98/EC, of 17 November; and the aforementioned the IPJ Act. Article 3(4) of Act 37/2007 rules the relationship between these two Acts: The contents of Act 37/2007 do not restrict the more favourable provisions on access to information or re-use of information set forth in sectorial rules such as the IPJ Act.

Moving on to another issue, it must be highlighted that case-law concerning this subject is not as extensive as might be expected, considering that the first Act was enacted in 1995. On the other hand, it is true that the number of

[3] Emilio Guichot Reina, *Transparencia y acceso a la información pública en España* (Fund. Alternativas 2011) 28, mentions both reducing access to information to those who are entitled by a direct legitimate interest and the length of the period for answering requests (3 months).

[4] The APA of 1992 has been recently derogated by new APA of 2015, Act 39/2015, of 1 October. The new Act gets into force on October 2015. As far as this paper is concerned, this legal change is not relevant. Access to information is now regulated by Act 19/2013, of 9 December, but relating to access to environmental information, its legal regime is still under IPJ Act.

requests has been quite large. This conclusion connects with the lack of effective guarantees for protecting the right of access to information. The slowness of judicial review prevents immediate protection and, in many cases, recognition of the right comes too late. Nevertheless, when a claim has been lodged, both the predominant role of eNGOs as claimants and the success of most of their claims are remarkable. This high degree of success has to do with administrative bodies' traditional reluctance to maintain a broad interpretation in any aspects liable to impact administrative effectiveness.

Beginning with the analysis of the IPJ Act, in comparison with the generic Article 6 of the former Act 38/1995, significant progress is to be noted in the area of active dissemination of information. According to Article 5(2) and (3) of the AC, Article 5 on one hand, and Articles 6 to 8 on the other of the IPJ Act implement the new requirements concerning collection and dissemination of environmental information. Concerning the general duties provided for in the AC, the Spanish Act follows the general scheme of the Convention rather than the scheme established in Directive 2003/4/EC.

Article 5(1) establishes several public authorities´ duties such as providing adequate information of public rights and the way to exercise these rights: Supplying advice and assessment; making lists of public authorities freely available; guaranteeing quick processing of requests, etc. Paragraph 2 establishes the duty of collecting accurate, comparable and updated information. Finally, the last paragraph of Article 5 imposes upon public authorities the specific obligation to take all the necessary measures to foster the effective application of this right, including the formal creation of bodies with the aim of complying with this right, creating and maintaining means of consultation, or creating records, information lists or information points where clear instructions about the location of the information requested is given.

Concerning the dissemination of specifically environmental information, Article 6 establishes the general duty of providing gradual, systematic and active diffusion of organized and updated information. To comply with this duty, the same Article demands that public authorities encourage access to such information by means of databases or website links and, generally speaking, through the implementation of new technologies.[5] Related to the information that should be actively disseminated, Article 7 provides a non-closed list of minimum requirements, including all those mentioned in Article 5(3) of the AC such as environmental reports – regulated in Article 8 IPJ Act – and others required by Directive 2003/4/EC on environmental impact assessment and integrated pollution, prevention and control fields, according to the amendments to Directives 85/337/EEC and 96/61/EC.

[5] See Antonio Magariños Compaired, 'Viejos y nuevos productos y herramientas: bibliografía, cartografía, estadísticas. Los informes SER', in Antonio Magariños Compaired (ed), *Derecho al conocimiento y acceso a la información en las políticas de medio* ambiente (INAP 2006) 147-207, for a broad collection of databases and institutional dissemination mechanisms.

A relevant issue in the implementation of Directive 90/313/EEC was the information that Member States were obliged to transmit to the public. Under Article 4(1), AC, the information which is accessible has been broadened. This avoids the kind of restricted interpretation that occurred in certain Member States, Spain included, when the Directive 90/313/EEC was still in force, which left aside environmental information related to environmental policy effects on public health, nuclear energy and financial reports of projects that may affect the environment. The new requirements were imposed by CJEU case-law and were claimed early on by the Spanish Supreme Court case-law. In other words, the Spanish law includes a wide development of fields where the right may be exercised – Article 2(3) –, regardless of the material form in which the information is found, and without considering the applicants' interests or the purposes for which the information would serve.

Moving on to access to information upon request, the question as to whether the right entitles individuals to request documents and/or worked out information has already been posed.[6] In Act 2007/26 there is no explicit provision imposing the requirement to collect and process information. The Act currently in force is not clear in this regard, but a positive interpretation[7] could be deduced.[8]

The Preamble of the Act and Articles 5(2) and 6(2) only refer to collection and information processing when collection and dissemination of environmental information are stated. The close link between these duties and the ordinary activity of administrative bodies when responding to requests for information allow a common solution to be understood also in this second case. Closely related to this, Article 2(5) defines the term 'information which is held by public authorities' as the environmental information possessed, received and processed by public authorities. This provision is clearly related to Article 10(2) where the duties of the authority to respond are determined. Therefore, public authorities are obliged to give processed information unless the request is included in one of the exceptions provided.

Article 12 IPJ Act mentions that the national authorities must inform, provided that it is requested for the interested parties, about the place where the 'method used in obtaining the information' can be found. This highlights that

6 Lucía Casado Casado, 'El derecho de acceso a la información ambiental a través de la jurisprudencia' [2009] RAP 178, 294-295, shows examples of regional Courts' judgments refusing such a possibility.

7 See Ángel Ruiz de Apodaca and José Antonio Razquin Lizárraga, *Información, participación y justicia en materia de medio ambiente* (Aranzadi-Thomson 2007) 207, Ricardo García Macho, 'La transparencia en el sector público', in Avelino Blasco Esteve (ed), *El Derecho público de la crisis económica. Transparencia y sector público. Hacia un nuevo Derecho Administrativo* (INAP 2012) 267 and Emilio Guichot Reina, *Transparencia y acceso a la información pública en España*, see footnote n. 3, 28.

8 However, it is necessary to mention that, as the Supreme Court has already maintained, this duty cannot be transformed into a firm obligation to communicate processed information individually, because in such a case the duty of dissemination would become confused with the duties of responding upon request.

the Spanish Act attributes duties regarding certain processed information which is related to information upon request.

Going further, another issue that is quite relevant but unsatisfactorily provided for under the former Act of 1995 was the definition of 'public authorities'. Article 2(4) IPJ Act broadens the definition of 'public authorities' obliged to give information. This definition includes the State Government, regional and local Governments, public and even private entities if they are empowered to carry out public responsibilities or functions and public services. This is an important way to avoid the non-fulfilment of the Act by means of the creation of private entities by public authorities.

Another important matter in this regard is the express reference to the Government, because according to the former Act, political action by Governments remained outside of the Act's field. On the other hand, it is highly important that the new article does not refer at all to the need for public authorities to exert power in the environmental field. Under the force of the former Act there were certain agencies and bodies that rejected requests for information on the grounds that they lacked public powers in the environmental field, although they could have information with environmental significance. The current Act just requires that public authorities 'possess' such information regardless of the field in which they are actually empowered to act.

Regarding the way exceptions have been provided, Article 13 rules two types of exceptions: Formal and material exceptions. Formal exceptions are related to the mode and before whom the request was made: Addressed to an authority that does not possess the required information; reasonability of the request; availability of the information, etc. Material exceptions are related to other legal goods such as confidentiality – in the same cases set by the AC: Administrative proceedings, commercial and industrial information, personal data[9]-, national defence, public security or *sub iudice* information among others. The only significant difference is related to industrial property rights which have been added to intellectual property rights. In any case, exceptions are stated including details aimed at limiting the possibilities for denial.[10]

According to CJEU case-law and currently to Article 4(4) of the AC, these exceptions will be interpreted strictly.[11] With regard to this aim, the article states

9 There has been an administrative trend toward refusing any information which includes personal data, although the information referred to public activities. Spanish case-law has not clarified the relations between the right to access to information and personal data protection rights.

10 See José Antonio Razquin Lizárraga, 'Los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente' [2008] QDL 16, 164.

11 Also according to Spanish case-law, see Blanca Lozano, 'Análisis general de la Ley 57/2006 de acceso a la información, participación pública y acceso a la justicia en materia de medio ambiente' [2008] Estudios de Derecho Judicial 137, 191. See also Ángel Ruiz de Apodaca and José Antonio Razquin Lizárraga, *Información, participación y justicia en materia de medio ambiente*, see footnote n. 7, 236 ff. and Lucía Casado Casado, 'El derecho de acceso a la información ambiental a través de la jurisprudencia', see footnote n. 6, 296 ff.

that the denial of information must balance the public interests which would be satisfied with the conferral of information against the interests that allow for its denial. From this point of view, *praxis* shows an increasing control based on reasonability and proportionality of administrative decisions rather than the fulfilment of the material exceptions.[12]

The time limit to respond to requests is one month, unless the volume and the complexity of the information justify an extension of this period up to two months (Article 10(2.c), according to Article 4(4) of the AC). The public authority is obliged to respond within this time frame, delivering the information or, when necessary, the reasons for denying the request. What happens if the decision is not taken on time? Article 4(1) in the former Act stated that when the decision was not taken in a timely manner, the 'administrative silence' should be understood as a negative decision. This Article was amended by Act 55/1999 of 29 December, which eliminated this aspect. The new IPJ Act does not establish anything concerning this issue. According to the general rules of the APA of 1992, in those cases where a sectorial Act does not foresee any other solution, then the 'administrative silence' must be understood as favourable. Nevertheless, the issue remains because although the lack of an explicit decision gives rise to the recognition of the right from the moment the information was requested, and the only way to make it real is by bringing a claim before the competent judicial body.

To end with the payment of fees, Article 15 establishes this possibility, but does not specifically mention that the fee must be 'reasonable'. This has been an important issue in Spanish practice, because of the high taxes ordinarily imposed on requests for information. Thus, Article 3(1.g) establishes the public right to view the list of taxes and prices, if any, for receiving the requested information, and the circumstances in which they may be required or waived.[13]

3 Second pillar: public participation rights

3.1 Pre-implementation phase: a legal tradition with long-standing practices

Azcárate's Act of 1889 assumed the instrumental concept of administrative procedures according to the traditional focus of administrative law on lawfulness of administrative action – *principe de légalité* – and to the

[12] See José Ignacio Cubero Marcos, 'Excepciones al derecho de acceso a la información en materia medioambiental' [2008] Estudios de Derecho Judicial 137, 164.

[13] Regarding the Spanish shared public power system, the IPJ Act only provides the taxes that State and local administrative bodies are entitled to receive. The 1st Additional Provision of this Act sets out a range of cases in which the request for information will be free of charge taking into account the material form and the amount of information requested. Finally, the 2nd Additional Provision states the possibility for local governments to charge a specific tax in this area, following the same rules.

influence of judicial patterns. In other words, administrative procedures' functions are to guarantee citizens' rights and ensure the proper implementation and enforcement of the law.[14] In fact, administrative procedures arose under the influence of judicial procedure, due to the need for conferring on citizens the same procedural guarantees as on those who claim before courts.[15]

The Act of 1889 took care of providing for the actions of parties and interested persons throughout the procedure. For this reason, the first concern was defining the concept of '*interesado*' – interested party – as the person whose legal *status* can be affected in a positive or negative sense by the final decision, *i.e.* conferring or, to the contrary, prejudicing the person's rights and interests. This concept was initially restricted as a reflection of the legal standing regulation: Only those who hold a subjective right or a legitimate interest – *interés directo* or direct interest – in the final decision were entitled to take part in an administrative procedure.

Interested parties already had the right to be heard. The 10th Base of Act 1889 established that before making the decision it was 'mandatory' to advise the interested parties in making allegations as well as presenting the documents they consider necessary to succeed in their claims (*audiencia*, or hearing, as a show of the *audi alteram partem* aphorism[16]). The right to be heard constituted one of the classic procedural guarantees directly linked to the rule of law principle[17] and the defensive approach to administrative procedures as a reflection of judicial processes. For this reason, since that early period the *audiencia* has been a key proceeding and non-compliance with this requirement was sufficient grounds for voiding the decision.[18]

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[14] See Enrique Serrano Guirado, 'El trámite de audiencia en el procedimiento administrativo', see footnote n. 2. Javier Barnés Vázquez 'Towards a third generation of administrative procedure', in Susan Rose-Ackermann and Peter Lindseth (eds), *Comparative Administrative Law* (Ed. Elgar Pub. 2010) systematizes correctly this first generation of administrative procedures in comparison with the second, focused on rule-making processes, and the third generation, based on new governance patterns.

[15] See Segismundo Royo Villanova, 'El procedimiento administrativo como garantía jurídica' [1949] Rv. de Estudios Políticos 48, 63-64.

[16] However, the administrative procedure regulations that developed the 1889 Act limited the '*audiencia*' in certain cases. For instance, the Decree of 7 September 1954 for the Industry Ministry provided that there would not be '*audiencia*' in cases whose file consisted of documents submitted by the interested party. Similar provisions are currently in force.

[17] Francisco López Menudo, 'Los principios del procedimiento administrativo', see footnote n. 1, 42, affirms that an analysis of case-law in the period 1889-1958 allows some embryonic general principles of administrative procedure to be identified. The author mentions the existence of many judgments that pass decisions according to a general principle of fairness, later formulated as general principles of administrative procedure such as the right to be heard.

[18] See Segismundo Royo Villanova, 'El procedimiento administrativo como garantía jurídica', see footnote n. 15, 90 and Enrique Serrano Guirado, 'El trámite de audiencia en el procedimiento administrativo', see footnote n. 2, 136 ff.

The rights of interested parties were confirmed even under Franco's dictatorship.[19] First of all, it is necessary to highlight the APA of 1958. Related to the concept of interested party, the 1958 Act maintains the provisions formerly stated in many regulations approved in developing the 1889 Act, although a more precise and technical wording is given as well as a broader view of the concept. According to Article 23, the following are entitled to take part in an administrative procedure: a) those who promote the procedure as holders of rights or legitimate interests; b) those who, prior to beginning the procedure, hold rights which may be directly affected by the decision; and c) those whose legitimate, personal and direct interests may be affected by the decision and make themselves known during the proceedings while the decision is being taken.

The APA of 1958 did not place citizens on an equal standing with the Administration. However, the Act provides interested parties with sufficient defensive tools: 1) Article 81 established the inquisitorial principle as one of the axes of administrative procedure, but at the same time recognized the initiative of interested parties to request proceedings in order to determine and examine data on the basis of which a decision would be taken. 2) The interested parties also had the right to allege – adversarial principle – whatever they consider necessary at any moment before the hearing. That information should be taken into account by the competent body when making the decision (Article 83). 3) Article 91 established the right to be heard, whereby interested parties might allege and/or present any reasoning or relevant documents to defend their rights and interests.[20] The conclusion at this stage is clear: Under Franco's dictatorship, individuals' right to be heard was effectively granted by Spanish administrative bodies and courts.[21]

As far as public participation is concerned, there are long-standing precedents that confirm to what extent public participation is also a tradition in the Spanish legal system.[22] The acknowledgment of public participation also developed during the dictatorship. Here it is necessary to differentiate between

[19] Notwithstanding the absence of democracy, and as many scholars still believe, this was the 'golden age' of Spanish administrative law because of the quality of the Acts approved during this time.

[20] Several cautions were provided for: a) Hearings should take place before the final decision is made, once the case is completed; b) Hearings should take place before the case is delivered to the Legal Assessment body and to the *Consejo de Estado* – Council of State – to allow those bodies to take all these considerations into account; c) The hearing would not be necessary in cases in which the case consisted solely of information given by the interested party.

[21] Under this authoritarian regime, individual's participation only served to extend the rule of law to cover the administrative agency's action, without any democratic connotations. See José Antonio Tardío Pato, 'El principio constitucional de audiencia del interesado y el trámite del artículo 84 de la Ley 30/1992' [1992] RAP 17, 116; Oriol Mir Puigpelat, 'Participation in Administrative Procedure: Lessons from the Spanish Experience' [2010] Italian Journal of Public Law 2 (2), 335.

[22] For example, Article 118 of the Public Works Act of 1877 provided that a specific participation procedure, was intended initially for those affected by expropriations, and secondly '*to the rest of individuals*'.

the general recognition made by the APA of 1958 and specific acknowledgement in several sectorial fields, mainly related to planning and rule-making processes. Accordingly with the first approach, the 1958 Act again distinguished twofold. On the one hand, Article 87 makes a general provision related to adjudication procedures, according to which the competent body will decide whether public participation is required – through specific proceedings named '*información pública*' – due to the specific characteristics of the case or when it affects professional, economic and social interests of specific stakeholders legally organized and protected . In these cases, the proceedings will be officially published in order to allow the public to examine the file and make allegations.

This general provision was later completed in the section 'special administrative procedures' with a specific provision for rule-making processes.[23] Article 130 set forth, firstly, institutional participation, that is to say a specific hearing with specific addressees rather than an open public participation. This procedure referred to the participation of certain entities that legally represent and defend general or corporate interests which could be affected by the provision. The aim of this special hearing was to allow all these entities to make allegations through a reasoned report, unless public interests duly motivated in the case could justify not proceeding with this participation. Before the Constitution was in force, case-law generally considered this as a non-mandatory procedure whose fulfilment was discretionary.[24]

Secondly, Article 130(5) stated a general right to participation when the competent Minister decided that the regulation would be submitted to public participation as long as it was advisable to take into account the characteristics of the provision. However, whereas the institutional hearing provided in Article 130(4) had a direct reflection in legal standing, granting the possibility to claim, the individuals taking part in the public participation proceedings did not have the legal condition of interested parties and, therefore, could not bring a claim before the courts. At this point it is very interesting to note that the preamble to the 1958 Act referred to this procedure affirming that the rule-making process endeavoured to assure both the legal correctness of the rule and learning the opinion of the public through participation.

On the other hand, there were many sectorial statutes establishing mandatory provisions in order to foster public participation maintaining the tradition

[23] It is necessary to clarify that the 1958 Act referred exclusively to the rule-making power of State Administration, leaving aside the local Government regulated specifically by Local Government Law.

[24] Jesús González Pérez, 'El procedimiento para elaborar disposiciones de carácter general' [1963] RAP 40, 16; Manuel Rebollo Puig, 'La participación de las entidades representativas de intereses en el procedimiento de elaboración de disposiciones administrativas generales' [1988] RAP 115, 102, and Enrique Alonso García, 'La participación de individuos en la toma de decisiones relativas al medio ambiente en España' [1989] RAP 61, 53.

established by the Public Works Act of 1877.[25] Failure to carry out such proceedings led to the annulment of the administrative decision.

The enactment of Spanish Constitution in 1978[26] determined a binding re-interpretation of those Acts in force already mentioned.[27] Nevertheless the traditional inquisitorial principle which has governed administrative procedures in the Spanish legal system since the 19th century, Article 24 gave rise to a certain strengthening of the adversarial principle.[28] Equally, the rights to

[25] *For example* Act of 1947 on road transport permits, Act of 1954 on expropriation, Act of 1957 on Forests, etc. Another outstanding Act which recognized mandatory public participation was the Urban Planning Act of 1956. The Act provided for two mandatory public participation procedures in urban planning processes. Firstly, in the initial stage of the process considering the drafting of the plan and, secondly, once the draft had been obtained the initial approval (*aprobación inicial*) by the Local Council. Likewise, the Act stated that the Local Council must consider the opinions of the public and, where appropriate, modify the draft. On the other hand, Courts were generous to allow openly public participation.

[26] Some remarkable articles are the following: - Art. 9(2): 'It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life'. - Article 24(1): 'Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended'. - Art. 105: 'The law shall regulate: a) the hearing of citizens directly, or through the organizations and associations recognized by law, in the process of drawing up the administrative provisions which affect them; b) the access of citizens to administrative files and records, except as they may concern the security and defence of the State, the investigation of crimes and the privacy of individuals; c) the procedures for the taking of administrative action, guaranteeing the hearing of concerned parties when appropriate'.

[27] Even before 1978 there were some remarkable academic articles invoking the need for a shift both from the re-legitimacy of Administration considering new parameters of administrative action, such as participation [Santiago Muñoz Machado, 'Las concepciones del Derecho Administrativo y la idea de participación en la Administración' [1977] RAP 84, 528 ff.] or from the perspective of deeper legal protection, enlarging the legal standing beyond individuals' direct interests [Alejandro Nieto García, 'La discutible pervivencia del interés público' [1977] REDA 12, 39 ff.] and towards the judicial protection of collective interests [see also Alejandro Nieto García, 'La vocación del Derecho Administrativo de nuestro tiempo' [1975] RAP 76, 24 ff.]. The coming into force of the Constitution had important consequences in legal scholarship. There were many academic works giving full significance to the shifts triggered by the new Constitution, invoking the need of re-interpretation of the Acts in force. Miguel Sánchez Morón, 'El principio de participación en la Constitución Española' [1979] RAP 89; Lorenzo Martín-Retortillo Baquer, 'El genio expansivo del Estado de Derecho' [1965] RAP 47; Alfonso Pérez Moreno, 'Crisis de la participación administrativa' [1989] RAP 119; Ángel Sánchez Blanco, 'La participación como coadyuvante del Estado Social y Democrático de Derecho' [1989] RAP 119; Enrique Alonso García, 'La participación de individuos en la toma de decisiones relativas al medio ambiente en España', see footnote n. 24.

[28] This was the early opinion of Francisco López Menudo, 'Los principios del procedimiento administrativo', see footnote n. 1, 52 ff., but the Constitutional Court has affirmed that the guarantees stated in

be heard and of access to archives were directly concerned, as emphasized by Article 105.[29] Nonetheless, the terms expressed in Article 105 are imprecise, and several expressions are unsatisfactory.[30]

On the other hand, the lack of any specific mention of administrative participation in Articles 9(2) and 24 is of no significance given the connection with Article 105, whereby it is mandatory for public powers to remove any obstacles to ensuring favourable conditions for administrative participation.[31] Furthermore, regarding public participation early cautions were raised concerning the satisfactory implementation of constitutional requirements, considering among others the requirement of effectiveness in administrative actions according to Article 103 of the Spanish Constitution.[32]

The APA of 1992 – *Ley 30/1992* – of 26 November is a good example of how traditional legal concepts are maintained and of their evolution and adaptation. The same must be said concerning the new APA of 2015 which will get into force in October 2015. As far as these questions are concerned, the new Act maintained the same legal provisions with no relevant changes.

A good example is the well-known concept of '*interesados*' – interested parties – in administrative procedures. Article 31 of the APA of 1992 (new Article 4 of APA 2015) defines this concept in a wider sense than its normative predecessors: a) holders of rights, legitimate interests and collective interests who promote the administrative procedure; b) those whose rights could be affected by an administrative decision although they do not promote the procedure; c) those whose

Article 24 are only translatable to administrative infringement procedures.

[29] In fact, this Article sets out the basis to link participation with transparency, see Miguel Sánchez Morón, 'El principio de participación en la Constitución Española', see footnote n. 27, 201.

[30] These open terms provided the basis for some early judgments of the Supreme Court highlighted that Article 105 was a mandate for legislature but not for the judiciary. Enrique Alonso García, 'La participación de individuos en la toma de decisiones relativas al medio ambiente en España', see footnote n. 24, 52 criticized this case-law, considering the supremacy of the Constitution maintained by the Constitutional Court, whereby the APA of 1958 should be interpreted according to the constitutional requirements, regardless of the diligence of legislature to comply with the constitutional mandates. Concerning rule-making, Manuel Rebollo Puig, 'La participación de las entidades representativas de intereses en el procedimiento de elaboración de disposiciones administrativas generales', see footnote n. 24, 107 ff., explains how according to Article 130(4) of the 1958 Act, which was still in force, case-law upheld the non-mandatory character of this procedure and the high degree of discretion given to the Administration.

[31] Anyway, the Constitution achieved a lower development than the Portuguese and Greek Constitutions which had influenced the Spanish Constitution, see Ángel Sánchez Blanco, 'La participación como coadyuvante del Estado Social y Democrático de Derecho', see footnote n. 26, 142-143.

[32] In this regard, Alfonso Pérez Moreno, 'Crisis de la participación administrativa', see footnote n. 27, 126 ff., suggested an administrative participation scale which would allow to modulate the intensity and variety of participative techniques. Equally, the author deduced, regarding the principle of proportionality, a principle of participative congruence which could condition participation by virtue of public goals and administrative effectiveness.

legitimate, individual or collective interests could be affected by the administrative decision and are present during the proceedings until the decision is made. A second paragraph adds that associations and organizations representing social and economic interests will be considered holders of collective legitimate interests according to the specific recognition in each Act.[33]

Further to this, Article 79(1) (new Article 76) sets forth the same procedural guarantee previously established in Article 83 of the 1958 Act: Interested parties have the right to allege whatever they consider necessary at any moment before the hearing, and that information should be taken into account by the competent body when making a decision. Aside from this regulation, Article 35(e) provides this procedural guarantee as a right held by citizens who take part in an administrative procedure. On the other hand, according to Article 105(c) of the Constitution and following Article 91 of the 1958 Act and its predecessor, the 1889 Act, Article 84 (new Article 82) regulates hearings under almost the same terms. What are the differences between Articles 79 and 84? The right of interested parties to allege, provided for in Article 79, is voluntary and does not imply any duty on behalf of the Administration except taking into account the allegations made. On the contrary, Article 84 implies a duty to the Administration, but the right is also for interested parties. Anyway, except in administrative infringement procedures, case-law is strongly criticized due to the limited *ex post* correction in terms of validity, mainly to those cases where the omission of the hearing takes place. In these cases, the lack of defence has not any legal consequence provided that the undefended part has been able to allege *a posteriori* all what deems necessary, for example, by means of previous administrative recourses or bringing an action before courts.[34]

In relation to public participation, Article 86 (new Article 83) regulates public participation (*información pública*). The terms are quite similar to Article 87 of the 1958 Act but some shifts deserve comment. As far as adjudication procedures are concerned, the new regulation is almost the same but for two issues. According to the new provisions, the competent body will decide whether public participation is required due to the specific characteristics of the case, but now the other exception provided in the old Article 87 APA of 1958 has disappeared: 'when affecting professional, economic and social interests legally organized and defended by certain stakeholders'. It is not necessary to explain

[33] In comparison with the APA of 1958, the Act of 1992 removed the requirement for direct affection by a decision – direct interests. Additionally, legitimate interests are understood in a very broad sense, including individual and collective interests. See Juan Alfonso Santamaría Pastor and other authors, *Comentario sistemático a la Ley de Régimen Jurídico y Procedimiento Administrativo Común* (Ed. Carperi 1993) 119-120; Ángel Sánchez Blanco and other authors, *Aproximación a la Ley de Régimen Jurídico y Procedimiento Administrativo Común* (Aranzadi 1993) 81, and Jesús González Pérez and Francisco González Navarro, *Régimen Jurídico de Procedimiento Administrativo Común* (Civitas 1993) 402.

[34] See César Cierco Seira, 'La subsanación de la indefensión administrativa en vía de recurso' [2006] RAP 170, 145 ff., and José Antonio Tardío Pato, 'El principio constitucional de audiencia del interesado y el trámite del artículo 84 de la Ley 30/1992', see footnote n. 21, 121 ff.

that, unlike hearings, which are limited to the interested parties, public participation is open to all citizens.

Other new items, to a certain extent previously recognized by case-law, are found in Article 86, paragraph 3. First of all, failure to take part in these proceedings shall not prevent interested parties from claiming. Secondly, participation in such proceedings will not confer the legal condition of interested parties, but those who submit comments to the proceedings are entitled to obtain a reasoned response, which may be common to all claims which raise substantially similar issues.

Moving on to another subject, the APA of 1992 does not regulate rule-making procedures. This is the reason why it is necessary to take into account many other regulations that provide for this type of procedures. One of these is Article 24(1), *Ley* 50/1997 of 26 November, on Government, applicable to the National Government. This rule states that in the drafting of administrative provisions it is mandatory to hold a hearing as long as the rule may affect rights and legitimate interests of citizens, directly or by means of legally recognized associations and organizations. Likewise, the same article states that when appropriate, according to the characteristics of the provision, it will be submitted to public participation. As far as this procedure is concerned, the new APA of 2015 modified *Ley* 50/1997 including a new and very developed proceeding, where participation reaches a very relevant position. This procedure is now regulated in Article 26 of *Ley* 50/1997 including, aside from the hearing of the legally recognized associations and organizations, a general participation of the public through internet tools, whose aims are related to justification of the proposal, goals, alternatives etc. that takes place at first stage of the proceeding.

In this regard, and relating to '*información pública*' proceedings, it is worth noting the large number of Acts which have established public participation as a mandatory procedure. Many of them are rule-making processes, but not necessarily. In many cases they are a reflection of European law but in other cases they are the continuation of a legal tradition such as happens in the field of urban planning. When mandatory, case-law is very strict in annulling those acts and provisions made without this procedure.

Lastly, under Article 86(4) of APA of 1992, as long as it is provided for in specific provisions, the public administration may impose other forms for citizen's participation, directly or through legally recognized organizations and associations in the process of drafting provisions and administrative measures. This is the door for new forms of participation that were long awaited, due to the failure of classic participation by means of '*información pública*' proceedings, generally mandatory but usually without any significance due to the failure to take the results into account.[35]

[35] This request is a long-standing constant: see Alfonso Pérez Moreno, 'Crisis de la participación administrativa', see footnote n. 27, 91 ff., and more recently Concepción Barrero Rodríguez, 'De nuevo sobre la crisis de la participación administrativa', in Francisco López Menudo (coord.) *Derechos y garantías del ciudadano* (Iustel 2011) 419 ff.

3.2 Post-implementation phase: a paradoxical implementation with steps forward and steps backward

Joining the European Communities in 1986 has had a very relevant impact on the Spanish legal order. Concerning environmental issues, it is hardly necessary to recall that European environmental law is one the of the most intense, developed and evolved areas of the European legal order related to procedural aspects, taking into account the 'proceduralization' of the environmental Directives of the early eighties. This regulative strategy has also had a remarkable importance in the Spanish legal order, mainly in participative aspects. Notwithstanding, this influence is not found in the requirement for participation – which has a great tradition in Spain –, but in the meaning and significance of participation in decision-making.

According to the constitutional system of shared competences in the environmental field (State and Autonomous Communities), the aforementioned IPJ Act provides a basic regulation in order to guarantee public participation, establishing a range of rules and principles which should be developed by each competent legislature and Government. In other words, the IPJ Act is not a complete set of rules and requires several others provisions to comply with the general duties imposed by the AC. On the other hand, the results of the IPJ Act are disappointing due to the lack of systematic structure of the provisions enacted and the ensuing legal uncertainty.

Participation is dealt with in adjudication procedures, plans, programmes, policy-making and rule-making procedures according to AC:[36] 1) Article 6 of the AC regulates participation in 'decisions of specific activities'. These provisions are also found in at least two different State Acts, because the IPJ Act modifies both the Environmental Impact Assessment Act[37] and the Integrated Preventive Pollution Control Act[38] with a close but different legal regime. 2) Related to participation during the elaboration of plans, programs and policies relating to environment provided in Article 7 of AC, is provided in Articles 16 and 17 IPJ Act. Article 17(2) establishes some exceptions whereby participation in the elaboration of those plans passed according to the Water Law[39] and according to the

[36] Ángel Ruiz de Apodaca and José Antonio Razquin Lizárraga, *Información, participación y justicia en materia de medio ambiente*, see footnote n. 7, 300, affirm that the IPJ Act provides for multi-level participation according to the scale of participation in the AC.

[37] The IPJ Act amended the Real Decreto Legislativo 1/2008, 11 January, the Act in force on this subject at that time. This norm was derogated by Act 21/2013, 9 December, currently in force.

[38] Act 16/2002, 1 July.

[39] The Real Decreto Legislativo 1/2001, 20 July, is the Act currently in force, several times amended. The specificities of water management planning allow for an understanding of the special regime maintained in this area. In any case, Real Decreto 907/2007 which approved the Hydrologic Planning Regulation establishes the submission of participation rules according to the IPJ Act.

Environmental Strategic Assessment Act[40] will be carried out under the specific regulations in force. On the other hand, participation during policy-making is very briefly dealt with. 3) Finally, in accordance with Article 8 of the AC and although Directive 2003/35/EC does not mention this case, Articles 16 and 18 IPJ Act deal with participation during the preparation of executive regulations and generally applicable legally binding normative instruments.

There are considerable specificities to the provisions recalled. Different elements are going to be considered: the definition of 'public concerned'; the extent and modes of participation; time frame; and how the result of the participation is taken into account.

3.2.1 Participation of the 'public concerned'

Regarding the definition of 'public concerned' – Article 2(5) of the AC –, both decisions of specific activities regulated in EIA and IPPC Acts, and the drawing up of plans and programmes, as well as executive regulations, assume a common definition according to Article 2(2) and related to Article 23 IPJ Act:

a) Any individual or legal person affected by the circumstances cited in the Administrative Procedure Law of 1992 – interested parties – including: 1) Those who promote, as holders of rights or legitimate individual or collective interests, the corresponding administrative procedure. 2) Those who despite having initiated the procedure hold rights which may be affected by the decision adopted in it. 3) Those whose legitimate individual or collective rights may be affected by the resolution and who officially attend the procedure prior to the issuance of a definitive resolution.

b) Any non-profit legal entities which certify compliance with the following requirements: 1) Their accredited aims, according to their statutes, are related to environmental protection in general or to any specific environmental elements (finalistic criterion). 2) They have been legally incorporated for at least two years and have been actively engaged in the activities necessary to achieve the ends specified in their statutes (seniority criterion). 3) According to their statutes, they exercise their activity in the area affected by the action or administrative omission (territorial criterion).

Some specific provisions are provided for planning and programming, and executive regulations. Aside from those already mentioned, Article 16(2) provides that the competent Administration will determine, sufficiently in advance, other members of the public (all the natural or legal persons, including associations, organizations and groups, defined in Article 2(4) of the AC and Article 2(1) IPJ Act) to allow them to take part in participation proceedings.

Going further into the details, the SEA Act did not include the same definition of 'public concerned'. In this case, 'public concerned' or interested parties

[40] The IPJ Act amended Act 9/2006, 28 April, the Act in force at that time. This Act was derogated by Act 21/2013, 9 December, currently in force.

were not defined with regard to any territorial criterion and, therefore, the concept of 'public concerned' was wider. This conclusion highlighted a lack of coordination between different pieces of legislation. Since both the EIA Act and the IPPC Act were modified by the IPJ Act, it was not understandable why the SEA Act was not also adapted. In the end the new Act 21/2013 cancelled these divergences and the definition is now the same.

Regarding the EIA Act, a new specific rule had been established because two different participation proceedings can be distinguished. This difference has been maintained by the Act 21/2013 currently in force. On one hand, the public in general – Article 2(4) of the AC and Article 2(1) IPJ Act – will participate in '*información pública*', and on the other hand, the public concerned will be consulted.[41] Nevertheless, nothing like this it is set forth in the IPPC Act.

This distinction included in the EIA Act allows us to move on to the main issue triggered by the IPJ Act. Concerning the range of public involved in participation, the definition included in the IPJ Act has a major consequence: interested parties rather than the public will be able to participate in all the aforementioned procedures. According to Spanish legal tradition the public in general may take part in public participation proceedings. In fact, the APA of 1992 maintains this broad range of participation rights. Accordingly with these rules and leaving aside the vagaries of sectorial norms, the provisions of the IPJ Act may provoke a limitation to participation.

The impact of this shift in the Spanish legal system can be considered as a 'legal irritant' due to a paradoxical and unsatisfactory implementation of the AC. With regard to this issue, it must be noted that Article 2(4) of the AC provides that the definition of 'public' is submitted to the 'national legislation or practice'. The paradox is clear: the IPJ Act does not reflect the 'national legislation' currently provided for in the APA of 1992, but creates a new parameter rather distant from true legal tradition in Spain.

Concerning the compulsory character of participation, from a formal perspective the IPJ Act introduces relevant shifts. For instance, in complex adjudication procedures such as EIA or IPPC decision-making processes, the submission of these procedures to '*información pública*' and/or consultation is an exception in comparison with the general rules of the APA of 1992, where participation by this procedure is not the general rule. In these cases, the influence of European and international law breaks an old rule in Spanish law which is reflected in the APA of 1992 whereby public participation is not mandatory in adjudication procedures, unless the characteristics of the case should require it in the opinion of the official in charge.

Related to planning and programming procedures, this rule does not change hardly anything in the light of the long-standing tradition of submitting drafts for public participation. Nonetheless, as far as executive regulations

[41] See Ana Pallarès Serrano, 'La participación pública en materia de medio ambiente', in Antoni Pigrau Solé (ed), *Acceso a la información, participación pública y acceso a la justicia en materia de medio ambiente: diez años del Convenio de Aarhus* (Atelier 2008) 341.

are concerned and considering the limits established in Act 50/1997 on public participation in drawing up such norms, the IPJ Act will be a significant step forward. This provision will change the discretionary powers of the Government to develop public participation. Henceforth *'información pública'* will be mandatory in the fields stated in the IPJ Act.

Wider participation according to the type of procedures due to the generalization of the compulsory character of participation, but limited because of the restriction of access to participation following the Spanish tradition, is the paradoxical outcome of the implementation of the AC. In the light of this conclusion, the last question to be posed is whether this paradox can be overcome considering paragraph 3, Article 16 IPJ Act. According to this article, rules governing participation in planning and programming procedures and executive regulations procedures do not substitute any other provision extending the rights regulated in the IPJ Act. What is the meaning of this article? It means that when a more favourable provision exists it will be applied instead of the IPJ Act.

Thus, the next question to solve would be: When is the IPJ Act going to be applied with regard to participation in planning and programming procedures and executive regulations procedures? The response is clear: 1) Almost never, related to plans and programs procedures, because participation was already mandatory and access to participation usually broader, so the provisions of the IPJ Act are generally worthless in this aspect. 2) With regard to executive regulations, it will always be applied because participation was not compulsory and access to participation had not been so wide.

3.2.2 Mode and scope of participation

Regarding the second issue mentioned, the mode and scope of participation, the IPJ Act provides an open and general rule applicable both to drawing up plans and programmes and executive regulations: The public concerned has a right to exect 'real and effective' participation when all options are open and before the decision is made – Article 16(1). Although early public participation is not mentioned – as stated in Article 6(4) of the AC – it can be inferred: this is only possible when drafting is open and different alternatives are also possible. In the same vein, the SEA procedure may be cited, because in this procedure participation will take place considering a preliminary version of the drafting plan or programme.[42]

Leaving aside the general rules, differences have to do with the fields where participation is provided for, as well as the exceptions. Article 17(1) sets forth the areas where participation is mandatory related to drawing up plans and programmes. Considering the exceptions of SEA and water management plans,

[42] The same conclusion can be reached taking into account both the former SEA Act –Act 9/2006- and the Act 21/2013 currently in force.

this Article lists the following fields: Waste, batteries and accumulators, nitrates, packaging and packaging waste, air quality and other areas.[43]

It is true that the plans and programmes of the listed areas would ordinarily be submitted to participation because of the wide scope of application of the SEA procedure. However, according to the above-mentioned Article 16(3) IPJ Act, if a more favourable provision exists it will be applied instead of the IPJ Act. We have to remember that to a certain extent the former SEA Act was more favourable than the IPJ Act, at least with regard to the definition of 'public concerned', because the SEA Act did not narrow that definition with the above mentioned territorial criterion. Accordingly, did it mean that the IPJ Act should not be applied either, in all these cases? The answer was probably affirmative. In fact, the 5th Additional Provision of the IPJ Act rules that when the State is competent to pass the plans and programmes mentioned in Article 17, the procedure to be followed will be as regulated in the SEA Act. From this point of view, the IPJ Act was once again worthless. Notwithstanding, the recent derogation of the SEA Act by Act 21/2013 has corrected this incoherent situation and the definition of such a concept is right now the same.

Article 18 establishes the subjects regarding which participation requirements must be applied to the procedures for drafting executive regulations.[44] The reasons why EIA is included but SEA is not are hard to understand. Likewise, IPPC is not mentioned but it could be considered to be integrated taking into account several listed topics.

Furthermore, regarding drawing up executive regulations, Article 17(3) establishes some exceptions to public participation. Generally speaking, national security and civil protection emergency plans are excluded from participation in all cases (Articles 16(3) and 17(3)(a)). However, Article 17(3)(b) establishes other specific exceptions applicable to procedures for drafting executive regulations. On the one hand, modifications and full revision of plans, programmes and executive regulations are also submitted to public participation (Articles 16(1), 17(1) and 18(1)), but Article 17(3)(b) mentioned above excludes participation when modifications are not relevant due to their organizational or procedural character, provided this does not imply a reduction of environmental protection. Such an exception is not considered for the remainder of procedures but it is

[43] This list is the same as Annex I of the Council and European Parliament Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council, unlike the reference to hazardous wastes, although it can be considered included in the general mention on waste (Ana Pallarès Serrano, 'La participación pública en materia de medio ambiente', see footnote n. 41, 319).

[44] Water, noise and soil protection, atmosphere pollution, countryside planning and urban land use, nature conservation and biodiversity, forest use, waste management, chemical products, biotechnology, any other substances emissions, environmental impact assessment, access to information, public participation, access to justice and other matters when a specific regional rule requires participation.

understandable, because the aim is to gain in efficiency and avoid unnecessary proceedings due to the negligible environmental impacts of regulation.

In the field of decisions over specific activities – EIA and IPPC –, things are again different, although with a common underlying sense. Both foster real and effective participation: the former EIA Act and the Act 21/2013 establishing that these procedures shall be submitted to '*información pública*' in early phases of processes when all the options are still open related to content, extent and definition of the project, and the IPPC Act establishing that participation shall take place in the early phases of procedures. The single outstanding difference is provided in the IPPC Act. Annex 5(5) adds that participation must be developed in 'different phases' granting enough time to the public concerned in to allow for effective participation in the decision-making process. The regional law will determine how this 'phasing participation' takes place.

The IPJ Act, in an attempt to respect regional competency to develop the basic rules and principles established, does not mention '*información pública*' as the single procedure to make real participation, unlike the modified EIA Act. This means that other possibilities for participation may be determined by the competent legislature and Government, according to Article 86(4) APA of 1992. In fact, participation is openly referred to and is not necessarily equivalent to '*información pública*' or consultation. This will depend on the competent legislature and Government. Going beyond this, with regard to the IPPC Act – not in the EIA case – the possibility of determining other modes of participation is expressly stated.

As a final point, it is necessary to remark that the IPJ Act only deals with participation along the elaboration of policies by means of different modes than consultation. To this end among others, the Environment Assessment Council provided in Article 19 is created. In other words, participation is channelled by means of institutional participation. That is the reason why not only institutional representatives, but also representation of the most important eNGOs in Spain[45] take part in the Environment Assessment Council. The main function of the Council is reporting proposals for Acts and executive regulations with environmental impact, aside from others such as assessment and proposing in the same area.

3.2.3 Time frames for participation

The exigency of reasonable of sufficient time frames for participation required in the AC is complied with different results depending of the type of the procedure. It is important to remark that Article 86(2) APA of 1992 sets as a general rule a minimum time limit of twenty days. On the other hand, Planning Urban Law traditionally increases this time frame up to one month.

[45] This direct designation has been criticized by Blanca Lozano Cutanda, *Derecho Ambiental Administrativo* (Dykinson 2005) 242, due to the lack of objective criteria to justify such a designation, aside from any reference to the review criteria to be taken into account.

Surprisingly the IPJ Act sets neither a general time frame for participation, nor any other reference to be taken into account. However, when the IPJ Act modified the EIA Act stated a time frame of thirty days, and when the same Act amended the IPPC Act only establishes some references to 'sufficient' or 'adequate' time limits, so that it will be necessary to fix a specific time limit by the competent authority (national or regional). Thirdly, the SEA Act established an especially long time limit: forty-five days. The same differences have been maintained in the field of EIA and SEA procedures with the new Act 21/2013.

The unspecific regulation of the IPJ Act provokes new inconsistencies. Due to the lack of any specific time limit, and in the absence of any concrete regulations from regional bodies in this respect, paradoxically, the timing will be as provided for in the general APA of 1992 (APA of 2015 from October 2015)– twenty days. One may wonder whether these are reasonable and sufficient time frames. According to the claims of associations and non-governmental organizations, doubts arise at least with regard the general time limits given in the APA of 1992, which are not generally considered to be sufficient. It seems obvious, therefore, that if all the State and regional laws were not adapted in this respect, it is doubtful whether Spain would be complying with the AC.

3.2.4 Due account of the results of participation

This is a major step forward in this field. The traditional assumption of participation in procedures such as planning processes was not really accompanied by a clear outcome as a direct consequence of proceedings such as '*información pública*'. Although a coherent and systematic interpretation of Urban Planning law and procedural law might allow the affirmation that authorities must consider the opinions alleged during consultation, administrative practice is rather long of this mark.

Urban Planning law has traditionally regulated participation by means of '*información pública*', firstly, imposing mandatory consultation in early phases of planning procedures; secondly, considering that consultation is a period for collecting 'opinions and suggestions', thereby urban plans should be approved 'in view of the result' of such allegations. However, planning documentation must give the reasons and considerations on which the decisions are based, but need not necessarily focus such explanations on the results of participation.

In practice, the outcomes of participation have often not been considered and, formally, allegations are taken into account only to be answered, as it is a general duty of the Administration under Article 86(3) APA of 1992 to respond to all allegations made. Needless to say, responding to allegations does not necessarily imply considering them and giving reasons for the extent to which those opinions are integrated in the decision. Administrative practice, on the whole, is closer to the formal exigency of responding to deny and refuse the allegations done. In other words, participation has been considered as a formal requirement without which decisions may be invalidated, but whose outcomes

have been ordinarily considered as unnecessary as the decision has been already 'taken' in advance, once the draft is presented. Effectiveness of administrative action is clearly behind this perception.

From this point of view, the requirements set forth in the AC are especially relevant. The need to ensure that the decision takes due account of the outcome of public participation, and the publication of the reasons and considerations on which the decision is based, are definitely the key elements to show to what extent a real and effective participation is achieved: How the public may influence decision-making.[46] The IPJ Act presents some progress in this regard.

Concerning plans and programmes and executive regulations, Article 16(1) (c) and (d) establishes the obligation of taking duly into account the outcomes of participation, as well as the duty of giving reasons for the motives and considerations that have been used to make de decision. The same conclusion is reached in adjudication procedures such as EIA and IPPC, where the corresponding Acts mention the duty of 'taking into account' or 'taking duly into account' the results of consultation, and the obligation to give reasons. Exactly the same rule, with different wording, is present in the SEA procedures.[47]

Regarding this issue, the challenge is not to implement more legal duties, but to put them into practice. The conflict between participation and effectiveness of administrative action is still the key question in understanding the constraints of public authorities to open consultation as a way to learn and improve decision-making processes, or even as a deliberative channel for learning, collecting relevant information and achieving consensus. In this regard, the monopoly of public authorities over determining what is best in the general interest, followed by the need of passing their decisions as soon as possible – effectiveness – is still strong enough to show that cooperation is a key tool for effectiveness and avoiding litigation.

4 Third pillar: access to justice

4.1 Pre-implementation phase: a long 'journey' towards the acknowledgement of a broad right of access to justice

The history of the Spanish '*Jurisdicción Contencioso-administrativa*' – Administrative Justice – over the 19th century is the result of the same convulsions that kept the Kingdom in a continuous state of revolutions, wars and political changes. After a long period, from 1845 to 1888, of constant legal discussion about the legal nature of the bodies which control administrative actions – administrative bodies *versus* judicial bodies – and about the independence of those controls – retained justice *versus* delegated justice, as in the

[46] Ángel Ruiz de Apodaca and José Antonio Razquin Lizárraga, *Información, participación y justicia en materia de medio ambiente*, see footnote n.7, 297-300.

[47] These conclusions remain the same with the Act 21/2013.

French model –, finally in 1888 the Act known as '*Ley Santamaría Paredes*' – Santamaría Paredes' Act – was approved on 13 September, that consolidated the definitive 'judicialization' of the judicial review system.

The 'administrative act' has been the legal concept around which the administrative justice system[48] was constructed. In fact, Article 1 of the 1888 Act only allows claims to be lodged against administrative acts which infringe 'administrative rights' formerly recognized by an Act, regulation or another administrative provision.[49] This conclusion placed extraordinary limits on access to justice for those whose rights were affected by the administrative action. This was a consequence of the initial intention of the legislature of establishing full jurisdiction over judicial claims related to the aim of linking rights infringed by an administrative action – hence, such administrative action being unlawful – to the damage caused by such an action.[50]

Although administrative justice was conceived from a subjective perspective, *legitimation ad causam* being based on the entitlement of an administrative right infringed by an administrative decision, the evolution of case-law was diminishing the need to justify the right that entitled the holder to bring a claim before the administrative courts.[51] This conclusion is more understandable in the light of the open legal standing assumed in the Local Law accepting an objective claim very close to *actio popularis*.

The jurisdictional Act of 1956 superseded the previous Act of 1889. In its first article, this Act expanded the scope of judicial review including both

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[48] Nevertheless, all the administrative acts based on discretionary powers were excluded from judicial review, aside from any administrative provisions.

[49] The notion of 'administrative right' was related to cases in which the Administration was entitled to act using public power and engaging in public legal relationships. Secondly, 'administrative right' means a right previously conferred in favour of the appellant/s: Vicente Santamaría Paredes, *Curso de Derecho Administrativo*, see footnote n. 1, 832 and 884, and Jaime Guasp Delgado, 'El derecho de carácter administrativo como fundamento del recurso contencioso' [1940] Rv. de la Facultad de Derecho de Madrid 2, 14 ff.

[50] This is the result of the influence of the French legal system, see Fernando Garrido Falla, 'El interés para recurrir en agravios' [1952] RAP 9, 83. However, as Fernando Garrido Falla, 'El recurso subjetivo de anulación' [1952] RAP 8, 177 ff., showed, this was only a primary coincidence that was later seen to be incorrect, both in France and in Spain. The objective character generally attributed to the *éxces de pouvoir* claim and the subjective meaning conferred to the full jurisdiction claim – linking legal standing to holding an administrative right – evolved towards confusion, it being accepted that those who were holders of a right could also claim only for annulment.

[51] See Enrique Serrano Guirado, 'El trámite de audiencia en el procedimiento administrativo', see footnote n. 2, 133. Alejandro Nieto García, 'Sobre la tesis de Parada en relación con los orígenes de lo contencioso-administrativo' [1968] RAP 57, 9 ff., mentions two judgments of the '*Consejo Real*' – Royal Council, finally substituted by the Supreme Court – of 1847 and 1848, where both administrative rights and legitimate interests were protected by administrative justice. See also Manuel Colmeiro, *Derecho Administrativo Español*, see footnote n. 1, 2420 and José Gallostra y Frau, *Lo Contencioso-Administrativo* (Prig. de Posada Herrera 1881) 126-132.

administrative acts and administrative provisions. Related to the control of discretion, the 1956 Act did not exclude such a control; on the contrary, it admitted a partial review – mainly related to formal issues –, except for 'political acts' of Government.

The new jurisdictional Act established a wider system of legal standing, although still limited mainly to claims against administrative provisions. Article 28(1)(a) provided that entitlement by a 'direct interest' was necessary to lodge a claim against the unlawfulness of administrative actions and demand their annulment. In relation to administrative provisions, Article 28(1)(b) restricted legal standing to public institutions and agencies in general, as well as other entities which represent or defend general or corporative interests, putting this provision in common with Article 130(4) of the APA of 1958, as long as the provision affects those interests directly.

In other words, the main consequences of these double legal standing criteria affected the remedies that each set of litigants could demand. Moreover, if besides annulment the litigant wanted to demand recognition of a particular legal situation and its reestablishment, according to Article 28(2), only the holder of the infringed right was entitled to claim. In this vein, although the preamble to the 1956 Act mentioned the lack of necessity to integrate the French distinction between actions for full jurisdiction (damages founded on a subjective claim lodged by the holder of an infringed right) and for annulment (control of lawfulness founded on an objective claim based merely on an interest in lawfulness *'excés de pouvoir'*), regulations on remedies in Articles 41 (control of lawfulness and annulment) and 42 (damages) confirmed such a presumption, establishing links respectively with Articles 28(1) and 28(2).[52]

Otherwise said, the French influence was a key component in determining the legal standing system, due to the traditional assumption of limiting access to justice according to the remedies. However, case-law contributed to the 'subjectification' of judicial system, indifferent as to whether litigants hold authentic rights or merely a direct interest in order to demand damages.[53]

Another key question that must be highlighted is the early evolution of *actio popularis* in the Spanish doctrine of standing.[54] In the French terminology, this

[52] See Jaime Sánchez Isaac, *El interés directo en los derechos español y francés* (IEAL 1977) 100.

[53] See Eduardo García de Enterría, 'Sobre los derechos públicos subjetivos' [1975] RAP 6, 427 ff.; Luis Ortega Álvarez, 'La inmediatividad del interés directo en la legitimación contencioso-administrativa' [1977] RAP 82, 211 ff.; Lorenzo Martín-Retortillo Baquer, 'El genio expansivo del Estado de Derecho', see footnote n. 27, 194; Jaime Sánchez Isaac, *El interés directo en los derechos español y francés*, see footnote n. 52, 94 ff.

[54] See Eloy Colom Piazuelo 'Apuntes históricos sobre las condiciones exigidas para poder ejercitar las acciones en los recursos contra actos municipales fundamentos en la infracción de Ley' in Lorenzo Martín-Retortillo Baquer (ed), *La protección jurídica del ciudadano* (vol. II, Civitas 1993), in relation to the past evolution of this particular procedural institution. *Actio popularis* has a remote precedent in the Spanish legal order, in Local Law. Luis Cosculluela Montaner, 'Acción pública en materia urbanística' [1973] RAP 71, 16 ff., mentions that there is a '*Cédula*' on 10 March 1788 where this action was provided

would be an objective claim where no infringed rights were necessary to have *legitimation ad causam*. According to the special characteristics of *actio popularis*, and considering its exceptional situation in the general standing system in administrative justice, limited legal remedies to be brought before a court have traditionally been conferred. The collaborative position of litigants in order to restore lawfulness is one the of the main reasons to understand that, from the early acknowledgment of *actio popularis* in the Spanish legal order, this was always assumed as an objective claim whereby the claimant could only demand the annulment of administrative actions.

As far as access to justice is concerned, in the provisional period from 1978 until the abrogation of jurisdictional Act of 1956 in 1998, the impact of Article 24(1) of the Spanish Constitution triggered a trend towards a broader legal standing and the effective protection of all legitimate interests. In dozens of judgments the courts recognized that the constitutional concept of 'legitimate interests' mentioned in Article 24 had entailed a broadening of the 'direct interest' concept assumed in Article 28 of the 1958 Act. In this vein, the Supreme Court insisted in assuming the *pro actione* principle as well as a wide and non-formalistic interpretation of legal standing.[55]

This evolution was underpinned by Article 7(3) of '*Ley Orgánica*' 6/1985, on 1 July, on the Judiciary. This article substantially broadens legal standing based on a constitutional interpretation for all jurisdictions – civil, criminal, administrative, etc. –. The key question was to specify firstly that legitimate interests recognized by Article 24 of the Spanish Constitution include both individual and collective interests. Secondly, this article provides a referral to each jurisdictional Act in order to specify how collective interests are given *locus standi* through entities, associations and affected groups legally entitled to defend and promote collective interests.

Another important point is related to *actio popularis*. Articles 125 of the Constitution and 19 of *Ley Orgánica*' 6/1985 empowers the law makers to recognize *actio popularis* in specific cases (Act by Act). As the Constitutional Court – Judgments 62/1983 or 147/1985 *et al.* – has established, *actio popularis* is one manifestation among others of effective judicial protection as stated in Article 24 of the Constitution.[56] However, this reference has a further legal significance in terms of legal standing. Merely defending legality is allowed only insofar as

for, related to local life. This tradition was maintained in the different local Acts of 1870 and onward. Many judgments of the Supreme Court show how, after the 1888 Act, it was not applied, preference being given to the provisions on legal standing in the jurisdictional Act. This trend changed in 1924 when the '*Estatuto Municipal*' – Municipal Statute – was enacted, recovering the *actio popularis* for local matters with applicative preference over the 1888 Act. Leaving aside local issues, the Urban Planning Act of 1956 also included *actio popularis* later repeated in all the urban planning Acts passed thereafter.

55 See Francisco López Menudo, 'Los principios del procedimiento administrativo', see footnote n. 1, 53 ff.

56 See José Almagro Nosete, 'Comentario al artículo 24 de la Constitución Español' in Óscar Alzaga Villaamil (ed), *Comentarios a las Leyes Políticas* (vol. III, Edersa 1983) 36, Ignacio Díez Picazo, 'Artículo 24' (Article 24), in *Comentarios a la Constitución Española de 1978* (vol. I, Edersa 1996) 30, and Enrique

a specific Act recognizes to every citizen –individually or organized in groups – *locus standi* in certain areas.[57] On the other hand, this special *locus standi* allowed claims against administrative acts and administrative provisions, opening legal standing mainly in this second respect, due to the slow evolution of case-law to admit open access to justice. This progress, justified in the 'general judicial review of administrative action' established in Article 106(1) of the Spanish Constitution, subjected all forms of administrative action to judicial review.

In 1998 the new jurisdictional Act, *Ley* 29/1998 of 13 July, was approved. Article 19(2) regulates legal standing in a generous manner: from the classic standing granted to those who hold a right or a legitimate interest, to all the private entities legally organized – or even informally organized – that are affected by an administrative act or provision, or are legally empowered to defend collective rights and interests.[58]

This provision largely overcomes the progresses of case-law in this area. On the one hand, Article 19(2)(a), maintaining the legal tradition of Administrative Justice Acts, recognizes firstly, that any person or entity may claim before the courts to protect their own rights and interests. Secondly, private entities and associations in general may also claim to protect their members' rights and interests, as long as the entity's interests are affected.[59] Obviously this does not prevent individuals who form part of those organized groups from claiming on their own behalf, as some judgments have stated. On the other hand, and aside from these possibilities, the current Act broadens the legal standing of private entities and groups who may claim to defend collective rights and interests in a twofold manner, as stated in Article 19(2)(b): a) Those organized groups legally entitled to defend collective interests; b) those whose interests are affected. Both are alternative criteria, but in presence of a specific Act which empowers certain groups to claim, it was not necessary to give evidence of being affected by the challenged measure.[60] However, in the absence of such an Act or such legal entitlement, these groups bear the burden of proof as to the criterion just mentioned.[61]

Alonso García, 'La participación de individuos en la toma de decisiones relativas al medio ambiente en España', see footnote n. 24, 61.

57 See Jaime Sánchez Isaac, *El interés directo en los derechos español y francés*, see footnote n. 52, 106 and 120, and Ignacio Díez Picazo, 'Artículo 24', see footnote n. 56, 30. Some of the Acts which recognized such a possibility were the 1985 Act on Heritage, the 1988 Act on Maritime-terrestrial Public Domain and the 1989 Act on Protected Areas, apart from the recognition in areas such as urban planning.

58 As far legal standing is concerned, homogenization of subjective rights and legitimate interests arises. This also occurs with remedies. Article 31 states that the claimant, regardless his legal standing, may claim in order to annul an administrative decision or provision, as well as to claim for damages.

59 See Jesús González Pérez, *Comentarios a la Ley de la Jurisdicción Contencioso-administrativa* (Vol. I, Civitas 1998) 495. This was also recognized by case-law in extensive jurisprudence.

60 See Lorenzo Bujosa Vadell, *La protección jurisdiccional de los intereses de grupo* (Bosch 1995) 304.

61 Concerning this possibility, legal empowerment has made important progress in civil and labour law, but it has not happened in administrative law at least until the implementation of the AC. Although

Leaving aside legal entitlements, environmental case-law has used mainly two linked criteria to ascertain when a group is affected by an administrative action: The affection to the goals and objectives that move those groups according to their legal statutes, foundation rules or founding agreements[62], and the existence of a close territorial connection between the group and the environmental problem. Several recent Judgments of the Supreme Court have reinforced this jurisprudence with a direct basis on Article 45 of the Constitution.[63] According to these judgments, this article broadens the legal standing of associations who do not act in defence of lawfulness – as happens in *actio popularis* – but in defence of qualified or specific interests that affect those groups and society as a whole.

A broad legal standing for groups does not mean that individuals may not bring an action by themselves in order to defend collective interests. In fact, both individuals and groups are entitled to bring an action when legislation specifically recognizes *actio popularis* (Article 19(1)(h) of the 1998 Act, according to Article 125 of Spanish Constitution). There are many Acts which establish *actio popularis* in certain areas and the environment is one of the fields benefiting most. However, there is no general recognition of such an action in the environmental area, as there is in urban planning. This situation leads to the use of different legal standing parameters for the specific area of environmental law. In those cases where *actio popularis* is recognized, access to justice is open to all persons and groups. However, when such recognition does not exist, legal standing will depend on the legal criteria listed in Article 19(1)(b). As mentioned above, until recently the sole applicable criterion was that relating to the specific link between the group's interests and the administrative decision challenged.

4.2 Post-implementation phase: an unsatisfactory implementation which amounts to a regressive step

The IPJ Act sets forth two legal mechanisms to comply with the requirements of the AC. Firstly, concerning access to justice to defend the right to access to environmental information, Articles 20 and 21 of the Spanish Act establish two different methods for bringing an action. It is remarkable that in both cases claims are admitted both against failure to respond to the right of access to information, and regarding failure to meet the obligation to ensure participation.

Article 19 of the 1998 Act sets out a broad range of possibilities for legal standing, sectorial Acts had not established any legal criteria to determine when a group is legally entitled to defend collective interests.

[62] This criterion was pointed out early on by legal scholarship; see Miguel Sánchez Morón, 'El principio de participación en la Constitución Española', see footnote n. 27, 123, and Manuel Lozano-Higuero, *La protección procesal de los intereses difusos* (García Blanco 1983) 251. The Judgment 47/1990 of the Constitutional Court also used this criterion but in areas other than environment.

[63] Article 45(1): 'Everyone has the right to enjoy an environment that is actionable for personal life development, as well as the duty to preserve it'.

The first method for lodging a claim related to information and participation rights has to do with actions or omissions by public authorities. In this case, the formal method to solve the legal issue is exactly the same as generally in administrative law. In fact, Article 20 refers to the APA of 1992 and the Administrative Justice Act of 1998 (AJA) to determine how to access a review procedure before an administrative body, in the first case, or before a court, in the second. The claimant is not free to choose the preferred method, as it is necessary to exhaust the preliminary administrative review procedures prior to recourse to judicial review procedures.

In other words, nothing new is provided here and it could even be said that these provisions are redundant and unnecessary because of the general application of the system for recourse in both Acts mentioned above. The problem with this procedure lies in whether administrative recourses comply with the right to a review procedure before an 'independent and impartial body', according to Article 9(1) of the AC? In other words, administrative recourses must be challenged before the same administrative body – when the administrative body does not have a superior hierarchical body, then optionally one may claim before the same administrative body by means of *recurso de reposición* (action for review) or challenging the recourse directly before a court – or before the superior hierarchical administrative body (the *recurso de alzada* or appeal is mandatory to exhaust administrative review procedures prior to recourse to judicial review procedures). Whether the claim is resolved before the same or the superior body in the administrative hierarchy, it can hardly be said that the AC requirements of independence and impartiality are complied with[64], so that it makes interested parties to bring an action before courts, where those requirements of independence and impartiality are obviously complied with, and with the burden of having to endure a lengthy and costly process.

The second mechanism to defend information and participation rights concerns other private natural or legal persons also included under the wide concept of 'public authorities', according to Article 2(4)(2) IPJ Act, which assume public responsibilities and/or exercise public functions or supply public services. In such a case, a new claim is provided for in Article 21. Access to a review procedure is established by means of bringing a claim before the public administrative authority which is empowered to control the activity of those private natural or legal persons. The decision exhausts the preliminary administrative review procedures prior to recourse to judicial review, thereby opening access to judicial review. The private natural or legal person must comply with the administrative decision giving access to information or ensuring participation. Fines are provided for, to be imposed in the event the decision is not fulfilled after the obliged entity is required to comply.

[64] See Alexandre Peñalver Cabré, 'Novedades en el acceso a la justicia y a la tutela administrativa en asuntos medioambientales', in Antoni Pigrau Solé (ed), *Acceso a la información, participación pública y acceso a la justicia en materia de medio ambiente: diez años del Convenio de Aarhus* (Atelier 2008) 364.

In this second case, we are not dealing with an ordinary administrative recourse but a new type of claim specifically applicable to rights to information and participation. The competent administrative body to resolve these claims is not determined, but considering that the decision exhausts the preliminary administrative review procedures, two possibilities arise. On the one hand, it can be understood that general administrative provisions are applicable to fill this gap and that the competent body should be the next echelon in the hierarchy. On the other hand, special rules may be passed, and consequently, specific entitled bodies might be established.

Furthermore, access to justice concerning actions or omissions by public authorities is established, when private natural or legal persons in the terms of Article 2(4)(2) IPJ Act are not involved, and in the areas already mentioned in Article 18. In these cases, Article 22 refers once again to the APA of 1992 and the AJA of 1998 to determine how to access a judicial review procedure.[65] The duty of exhausting the preliminary administrative review procedures prior to recourse to judicial review procedures is maintained, in compliance with the general rules of the aforementioned administrative provisions and nothing new is provided in this regard. In other words, unlike Article 2(4)(2) IPJ Act, there are no alternatives to traditional administrative claims and the corresponding judicial review claims.

As far as legal standing is concerned, problems are detected because, concerning information and participation rights issues, the regulation on legal standing is limited to those persons specifically affected by the refusal of the information requested or by the failure to take part during the administrative procedure. In this vein, the implementation of the IPJ Act in this field will prove problematic unless an integrative understanding of this rule is made, in view of the AJA of 1998. Otherwise, the results of the implementation will be clearly unsatisfactory.[66]

Article 9(2) of the AC is quite flexible, giving relevant discretionary powers to State parties in order to define legal standing. According to this article, the interests of any non-governmental organization meeting the requirements referred to in Article 2(5) shall be deemed sufficient. Article 2(5) defines the 'public concerned' considering that eNGOs shall be deemed to have an interest in environmental decision-making when promoting environmental protection and meeting any requirements under national law. That is exactly what Article 23 IPJ Act does but in very questionable terms and with paradoxical outcomes.

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[65] Things remain exactly the same after APA of 2015.

[66] See Ángel Ruiz de Apodaca and José Antonio Razquin Lizárraga, *Información, participación y justicia en materia de medio ambiente*, see footnote n7, 367 ff., Alexandre Peñalver Cabré, 'Novedades en el acceso a la justicia y a la tutela administrativa en asuntos medioambientales', see footnote n. 64, 360 ff., and Ricardo García Macho, 'La transparencia en el sector público', see footnote n. 7, 272.

The Act talks incorrectly of *actio popularis* when regulating this issue.[67] Against a long Spanish legal tradition and consolidated case-law, the IPJ Act limits the legal standing of legal persons and groups (eNGOs) which fulfil certain requirements. Article 23 requires compliance with the following criteria: 1) According to the aims described in their statutes, their aim must be focused on environmental protection in general or on a specific environmental element; 2) They have been legally created and organized at least two years before the decision or provision against which the claim is lodged, and have been actively engaged in the activities specified in their statutes;[68] 3) According to their statutes, they must exercise their activity in a territorial domain which is affected by the administrative action or omission.[69]

Considering these three requirements, access to justice in environmental issues is far from a general *actio popularis*.[70] On the contrary, if the application of this Act is considered separately, or in other words, if in these aspects the IPJ Act is understood to revoke the AJA of 1998, and even the dozens of sectorial Acts that specifically state *actio popularis* in different environmental areas, the result would be a huge step backwards in the acknowledgment of legal standing. For these reasons, according to the *pro actione* principle assumed by the Constitutional Court, and based on the old aphorism *lex specialis derogat legi generali* it is possible to uphold that this *lex posterior* does not revoke previous special rules.[71]

The reason why the IPJ Act designates this action as *actio popularis* is that those groups which comply with the former three criteria do not need to prove to be affected in their rights or interests. This, however, is wrong because those three criteria involve the presumption of being affected, as the Supreme Court recognised some years ago using some of those requirements. In fact, from those three criteria, only one was not previously required by case-law: The one related to the seniority of the group. The aim of this criterion is to avoid the creation of *ad hoc* groups. Paradoxically, those new groups would be able to claim according to Article 19(1)(a) of the AJA of 1998.[72]

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[67] In this case, Article 22 also provides for the duty of exhausting the preliminary administrative review procedures prior to recourse to judicial review procedures.

[68] This is inspired on the French '*agrément*' requirement regulated in Article 252(2) of *Code Rural* passed in 1977 (Jesús Jordano Fraga, 'Análisis de la Ley 27/2006 en cuanto al acceso a la justicia, en especial el principio de legitimación en los contenciosos ambientales' [2008] Estudios de Derecho Judicial 137, 123.

[69] This territorial criterion has an Anglo-Saxon influence, specifically in the *Sierra Club v. Morton*, U.S Supreme Court Judgment of 19 April 1972, see Jesús Jordano Fraga, 'Análisis de la Ley 27/2006 en cuanto al acceso a la justicia, en especial el principio de legitimación en los contenciosos ambientales', see footnote n. 68, 124 ff.

[70] See Blanca Lozano Cutanda, *Derecho Ambiental Administrativo*, see footnote n. 11, 204.

[71] See Jesús Jordano Fraga, 'Análisis de la Ley 27/2006 en cuanto al acceso a la justicia, en especial el principio de legitimación en los contenciosos ambientales', see footnote n. 68, 138.

[72] In Case C-240/09 *Lesoochranárske zoskupenie*, the Court of Justice pointed out that Article 9(3) of the AC does not have direct effect on EU law. It is, however, for the referring court to interpret, to the fullest

Further to this, and concerning the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice (Article 9(5) of AC), Article 23(2) IPJ Act provides that the legal persons (eNGOs) who comply with legal standing requirements as per Article 23(1) will be entitled to ask for free legal assistance according to Act 1/1996 of 10 January. This provision is relevant due to the limits formerly established in Act 1/1996, referred to legal persons. According to Article 2(c)(1) only legal persons who have accredited insufficient financial means and have been declared as an association of public interest, as per Article 32 of Act 1/2002, 22 March, on Right of Association may request free legal assistance. Taking into account Article 23(2) IPJ Act, all eNGOs which comply with the legal requirements will henceforth have the same rights as public interest associations. Moreover, this also means that many eNGOs will not be able to ask for such assistance either in this field or in any other.

Some progress is made with regard to remedies in the IPJ Act. Concerning claims involving the right to information and participation, and access to judicial review in general, Articles 20, 21 and 22 describe mechanisms of appeal against unlawful actions and omissions. Such progress consists in allowing claims against omissions without set limits, in contrast with the restrictive general system of legal remedies established in Article 29 of AJA of 1998. The IPJ Act seems to have overcome the specific requirements stated in the previous Act, thereby including general injunctive remedies, although nothing is mentioned about the extent, sense and content of those remedies.

On the other hand, nothing can be deduced about other remedies such as those relating to irregular material administrative action – *vía de hecho* –. Thus it is to be assumed that general legal remedies are available, provided that the general requirements established in the AJA of 1998 are complied with, including injunctive remedies and damages. This interpretation notwithstanding, the IPJ Act has missed a good opportunity to correctly define these aspects.[73]

With regard Article 9(2) of the AC according to which the Parties shall ensure access to a review procedure to challenge the substantive and procedural legality of any decision, the IPJ Act does not provide anything at this regard. Concerning judicial review, general rules must be applied in this forum. From this point of view, the Spanish administrative judicial review system is tradition-

extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of the AC and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an ONG to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law. According to this, we must add that principles of equivalence and effectiveness will force Spanish Courts to interpret Article 23 of the IPJ Act in the same way the Supreme Court had maintained upon the enforcement of the AJA of 1998.

73 At all events, as Alexandre Peñalver Cabré, 'Novedades en el acceso a la justicia y a la tutela administrativa en asuntos medioambientales', see footnote n. 64, 372-373, affirms, there is still so much lacking that we cannot talk about a correct implementation of the AC.

ally focused on outcomes rather than decision-making in and of itself. Lawfulness is the key parameter conditioned by the 'fetishism' of the *principe de légalité*. Nonetheless, in complex discretionary adjudicative procedures and drafting of plans and rules the solution is different.[74] Case-law has defined several revision criteria: 1) Formal criteria: Mainly concern with mandatory provisions relating to procedural issues and attribution of power; 2) Substantive criteria: Arbitrariness; manifest error of finding and assessing facts; respect of general principles of law.

Notwithstanding these legal technicalities, control is limited to the most significant breaches. For instance, concerning the legal importance of procedural irregularities, in Spain, as in most States whose legal culture is based on civil law, procedural breaches are given limited legal relevance.[75] Informality governs administrative procedures although no written rule exists in this regard. However, case-law has frequently made this assumption. In other words, two conclusions stand out: 1) The acknowledgment of certain decisive and necessary proceedings in sectorial law by means of making them compulsory. In these cases, compliance with the proceedings is decisive in declaring an administrative decision void (*e.g.* non-compliance with mandatory participation). 2) The general rule is that most breaches of formal regulations are irrelevant because they do not influence the decision-making (Article 63 APA of 1992; new Article 48 of APA of 2015).

Regarding substantive elements, the outcome of these formal proceedings are not generally conclusive in rendering the decision void, except when the law confers a binding effect on them (which generally only happens with certain administrative reports) and when it could cause real and effective defencelessness to parties (which is directly linked to the right to be heard). The control of discretionary decisions is focused here on reviewing the reasons given for taking such decisions avoiding abuse of discretion (arbitrariness) or breaches of fundamental principles (proportionality). Reasons are a material requirement, linked to validity, whereby judicial review of proportionality and reasonableness of administrative decisions is possible. This is why Article 54(1)(f) APA of 1992 (new Article 35 of APA of 2015) specifically requires reasons when discretionary decisions are made. In any case, it is necessary to note that substantive control of discretion is limited to the breaches which render the decision arbitrary and contrary to the structural principles of the legal system, going beyond the power to err.

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74 Here we are referring to procedures where discretionary powers are in play, many interests are involved and legal situations can hardly be identified with individual or singularizing positions, and technical knowledge is especially relevant. Environmental processes are one of the best examples.

75 For example, the aforementioned concern with regard of the omission of hearings and the correction of the lack of defense by means of administrative recourses or bringing an action before courts.

5 Final remarks

Spanish administrative law has enjoyed a strong and generous tradition in least two of the three pillars regulated by the AC: participation rights and access to justice. On the one hand, major progress has been observed in the field of access to information, in which a top-down influence is clear. On the other hand, participation is a long-standing element of administrative procedures beyond the defensive perspective linked to the rule of law. Although one cannot determine a bottom-up influence in this aspect, Spanish law may surely be cited as one of the legal references throughout Europe. Nevertheless, in this case issues arose from the unsatisfactory implementation of the AC in Spain, showing a paradoxical execution with some steps forward, while significant steps have been taken backward as well.

The same conclusion, or worse, may be drawn with regard to access to justice. Paradoxically, the Spanish legal order having evolved toward a broad acknowledgement of legal standing, related to the protection of collective interests, the implementation of the AC has served to reduce *locus standi*. In the field of remedies, the same conclusion is reached: Notwithstanding the logical limits in this regard, shared by all European legal orders, implementation of the AC has not taken advantage of the opportunity to develop reasonably new judicial actions.

Criticism is the main outcome of the deficient implementation process which is provoking considerable interpretative conflicts, although both the mentioned idiosyncrasy of Spanish administrative law and the Spanish tradition concerning several pillars of the AC could have allowed an easy adaptation. However, the Spanish legislature has shown a significant narrow-mindedness due to a deficient understanding of the AC, while at the same time displaying a poor legislative technique that it is generating a problematic implementation.

CHAPTER 10

United Kingdom

Carol Day

1 Access to environmental information

1.1 Introduction

The 1980s witnessed a growth in the momentum against 'unnecessary' official secrecy and for an effective UK Freedom of Information Act. The passage of four private members' bills, drafted and promoted by the Campaign for the Freedom of Information, became law in the late 1980s, including the Environment and Safety Information Act 1988.[1] This Act required safety and environmental authorities to set up public registers of the enforcement notices served on factories, shops and other premises where public hazards or breaches of safety or environmental laws occurred. Rights of access to environmental information have since become a significant part of the regulatory landscape in the UK on the basis that information is a necessary prerequisite of participation in many of the procedural settings of environmental protection.

The EU's signature to the Aarhus Convention in 1998 prompted a 2003 European Directive on public access to environmental information[2] and accelerated the trend towards public sector transparency. The UK passed a raft of regulations, including the Environmental Information Regulations 2004 (EIRs)[3] in order to meet its obligations. An attempt was made to align the EIR with the structures under the pre-existing Freedom of Information Act 2000[4] (FOIA, which offers a general right of access to information held by public authorities), although provision had already been made in the FOIA to exempt environmental information from its remit in anticipation of the EIRs.

There are a number of important differences between the FOIA and the EIRs - notably in the area of exceptions. For example, under the FOIA there is a specific absolute exception (not subject to the public interest test) that allows a public authority to withhold information where any other law prevents the authority from disclosing it. By contrast, the EIRs state explicitly that any prohibition on releasing information that is contained in any other law does not apply to environmental information. In general terms, the public's rights under the EIRs are stronger than the FOIA because of the UK's obligations under the Aarhus Convention, which recognises the public interest nature of such information.

The Department of the Environment, Food and Rural Affairs (Defra) has published guidance to public authorities on best practice in providing access to environmental information.[5] The Information Commissioner's Office provides

1 Environment and Safety Information Act 1988.

2 OJ L41 14.2.2003, 26-31.

3 The 2004 Regulations apply in England, Wales and Northern Ireland. Separate provision is made in Scotland via the Environmental Information (Scotland) Regulations 2004.

4 The FOIA 2000 applies in England, Wales and Northern Ireland. Separate provision is made in Scotland via the Freedom of Information (Scotland) Act 2002.

5 DEFRA, Code of practice on the Discharge on the obligations of Public Authorities under the Environmental Information Regulations (EIR) 2004, SI 2004/3391, available at <https://ico.org.uk/media/

information on the Freedom of Information Act, the EIRs and the Data Protection Act[6] and also provides a range of advice and training products. The Scottish Information Commissioner[7] has similar powers under the Freedom of Information (Scotland) Act, although data protection is not devolved and remains with the UK Information Commissioner.

1.2 Routinely publishable information

As a minimum, public authorities must routinely publish information listed in Article 7(2) of Directive 2003/4/EC on public access to environmental information.[8] This includes policies, plans and procedures relating to the environment, reports on the state of the environment, environmental impact studies and data taken from monitoring activities and risk assessments that affect or are likely to affect the environment. This may include public registers of environmental information, carbon emissions data or details about external renovation or building work. A public body must also publish facts and analyses of facts that are relevant and important to major environmental policy decisions. The EIRs require public authorities to proactively publish environmental information electronically, and organise information in a systematic manner.

1.3 What does the public have the right of access to?

Both the FOIA and the EIRs cover the right of access to information as opposed to documents, the latter providing a more limited right of access to information held by the European Community bodies and institutions.[9]

The definition of 'environmental information' in the EIRs mirrors that of the Aarhus Convention, including information about the state of the air, water, land, natural sites, living organisms including genetically modified organisms' and emissions or discharges including energy, noise and radiation. It also covers legislation, policies, plans, activities, administrative and other measures likely to affect any of the above or intended to protect them, assessments of the costs or benefits of such measures and reports on the implementation of environmental legislation.[10] To the extent that any of these factors affect human health or safety, food contamination, living conditions, built structures or cultural sites, the information about these matters is also environmental information.

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for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf> accessed 29 march 2016.

6 See <https://ico.org.uk/>, accessed 25 march 2016.

7 See <http://www.itspublicknowledge.info/home/ScottishInformationCommissioner.asp>, accessed 25 march 2016.

8 OJ L41 14.2.2003, see footnote 2.

9 *WWF European Policy Programme v Council of the European Union* [2007] ECR II -911, 76.

10 Environmental information regulation (EIR) 2004 SI 2004/339, 2(1).

As 'information on' covers information about, concerning, or relating to, this definition extends not only to written measures, but also to their application. Information held on record as a result of following processes required by a measure is also likely to be information on an activity. For example, information about payments received by individual New Forest verderers under the Countryside Stewardship Scheme and legal advice obtained by the verderers on that Scheme were defined as environmental information as information on a measure that affects, or is likely to affect, an element of the environment.[11]

Environmental information can include or be included in expressions of opinions, reports, letters, analyses, studies, notes of meetings, telephone records and emails between authorities. For the purposes of the EIRs, a public authority is still considered to hold environmental information where another public body holds it on their behalf. For example, where a public body subcontracts public services to an external company, that company may then hold environmental information on behalf of the public body depending on the type of information and the contract between the two organisations.

If work related emails are sent using private email accounts and this results in official information being stored on private non-work email accounts, this information will be held for the purposes of the Regulations. However, the EIRs only cover information that is already in a recorded form. A public body may have to manipulate databases to extract information but the EIRs do not oblige them to create new information or find out the answer to a question.

The courts have repeatedly determined that the definition must be applied broadly. For example, in *Omagh District Council v Information Commissioner*[12] and *Black v Information Commissioner,*[13] it was held that the definition of environmental information does not relate exclusively to the natural environment but can include that environment as altered by human activity. Elements of the definition (such as the meaning of landscape) can receive quite a liberal interpretation (as in the *Omagh* case, which concerned the construction of a memorial on Council owned land to commemorate IRA members who died during the hunger strikes of 1981) but there must be elements of visual amenity at the very least.

However, while Genetically Modified Organisms (GMOs) are specifically included in the definition of environmental information,[14] in *GM Freeze v Defra,*[15] the First Tier Tribunal[16] held that the adventitious sowing of GM seed did not constitute an 'emission' under the Regulations. This term implied some-

[11] ICO Decision Notice FER0148337 confirmed in *Rudd v Information Commissioner and The Verderers of the New Forest* [2008] EA/2008/0020.

[12] *Omagh District Council v Information Commissioner* [2010] EA/2010/0163 UKFTT.

[13] *David Black v Information Commissioner* [2011] EA/2011/0064 UKFTT.

[14] EIR 2004, see footnote 10, 2(1)(a).

[15] *Bristol City Council v ICO* [2011] EA/2010/0012 UKFTT.

[16] Appeals to the First-tier Tribunal are against the decisions from government departments and other public bodies. The First–tier Tribunal comprises six chambers including the General Regulatory Cham-

thing other than a deliberate release. The consequence of this is that a number of exemptions to the provision of information within the Regulations and Directive 2003/4/EC are dis-applied where the information involves 'emissions'. The Tribunal held that information about the location of GM planting was classified as personal data, thus while the information may be the subject of disclosure it will be necessary for applicants requesting information to demonstrate where the public interest lies.

1.4 The definition of public authorities

The FOIA applies mainly to 'public authorities' including government departments and agencies, local councils, schools colleges and universities, the police and armed forces, regulators, quasi-governmental bodies, advisory committees, Parliament (and the devolved assemblies), NHS bodies and doctors, the Association of Chief Police Officers of England, Wales and Northern Ireland, the Financial Ombudsman Service and the Universities and Colleges Admissions Service (UCAS). It also covers publicly owned companies including the British Broadcasting Corporation (BBC) and Channel 4 (except journalistic material).[17] The Scottish Freedom of Information Act applies to the Scottish Executive and its agencies, the Scottish Parliament, local authorities, NHS bodies, police forces, schools, colleges and universities and other Scottish authorities.

The EIRs apply more widely, extending the definition of public authorities beyond those listed above to include the security and intelligence agencies, the special forces, courts and tribunals and members of the Royal Family.[18]

The concept of a public body has been thought to be wide-ranging, including those conducting functions of public administration and any other body or person under the control of this type of body that has public responsibilities, exercises functions of a public nature or provides public environmental services.[19] It was assumed at the time of introduction of the EIRs that this provision would cover companies such as waste disposal, water, energy, and transport companies and certain environmental consultants. However, the hybridised nature of many public service providers renders this definition problematic. The Aarhus Implementation Guide reinforces the importance of both function and

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ber, which houses the Environment and Information Rights Tribunals. A simplified diagram of the Court structure England and Wales can be found in the section on access to justice.

17 For a complete list of public authorities covered see Freedom of information Act (FOIA) 2000, sch I.

18 See *Bruton v IC and the Duchy of Cornwall and the Attorney General to HRH the Prince of Wales* [2011] EA/2010/0182.

19 EIR 2004, part I, 2(2), that includes: "*(c) any other body or person that carries out functions of public administration or (d) any other body or other person, that is under the control of [another public authority] and – (i) has public responsibilities relating to the environment; (ii) exercises functions of a public nature relating to the environment; or (iii) provides public services relating to the environment*".

status, confirming that what matters is whether what is being done amounts to public administration':

> "The definition of public authority is important in defining the scope of the Convention. While clearly not meant to apply to legislative or judicial activities, it is nevertheless intended to apply to a whole range of executive or governmental activities, including activities that are linked to legislative processes. The definition is broken into three parts to provide as broad coverage as possible. Recent developments in privatized solutions to the provision of public services have added a layer of complexity to the definition. The Convention tries to make it clear that such innovations cannot take public services or activities out of the realm of public information, participation or justice."[20]

In recent years, the status of such bodies has been a contentious issue in the UK. In *Network Rail Ltd v Information Commissioner,*[21] the Information Commissioner held that under the 2004 Regulations an applicant must prove that the body was 'public in nature' by reference to a number of criteria, including whether that body is: (i) publicly funded; (ii) exercising statutory powers; (iii) acting in the place of central government or local authorities; (iv) providing a public service; and (v) under a significant degree of government control. However, in *Smartsource v Information Commissioner,*[22] the Commissioner exempted privatised water utility companies from the definition of public bodies,[23] recognising that while they may perform public functions this was not the same as performing functions of public administration. The Upper Tribunal also held that the privatised water companies were not 'under a significant degree of government control'. In a separate case brought by NGO Fish Legal the Upper Tribunal judge agreed to refer the question of the status of the water companies to the Court of Justice of the European Union[24] (CJEU). The CJEU held that if the Water Utilities are under the control of a body falling with Article 2(2)(a) or (b) of the Access to Information Directive they should be defined as 'public authorities' as long as do not determine the way in which they provide those services in a genuinely autonomous manner. Furthermore, a body falling within Article 2(2)(b) of the Directive constitutes a public authority in respect of all the environmental information it holds, although it is not obliged to provide

[20] See UNECE, *The Aarhus Convention: An Implementation Guide,* (Second Edition 2014) 46-47, <http://www.unece.org/env/pp/implementation_guide.html>, accessed 25 march 2016.

[21] *Network Rail Ltd v IC and Network Rail Infrastructure Ltd* [2007] EA/2006/0061 and EA/2006/0062 UKFTT.

[22] *Smartsource v Information Commissioner and a Group of 19 additional parties* [2010] UKUT 415 (AAC).

[23] EIR 2004, Regulation 2(2), defines public authority to include government departments, all organisations covered under the FOIA 2000, any other body or person that carries out functions of public administration or is under the control of a public body and exercises environmental duties.

[24] Case C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and United Utilities, Yorkshire Water and Southern Water.*

environmental information if it is agreed the information does not relate to the provision of such services.

1.5 How quickly must the information be provided?

Under FOIA, public authorities must release the information 'promptly' and at the latest within 20 working days unless they need longer to carry out an assessment of the 'public interest'. In those cases there is no explicit time limit but they are obliged to inform the applicant when they will respond to a request. A 10 working day extension is allowed for requests to the National Archives and Keeper of Records in Scotland for information that is not already publicly available.

For environmental information the information must be provided "as soon as possible" and in any event within 20 working days. The time limit can only ever be extended where the information requested is both complex and voluminous and may only be extended by another 20 working days maximum.

In both cases, the authority must give the applicant a written notice that they are extending the time and explain why they are doing so. If the public authority declines to provide the information requested they must send the applicant a refusal notice explaining the basis for their refusal and the right to appeal. In particular the authority must set out: (i) which exemption applies; (ii) why that exemption applies; and (iii) how they have carried out the public-interest balancing exercise (where it applies).

1.6 Exemptions to disclosure

Some categories of information are exempt from disclosure. Under the FOIA there is a specific absolute exception that allows a public authority to withhold information where any other law prevents the authority from disclosing it (which is not subject to the public interest test), whereas the EIRs explicitly prohibits this exception with regards to environmental information. In other words, the EIRs supersede other legislation in relation to information of an environmental nature.

There is an express presumption of disclosure under the EIRs. Thus, a public authority may only refuse to disclose information where an exception applies. Regulation 12(4) applies to certain circumstances and categories of information (stand-alone exceptions); Regulation 12(5) applies where the disclosure would have one of the adverse effects listed in that regulation ('adverse effect' exceptions).

With the exception of a small number of specific absolute exemptions under FOIA the exemption will be subject to a public interest test and the information can only be withheld if the public interest in withholding the information outweighs the public interest in disclosing it. The public interest test applies to all exceptions contained in the EIRs except those relating to personal data. This

means that even if an exception is engaged and an authority wishes to withhold the information, it must go on to consider whether it is in the public interest to disclose it.

Most of the 'stand-alone' exemptions are relatively straightforward. They cover situations in which the information is not held by the authority in receipt of the request, or the request is manifestly unreasonable or too general.[25]

A fourth exception in this category is that the request covers material in the course of completion, unfinished documents and incomplete data.[26] This exception covers most work in progress, although the authority must consider the status of the information at the time of the request. In *Secretary of State for Transport v The Information Commissioner,*[27] the Information Tribunal overruled the Information Commissioner's[28] decision notice, in which it was concluded the exception did not apply where a final version of the information existed. The Tribunal found that the exception was engaged but the fact that a final version of the document exists does not change the status of the draft report. The public interest test is an important consideration with regard to this exception. The ICO considers that the public interest in maintaining this exception will decline once the final version of the document has been completed.[29]

Finally, an authority may refuse to disclose information to the extent that the request involves disclosing internal communications. The Information Tribunal upheld the view of the Information Commissioner that the exception does cover communications between separate government departments and communications between a central government department and a local authority or two local authorities.

The 'adverse effect' exemptions only apply to the extent that the disclosure of the information would adversely affect the particular interest protected, and where the authority is also satisfied that the public interest in maintaining the exception outweighs the public interest in disclosing the information. The criterion of adverse effect is similar to that of 'prejudice' under the FOIA, although the latter is "would, or would be likely to, prejudice", whereas for adverse effect the harm must be at least probable rather than merely likely. These exceptions, *inter alia*, include: (i) international relations, defence, national security or public safety; (ii) the course of justice, the ability of a person to obtain a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature; (iii) intellectual property rights; (iv) the confidentiality of the proceedings of a public authority where such confidentiality is provided by law; (v) the confidentiality of commercial or industrial information where such confiden-

[25] EIR 2004, Regulation 12(4)(a)-(c) respectively.

[26] EIR 2004, Regulation 12(4)(d).

[27] *Secretary of state for transport v Information Commissioner* [2009] EA/2008/0052.

[28] The ICO has a general duty to investigate complaints from members of the public who believe that a public authority has failed to respond correctly to their request for information.

[29] ICO, *An Introduction to the Environmental Information Regulations (EIR) exceptions* (2009).

tiality is provided by law to protect a legitimate economic interest; and (vi) the protection of the environment to which the information relates.[30]

A public authority cannot use exceptions relating to: (i) the confidentiality of the proceedings of a public authority; (ii) the confidentiality of commercial or industrial information; (iii) the interests of the person who provided the information; or (iv) the protection of the environment to which the information relates concerning information on emissions. Emissions are not defined in the EIRs, nor Directive 2003/4/EC, but the term "emissions" captures a great deal of information. However, the view of the Information Commissioner's Office is that phrase "relates to information on emissions" suggests that information will not necessarily need to be directly concerning emissions to fall within this provision and that the exception is not limited to past emissions, but could also encompass present and future emissions.

In *Office of Communications v Information Commissioner*[31] the Supreme Court was divided on the question of whether, when considering the exceptions under Article 4(2) of Directive 2003/4/EC to the duty to disclose environmental information, the interests served by different exceptions could be combined and then weighed as a whole against the public interest in disclosure. The Supreme Court favoured the Court of Appeal's approach that the answer was in the affirmative by a majority of three to two, but referred the question to the CJEU. The CJEU endorsed the majority view of the Supreme Court.[32]

There have been a number of other interesting cases in the field of exemptions. In *Birkett v Defra,*[33] the Court of Appeal held that where a public authority had initially relied upon a particular exception when refusing to release environmental information under the EIRs, it is lawful to rely upon a different exception or exceptions in proceedings before the Information Commissioner or the First-Tier Tribunal. The Court considered that: (i) the relatively short time within which the initial decision to release, or withhold with reasons, must be made; (ii) the broad scope of the review process; and (iii) the balance that had to be struck between the public interest in the prompt release of environmental information and the need to avoid harm to other important public interests - taken together with a purposive interpretation of Directive 2003/4/EC – justified errors or omissions with regard to the exceptions relied upon by public authorities in their initial decision. In short, the Court recognised that it was not always possible for the public authority to "get it right the first time".

Finally, while legal professional privilege is recognised as a ground for exemption under FOIA, it is not recognised as such in the EIRs. A public authority must demonstrate that disclosure of the legal advice would adversely affect the course of justice, and in all the circumstances of the case, the public

[30] EIR 2004, Regulation 12(5)(a)-(g).

[31] *Clive Lewis QC and Akhlaq Choudhury v Dinah Rose QC, Jane Collier and Charlie Potter* [2010] UKSC 3.

[32] Case C-71/10 *OFCOM v Information Commissioner.*

[33] *Birkett v Department for the Environment, Food and Rural Affairs sub nom Department for the Environment, Food and Rural Affairs v Information Commissioner* [2011] EWCA Civ 1606.

interest in maintaining that exemption outweighs the public interest in disclosure. There is also a presumption in favour of disclosure. In *Robinson v. Information Commissioner and Department for Communities and Local Government,*[34] a case concerning the impact of an 80m tall anemometer on the local population of pink-footed geese in North Norfolk, the First-Tier Tribunal held that the public interest elements in this case were sufficiently compelling to override the considerations which usually favour withholding legal advice. Whilst the principle of legal professional privilege (a right to consult your lawyer and receive advice unimpeded) is itself an important value to be upheld, it has been noted that it equally must be right that the balancing of public interests must be carried out in the circumstances of each case before disclosure is ordered or refused, as the case may be.[35]

1.7 Scotland

The main difference with the Scottish exemptions is in the harm test. Many of the EIRs exemptions apply where disclosure would "adversely affect" a particular interest, whereas the Scottish exemptions adopt the more demanding test of whether disclosure would "substantially prejudice" that interest, thereby making it more likely that an applicant will be able to obtain the information under the Scottish EIRs.

1.8 What is in the public interest?

The term "the public interest" is not defined in either the FOIA or the EIRs. According to the Information Commissioner the public interest test entails a public authority deciding whether, in relation to a request for information, it serves the interests of the public either to disclose the information or to maintain an exemption in respect of the information requested. To reach a decision, a public authority must carefully balance opposing factors, based on the particular circumstances of the case. Generally speaking, the public interest is served where access to the information would: (i) further the understanding of, and participation in the debate of issues of the day; (ii) facilitate the accountability and transparency of public authorities for decisions taken by them; (iii) facilitate accountability and transparency in the spending of public money; (iv) allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions; or (v) bring to light information affecting public safety.

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[34] *Robinson v. Information Commissioner & Department for Communities & Local Government* [2011] EA/2010/0204 First-Tier Tribunal.

[35] David Hart, 'Strategic Issues – England and Wales' [2012] Environmental Law & Management 24.

1.9 Partial refusal and redaction of documents

Like the FOIA, the EIRs provide a right of access to 'information', rather than to documents or records. So it follows that any exemption applies to information, rather than to entire documents or records. Where a document contains some information that can be refused, then the authority is not entitled to withhold the whole document or record. They may remove or redact (black out) the legitimately withheld information but must disclose everything else.

Any information that is redacted or removed is information which is 'refused', and full reasons must be given. The applicant has full rights of reconsideration and appeal. Where information is redacted for a number of different reasons, the reasons given must indicate clearly why different parts of the document have been redacted.

1.10 Appealing against refusals

If a request is refused, the applicant can make a complaint to the same authority that refused to provide the information. This must be done within 40 working days from the date of the refusal. If the information is still declined (or if the public body has no complaints procedure) the applicant can make a complaint to the Information Commissioner's Office. Complaints about a request made under the EIRs must be submitted to the ICO within six months of the public authority issuing the outcome of its internal review. The ICO has a general duty to investigate complaints from members of the public who believe that a public authority has failed to respond correctly to their request for information. If the complaint is not resolved informally, the ICO will issue a Decision Notice and, ultimately, has the power to enforce compliance.[36] However, the ICO's complaint process is slow – while most complaints are dealt with in six months, it can take more than a year for the issue to be resolved.

An Appeal concerning the Decision Notice issued by the UK or Scottish Information Commissioner must be made to the First-Tier (Information) Tribunal within 28 days. Making an appeal is free and the Tribunal will only make an order for costs against the appellant in very unusual circumstances. Beyond the Information Tribunal, it is possible to appeal on a point of law to the High Court in the UK (other than Scotland) or, in Scotland to the Court of Session.

1.11 Charging for environmental information

For information published under a Publication Scheme[37] the charging regime must be set out in the scheme.

[36] EIR 2004, Regulation 18.

[37] All public authorities must produce and maintain a publication scheme, which sets out what kinds of information the public authority will automatically make available to the public and how they will do so.

For non-environmental information, public authorities can make a charge[38] as long as that charge is in accordance with the Fees Regulations. Generally authorities will only be able to charge for copying and postage, and not for time involved in researching and responding to the request unless that amount exceeds £600 (central government) or £450 (other authorities). If the cost of providing the information is above these amounts, the authority is not required to provide the information at all.

The EIRs prohibit public authorities from charging for certain types of environmental information, including accessing public registers or lists of environmental information held by a public authority or to examine the information requested at a place made available by the public authority.[39]

For other requests, a charge may be made but must not exceed a 'reasonable amount'. Neither the EIRs nor the Directive define this term. However, the EIR Code of Practice states that a charge must not exceed the cost of producing the information, whether for information proactively disseminated or provided on request.[40] This may, depending on the circumstances, include the cost of locating, retrieving, and extracting the information; the cost of communicating that information to the applicant; and staff time spent on carrying out the activities related to supplying the information.

An EIR request cannot be refused on grounds of cost alone. However, cost may be a factor in deciding whether a request is manifestly unreasonable. If an applicant considers that a fee may have been wrongly charged under the EIRs, they can request an internal review of the decision to impose a charge from the public authority. Complaints can be made to the ICO and the decision of the Information Commissioner may, in turn, be appealed to the First-Tier Tribunal (Information Rights). More information about charging for information under the EIRs can be found on the website of the Information Commissioner's Office.[41]

Most requests to Scottish public authorities will be free or cost very little. The first £100 of the costs of responding to a request, including any photocopying costs, will automatically be waived. If the cost to the public authority exceeds £100, it can charge 10% of its costs. As the maximum hourly rate is £15 an hour, the most an applicant can be charged for staff time is £1.50 an hour. The authority can charge for the work involved in locating, retrieving and providing the information but it cannot charge for the time spent deciding whether it holds

All schemes must be approved by the Information Commissioner, and once a publication scheme is in place then an authority must comply with what is set out there.

38 The charging provisions in the EIRs are permissive. Public authorities have the discretion whether to make a charge; it is not mandatory.

39 EIR 2004, Regulation 8(2).

40 EIR 2004, s V, para 28.

41 See ICO, 'Charging for Environmental Information' available at <http://ico.org.uk/for_organisations/environmental_information/guide/~/media/documents/library/Environmental_info_reg/Practical_application/charging-for-environmental-information-reg8.pdf>, accessed 25 march 2016.

the information and deciding whether it should be disclosed. The applicant will also have to pay the full copying, printout and postage costs. Photocopying charges are not fixed, however, the Scottish Executive's guidance states: "If the cost to the authority for photocopying material is 10 pence per A4 sheet, it would be unacceptable to include a greater charge for this element".

A Scottish authority does not have to provide information if it would cost more than £600 to do so, however, it is obliged to inform the applicant what information is available without exceeding that limit or advise on how the applicant could narrow their request to stay within the limit. If two or more separate requests are made for related information, they have to be answered, even if the combined cost exceeds £600. A Scottish authority can only refuse requests where the combined cost exceeds £600 if it publishes that information within 20 working days. The Scottish Executive's guidance on the Scottish EIRs also says that authorities may decide to adopt the Scottish FOI Act's approach to charges where the cost is below £600. These are described above. If the cost exceeds these limits the authority is still required to deal with the request though it can charge a 'reasonable' amount for doing so.

2 Participation rights

2.1 Introduction[42]

It has been noted that the UK has had *"a historical lack of experience in broad public engagement"* and a political culture where *"experts whose right to speak [was] virtually unquestioned"*.[43] However, a major change took place on the UK's ratification of the Aarhus Convention in terms of innovating in, and institutionalising, public participation.

In the late 1960s and throughout the 1970s, local participation grew quickly, especially in the community planning field. This development stopped during the 'Thatcherite' government, when the predominant trend on environmental decision-making was to favour a technocratic approach, focusing on one-way communication with the public. From the mid-1990s to 2005, a new wave of research on public participation emerged. It focused on two-way dialogue, and promoted decision-making practices by developing innovative methods. This affected decisions in all fields, whether the issue was genetically modified organisms (GMOs) or managing hazardous waste.

The domains open to public participation seemed to change: sustainable development and climate change became key issues given the underlying crisis

[42] Jason Chilvers, 'Research on Public Participation in Environmental Decision-Making: Approaches, Contexts, Stakes and Perspectives Across Borders' (International Seminar, University of East Anglia, Wadham College, Oxford, 12 - 13 April 2011).

[43] Sheila Jasanoff, *Designs on Nature: Science and Democracy in Europe and the United States* (Princeton University Press 2005) 286–289.

of confidence in science. This led to attempts to rethink public participation, a theme adopted by 'New Labour' as part of its development of a democratic renewal and social inclusion programme. These changes affected environmental sectors, including environmental risk management, waste management, etc. The focus was increasingly on theoretical debate on values, as two new forms of public participation emphasizing agreement or consensus developed. These approaches were: (i) stakeholder-based approaches, which targeted actors interested in or affected by the issues being debated. These methods included mediation, conflict resolution, etc; (ii) public deliberation methods: citizens' juries, consensus conferences, focus groups, etc. This period was also characterised by a move towards participative and qualitative research.

Since 2005, a new phase appears to have begun characterised by a move to institutionalise and professionalise public participation (as seen in the rising public engagement industry, a second wave of practice-based research and the institutionalisation of participation itself), and public engagement in science and technology. While new practices have emerged, some patterns can be observed: there is a shift towards decision-making by small groups of "innocent citizens", but also an opposing movement in favour of "scaling up", which attempts to involve hundreds of people located in the same room at the same time.

On-line participation is presumed to be more efficient and effective and has become increasingly common. Indeed, the Cabinet Office Consultation Principles[44] advocate consultation should be 'digital by default', whilst recognising that other forms of consultation may be necessary to reach all those affected by a policy.

2.2 The effect of the Aarhus Convention

In order to implement Articles 6, 7 and 9(2) of the Aarhus Convention, the EU adopted EC Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (the "Public Participation Directive", or "PPD"). The PPD amended existing public participation rights under EC Directives on Environmental Impact Assessment (EIA) (85/337/EEC) and Integrated Pollution Prevention and Control (IPPC) (96/61/EC) and also established rules for public participation in plans and programmes drawn up within other existing Directives, including the 1975 framework waste Directive (75/442).

In the following years, the UK brought into force a raft of the laws, regulations and administrative provisions necessary to comply with the PPD. In general terms, the UK makes no distinction between the requirements of the Aarhus Convention and public participation obligations arising from the PPD.[45]

[44] Available at <http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>, accessed 25 march 2016.

[45] For more detailed analysis see above ch by Nagy.

2.3 Public participation in relation to specific activities (Article 6)

The obligations arising from Article 6(1)(a) of the Aarhus Convention are implemented by elements of national regulations implementing the Community Directive on Integrated Pollution Prevention and Control Regulations 2000[46] and the EIA Regulations 1999.[47] In the UK, all projects likely to have "a significant effect on the environment"[48] are subject to EIA procedures (according to EC Directive 85/337).

Although the EIA Regulations 1999 were prepared with the Aarhus Convention in mind, at the time of UK ratification (2005), some noted a low standard in the EIA system with respect to public involvement by developers prior to submissions of their development applications.[49] At the time, the "half-hearted" implementation of the public participation process in EIA decision-making was widely accepted to be, at least in part, due to deficiencies in the 1999 UK Regulations.[50]

In November 2008, the UK parliament passed the Planning Act 2008. The Act provided for the establishment of a separate body, the Infrastructure Planning Commission (IPC),[51] to consider applications for development consent for major infrastructure projects, which had been previously been subject to decision by local government bodies. New regulations, the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009, were also enacted to ensure that the UK complied with the requirements of the EIA Directive.

More recently, the government has introduced new procedures for ensuring a more "streamlined" approach for the public to participate in major infrastructure developments. In 2011, the passage of the Localism Act saw the abolition of Regional Spatial Strategies (RSS)[52] and the Infrastructure Planning Commission (IPC).[53] The Planning Inspectorate became the agency responsible for operating the planning process for nationally significant infrastructure projects (NSIPs),

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[46] See the Pollution Prevention and Control (England and Wales) Regulations 2000 and Environmental Impact Assessment (EIA) Regulations 1999.

[47] See the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999.

[48] Aarhus Convention, art 6(1)(b).

[49] John Glasson, Riki Therivel and Andrew Chadwick, *Introduction to Environmental Impact Assessment* (3rd Edition, Routledge, New York 2005).

[50] Eduardo Langa, 'An Appraisal of Effectiveness of Public Participation Process at the Pre-implementation Stage of the Aarhus Convention in the UK EIA System' (2008) UEA Thesis, <http://www.academia.edu/7119244/An_Appraisal_of_Effectiveness_of_Public_Participation_Process_at_the_Pre-implementation_Stage_of_the_Aarhus_Convention_in_the_UK_EIA_System> accessed 25 march 2016.

[51] The Infrastructure Planning Commission is available at <http://infrastructure.independent.gov.uk>, accessed 25 march 2016.

[52] Localism Act 2011, s 109.

[53] Ibid, s 128 and sch 13.

including new harbours, power generating stations (including wind farms), and electricity transmission lines. From April 2012, the relevant Secretary of State became the decision-maker on all national infrastructure applications for development consent. At the end of the examination of an application, to be completed within a maximum of six months, the Planning Inspectorate has three months to make a recommendation to the relevant Secretary of State, who then has a further three months to reach a decision.

The Localism Act 2011 also established new procedures for developers to consult with local communities prior to submitting certain types of planning applications, the scale of which would invariably require EIA.[54] In particular, the application must be publicised in such a way as to bring it to the attention of the majority of people who live, work or spend time in the vicinity of the area. Details must be given as to how the public can engage with those promoting the application and the applicant must include a reasonable timetable within which representations can be made.[55] Developers are obliged to consider any responses received before finalising proposals and submitting an application[56] and when submitting an application, developers must account for how they have consulted the local community, what comments they have received, and how they have taken those comments into account.[57] This duty exists alongside a more general duty for applicants to draw up a statement detailing how it will consult local residents under s.47 of the Planning Act 2008.

2.4 Third party right of appeal

Whilst an applicant can appeal the decision of a local planning authority on fact and law, there is currently no scope for civil society to challenge planning decisions beyond an application for Judicial Review (see later). Furthermore, once planning permission has been granted, there is no guarantee of redress if any of the conditions of the permission are breached. The enforcement of a breach of planning conditions is at the discretion of the local planning authority, and individuals do not have the right to ensure enforcement of any breaches, regardless of the environmental consequences.

2,5 GMOs

In March 2001, the EU adopted Directive 2001/18/EC on the deliberate release into the environment of genetically modified organ-

54 'Large scale major applications' includes residential developments of 200 or more new residential units or (where the number of residential units to be constructed is not specified) with a site area of four hectares or more and any non-residential developments providing 10,000 square metres or more of new floor space, or with a site area of two hectares or more. See Localism Act 2011, s 122.

55 Town and Country Planning Act 1990, s 61W(1)-(4) as amended by the Localism Act 2011, s 122.

56 Ibid, s 61X.

57 Ibid, s 61Y.

isms (GMOs) and repealing Council Directive 90/220/EEC.[58] The Directive is implemented in the UK by part VI of the Environmental Protection Act 1990 and regulations made under that Act.[59] The Secretary of State is under a duty to maintain a public register containing information about applications for consents and any advice given in relation to such applications. The register is open to inspection by members of the public free of charge at all reasonable hours and members of the public must be afforded facilities for obtaining copies of entries on payment of reasonable charges.[60] Following receipt of an application for consent to release GMOs, the Secretary of State is obliged to invite representations as to any environmental risks arising from the release within 60 days of the date the application was received. The invitation is placed on the public register and repeated on the Defra website. The Secretary of State is also under a duty to take into account any representations relating to risks of damage.[61] Similar duties are imposed on the Scottish Executive and the Welsh Assembly Government.

2.6 Public participation in relation to plans, programmes and policies relating to the environment (Article 7)

As mentioned above, the EU has implemented the obligations arising from Articles 6, 7 and 9(2) of the Aarhus Convention through the EC Public Participation Directive.

2.7 The town and country planning system

The protection of the public interest has been a fundamental principle of land-use planning in the UK since 1947. Through the passage of the Localism Act 2011, the Government ended an era of top-down government by abolishing Regional Spatial Strategies[62] and giving new powers to local councils, communities, neighbourhoods and individuals ('Big Society') through new "Neighbourhood Plans". The reform of the planning system was an important part of 'decentralisation', with the stated aim of giving local councils and communities a stronger role in decision-making.

It is a matter of law that determinations of planning applications have to be taken in accordance with the development plan unless material considerations

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58 European Parliament and Council Directive (EC) 2001/18 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive (EEC) 90/220 - Commission Declaration.

59 E.g. in respect of England and Wales, the GMOs (Deliberate Release) Regulations 2002.

60 Environmental Protection Act 1990, part VI, s 122.

61 Genetically Modified Organisms (Deliberate Release) Regulations 2002, s 20.

62 Localism Act 2011, s 109. Responsible regional authorities previously charged with developing 'regional plans' under s 70 of the Local Democracy, Economic Development and Construction Act 2009 are removed.

indicate otherwise.[63] The Planning and Compulsory Purchase Act 2004 defined the development Plan as the Regional Strategy for the region in which the area was situated and the Development Plan Documents (taken as a whole) adopted or approved in relation to that area.[64] The abolition of the regional planning tier made way for the introduction of Neighbourhood Development Plans setting out policies in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan.[65] Any "qualifying body" is entitled to initiate a process for the purpose of requiring a local planning authority in England to make such a plan, including parish councils and neighbourhood forums. The Localism Act 2011 amended the 2004 Act so as to make Neighbourhood Development Plans part of the development plan in accordance with which planning applications must be determined.[66]

The Localism Act 2011 also gave powers to parish councils and Neighbourhood Forums to initiate Neighbourhood Development Orders, which grant planning permission in relation to a particular neighbourhood area specified in the order for either: (a) development specified in the order; or (b) for development of any class specified in the order. This second category allowed an increase in "permitted development" rights. For example, a neighbourhood may wish to allow anyone to have a loft extension or outbuilding in the garden regardless of whether it conformed to the relevant dimension in the General Permitted Development Order 1995. The power to make Neighbourhood Development Orders has been described as quite radical insofar as it elevates local people to the status of decision-makers in respect of planning applications.[67] Others have criticised it as giving power to local people who may lack the relevant professional expertise to plan or who may be conflicted by evidence and local sentiment pulling in opposite directions.[68]

It has also been noted that the "power to the people" public image of the Localism Act 2011 is in sharp conflict with an analysis of the trends in local government and their effects on the planning system over the last 20 years.[69] Prior to 1850 was the era of the "private interest"; the advent and eventual supremacy of the modern administrative state was 1940–1980s, the ideology of the "public interest".[70] The advent of the 'Thatcherite' Government made money-making respectable and efficiency, as defined by the private sector, was introduced into local government. The new Labour administration of 1997 tightened up the

[63] Planning and Compulsory Purchase Act 2004, s 38(6).

[64] Ibid, s 38(3) and (4).

[65] Inserting a new s 38A into the Planning and Compulsory Purchase Act 2004.

[66] Absent material considerations to the contrary, see the Localism Act 2011, sch 9 paras 5-7.

[67] Tom Cross, 'The Localism Act 2011' (2012) KBW <http://www.11kbw.com/uploads/files/PlanningTC.pdf> accessed 25 march 2016.

[68] Ibid.

[69] Wendy Le-Las and Emily Shirley, 'Does the Planning System need a "Tea Party"?' [2012] Journal of Planning Law, Issue 3.

[70] Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon 1980).

delivery of services by local government, introducing targets[71] and the 1999 Local Government Act, with the concept of "best value" impacting adversely on third parties participating in the planning system.[72]

The trend continued with the passage of the 2008 Planning Act, which introduced a fast-track system for major infrastructure proposals which hitherto had been debated in large public inquiries. Similarly, there had always been provision for a Minister to "call-in" significant proposals for his/her own determination, thus prompting a public inquiry, but a government direction of 2008[73] halved the number of applications being called-in from circa 100 to only 50 out of half a million applications per year. Commentators have emphasised that "call-ins" are vitally important as a safeguard for local communities faced with a combination of a supine Local Planning Authority and a powerful developer: the community is totally impotent even with the support of a government agency because they lack the funds to risk Judicial Review.

The trend towards decentralisation also manifests itself in that government no longer regulates the precise detail of how local authorities prepare plans. While the Town and Country Planning (Local Development) (England) Regulations 2008 set out the law governing the production of development plan documents (supported by the National Planning Policy Framework (NPPF) published in 2012), local authorities have more opportunity to tailor the process of plan preparation to the task in question.

In general terms, the NPPF advocates early and meaningful engagement with neighbourhoods, local organisations and businesses. It recognises that a wide section of the community should be proactively engaged, so that Local Plans, as far as possible, "*reflect a collective vision and a set of agreed priorities for the sustainable development of the area, including those contained in any neighbourhood plans that have been made*".[74]

When preparing a development plan document, Regulation 27 requires local authorities to invite bodies that may have an interest in the subject of the document to make representations on what the Plan should contain. Local authorities are urged to 'front load' the plan preparation process on the basis that early and effective involvement of key stakeholders and the community should ensure there are fewer objections to the plan, or issues arising at a later stage. Similarly, local authorities are urged to examine the importance of early and effective community engagement through the scoping of the sustainability appraisal and engagement with key stakeholders.

Regulation 28 requires the local authority to allow a minimum of 6 weeks in which to receive representations on the development plan document. Local

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[71] Municipal Journal, March 26, 1999. See also *Modern Local Government: in touch with the People* (White Paper 1998).

[72] Wendy Le-Las, 'Planning & Best Value' [2000] Local Council Review 51, n 6, 18-19.

[73] The Town and Country Planning (Consultation) (England) Direction, Circular 2 2009

[74] National Planning Policy Framework 2012, par 155, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6077/2116950.pdf> accessed 25 march 2016.

authorities are at liberty to extend the 'standard' 6 week period for representations, for example if there is a recognised holiday during the 6 weeks or to be in line with agreed local authority policies on engagement with the community. As such, a local authority is free to prescribe whichever period they feel is most suitable, taking into account local issues and the coverage of the development plan document.

The local authority must take into account any representations received as a result of preparing the development plan document and is required to publish the time and place of the independent examination hearing sessions, along with the name of the inspector, on their website at least 6 weeks before the examination opens. They must also advertise the matter locally. Anyone who has made representations (and not withdrawn them) must also be directly notified of the details.

The local authority must make an adopted development plan document, along with the adoption statement and sustainability appraisal report, available as soon as reasonably practicable after the local authority has adopted that plan. These should be advertised for inspection at the locations where previous documents were placed under new Regulation 27. The adoption statement must be published on the website.

Where the plan is adopted, a statement must be published outlining how the options and consultation responses received on the development plan document and sustainability appraisal reports were taken into account and the reasons for choosing the development plan document in light of other reasonable alternatives. The adoption statement must be sent to anyone who requested to be notified of the adoption of the development plan document, the consultation bodies and anyone who made representations following publication.

2.8 National infrastructure projects

The Planning Act 2008 introduced changes to the planning regime for Nationally Significant Infrastructure Projects (NSIPs). The Act provided for the Government to produce National Policy Statements (NPSs) integrating environmental, social and economic objectives and provide clarity on the need for infrastructure. The new regime aimed to be more transparent and provide better opportunities for the public and local communities to shape decision-making. The Localism Act 2011 rendered NPSs subject to more extensive Parliamentary scrutiny.[75] A draft NPS or amendment to an existing NPS will have to be laid before Parliament and will only be able to be designated if the House of Commons resolves within 21 sitting days that it should be pro-

[75] The Localism Act 2011, sub-ss 2-7 and 13 of s 130, amended the Planning Act 2008, ss 5, 6 and 9, to require House of Commons approval of NPSs and material amendments to existing NPSs. This approval is now required in addition to complying with the existing consultation, publicity and Parliamentary scrutiny arrangements into the Planning Act 2008, ss 7 and 9.

ceeded with, or that period ends without the House of Commons resolving that it should not be proceeded with.

2.9 Scotland

Substantial modernisation of the planning system in Scotland was introduced through the Planning etc. (Scotland) Act 2006 and associated secondary legislation. These changes were designed to increase opportunities for local people to be involved in the planning system, alongside contributing to efficiency, effectiveness and sustainable economic development.[76]

2.10 Opportunities for participation in relation to normative instruments (Article 8)

The purpose of Directive 2001/42/EC on Strategic Environmental Assessment (SEA) was to integrate environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, specifically by ensuring that an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment. The Directive is implemented in the UK via a number of implementing regulations.[77] The Directive creates requirements for Consultation Authorities which, because of their environmental responsibilities, are likely to be concerned by the effects of implementing the plan or programme, and must be consulted on the scope and level of detail of the information to be included in the Environmental Report. These authorities are designated in the SEA Regulations as the Consultation Bodies[78] (Consultation Authorities in Scotland).

It is for the Responsible Authority[79] to identify the public to be consulted on a particular plan or programme and its Environmental Report. The authority must also take account of any legal obligations or guidelines, in addition to those of the Directive, which are relevant to the plan or programme for which it

[76] More information can be found at <http://www.scotland.gov.uk/Topics/Built-Environment/planning>, accessed 25 march 2016.

[77] See The Environmental Assessment of Plans and Programmes Regulations 2004, SI 2004/1633, The Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004, SR 2004/280, The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004, SSI 2004/258, and The Environmental Assessment of Plans and Programmes (Wales) Regulations 2004, SI 2004/1656 (W 170).

[78] These include, for England: Natural England, Countryside Agency, English Heritage and the Environment Agency; fo Northern Ireland: The Department of the Environment's Environment and Heritage Service; for Scotland, Consultation Authorities: Historic Scotland, Scottish Natural Heritage, and the Scottish Environment Protection Agency; and for Wales: Cadw (Welsh Historic Monuments), Countryside Council for Wales and the Environment Agency Wales.

[79] Environmental Assessment of Plans and Programmes Regulations 2004, part 3 reg 13(2).

is responsible. The public and the Consultation Bodies must be consulted on the draft plan or programme and the Environmental Report, and must be given an early and effective opportunity within appropriate time frames to express their opinions. The Consultation Bodies must also be consulted on screening determinations on whether SEA is needed for plans or programmes under Article 3(5), i.e. those which may be excluded if they are not likely to have significant environmental effects.

A plan or programme prepared wholly within one part of the UK (e.g. England) may have significant effects in another part (e.g. Scotland or Wales). In such cases the Responsible Authority must make arrangements to consult the Consultation Bodies and the public in the areas affected. In Scotland such consultations should be routed via the SEA Gateway. Consultation with the public at earlier stages (e.g. when considering the scope of the Environmental Report) is also encouraged.

The Directive requires responses to consultation to be taken into account during the preparation of the plan or programme and before its adoption or submission to a legislative procedure. The Directive refers only to consultation with the Consultation Bodies and with the public, although Responsible Authorities will normally consult a range of other bodies in the course of preparing their plans and programmes (e.g. Local Authorities, Regional Development Agencies and Primary Care Trusts).

When carrying out consultation, Responsible Authorities must have regard as appropriate to: (i) the agreement between Government and the voluntary sector, the Compact Code of Good Practice on Community Groups, which sets out agreed ways of working with community groups and voluntary organisations including black and ethnic minority groups and organisations;[80] (ii) the Scottish Compact Good Practice Guides, which provide advice on the Scottish Executive's relations with the voluntary sector including good consultation practices;[81] (iii) the Race Relations (Amendment) Act 2000 to promote race equality and the Disability Act 1995 to ensure that disabled people are not discriminated against; (iv) the government's Consultation Principles,[82] which set out criteria for conducting effective consultation; and (v) the Equalities Act 2010 and the need to have due regard to equalities duties in conducting public functions.

Responsible Authorities must allow enough time for consultation when preparing for the plan or programme and the Environmental Report. The

[80] See Compact Voice, *The Coalition Government and civil society organisations working effectively in partnership for the benefit of communities and citizens in England* (2010) available at <http://www.compactvoice.org.uk/sites/default/files/the_compact.pdf>, accessed 26 march 2016.

[81] See The Scottisch Compact, *The compact between the scottish executive, its agencies, NDPBS and the voluntary sector in Scotland* (2004) available at <http://www.scotland.gov.uk/Publications/2004/02/18723/31451>, accessed 26 march 2016.

[82] See Cabinet Office, 'Consultation Principles' (2012), available at <http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance> accessed 26 march 2016.

government has produced a UK-wide practical Guide on the SEA Directive.[83] The Guide confirms that it may be helpful to produce an outline of how consultation is to be conducted, clarifying how the Directive's requirements will be met (normally as part of the wider consultation strategy for the plan or programme). The outline could indicate the objectives of the consultation process, what consultation activities will be conducted, what information and documents will be made available, how they can be obtained, how consultation responses will be considered, and how the Responsible Authority will provide feedback to consultees. It also recognises that it may be beneficial to involve a selection of consultees in the development of this outline.[84] In Scotland detailed guidance in the form of an SEA Tool Kit is available to all responsible authorities.[85]

Where a plan or programme is likely to have significant effects on the environment in another EU Member State, the SEA Directive provides for trans-boundary consultation. Where a Responsible Authority expects a plan or programme to require trans-boundary consultation, it must bear in mind the time needed for contact to be established between the government bodies concerned, identification of and consultation with the public and environmental authorities in the affected Member State, and consideration of the resulting comments.

More generally, local government has an established practice of involving communities in decisions and services. Local authorities are obliged to prepare community strategies, which contain legal obligations for public participation. Furthermore, a duty to involve came into force on the 1st April 2009.[86] The aim of the duty is to embed a culture of engagement and empowerment, requiring authorities to consider, as a matter of course, the possibilities for provision of information to, consultation with and involvement of representatives of local people across all authority functions.[87] The Local Democracy, Economic Development and Construction Act 2009 extended the *'duty to involve'* to a wider range of public bodies. Local planning authorities are required to produce a statement of community involvement. This statement explains how a local planning authority will engage the public throughout the planning process, including in the determination of planning applications.

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[83] See <http://www.communities.gov.uk/documents/planningandbuilding/pdf/practicalguidesea.pdf>, accessed 29 march 2016.

[84] Ibid, paras 3.14-3.16.

[85] See Strategic Environmental Assessment Tool Kit (2006 and 2013) available at <http://www.scotland.gov.uk/Publications/2006/09/13104943/0> accessed 26 March 2016.

[86] Local Government and Public Involvement in Health Act 2007, s 138.

[87] Statutory guidance on LSPs and the development and implementation, available at http://www.communities.gov.uk/documents/localgovernment/doc/930696.doc accessed 26 March 2016.

2.11 Are consultation processes effective?

In 2008, the government published a Code of Practice on Consultation[88] containing clear guidance that consultations should normally last for at least 12 weeks, with consideration given to longer timescales where appropriate (for example during the Summer and Christmas holidays). It also provided guidance on how to address an unavoidably shorter consultation period. This document was cited by the UK in its National Implementation Report on the Aarhus Convention in preparation for the Fourth Meeting of the Parties to the Aarhus Convention in Moldova in 2011 in terms of compliance with Articles 3(4), 7 and 8 of the Convention.[89]

In July 2012, the Government revised the Code of Practice substituting it with new "Consultation Principles"[90] taking effect in Autumn 2012. The key change is that the new principles state that "*The amount of time required…might typically vary between two and twelve weeks*" and that "*In some cases there will be no requirement for consultation at all*". While the principles constitute non-legally binding guidance and may be overridden by existing case-law establishing the legal principles with which public consultation must conform (see below), this signalled a significant change in government policy, with serious consequences. For example, implying (as the principles do) that a 12 week consultation period is likely to be the exception rather than the rule may encourage consultation at a later stage in the formulation of policy proposals.

As mentioned above, Defra and the Department for Energy and Climate Change (DECC) had previously signed up to a Consultation Code of Practice, produced by the Better Regulation Executive.[91] The Cabinet Office website confirms that the new Consultation Principles, with their shortened timescales for public consultation, replace the Code of Practice on Consultation issued in 2008. It is questionable whether the application of the Consultation Principles will necessarily be compliant with Aarhus, which requires timeframes for consultation to be 'reasonable'.[92]

2.12 Case-Law on consultations

While there is no general duty to consult, common law has established that fairness requires that parties with an interest in the decision must be consulted, in particular where there is a legitimate expectation

[88] Code of Practice on Consultation 2008, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/100807/file47158.pdf> accessed 26 march 2016.

[89] Economic Commission for Europe, *National Implementation Report for the UK prepared for the Fourth Meeting of the Parties to the Aarhus Convention in Moldova* (2011) available at <http://www.unece.org/fileadmin/DAM/env/pp/reporting/NIRs%202011/UK_NIR_2011.pdf>, accessed 29 march 2016.

[90] See footnote 85.

[91] Ibid.

[92] Aarhus Convention artt 6(3), 7 and 8(a).

of consultation. Such an expectation may derive from: (i) a representation or promise that there will be consultation prior to a decision; or (ii) a past practice of consultation.

The most commonly cited requirements of the duty to consult are the so-called "Sedley requirements",[93] which hold that: (a) consultation is undertaken when the proposals are still in a formative stage; (b) adequate information is given to enable consultees properly to respond (this in turn may require that there is an actual proposal in existence upon which consultation takes place); (c) adequate response time is provided; and (d) the decision-maker gives conscientious consideration to the response to the consultation. While the Sedley requirements pre-date the Aarhus Convention by at least a decade, they clearly focus on the common elements of effective consultation, i.e. that consultation should be early[94] and informed,[95] that it should include reasonable timeframes[96] and that due account is taken of the outcome of the consultation process.[97]

While the Sedley requirements are commonly cited as the leading statement of the content of the duty to consult, there is no general rule as to the kind or amount of consultation required. The nature and form of consultation will vary from case to case, and must relate to the circumstances which call for it. This is especially so for extended and complex consultations. Courts take a holistic approach, assessing whether the consultation viewed in its totality satisfies the decision-maker's obligation to consult.[98] For example, in *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry,*[99] the High Court held that a consultation process leading to the government's decision to support the building of new nuclear power stations was procedurally flawed on the basis that the purpose of the consultation document was unclear, there was no information of substance on the two critical issues of economics and nuclear waste and that the information on waste was seriously misleading.

2.13 The role of NGOs in decision-making

There are no general requirements for the recognition of associations, organisations or groups promoting environmental protection in the UK. While the government maintains that a *"broadly liberal and inclusive approach is taken to their participation in public life, including in relation to environmental*

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93 The submissions of Stephen Sedley QC were made in the case of *R v Brent London Borough Council, ex parte Gunning* [1986] 84 LGR 168, set out by Hodgson J at 189.

94 Aarhus Convention artt 6(2), 6(4), 7 and 8.

95 Aarhus Convention artt 6(2), 6(6), 7 and 8.

96 Aarhus Convention artt 6(2), 6(3), 7 and 8.

97 Aarhus Convention artt 6(8), 7 and 8.

98 *R (Enfield London Borough Council) v Mayor of London* [2007] EWHC 1795, para 16; *R (Newsum) v Welsh Assembly (No 2)* [2006] Env LR 1.

99 *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] ECHC 311.

policy issues"[100] express recognition of the role of NGOs in the planning system, for example, have not been repeated. A previous reference to the vital contribution voluntary organisations make to the proper implementation of the planning policy guidance, for example, have not been included in the National Planning Policy Framework (NPPF).[101]

3 Access to environmental justice[102]

3.1 Introduction

The UK's approach to the obligations imposed by the access to justice provisions of the Convention was that Judicial Review (JR) provided a ready and compliant mechanism. However, litigation before the UK courts, whether concerned with private or public law, remains an expensive exercise and the fulfilment of Article 9 has posed particular challenges for the UK. Until very recently, the high cost of legal action (and adverse costs in particular) represented the most significant obstacle for civil society to access environmental justice in the UK. These concerns were, in part, addressed by the introduction of customised costs regimes for environmental cases in 2013. However, recent measures to "streamline" the process of JR and concerns that the process fails to provide a substantive as well as a procedural review (as required by Article 9(2) of the Convention) continue to frustrate the UK's ability to fully comply with the third pillar of the Convention.

3.2 The System for decision-making and administrative appeals

Where regulation is based on a licensing system, there is a strong tradition that the applicant should have the right of administrative appeal against the decision to another part of the administration – typically from local government/national agency to central government. These are merits appeals where the case essentially is heard *de novo*, but the right of appeal lies only with the person or business making the application. As mentioned earlier, members of the general public and other third parties do not have a general right of appeal other than by way of JR.

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[100] Economic Commission for Europe, *National Implementation Report for the UK prepared for the Fourth Meeting of the Parties to the Aarhus Convention in Moldova*, see footnote 92.

[101] Planning Policy Guidance 9: Nature conservation 2002, para 20.

[102] Some of this text is taken from a Study on the Implementation of artt 9.3 and 9.4 of the Aarhus Convention in 17 Member States of the European Union, written by Richard Macrory and Carol Day under contract from the European Commission in 2012, available at <http://ec.europa.eu/environment/aarhus/access_studies.htm>, accessed 26 march 2016.

3.3 Judicial review (JR)

Administrative (or public) law is generally concentrated on the control of the government or public authorities. Wade and Forsyth have indicated that:[103]

"The primary purpose of administrative law [...] is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok."

JR is the core procedure allowing individuals or groups to challenge the way in which Ministers, Government Departments, local authorities and other public bodies make decisions. The main grounds of review are that the decision maker has acted outside the scope of its statutory powers, that the decision was made using an unfair procedure, or that the decision was manifestly unreasonable or irrational (so-called '*Wednesbury* unreasonableness').[104] The Human Rights Act 1998 created an additional ground, making it unlawful for public bodies to act in a way incompatible with Convention rights.

Unlike the regulatory appeals discussed above, JR is not concerned with the merits of a decision or whether the public body has made the 'right' decision. The only question before the court is whether the public body has acted unlawfully.[105] In particular, it is not the task of the courts to substitute its judgment for that of the decision-maker.

A specialised Administrative Court was established in October 2000. The jurisdiction of the Administrative Court is set out in the Civil Procedure Rules (CPR) Part 54. In general this jurisdiction covers:

- Applications to prevent a public authority acting unlawfully (a prohibiting order);
- Applications to require a public authority to act lawfully (a mandatory order);
- Applications to quash an invalid act (a quashing order);
- Applications for declarations as to what is the proper legal regime and rules applying to a particular case (a declaration);
- Where appropriate, applications for injunctions;
- Human Rights Act Damages;
- Where appropriate, applications for damages associated with a substantive claim.

JR cases must be brought 'promptly' and in any event not later than three months after the grounds to make the claim first arose. Where the application

[103] William Wade and Christopher Forsyth, *Administrative Law* (9th Edition, 2004) 5.

[104] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

[105] The court can intervene where there has been an error of fact (although it may be cautious to entertain a fact based challenge), however, case-law makes plain that "a court of supervisory jurisdiction does not, without more, have the power to substitute its own view of the primary facts for the view reasonably adopted by the body to whom the fact finding power has been entrusted". See *Adan v Newham London Borough Council* [2001] EWCA Civ 1916.

relates to a decision made by the Secretary of State or local planning authority under the planning acts, the claim form must be filed not later than six weeks after the grounds to make the claim first arose.[106] The time limit for the lodging of the application cannot be extended by agreement between the parties.

Parties are expected to have exhausted all other remedies before commencing a claim, including alternative remedies such as statutory appeals and appeals to relevant tribunals (although the jurisdiction of the court is not ousted if an alternative remedy is available). There is also a "pre-action protocol" designed to allow parties to avoid litigation.[107]

In England, Wales, and Northern Ireland, claimants for JR must first receive permission from the court to proceed. The process is primarily designed to filter out those claims which are vexatious, frivolous or have no prospect of success, and in practice is often conducted in writing. Permission may also be refused on other grounds such as undue delay, or lack of standing, though this is rare since the courts have adopted a liberal approach to the latter (see later), and would generally leave such issues to be determined at the full hearing. Judicial statistics indicate that about 50% of applications are refused permission,[108] in which case an appeal is usually possible.[109] Once permission is granted the case will go on to a full oral hearing.

The substantive legal and factual merits of the case are considered, and ruled on, at the full hearing. However, courts are now more prepared to consider JR proceedings in a combined (or 'rolled-up') hearing, considering in the same hearing both whether permission should be granted and if so, the full case. This is especially so in complicated cases, and where, for example, the issue of standing can only be determined by a full examination of the facts and law.

All the remedies available to the Court are discretionary. Where the court rules against the defendant, cases are often remitted back to the decision-maker (although the court can grant other remedies, listed above) to reconsider the

[106] CPR 54 5(5).

[107] This involves a claimant producing a letter before claim, which identifies the decision being challenged and the basic reasons (e.g. procedural defects, failure to take into account relevant facts, defective reasoning). The defendant is allowed 14 days to reply before the claimant lodges a claim in the Administrative Court. If it wishes to contest the claim the defendant authority is obliged to file an acknowledgement of service (pursuant to CPR 54.8). This has to be served on the claimant and the Administrative Court and has to contain a summary of the grounds for contesting the claim.

[108] In 2010, excluding immigration and asylum cases which form the vast majority of JRs, 2091 applications were received, 1021 refused and 419 granted – the precise grounds for refusal are not contained in the statistics. Source: *Judicial and Court Statistics justice 2010* (Ministry of Justice 2011).

[109] The claimant is normally entitled to seek (within seven days) that the matter be reconsidered at an oral hearing (CPR 54.12). If at the oral hearing the judge again refuses permission, the claimant will have a right to apply for permission to appeal to the Court of Appeal against that refusal pursuant to CPR 52.15. However, where the court refuses permission to proceed and records the fact that the application is totally without merit in accordance with CPR 23.12, the claimant may not request that decision to be reconsidered at a hearing (CPR 54.12(7)).

matter afresh. It does not mean, however, that the decision maker cannot reach the same conclusion for different and legally justified reasons. It is possible that the court will determine that a particular approach or course of action is unlawful and may give some guidance as to how a matter should be reconsidered. The court may also order that the matter is remitted to a differently constituted decision maker.

JR procedure in Northern Ireland is very similar. In Scotland the grounds for which JR may be sought are broadly similar to those in the rest of the UK. The Scottish Court will recognise case law from the courts in England and Wales and Northern Ireland – and *vice versa*. However the distinction between public and private law is not recognised in the same way in Scotland. In Scotland the test for the court to answer for it to judicially review an act is to see if there has been a "tripartite relationship" – that is to say a relationship between the decision-maker, the legislature and the applicant for whose benefit a jurisdiction, power or authority is to be exercised.

The procedure for JR in Scotland is similar, procedurally, to private law proceedings between private individuals, and there is no prior permission stage. All applications for JR must be made to the Court of Session. There are no fixed time limits within which proceedings must be commenced, although it is open to the court to refuse an application on the grounds that the proceedings have been commenced too late. Broadly similar remedies are available to the Court in Scotland – although an injunction there is called an "interdict".

Although this text concentrates on the procedures and practicalities around bringing a JR, it is noted that Articles 9(3) and (4) of the Aarhus Convention can apply to private law environmental cases[110] and other environmental challenges including, for example, challenges brought under s.288 of the Town and Country Planning Act 1990[111] (and other statutory challenges).

3.4 Other routes to redress

Given that JR is an option of last resort, it is important to note that there are other options for people who wish to obtain redress against administrative decisions. Alternative remedies include complaints to: (i) the decision making Department or agency; (ii) independent complaints handlers; (iii) a Member of Parliament (MP); and (iv) the Parliamentary Ombudsman.

Where a constituent's complaint is about the way in which their case has been handled, rather than the substantive decision, it is open to MPs to supplement their own efforts with a reference to the Parliamentary Ombudsman (also called the Parliamentary Commissioner for Administration). The office of

[110] See *Morgan (1) Baker (2) v Hinton Organics (Wessex Ltd) & CAJE (intervener)* [2009] EWCA Civ 107, para 44.

[111] S.288 provides for challenges to the validity of certain orders. It applies where an aggrieved person wishes to obtain an order quashing the decision of a Planning Inspector or the Secretary of State on an appeal in relation to a Planning Permission application.

Parliamentary Ombudsman was established by statute in 1967 under the Parliamentary Commissioner Act (as amended). The Ombudsman is independent of both Government and Parliament and can investigate complaints from people who consider they have been caused injustice by administrative fault (maladministration) in connection with the actions or omissions of bodies within the Ombudsman's jurisdiction. Complaints must be directed through a MP and the complainant must first have put their grievance to the department concerned in order to allow officials to respond before taking the matter further. Further information about the Ombudsman can be found in the Library Standard Note Parliamentary Ombudsman: rights of appeal.[112]

3.5 Standing

Article 9(3) of the Aarhus Convention requires contracting Parties to ensure that members of the public meeting criteria laid down in national law have standing to challenge acts and omissions by private persons and public authorities contravening provisions of national environmental law. More detailed provisions apply in Article 9(2) of the Convention in relation to standing, to challenge the procedural and substantive legality of decisions, acts or omissions subject to the provisions of Article 6 of the Convention. Here, members of the public having a sufficient interest (determined within the framework of national legislation and with the objective of giving the public concerned wide access to justice) should be granted standing. In this respect, the Convention holds that environmental NGOs shall be deemed to have sufficient interest.

The framework in England and Wales respects the provisions of Article 9(2)(a) of the Convention. Section 31(3) of the Supreme Court Act 1981 provides that the High Court will not give [leave] for an application for JR unless the applicant has "sufficient interest" in the matter to which the application relates. In determining whether a claimant has standing, the High Court considers the merits of the application, the nature of the claimant's interest and the circumstances of the case. These rules are rules of court, thus it is for the courts to interpret them. However, the question of "standing" is not an act of discretion but is an assessment of fact and law.

In general terms, in the last thirty years the courts in England and Wales have adopted a liberal approach to the interpretation of "sufficient interest", and one that is based on a theory of interests rather than rights: "*What modern public law focuses upon are wrongs - that is to say, unlawful acts of public administration. These often, of course, infringe correlative rights, but they do not necessarily do so: hence the text for standing for public law claimants, which is interest based rather than rights based*".[113] There are very few modern examples of individuals or environmental groups being refused standing, and having securing standing, there

[112] *Parliamentary Ombudsman: rights of appeal* (House of Common's Library SN/PC/3079, July 2006).

[113] Lord Justice Sedley in *R (on application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007].

is no limitation on the arguments as to legality that may be raised in JR proceedings.

3.6 Scotland and Northern Ireland

In Scotland, the situation with regard to standing has in the past been significantly more restrictive and based more on the protection of rights. Rather than the broad test of 'sufficient interest', the standing test in Scotland has been "title and interest".[114]

In *Marco McGinty v The Scottish Ministers*, the Outer Court of Session held that the claimant (who lived a few miles from the site of a development proposal he sought to challenge and uses the area for bird-watching and recreation) may have been able to establish a title to sue, but he could not establish an interest to sue (i.e. he did not have a "real and legitimate" or "real and practical" interest to bring the proceedings). Lord Brailsford noted that Mr McGinty's "*only claim was that as a member of the public who used the area for recreational purposes, he was entitled to be consulted*".

However, in October 2011 the Supreme Court (whose decisions bind Scottish courts) held in *Axa General Insurance Limited and others v The Lord Advocate and others*, that the standing test of 'title and interest', derived from private law, had no place in JR procedures in the field of public law. The Supreme Court advocated that a preferable test was one of 'directly affected'.

Axa was not an environmental case. However, in *Walton v The Scottish Ministers,*[115] the Supreme Court had the opportunity to address the issue directly. The case concerned the preferred route for a Modern Transport System which became the subject of a public inquiry. The inquiry confirmed the Minister's proposals and an individual, Mr Watson, challenged the decision by way of statutory appeal as a "person aggrieved". The appeal failed in both the Outer and Inner House, the latter holding Mr Watson had no standing to sue. The Supreme Court in three substantive judgments made it plain that it considered Mr Watson a person aggrieved because he had appeared at the inquiry and he was the chair of a local organisation formed specifically to oppose the road scheme. In particular, the Supreme Court made reference to the purpose of

[114] Rules of the Court of Session 1994, 58.8(2), as amended by SSI 2000/317, provides: "Any person not specified in the first order made under rule 58.7 as a person on whom service requires to be made, and who is directly affected by any issue raised, may apply by motion for leave to enter the process; and if the motion is granted, the provisions of this Chapter shall apply to that person as they apply to a person specified in the first order." An annotation to this rule in *Greens Annotated Rules* (Court of Session, Parliament House Book, vol 2, C 478/4) states: "The motion to enter the process should state the title and interest of the person." Although the phrase "title and interest" does not appear in rule 58.8(2), it is used in the form of petition for JR which is set out in Form 58.6. That form, which is to be read together with Rule of Court 58.6(1), requires paragraph 1 of the petition to state the "designation, title and interest" of the petitioner.

[115] *Walton v The Scottish Ministers* [2012] UKSC 44.

environmental law, which proceeds on the basis that "*the quality of the natural environment is of legitimate concern to everyone.*" As such, whilst nature itself may not have rights, civil society has the right to stand up for it.

The standing principles in Northern Ireland are the same as in England and Wales, with the 'sufficient interest' test appearing in the relevant court rules,[116] and the same liberal approach in modern case law. For example in *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety*[117] the court cited with approval the passage in the leading text book on JR, De Smith: "*In summary it can be said that today the court ought not to decline jurisdiction to hear an application for JR on the grounds of lack of standing to any responsible person or group seeking, on reasonable grounds, to challenge the validity of government action*".

3.7 Standing for groups

JR may be brought by a group (e.g. a number of local residents), to challenge a decision which is regarded as controversial, and the courts do not require the body to have a distinct legal entity. Such groups, therefore, may be unincorporated[118] or incorporated.[119]

Many of the larger environmental NGOs in the UK are established as charities and/or companies limited by guarantee. The latter is not intended to be a 'vehicle for litigation' but a more suitable structure for a number of activities NGOs routinely undertake, including lobbying and campaigning. As to its effect, some courts have dealt with the question of costs protection by saying it is provided if the claimant's status is that of a limited company, without further elaboration.[120] However, this formulation does not confer protection - an environmental NGO would have to go into liquidation if an adverse costs order exceeded its assets, as would any other body.

There are no restrictions in the CPR (and equivalent) regarding geographical scope so foreign environmental individuals and NGOs are not prohibited from applying for JR providing they can demonstrate sufficient interest in the matter to which the application relates. However, in such cases, a court is more likely to

[116] Rules of the Court of Judicature (Northern Ireland) 1980, order 53, rule 3(5).

[117] *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety* [2005] NI 188 para 45.

[118] An unincorporated association form is usually chosen when a number of individuals agree or 'contract' to come together for a common purpose. However, they have no separate legal identity so their members carry the risk of personal liability.

[119] The limited company is an organisational structure which gives limited liability to its members, and the courts have accepted that a limited company may be formed to bring a case in order to limit exposure to costs.

[120] In *R (Stop Bristol Airport Expansion Ltd) v North Somerset Council* [2011], the High Court held that the claimant, an NGO, already had costs protection through its status as a limited liability company.

exercise its discretion to require greater provision for security of costs before the action takes place.[121]

3.8 The effectiveness of JR as a remedy – "substantive and procedural legality"

Article 9(2) of the Convention requires contracting Parties to ensure that members of the public concerned have access to a review procedure to challenge the procedural and substantively legality of any decision, act or omission subject to the provisions of Article 6 of the Convention.

The Aarhus wording is imported into Article 10a of the EC Directive on Environmental Impact Assessment (EIA) via Article 7 of the EC Public Participation Directive (PPD). Article 9(3) of the Convention does not refer specifically to either substantive or procedural legality, instead referring to "*acts or omissions [...] which contravene its national law relating to the environment*". As such, the issue to be considered in such a review procedure is whether the act or omission in question contravened any provision – be it procedural or substantive – in national law relating to the environment.

While ostensibly a process whereby the procedural and substantive legality of a decision can be challenged, in practice the main way in which substantive legality can be contested is by applying the *Wednesbury* unreasonableness test where an authority has made a judgment on substantive issues. The courts are acutely aware that it is not their role to substitute their judgment for that of the decision-maker, but in environmental cases, the *Wednesbury* unreasonable test in practice is very difficult to satisfy.

This particular problem was discussed by the Aarhus Convention Compliance Committee (ACCC) in Communication C33.[122] The Committee concluded that the UK allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to Article 9(2) and (3) of the Convention, but the Committee was not convinced that the UK meets the standards for review required by the Convention. Particular reference was made to criticisms by the House of Lords[123] and the European Court of Human Rights,[124] concerning the very high threshold for review imposed by the *Wednesbury* test. While the Committee did not go as far as to find the UK in non-compliance with Article 9(2) or (3), it did suggest that the application of the 'proportionality principle' by the courts in England and Wales could provide a more adequate standard of review in cases within the scope of the Convention.

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[121] CPR 25.12.

[122] See <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html> para 121-125, accessed 26 march 2016.

[123] See, for example, Lord Cooke in *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532 para 32.

[124] *Smith and Grady v United Kingdom* [1999] 29 EHRR 493, para 138.

Subsequent cases in the UK, including *Evans*[125](concerning an EIA screening decision) and, more particularly, *Viking*[126] (concerning a wind farm on central Shetland) confirm the judiciary's view that JR is "*a flexible procedure with an intensity of review*[127] *consistent with the requirements of Article 9(4) of the Aarhus Convention*". As such, the UK's compliance with Article 9(2) of the Convention in this regard is likely to be the subject of international scrutiny again at some point in the future.

3.9 Costs in the environmental procedure

Up until very recently, the CPR made no specific provision for environmental cases. However, international concern, principally in the form of EU infraction proceedings[128] and findings of non-compliance with Article 9(4) of the Convention by the ACCC[129] forced the UK to introduce bespoke rules for Aarhus cases in 2013.[130] While the new rules have made it possible for civil society to bring environmental cases to court, they remain deficient in a number of ways and significant differences between the regimes operating in England and Wales, Scotland and Northern Ireland remain (see later).

Costs in the UK typically include lawyers' fees, witness and expert fees, court fees, travel, copying and VAT.

3.10 Court fees

A fee of £140 is payable when a claimant lodges an application for permission to apply for JR.[131] A further £700 is payable if the claimant wishes to pursue the claim if permission is granted.[132] If permission is refused, the claimant can apply for the matter to be reconsidered at an oral hearing (as long as the case is not deemed by the judge to be totally without merit), for which a further charge of £350 is made.

The cost of applying for permission to appeal to the Supreme Court was increased in 2011 to £1000[133] and the current cost of filing a notice of appeal is £1600. If permission is granted, there is a charge of £800 to proceed and £4280

[125] *Evans v Secretary of State for Communities and Local Government* [2013] EWCA Civ 115.

[126] *Sustainable Scotland v The Scottish Ministers* [2014] CSIH 60.

[127] *Ibid*, para 130-138.

[128] Case C-530/11 *Commission v UK*.

[129] See <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html>, accessed 26 march 2016.

[130] CPR 45.41.

[131] Administrative Court Office Fee Table 2014 at <http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court>, accessed 26 march 2016.

[132] Civil Proceedings Fees (Amendment) Order 2011.

[133] Supreme Court Fees (Amendment) Order 2011, SI 2011/1737 L16.

to file a statement of facts and issues. Thus, costs can total in excess of £7,000 at the Supreme Court level.

3.11 Lawyers' fees

The general principle in court cases is that "costs follow the event". That is to say that the party who is not successful pays the costs of the party that is successful. However, there is always discretion as to any award of costs.[134]

As is common practice in tribunal appeals, each party normally bears their own costs, although the 2009 Rules allows for a Tribunal, acting either on its own initiative or in response to an application, to make an Order for Costs where, for example, it considers a party has acted unreasonably in bringing, defending, or conducting proceedings. However, where the Upper Tribunal is determining JR applications, it has the discretion to make an order as to costs, whether or not there has been unreasonableness.[135]

A Protected Costs Order (PCO) is an order of the court that the claimant is not liable to pay the costs of a successful defendant or that his liability to pay will be limited to a particular amount. An application for a PCO should usually be included in the claim form and would be ruled on at the application for permission stage. The decision to grant a PCO is one of the discretion of the courts, and until recently they were fairly rare. However, in the context of JR proceedings, they were given a significant boost by the 2005 judgment of the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry*[136] ('*Corner House*'). The Court said that a PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided the court is satisfied that: (a) The issues are of general public importance; (b) The public interest requires that those issues should be resolved; (c) The claimant has no private interest in the outcome of the case; (d) Having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order; and (e) If the order is not made, the claimant will probably discontinue the proceedings and will be acting reasonably in so doing.

Corner House was not an environmental case and was not driven by Aarhus conditions concerning the principle of 'not prohibitively expensive'. However, for a period of time (2005- 2013), the award of costs in environmental cases was governed by the *Corner House* principles. In 2010, the Court of Appeal case of *Garner*[137] recognized that the *Corner House* limitations could not apply where EU access to justice provisions were in play and that they must be modified, "*insofar as it is necessary to secure compliance with the directive*". Essentially the tests of

[134] CPR, part 44.3(2).

[135] Tribunal Procedure (Upper Tribunal) Rules 2008, SI 2008/2698 L15, s 10(3).

[136] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600.

[137] *R (on the application of Garner) (Appellant) v Elmbridge Borough Council (Respondent) & (1) Gladedale Group Ltd (2) Network Rail Infrastructure Ltd (Interested Parties)* [2010] EWCA Civ 1006.

general public importance and no private interest no longer apply, at least in cases where a EU directive is involved.[138]

Meanwhile, a complaint submitted to the European Commission concerning the prohibitively high cost of legal action in environmental cases in 2005 resulted in a letter of formal notice to the UK in October 2007, a Reasoned Opinion in March 2010 and referral to the CJEU in April 2011.[139]

Moreover, in 2011, the ACCC also found the UK in breach of Articles 9(4), 9(5) and 3(1) of the Convention concerning costs and injunctive relief. The Committee recommended the UK review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures to ensure that such procedures are fair and equitable and not prohibitively expensive and also provide a clear and transparent framework.

The final piece of the UK jigsaw was that a domestic case concerning the legality of an environmental impact assessment in respect of a cement works in England (*Edwards*[140]) was making its way to the UK Supreme Court, which duly referred a number of questions on the meaning of prohibitive expense to the CJEU.

Advocate General Kokott's Opinion in *Edwards* was delivered in October 2012 and final judgment in April 2013. The same AG delivered her Opinion in the UK infraction case in September 2013 with final judgment in April 2014. Essentially, the CJEU held in both cases that domestic courts cannot look exclusively at the financial means of individual claimants but must also carry out an objective analysis of the amount of the costs. In deciding whether a figure would be "objectively unreasonable", the court must take a number of other factors into account, including whether the claimant has reasonable prospects of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and whether public funding or other costs protection schemes are available.

In response to the findings of the Compliance Committee and the imminent judgments of the CJEU, new costs rules for environmental cases were introduced throughout the UK. In England and Wales, adverse costs liability for unsuccessful claimants in environmental judicial reviews was capped at £5,000 for individuals and £10,000 for 'all other cases'. However, successful claimants are also subject to a reciprocal cap of £35,000 inclusive of VAT. With respect to injunctive relief, the court must have regard to the question of prohibitive expense when considering whether a cross-undertaking in damages is required

[138] It was accepted that the access to justice provisions in the Environmental Assessment directive as amended had direct effect and therefore could be involved by the claimant. In other cases, it would be far less certain that a court would feel obliged to modify the Corner House principles – UK law has adopted a dualist approach to international public law, and provisions of Aarhus, though influential, cannot be directly relied upon in the UK Courts.

[139] Case C-530/11 *Commission v UK*.

[140] Case C-260/11 *R oao David Edwards, Lilian Pallikaropoulos v (i) Environment Agency, (ii) First Secretary of State, (iii) Secretary of State for Environment, Food and Rural Affairs*.

and must make necessary directions to ensure the case is heard at the earliest opportunity.

Whilst representing a significant improvement on the previous regime, the caps still represent an obstacle to justice (in particular, the £5,000 cap for individuals) and the imposition of a £35,000 cross-cap (for which there is no basis in the Convention) can render complex environmental cases difficult to run. There are also significant differences between the regimes operating in England and Wales, Scotland and Northern Ireland. For example, in Scotland the £5,000 cap and the £35,000 cross-cap can be lowered and raised respectively on cause shown, thus enabling the Scottish courts to ensure that those of patently limited means can still access the courts. This flexibility satisfies the need for the court to make an objective *and* subjective assessment as to what is prohibitively expensive for the claimant, as confirmed in the judgments of the CJEU.[141]

3.11 Scotland and Northern Ireland

Prior to the introduction of a similar costs regime for environmental cases in Scotland, the awards for Protective Expenses Orders (the equivalent of PCOs) were generally higher in Scotland than elsewhere in the UK. For example, in *McGinty* (see above), the petitioner was awarded a PEO for £30,000, which - even by UK standards - was extraordinarily high.

In 2013, the Scottish Government also introduced bespoke rules for environmental cases falling within the remit of the EC Public Participation Directive.[142] Whilst the Scottish rules are, in some ways, superior to those operating elsewhere in the UK they are flawed in extending only to cases covered by the PPD – not to environmental cases within the remit of the Aarhus Convention more generally.

Customised Rules for environmental cases were also introduced in Northern Ireland in 2013.[143]

3.12 Cross undertakings in damages and injunctive relief

The lodging of an application for JR, or the granting of permission, does not have an automatic suspensive effect. The well-publicised case of *Lappel Bank*[144] highlights the shortcomings in the previous regime for injunctive relief, in which the claimant was required to give the court an undertaking

[141] See footnote 144, para 40-42, and footnote 145, para 47-49.

[142] See <http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chapter58a-1.pdf?sfvrsn=6>, accessed 29 march 2016.

[143] Practice Note 1/2008 (Judicial Review) revised 10/10/2103, available at <http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/Practice%20Directions/Documents/PN%201-2008/j_j_PN%201-2008%20-%20revised%2010%20October%202013.htm>, accessed 29 march 2016.

[144] *R v Secretary of State for the Environment ex parte the Royal Society for the Protection of Birds* [1997] Env L.R. 431.

to reimburse the defendant for any "profits foregone" as a result of putting the project on hold while the case was heard.

In 1991, the Government listed the Medway Estuary and Marshes as a potential Special Protected Area (SPA) for birds under the Wild Birds Directive. In March 1993 the Secretary of State for the Environment indicated his provisional view that the area for designation should exclude Lappel Bank (an area of mudflats). At this time, the Port of Sheerness had planning permission to reclaim parts of the estuary which formed part of Lappel Bank. The NGO Royal Society for the Protection of Birds (RSPB) applied for a JR of the decision to exclude Lappel Bank from the SPA. The Divisional Court refused to quash the decision of the Secretary of State and the Court of Appeal dismissed RSPB's appeal. In February 1995, RSBP appealed to the [then] House of Lords and sought interim relief pending a possible reference to the [then] European Court of Justice. The House of Lords referred the matter to the ECJ, but refused to grant the interim relief as RSPB could not give any cross undertakings in damages in relation to the large commercial loss which may result from the delay in the development of the port. In February 1996, the ECJ ruled that a Member State was not entitled to take economic requirements into account when designating an SPA and defining its boundaries. However, in the 12 months between the case in the House of Lords and the decision of the ECJ, and because no interim relief had been ordered by the House of Lords, the development of Lappel Bank had gone ahead and the area in question had been turned into a car park.

In April 2011, the ACCC found that the high costs involved in pursuing injunctive relief effectively amount to prohibitively expensive procedures that are not in non-compliance with Article 9(4) of the Aarhus Convention.[145] Similarly, the judgment of the CJEU in the UK infraction proceedings in 2013 confirmed that courts must have regard to the question of prohibitive expense when considering whether a cross-undertaking in damages is required and must make necessary directions to ensure the case is heard at the earliest opportunity.[146] England and Wales duly introduced provisions in respect of injunctive relief,[147] which came into effect on 1st April 2013.

3.13 Legal Aid

Under the Access to Justice Act 1999 a Community Legal Service (CLS) was established by the Legal Services Commission (LSC) which is intended to provide funds to individuals to bring cases – both civil and criminal. Under s.28 of the Act the Secretary of State may give guidance to the Commission. Under such guidance documents JR cases may be funded, and furthermore funding may be made available for cases which have a significant

[145] See <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html>, accessed 29 march 2016.

[146] See footnote 145, paras 64-72.

[147] Practice Direction 25A - Interim Injunctions (5.1B).

wider public interest. Under the CLS the assisted person does not have to pay for his own legal representation; and is protected from having to pay the other side's costs if he loses – as costs orders can only be enforced against the assisted person with the permission of the court, which is rarely granted.

The public legal assistance is subject to a "means test" – that is to say it is dependent on levels of income. In practice only people on state benefits are likely to qualify. Public legal assistance is available to individuals. However, the LSC will usually investigate whether there is a wider group 'standing behind' the individual and, if so, will require a contribution to be made depending on the funds of the group and number of people in the community said to be affected. Thus, they will fund those who represent groups, but only on the basis that a contribution to costs is made. Legal assistance is not available for NGOs or other public interest groups.

Where a case has "significant wider public interest" the test for public legal assistance is whether the likely benefits of the proceedings to the applicant and others justify the likely costs, having regard to the prospects of success and all other circumstances. Wider public interest means "the potential of the proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which would normally flow from the type of proceedings in question)". The Funding Code Guidance places the real benefits to the public under four categories: (i) protection of life or other basic human rights; (ii) direct financial benefit; (iii) potential financial benefit; and (iv) intangible benefits, such as health, safety and quality of life.

The Guidance also sets out assistance in determining when a wider public interest may be significant. A common sense approach must be adopted. Much will depend on the nature of the benefits alleged, and the more intangible and indirect the benefits are the harder it will be to show that there is a significant wider public interest. The Guidance goes on to state that "*public interest carries with it a sense that large numbers of people must be affected. As a general guideline, even where the benefits to others are substantial, it would be unusual to regard a case as having a significant wider public interest if fewer than 100 people would benefit from its outcome*".

A LSC Public Interest Advisory Panel (PIAP) was established to try and interpret these guidelines consistently. It is chaired by a member of the LSC but is mainly composed of independent members with a strong interest in public interest litigation. It meets about every six weeks and decides whether a case involves a wider public interest, and if so whether that interest should be classified as "significant", "high" or "exceptional". The results of the decisions of the Panel are published on the LSC website.[148]

[148] See <http://www.legalservices.gov.uk/civil/guidance/full_reports.asp>, accessed 29 march 2016.

CHAPTER II

Towards a Common European Legal Culture under the 'First Pillar' of the Aarhus Convention

Franziska Grashof

1 Introduction

Knowledge is power[1] – this proverb can be said to lie at the heart of any discussion on the disclosure and dissemination of information held by public authorities. Through the right to access to information, the public is empowered to effectively participate in public debates and decision making procedures and it is equipped with an instrument to control whether the law is complied with. In this regard, the right to access information is a prerequisite for democratic societies.[2] In environmental matters, the empowerment of the public is of particular importance, not only because it provides citizens with the ability to be informed about risks to their health and potential dangers to the environment in which they are living, but also because the environment cannot enforce legislation by itself. Originally, in many legal systems, knowledge about the environment was held secretly behind the closed doors of the public administration, which hindered the effective participation of the public in democratic processes concerning the environment. Since the 1980s, this problem has been addressed at various political levels.[3] At the international level, 47 contracting parties agreed upon a set of rules empowering the public to access environmental information by adopting the 'first pillar' of the Aarhus Convention.[4]

This book is devoted to the question in how far the different 'pillars' of the Aarhus Convention have been influenced by different legal cultures and to what extent the Convention has induced changes in the legal systems of the contracting parties. In the previous part, the implementation of the rules of the Aarhus Convention in the various legal systems of the Union has been traced. This chapter will take these national reports as a basis to develop comparative observations on the process of creating a common European culture on access to environmental information under the 'first pillar' of the Aarhus Convention.

For the purpose of analyzing this process, some preliminary reflections on the concept of 'legal cultures' are necessary. According to the Oxford dictionary, the term 'culture' is defined as 'the ideas, customs, and social behaviour of a

1 Proverb which goes back to Bacon (1597): 'nam et ipsa scientia potestas est', John Simpson, Jennifer Speake, *The Oxford Dictionary of Proverbs* (5th edn, Oxford 2008).

2 Michael O'Neill, 'The Right of Access to Community Held Documentation as a General Principle of EC Law' [1998] European Public Law 4, 403, 425; Adrienne Héritier, 'Composite democracy in Europe: the role of transparency and access to information' [2003] Journal of European Public Policy 814.

3 International level: UNCED, Rio Declaration on Environment and Development [1992] Principle 10; European level: Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment [1987-1992] OJ C 328, 1987, 1-44 (specifically 15 at 2.6); National level: see for example the German Green Party making a proposal for a law on access to environmental documents [1987] BT Drs. 11/1152.

4 UNECE, 'Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (1998); an overview over the contracting parties is provided for at <http://www.unece.org/env/pp/aarhus/map.html> accessed 25 may 2016.

particular people or society.'[5] In a democratic legal system, rules and legal principles reflect ideas of the society, they are manifestations of customs and they intend to regulate the behaviour of people. On the other hand, rules influence the ideas of people, they change customs in a society and rules may succeed or fail in governing the behaviour in a society. Hence, law and culture are two separate, but mutually connected concepts. *Helleringer* and *Purnhagen* describe this relationship with the metaphor of 'uneasy bedfellows', which means that law and culture "while being dependent on one another, influence each other through mutual irritation."[6] In this regard, they note that a legal culture is not a static concept, but that the reciprocal influences trigger constant developments "towards" a legal culture.[7]

For this study on the development of legal cultures under the Aarhus Convention these considerations mean that it is necessary to describe the different rules, ideas, customs and behaviour pre-existing the Aarhus Convention and to analyze how and to what extent the international rules have been accommodated in the different legal systems. As this chapter and the national reports are written from the perspective of legal researchers, the focus is on the development of rules and their interpretation and application in the legal systems. For this purpose, section 2 will provide a comparative overview of diverse national regulations on access to environmental information which existed before any supranational rules were adopted on this issue. Next, it will be explained to what extent the national rules had already changed under the influence of the rules of the European (Economic) Community[8] before the international Aarhus Convention was adopted (section 3). After this, it will be examined, how the rules of the 'first pillar' were developed and how they were implemented in the different legal systems (section 4). Furthermore, it will be questioned whether the Aarhus Convention also induced changes in the legal culture on access to environmental information on the supranational Union level (section 6). Finally, the question will be raised to what extent a common European legal culture on access to environmental information is developing (section 7).

2 The beginning: diversity in national legal rules and the legal culture on access to information

Before the issue of access to environmental information became the focus of international and European debates, national rules and legal cultures in Europe differed considerably. On the one hand, there were

5 Angus Stevenson, *Oxford Dictionary of English* (3rd edn, Oxford 2010).

6 Geneviève Helleringer, Kai Purnhagen, 'On Terms, Relevance and Impact of a European Legal Culture' in Geneviève Helleringer, Kai Purnhagen (eds), *Towards a European Legal Culture* (Baden-Baden 2014) 5.

7 Ibid, 13.

8 The European Economic Community was succeeded by the European Community which was later replaced by the European Union.

national systems in which the rule was the strict confidentiality of information and in which information relative to the environment was hardly accessible. On the other hand, there were national legal systems, which had a rather long tradition in generally making information accessible to the public, and this was not restricted to environmental information. Among the legal systems under consideration in this book, four groups can be identified, which provided for different legal regimes and cultures regarding access to environmental information. Thereby, it should be noted that this classification is of course a simplification and that within the groups there are differences. The common denominator for being classified in a specific group is whether or not there have been certain rules and whether or not these rules have been followed.[9]

2.1 Sweden, the Netherlands and France: Rules on access to information and the legal culture of openness

The first group comprised the legal systems of Sweden, the Netherlands and France. They had in common that they provided for a general legal framework on access to information, including environmental information. Among these legal systems, Sweden took an outstanding role, as it had a very long tradition of open government. As early as 1766, a Royal Decree vested the citizens with the right to consult official documents and this rule has been incorporated in the Freedom and Press and Information Act of 1949 which has constitutional status.[10] Later, another act was adopted providing for several rules, according to which access to certain documents could be denied, but this did not usually include environmental information.[11] Besides these laws, Swedish administrative culture has been characterized by a general obligation of public authorities to serve the public and to provide for information. In summary, the Swedish culture on access to information has been one of "total openness".[12]

Comparable to this, in the Netherlands, provisions on the disclosure of documents find their basis in the constitutional rule that government has to practice openness, which had been in place since 1798.[13] The concretization of this rule is the statute on public access to government information (*Wet openbaarheid van bestuur*, Wob), from 1978, providing for general rules on access to information

9 The classification builds on the study by Ralph Hallo, 'Directive 90/313/EEC on the freedom of access to information on the environment: its implementation and implications' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC* (London 1996).

10 Staffan Westerlund, 'Sweden' in Ralph Hallo (ed) *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC,* see footnote 9, 301.

11 Ibid; Sekretesslagen, Svensk författningssamling (Swedish statutes) (1980:100).

12 Staffan Westerlund, 'Sweden' in Ralph Hallo (ed) *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC,* see footnote 9, 302.

13 Ralph Hallo, 'Netherlands' in Ralph Hallo (ed) *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC,* see footnote 9, 196.

also comprising environmental information and there have been several more specific rules in other statutes on environmental legislation.[14] Under this legal framework, information has been requested on a rather broad scale and information was given without unreasonable delay.[15] Although the specific rules on access to environmental information of the Wob are rather young if compared to the Swedish rules, also in the Netherlands, a culture of openness was already established before the issue was addressed by the European legislator.

Also the French framework on the disclosure of information has long roots which can be traced back to the Declaration of the Rights of Man of 1789. However, specific rules on the disclosure of general information were only adopted with the statute of 17 July 1978 which has also been applicable to environmental information.[16] The French system of transparency and access to information was already in place before the European legislator got involved.[17]

2.2 Italy, the UK and Ireland: Some rules on access to environmental information and legal culture of secrecy

The second group comprised the legal systems of Italy, the UK and Ireland. In these systems, some sector specific rules on access to environmental information were already in place before the adoption of the European and international framework. However, the scope of these domestic rules was limited, the application was not always very effective, and, compared to the first group, there was no legal culture of openness.

In Italy, different rules on access to information existed prior to the implementation of European rules in this area. A statute of 1986 provided that citizens had the right to access environmental information held by public authorities and the Ministry of Environment was obliged to actively disseminate some environmental information.[18] Furthermore, on the local level, citizens had a right to access documents and to receive copies.[19] Moreover, in 1990, general

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[14] Wet openbaarheid van Bestuur, Wob (Freedom of Information Act) Stb 1978, 581.

[15] Ralph Hallo, 'Netherlands' in Ralph Hallo (ed) *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC,* see footnote 9, 212.

[16] Loi no. 78-753, JORF 18.7.1978, 2651 ff ; Francois Pelisson and Michel Prieur, 'France' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC,* see footnote 9, 72.

[17] Francois Pelisson and Michel Prieur, 'France' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC,* see footnote 9, 80.

[18] Law 349/86, OJ 162/1986, Mauro Albrizio and Patrizia Fantilli, 'Italy' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC,* see footnote 9, 176.

[19] Law 142/90, OJ 135/1990; Mauro Albrizio and Patrizia Fantilli, 'Italy' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC,* see footnote 9, 176.

provisions for the access to documents held by authorities were adopted.[20] In theory, there was hence a framework on the access to environmental documents, but in practice, the enforcement was difficult because of the lack of a general culture of openness.[21]

In the UK, there had initially been a general presumption against disclosure, but in the 1980s some public registers were set up under which information on the environment could be obtained.[22] For example, the public register under the Safety Information Act 1988 provided for information on enforcement notices which had been served where there was a breach of safety or environmental laws.[23] However, there was no comprehensive statute on access to environmental information.

Also in Ireland, some fragmented rules on information on the environment existed, but these were rather limited in their scope. Planning legislation provided for public access to information relating specifically to the development consent procedure. Ultimately, however, there was no general statute on access to environmental information and no legal culture of openness.[24]

2.3 Germany and Spain: no rules on access to environmental information and legal culture of secrecy

The third group comprised the legal systems of Germany and Spain, in which no rules on access to environmental information existed and which were firmly rooted in a culture of secrecy. In Germany, there have been provisions for access to documents that concern the applicant himself of herself in administrative proceedings,[25] but there was no general rule on access to information or to environmental information.[26] Similar to this situation, in Spain, some provisions allowed access to documents in administrative proceedings where a party's interests were concerned, but these rules were rather limited and

[20] Law 241/90, OJ 192/1990, Mauro Albrizio and Patrizia Fantilli, 'Italy' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC*, see footnote 9, 176.

[21] Mauro Albrizio and Patrizia Fantilli, 'Italy' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC*, see footnote 9, 179.

[22] Stuart Bell, Donald McGillivray, Ole W. Pedersen, *Environmental Law* (8th edition, Oxford 2013) 323.

[23] Carol Day, 'United Kingdom' in this book, 1.

[24] Jeremy Wates, 'Ireland' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC*, see footnote 9, 125 ff.

[25] §29 Verwaltungsverfahrensgesetz (VwVfG) (Federal Act of Administrative procedure) and the corresponding rules in the laws of the federal states.

[26] Bilun Müller, 'The Aarhus Convention – The Legal Cultural Picture. Country report for Germany' in this book, 1 ff.

there was no statute on access to environmental information.[27] Thus, the legal setting in this third group was very different from the first and second group.

2.4 Romania: Rules on access to information but legal culture of secrecy

Finally, Romania takes a special position in this attempt to classify the various legal systems due to its history as a part of Eastern Europe controlled by the Soviet Union and because it joined the European Union only in 2007. In theory, there had been rules on access to information even before the collapse of the Soviet Union, however, these were in fact "of no practical use."[28] After the fall of the Communist regime, the new Constitution of 1991 stipulated that the right to any information of public interest shall not be restricted.[29] However since the beginning, the enforcement of this right has been difficult, mainly because of the ineffectiveness of the administration and the lack of public awareness.[30]

2.5 Conclusion

To conclude, before international and European rules on access to information were adopted, the various national legal systems provided for very diverse rules, reflecting different legal cultures, ranging from systems based on complete openness to systems protecting administrative secrecy. A first step inducing changes in national legal cultures and in blurring the lines between the different groups was the adoption of European legislation, which will be the subject of the next section.

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[27] Jorge Agudo González, 'The implementation and influence of the Aarhus Convention in Spain' in this book, 2.

[28] Barna Bartha, 'Romania' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC,* see footnote 9, 388.

[29] Art 31, Romanian Constitution; Dacian C. Dragos and Bogdana Neamtu, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania' in this book, 2.

[30] Barna Bartha, 'Romania' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC,* see footnote 9, 391 ff.

3 The first step towards the creation of a common legal culture on access to environmental information: Directive 90/313/EEC

The adoption of Directive 90/313/EEC on the freedom of access to information on the environment[31] marked a 'radical break'[32] with the culture of secrecy, by obliging Member States to introduce laws on access to environmental information held by public authorities. This Directive required Member States to make environmental information available to any natural or legal person without the necessity to prove an interest[33] and to regularly publish general information on the state of the environment to the public.[34] The focus was on the so-called 'passive' access to information, meaning the disclosure of information upon request. In general terms, the provisions were very broad and only provided for a minimum standard for access.[35] A specific weakness of the newly created piece of legislation was the list of numerous exceptions to the rule that information had to be disclosed upon request.[36]

3.1 Sweden, the Netherlands and France: no significant changes in law and legal culture of openness

The political decision taken to oblige national authorities to disclose information meant that a choice was made to strive for a culture of openness, meaning to move cautiously in the direction of the rules which were already in place in the legal systems of the first group. For this reason, the implementation of the requirements of Directive 90/313/EEC did not necessitate any major changes in the legislation and legal culture of Sweden,[37] the Netherlands and France.[38]

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31 Council Directive 90/313/EEC on freedom of access to information on the environment, OJ L158/56.

32 Ralph Hallo, 'Directive 90/313/EEC on the freedom of access to information on the environment: its implementation and implications' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC,* see footnote 9, 1.

33 Council Directive 90/313/EEC on freedom of access to information on the environment, see footnote 31, art 3 (1).

34 Art 7, ibid.

35 Ralph Hallo, 'Public Access to Environmental Information' [1997] European Environment Agency Experts' Corner 6 f.

36 Art 3 (2), (3) Council Directive 90/313/EEC on freedom of access to information on the environment, see footnote 31.

37 Sweden joined the European Union in 1995 and had to comply with the *acquis communautaire* from this year on.

38 Ralph Hallo, 'Directive 90/313/EEC on the freedom of access to information on the environment: its implementation and implications' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC,* see footnote 9, 6 ff.

3.2 Italy, the UK and Ireland: broadening of legislation and enhancing the legal culture of openness

As far as the legal systems of the second group are concerned, the piece-meal legislation on access to environmental information that existed prior to the adoption of the European instrument had to be broadened and modified. In order to implement the obligations of Directive 90/313/EEC, Italy adopted a regulation which delimited the discretion of the administration to deny access to environmental information.[39] Also, the concept of 'public authority' was interpreted widely,[40] including privatized entities like railway and mail service companies.[41] Moreover, as far as the obligation to disseminate information is concerned, Italy is described as an 'exporter' of innovation.[42] However, the term 'environmental information' was interpreted restrictively and according to the national courts, a potential impact on the environment was requested [I think "required" rather than "requested" is more appropriate here].[43] Furthermore, the implementing legislation had no immediate effect on the administrative culture which was still marked by an attitude of secrecy.[44]

In the UK, Directive 90/313/EEC was transposed with the Environmental Information Regulations 1992[45] which were amended in 1998.[46] A specific problem related to the exemptions to disclosure. To begin with, the refusal of some information was made mandatory and not discretionary,[47] which was not compatible with the Directive.[48] Moreover, similar to other legal systems, the exemptions as provided for under the Directive have been interpreted widely so that many requests for information have been refused.[49]

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39 Decreto legislativo (D.Lgs.) (legislative decree) n 39, 24/02/1997, in execution of Council Directive 90/313/EEC on freedom of access to information on the environment.

40 Alessandro Comino, 'The application of the Aarhus Convention in Italy' in this book, 4 ff.

41 Andrea Antonelli, Andrea Biondi, 'Implementing the Aarhus Convention: some Lessons from Italian Experience' [2003] EnvLRev 5, 172.

42 Alessandro Comino, 'The application of the Aarhus Convention in Italy' in this book, 3.

43 Ibid, 4; Andrea Antonelli, Andrea Biondi, 'Implementing the Aarhus Convention: some lessons from Italian experience', see footnote 41, 173.

44 Mauro Albrizio and Patrizia Fantilli, 'Italy' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC*, see footnote 9, 179.

45 The Environmental Information Regulations 1992, SI 1992/3240.

46 The Environmental Information (Amendment) Regulations 1998, SI 1998/1447.

47 Regulation 4(3); William Birtles, 'A right to know: The Environmental Information Regulations' [1993] JPL 615.

48 Daniel Wilsher, 'Freedom of Environmental Information: Recent Developments and Future Prospects' [2001] EPL 7 (4) 677 ff.

49 Cliona Kimber, 'Understanding Access to Environmental Information' in Tim Jewell, Jenny Steele (eds), *Law in Environmental Decision Making* (Oxford 1998) 156 ff.

In Ireland, the obligations of the Directive were implemented by Regulations in 1993,[50] which were revised and replaced by Regulations in 1996.[51] Subsequently they have been amended in 1998[52] as their scope of application was too narrow.[53] The initial implementation of 1993 was considered to be minimalistic, and the exemptions were interpreted widely, so that many requests for information were refused, answers to requests were only given with considerable delays and authorities levied very different and sometimes high charges.[54] A specific problem was that, initially, the national planning appeals board was excluded from the scope of 'administrative authorities'. The amendments improved the situation in including also information held by the planning appeals board and in shortening the time limits.[55] Generally, the European legislation improved the situation on access to information, but still, a lot of information was withheld.[56] In addition to the Regulations, the general Freedom of Information Act (FOIA) was adopted in 1997, which at that time provided for broader and more favorable rules than the regulations, but there was uncertainty in how far these rules also applied to environmental information.[57]

3.3 Germany and Spain: creation of rules on access to environmental information and break with the legal culture of secrecy

Finally, Directive 90/313/EEC had the greatest impact on national rules of the third group, which had to create new rules in order to comply with the requirements of the Union and thereby had to abandon to a certain degree their legal culture of secrecy. In Germany, the federal statute on environmental information was adopted in 1996 in order to comply with the Union Directive.[58] However, the rules of this statute were framed and interpreted very restrictively which ultimately led to two cases decided by the Court of Justice. To begin with, in *Mecklenburg* v *Kreis Pinneberg,* the claimant was denied access to an authority's opinion concerning a procedure for planning approval on the construction of a road. The reason for refusal was that the information was not considered to be 'environmental information' and that the development consent procedure fell under the exemption of 'preliminary

[50] The Access to Information on the Environment Regulations 1993, SI 1993/133.

[51] The Access to Information on the Environment Regulations 1996, SI 1996/185.

[52] The European Communities Act 1972 (Access to Information on the Environment) Regulations 1998, SI 1998/125.

[53] Áine Ryall, 'Access to Information on the Environment' [1998] IPELJ 5, 48.

[54] Jeremy Wates, 'Ireland' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC,* see footnote 9, 122.

[55] Ibid, 123 ff.

[56] Ibid, 148.

[57] Áine Ryall, 'Access to Information on the Environment', see footnote 53, 50 ff.

[58] Umweltinformationsgesetz (UIG) (Environmental Information Act) 8 July 1994, BGBl I 1490.

investigation proceedings'. The Court of Justice took a rather broad approach on the interpretation of 'environmental information', which may include an opinion where this is capable of influencing the outcome of the procedure where the environment is concerned.[59] Moreover, the Court specified that the exemption of the preliminary investigation had to refer to an administrative procedure 'only if it immediately precedes a contentious or quasi-contentious procedure and arises from the need to obtain proof or to investigate a matter prior to the opening of the actual procedure.'[60] In *Commission v Germany*, the issue of the exclusion of access to information during administrative proceedings was again raised and the Court found the German rule to be incompatible with Union law.[61] Furthermore, the Court found breaches with respect to the requirement to make information partially available, and with regard to charges, which were even levied where the request for information was denied.[62]

In Spain, the government was first of opinion that a provision in the rules on administrative procedure from 1992, providing for a right of citizens to access records and archives, sufficiently transposed the requirements of the Directive.[63] Only after the Commission started infringement proceedings, a statute was adopted in 1995, which provided for access to environmental information. In Spain, these rules were interpreted restrictively, excluding information on public health, nuclear energy and financial projects with an impact on the environment.[64]

To summarize, in this third group, the first changes in legislation on access to environmental information were clearly induced under European pressure. Changing the attitude of public servants has been more difficult.

3.4 Romania: Even though not a Member State at the time, still enacting laws on access to information

At the time when Directive 90/313/EEC had to be implemented, Romania was not yet a Member of the European Union. However, most legal systems in Central and Eastern Europe at this time adopted rules on access to environmental information, and of course, those states which wanted to accede to the Union had to bring their legislation in line with the *aquis communautaire*.[65] In 1995, Romania adopted the Romanian Environmental Protection Law (137/1995), which provided for a rule according to which the access to informa-

[59] C-321/96 *Mecklenburg v Kreis Pinneberg.*

[60] §30, ibid.

[61] C-217/97 *Commission v Germany*, paras 27, 28.

[62] Ibid, § 38, 60.

[63] Jorge Agudo González, 'The implementation and influence of the Aarhus Convention in Spain' in this book, 2.

[64] Ibid, 4.

[65] Ralph Hallo, 'Public Access to Environmental Information', see footnote 35, Corner 15?

tion on the quality of the environment should be guaranteed.[66] Additionally, a Ministerial Order provided for some more detailed rules on access to information.[67] However, the actual implementation of these laws encountered considerable problems.[68]

3.5 Conclusion

In conclusion, because of the duty to implement Directive 90/313/EEC, some national legal systems had to abandon their legal culture of secrecy and had to broaden their extremely restrictive rules on access to environmental information. Thus, the legal differences which initially existed between the legal systems had already been diminishing under the influence of European legislation. The classification of the states into groups would change, given that there were rules on access to environmental information everywhere now, even though some states had more advanced standards. When the negotiation on the Aarhus Convention started, rules on access to information were already to some extent harmonized, and the experiences gained with Directive 90/313/EEC formed a firm basis upon which the rules of the Aarhus Convention could build on. This will be explained in the following section.

4 The second step towards the creation of a common legal culture on access to environmental information: Aarhus Convention and Directive 2003/4/EC

A second step in the development of rules laying the foundation for a common European culture on openness with regard to environmental information was the adoption of the Aarhus Convention in 1998 and Directive 2003/4/EC. This section will first describe the creation and framework of these international and European rules (4.1) and thereafter show how and to what extent these rules changed the national legal cultures on access to environmental information (4.2).

4.1 The creation of the Aarhus Convention and Directive 2003/4/EC

In the negotiations for the Aarhus Convention, representatives of different legal systems with very different rules and cultures on access to information sat around the table. Besides the Member States of the Union in which a minimum level of access to environmental information was already

66 Barna Bartha, 'Romania' in Ralph Hallo (ed), *Access to environmental information in Europe: the Implementation and Implications of Directive 90/313/EEC*, see footnote 9, 389.

67 Ibid, 398 ff.

68 Ibid, 391.

regulated by Directive 90/313/EEC, other legal systems, notably from former Central and Eastern Europe, took part in the discussions. By means of these negotiations, the rules of the European Community infiltrated the international framework.[69] Next to the representatives of the contracting parties nation states, environmental groups were strongly involved in the Aarhus negotiation process.[70] The influence of the network of experts, which had been organized for guiding and observing the implementation process of the European Directive, was very strong, as these actors had practical experience with requests for environmental information at the national level and as they knew about the shortcomings of the Directive and obstacles in their application.[71] The shortcomings and obstacles lie, in particular, in the definition of the terms 'environmental information' and 'public authority', the number of exemptions and their broad interpretation, difficulties to challenge decisions, high charges for the supply of information, long time-limits and the focus on disclosure upon request instead of the active dissemination of information.[72]

The result of these negotiations has been the creation of Articles 4 and 5 of the Aarhus Convention, the former regulating the request of environmental information by members of the public without having to state an interest and the latter obliging the contracting parties to establish systems according to which environmental information is disseminated. These provisions go further than the minimum rules prescribed in Directive 90/313/EEC. To begin with, the definition of environmental information as laid down in Article 2(3) of the Aarhus Convention is much broader, comprising elements of the environment, including genetically modified organisms, substances and the state of human health and safety. Furthermore, the notion of 'public authority' encompasses natural and legal persons, which perform public administrative functions under national law and any other natural and legal person having public responsibilities or functions, or providing public services in relation to the environment under the control of the former category of public authorities.[73] Moreover, the time limit for making information available upon request was shortened to one month[74] and the exemptions had to be interpreted restrictively, taking specifically into account whether information on emissions into the environment was at stake.[75] Where a request for information is ignored, denied, or inadequately

[69] 'Report to the Council and the European Parliament on the experiences gained in the application of Council Directive EEC 90/313 on freedom of access to information on the environment' COM (2000) 400 final, 8.

[70] Jeremy Wates, 'The Aarhus Convention: a Driving Force for Environmental Democracy' [2005] JEEPL 9 ff.

[71] Ralph Hallo, 'Access to Environmental Information' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten* (Groningen 2011) 60 ff.

[72] Stuart Bell, Donald McGillivray, Ole W. Pedersen, *Environmental Law*, see footnote 22, 321 ff.

[73] Art 2(b) (c) Aarhus Convention.

[74] Art 4(2) Aarhus Convention.

[75] Art 4(5) Aarhus Convention.

answered, any person shall have access to a review procedure.[76] Next to the regulation of the request for environmental information, the Aarhus Convention provides for rules on the dissemination of information, which are much more detailed than what was provided for in the European Directive and the international rules clearly formulated the obligation to foster the use of electronic databases in this regard.[77]

With the adoption of the Aarhus Convention a political decision was taken to move towards a culture of openness in the legal systems of the contracting parties. This meant also that the (then) European Community and its Member States had to adapt their legal systems and to strive for more openness than before. Directive 90/313/EEC had been under revision when the Aarhus negotiations took place and it was finally repealed by Directive 2003/4/EC.[78] This new Directive transposed many provisions of the Aarhus Convention and provided for some additional requirements.[79] A rule which is stricter than what is required by the Aarhus Convention is the so-called 'emission rule'. According to article 4 (5) of the Aarhus Convention, the exemptions enumerated in this article have to be interpreted restrictively 'taking into account whether the information requested relates to emissions into the environment.' This obligation 'to take information into account' transforms in the European Directive into an obligation not to refuse information on emissions into the environment, even where this concerns proceedings of public authorities, commercial or industrial information, personal data and files relating to a natural person, interests or the protection of a person which supplied the information on a voluntary basis and the protection of the environment, like the location of rare species.[80] This restriction of the exemptions shows the intention of the Union legislator, which of course comprises the different Member States, to create a culture of openness as far as environmental information is concerned.

The Court of Justice had to interpret the European rules on access to environmental information in several cases. In the case of the *Flachglas Torgau GmbH*, the Court had to interpret the definition of "public authorities" with regard to ministries involved in the legislative process. The Court found that the ministry could be exempted as a body "when acting [...] in a legislative capacity"[81] during the process but not after that the process had ended.[82] Moreover, in this case, the Court held that for the application of the exemption of disclosure on grounds of the confidentiality of proceedings of public authorities, it was

[76] Art 9(1) Aarhus Convention.

[77] Art 5(3) Aarhus Convention.

[78] European Parliament and Council Directive (EC) 2003/4 on public access to environmental information and repealing Council Directive 90/313/EEC. In this book: Report on the European Legal System, p. 5.

[79] Peter Oliver, 'Access to Information and to Justice in the EU Environmental Law. The Aarhus Convention' [2013] Fordham Int'l L.J. 36, 1436 ff.

[80] Art 4(2) s 4 European Parliament and Council Directive (EC) 2003/4, see footnote 78.

[81] Art 2 s 2 ibid.

[82] C-204/09 *Flachglas Torgau v Bundesrepublik Deutschland,* paras 51, 58.

sufficient that a general rule exists, as long as there is a sufficiently precise definition of the term 'proceedings'.[83] In other cases, the Court had to give an interpretation on the exemptions listed in the Directive. In the case of *Stichting Natuur en Milieu* concerning the confidential treatment of commercial information, the Court stressed that the exemption is limited where emissions into the environment are concerned, and that the diverging interests have to be weighed up against each other in each particular case.[84] Another case concerning the exemptions was the case of *The Office of Communications* in which the Court held that the interests protected under the exemptions have to be considered cumulatively.[85]

The Member States of the Union, being at the same time contracting parties to the Aarhus Convention, had to implement the obligations under the international and the European regime. In the first part of this book, a detailed description for each legal system was given. The purpose of the following section is to highlight whether or not and to what extent the different legal systems and cultures changed under the rules of the 'first pillar', by summarizing the results of the national reports and by adding some information which was reported by the Member States to the Commission, including statistics, which are available online.[86]

4.2 The implementation of the rules of the Aarhus Convention and Directive 2003/4/EC

According to the report from 2012 of the European Commission on the experiences gained in the application of Directive 2003/4/EC, the legal implementation of the Directive in the Member States is, despite some problems in some Member States, satisfactory.[87] Some Member States were (very) late in transposing the obligations, which meant that several infringement procedures had been initiated,[88] and some problems in the application of the rules persist. Nevertheless, overall, the implementation of the rules of the first pillar in the Union and its Member States has been less controversial and problematic than the implementation of the other two pillars, notably the third on

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[83] Para 65 ibid.

[84] Case C-266/09 *Stichting Natuur en Milieu and Others v College voor de toelating van gewasbeschermingsmiddelen en biociden,* para 59.

[85] Case C-71/10 *Office of Communications v Information Commissioner,* para 32.

[86] The reports submitted to the Commission can be found on <http://ec.europa.eu/environment/aarhus/reports_ms.htm> accessed 26 may 2016.

[87] Report from the Commission to the Council and the European Parliament on the Experiences gained in the Application of Directive EC 2003/4 on public access to environmental information, COM (2012) 774 final, 5.

[88] Case C-44/07, *Commission v Germany;* Case C-85/06, *Commission v Greece*; Case C-53/06, *Commission v Spain*.

access to justice.[89] In any event, it has to be noted that the setting for implementing the rules of the 'first pillar' is very different from the setting at the times, in which the first European Directive on access to environmental information was negotiated. This is due to the 'digital revolution' through which the Internet has become an extremely important source for information. The accessibility of environmental information can already be improved just by technical means, and the Commission has stressed the importance to foster "active and wide dissemination using latest technologies".[90] After these preliminary remarks on the implementation as seen from the supranational perspective, the focus will, in the following, be on the national legal reforms and changes in national legal cultures which were induced under the 'first pillar' of the Aarhus Convention.

4.2.1 Sweden, the Netherlands and France: little change in the legal framework and the legal culture on access to environmental information

The impact of the Aarhus Convention has been very modest with regard to the first group of legal systems identified in section one of this chapter. Sweden had already provided for very liberal rules on access to information before the European and international rules were adopted, so that only little changes in the statutory framework were necessary in order to implement the rules of the Aarhus Convention.[91] These modifications mainly concerned the scope of administrative authorities covered by the new rules, which are broader than the initial Swedish legislation. As far as the application of these rules is concerned, it has always been self-evident that applicants request information from public authorities, so that no change in the legal culture was induced. Furthermore, the principle of openness is not only applicable to environmental information, but to any information held by the authorities.[92]

Similarly, in the Netherlands, which had already relatively liberal rules in place for a long time (at least if compared to the legal systems of the other groups), only minor changes in the legislation were necessary.[93] It should

[89] On the third pillar: Jan Darpö, 'Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9(3) and 9(4) of the Aarhus Convention in Seventeen of the Member States of the European Union' in Jan H. Jans, Richard Marcrory and Moreno Molina (eds), *National Courts in EU environmental Law* (Groningen 2013) 169-212; Mariolina Eliantonio, 'Collective Redress in Environmental Matters in the EU: A Role Model or a "Problem Child"?' [2014] Legal Issues of Economic Integration, 41, 257.

[90] 'Report to the Council and the Parliament on the experience gained in the application of the Directive 2003/4/EC on public access to environmental information' COM (2012) 774 final, 12.

[91] Ibid, 2.

[92] Ibid, 1 ff.

[93] Dutch Government's, 'Legal and empirical basis for the replies to the Commission questions on the experience gained with regard to Directive 2003/4/EC on public access to information' (30 march 2009) available at http://ec.europa.eu/environment/aarhus/pdf/reports/netherlands_en.pdf accessed 21 july 2016, 4 ff.

however be noted that among the three pillars of Aarhus, the rules of the first pillar induced the most changes in Dutch legislation.[94] The rules implementing the Aarhus Convention and the European Directive entered into force in 2005.[95] As far as the procedure to access information is concerned, special time limits for environmental information were introduced. Another important change in legislation concerned the classification of exceptions, of which some had previously been absolute reasons for refusal, which then became relative grounds.[96] From an empirical perspective, no specific change in the attitude about administrative openness resulted from the Aarhus Convention.[97]

Also in France, the ratification of the Aarhus Convention and the implementation of the Union Directive did not induce a process of change.[98] The French framework on access to environmental information is in principle still based on the rules which were applicable in the 1980s and some more specific provisions in the Environment Code.[99] Moreover, the prominent position of the Environmental Charter of 2004 has to be mentioned, which has constitutional statutes and which enshrines in its article 7 the right of any person to access information relating to the environment which is held by public authorities.[100] As far as the application of the rules is concerned, the national report in this book observes that there are still some uncertainties about the interpretation of the exemptions and that in particular the exemption for the protection of commercial and industrial information has been interpreted restrictively.[101] From the perspective of different public authorities, whose experiences were reported to the Commission, the public gets increasingly involved, which is mainly due to the dissemination of information via the Internet,[102] although as observed in the

94 Barbara Beijen, 'The Aarhus Convention in the Netherlands' in this book, 3.

95 Wet van 30 september 2004 tot wijziging van de Wet milieubeheer, de Wet openbaarheid van bestuur en enige andere wetten (Act of September 30, 2004 amending the Environmental Management Act, the Open Government Act and some other laws) Stb. 2004, 519; Wet van 23 juni 2005 houdende wijziging van de Wet milieubeheer, de Wet openbaarheid van bestuur en de Archiefwet 1995 ten behoeve van de implementatie van richtlijn nr. 2003/4/EG en van richtlijn nr. 2003/35/EG (Law of June 23, 2005 amending the Environmental Management Act, the Open Government Act and the Public Records Act 1995 for the purpose of implementing Directive 2003/4/EC and Directive 2003/35/EC) Stb. 2005, 341.

96 Barbara Beijen, 'The Aarhus Convention in the Netherlands' in this book, 5 ff.

97 'Report to the Council and the European Parliament on on the experience gained in the application of the Directive 2003/4/EC on public access to environmental information', see footnote 90, 9.

98 Giulia Parola, 'The Aarhus Convention – The Legal Cultural Picture, Country report for France' in this book, 3 ff.

99 Ibid, 4.

100 Loi constitutionnel du 1 Mars 2005 relative à la Charte de l'Environnement (Constitutional Law of 1 March 2005 on the Charter of the Environment) n 2005-205, JORF n 51, 2 march 2005, 3697

101 Giulia Parola, 'The Aarhus Convention – The Legal Cultural Picture, Country report for France' in this book, 9.

102 'Rapport national sur l'experience aquise dans le cadre de l'application de la directive 2003/4/CE concernant l'access du public à l'information en matière d'environnement' (23 december 2009) available at

national report, there is still room for improvement.[103] Requests for environmental information are usually answered within the delay prescribed by the law and only very few requests for access are denied.[104]

4.2.2 Italy, UK and Ireland: modifying rules and enhancing the legal culture on access to environmental information

Contrary to the modest impact which the Aarhus Convention and the Directive had on the legal systems of the first group, the legal systems of the other groups had to adapt more substantially to the rules of supranational law.

According to the Italian report, the implementation of the new rules by the Statute of 19 August 2005, nr. 195, and in particular the terminological shift from 'freedom' to 'rights', "has been seen as a sign of transition from a perspective in which the public authorities forced themselves not to oppose citizens' demands for access to information, to one in which the public authorities have to make environmental information available to citizens and to facilitate its acquisition."[105] The overview of the case law in the Italian report shows that the exceptions for disclosure are generally interpreted restrictively and that there are no unreasonable obstacles to access information which relate to personal data, commercial, industrial or internal deliberations or public order and security.[106] However, in order to ensure that the right of access is not abused, a 'true environmental concern' is required, which has to be actual and concrete. Finally, the charges required for accessing environmental information are considered to be reasonable and not to constitute an obstacle to access environmental information.[107] Hence, the rules of the Aarhus Convention broadened the already existing possibilities to access environmental information. In how far this has an impact on the Italian legal culture is difficult to assess due to a lack of conclusive data.

In the UK, the statutory framework on access to environmental information has been broadened. Today, there are two sets of rules applicable to access to information. To begin with, the Freedom of Information Act 2000 (FOIA) provides for a general right to access information. This right is however subject to several exemptions.[108] Some of these exemptions are absolute, others are relative. In the cases of relative exemptions, the public authority has to balance

http://ec.europa.eu/environment/aarhus/pdf/reports/france.pdf accessed 21 july 2016, 1 ff.

[103] Giulia Parola, 'The Aarhus Convention – The Legal Cultural Picture, Country report for France' in this book, 7.

[104] 'Rapport national sur l'experience aquise dans le cadre de l'application de la directive 2003/4/CE concernant l'access du public à l'information en matière d'environnement', see footnote 102, 15 ff.

[105] Alessandro Comino, 'The application of the Aarhus Convention in Italy' in this book, 5.

[106] Ibid, 6 ff.

[107] Ibid, 9.

[108] Ss 22 to 44 Freedom of Information Act 2000 (FOIA).

the public interest to keep the information sought inaccessible against the public interest to disclose the information.[109] With respect to environmental information, the FOIA has only a residual function.[110] The rules which are usually applicable in this regard are the Environmental Information Regulations 2004 ('EIR') which were adopted in order to implement the rules of the Aarhus Convention and Directive 2003/4/EC.[111] The term 'environmental information' is interpreted very liberally, also including the environment as altered by human activity, and also the notion of the 'public authority' is in principle interpreted broadly.[112] Under the EIR, information has to be supplied in principle 'as soon as possible' and no later than within 20 working days which goes further than what is required by the Directive.[113] Finally, charges for the request of information and dissemination must generally not exceed the costs for producing the information and excessive costs are as such not a ground for refusal.[114] As far as active dissemination is concerned, public authorities are under an obligation to publish information electronically.[115] In this context, it should be noted that the tradition of public registers,[116] continues to play an important role for the disclosure of information relating to the environment.[117] In Scotland, the rules on access to (environmental) information are to some extent different from the rules described so far.[118] Under the Scottish rules for example, the test for balancing the interests in order to decide whether or not to disclose the information required depends on whether the disclosure would *substantially* prejudice the interest concerned.[119] As far as the influence of the international and European rules on the British culture is concerned, the extension of possibilities to access environmental information has encountered some criticism, namely as going too far.[120]

In any event, public awareness concerning the right of access to environmental information has been increasing over the last years. Statistics published by the Ministry of Justice on requests received by monitored central government

[109] Carol Day, 'United Kingdom' in this book, 5.

[110] Stuart Bell, Donald McGillivray, Ole W. Pedersen, *Environmental Law*, see footnote 22, 323.

[111] The Environmental Information Regulations 2004 (EIR), SI 2004/3391.

[112] Carol Day, 'United Kingdom' in this book, 2 ff.

[113] S 5(2) Environmental Information Regulations 2004 (EIR).

[114] Carol Day, 'United Kingdom' in this book, 9.

[115] Ibid, 2.

[116] See section 2 of this Chapter.

[117] Stuart Bell, Donald McGillivray, Ole W. Pedersen, *Environmental Law*, see footnote 22, 328.

[118] Freedom of Information (Scotland) Act 2000; Environmental Information (Scotland) Regulations 2004, SI 2004/520.

[119] S 10(5) Environmental Information Regulations 2004 (EIR).

[120] Stuart Bell, Donald McGillivray, Ole W. Pedersen, *Environmental Law*, see footnote 22, 333.

bodies show that in 2014, 1,884 requests were made under the EIRs, which constitutes a small increase compared to the year 2013.[121]

The Scottish report on experiences with Directive 2003/4/EC communicated to the European Commission found that the adoption of the implementing legislation has promoted the change of culture, improving openness, leading to greater accountability, a more informed debate and awareness regarding environmental information.[122] To conclude, in the UK, the broadening of rules also had an impact on the openness of the legal culture of access to information.

In Ireland, the rules of Directive 2003/4/EC have been implemented by the European Communities (Access to Information on the Environment) Regulations 2007,[123] the so called EIRs. According to the national report in this book, these rules "represented a long-overdue improvement on the relatively ineffective provisions that had applied in Ireland up to 1 May 2007."[124] A major improvement was the establishment of a specific review mechanism for requests on environmental information which had been ignored, delayed or denied. Nevertheless, the national report reveals that even after an amendment of the EIRs in 2011,[125] the rules are still deficient.[126] According to the Irish implementing rules, requests for environmental information have to be made in writing, which is not a requirement under Union law. Moreover, the Irish rules provide for mandatory exceptions to the right to access to environmental information, which contravenes the rules of the European Directive.[127] Besides these defects in legislation, the application and enforcement of the rules encounters various problems. In the national report, it is explained that there is a lack of public awareness and requests are poorly dealt with.[128] A specific problem has been that the Commissioner responsible for the review of ignored, denied or delayed requests is vested with insufficient resources only and that the fee for making an appeal constitutes an obstacle to the effectiveness. In conclusion, as far as the legal system of Ireland is concerned, the international rules tried to, but so far

[121] However, the overall number of requests under the FOI has decreased for the first time since 2007; Ministry of Justice, 'Freedom of Information Statistics: Implementation in Central Government' (23 April 2015) available at https://www.gov.uk/government/collections/government-foi-statistics accessed 21 july 2016, 9.

[122] 'Reporting about the Experience gained in Scotland in the application of Directive 2003/4/EC concerning Public Access to Environmental Information' available at http://www.gov.scot/Resource/Doc/921/0085214.pdf accessed 21 july 2016, 2.

[123] SI 2007/133.

[124] Áine Ryall, 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book, 6.

[125] European Communities (Access to Information on the Environment) Regulations 2011, SI 2011/662, available at http://www.irishstatutebook.ie/eli/2011/si/662/made/en/print accessed 21 july 2016.

[126] Áine Ryall, 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book, 7 ff.

[127] Ibid, 8.

[128] Ibid, 8.

did not achieve a significant change in the culture on access to environmental information.

To summarize, the Aarhus Convention obliged Italy, the UK and Ireland to modify their rules which lays the foundation to a culture of more openness. However, the experiences with the new rules are different among these states.

4.2.3 Germany and Spain: modifying rules and enhancing the legal culture on access to environmental information

In Germany, on the federal level, the rules emanating from the Aarhus Convention were implemented with the adoption of a new statute in 2004.[129] As the competence to create environmental laws lies no longer with the federal level,[130] the rules of the federal statute are only applicable to federal authorities and the different *Länder*, i.e. states, had to adopt their own rules in order to comply with supranational law.[131] It should be recalled that the 'break' with the culture of secrecy was already induced through the adoption of Directive 90/313/EEC,[132] so that the rules of the Aarhus Convention were not causal for this shift in legal culture, but only reinforced it.[133] According to the national report, citizens make increasingly use of their right to access information, but in many cases requests are still denied. A reason for denial given frequently is, that the authority would not have the information requested, and very often access to information is denied for reasons of confidentiality, either of the proceedings of the public authority or of commercial and industrial information.[134] Another problem which has been identified in the national report is the charges which may be required from citizens making a request. Moreover, the fragmented legislation on access to information which exists in Germany is not very transparent.[135] In conclusion, the rules of the Aarhus Convention have – to some extent – strengthened the rules on access to environmental information and contributed to a further trend towards openness in German legal culture.

Comparable to the situation in Germany, in Spain there is no general statute on access to information, but rules on this matter are found various pieces of legislation: the general statue on administrative procedure and other sector

[129] Umweltinformationsgesetz (UIG) (Environmental Information Act) 22 December 2004, BGBl, I 3704.

[130] Christian Schrader, 'Neue Umweltinformationsgesetze durch die Richtlinie 2003/4/EG' [2004] ZUR 15, 134.

[131] Bilun Müller, 'The Aarhus Convention – The Legal Cultural Picture. Country report for Germany' in this book, 3.

[132] See section 3 of this chapter.

[133] Bilun Müller, 'The Aarhus Convention – The Legal Cultural Picture. Country report for Germany' in this book, 6.

[134] Ibid, 8.

[135] On advantages and disadvantages to unify and harmonise the existing legislation: Matthias Rossi, 'Brauchen wir ein Informationsfreiheitsgesetzbuch?' [2014] ZRP 201ff.

specific acts.[136] The rules of the Aarhus Convention and Directive 2003/4/EC have been implemented by Act 27/2006 in 2006.[137] These new rules are broader than the rules on access to information under the general administrative procedure.[138] For example, the general rules on access prescribe that requests for disclosure can only be made by Spanish citizens, whereas under the rules of Act 27/2006 anyone can make a request. Moreover, where access to environmental information is concerned, the grounds for exempting information from access are more limited than under the general rules.[139] In practice, as the national report has highlighted, courts do not concentrate on checking whether the exemptions were substantively complied with, but rather control administrative decisions on the basis of reasonableness and proportionality.[140] Furthermore, the time limit for providing the information is shorter in environmental matters than under the general rules on administrative procedure.[141] Finally, the scope of administrative bodies covered by Act 27/2006 is greater if compared to the rules on access, which existed before the Aarhus Convention was adopted, or which are still in place with regard to the general administrative procedure.[142] However, a problem which persists are the fees requested by some authorities for accessing information.[143] According to the national report in this book, 'significant progress' has been made as far as the dissemination of information is concerned.[144] In the official report to the Commission, it was observed that the public awareness increases steadily but that there is still room for improvement.[145] To conclude, in Spain, similar to what was observed with regard to Germany, the rules of the Aarhus Convention have broadened the rules on

[136] Blanca Lozano Cutanda and Carmen Plaza, 'The Europeanization of National Procedural Rules in the Field of Environmental Protection' [2009] EPL 15, 321.

[137] Statute of 18 July 2006, n 27, BOE 171 (19 july 2006).

[138] Blanca Lozano Cutanda and Carmen Plaza, 'The Europeanization of National Procedural Rules in the Field of Environmental Protection', see footnote 136, 321.

[139] Ibid, 322.

[140] See Jorge Agudo González, 'The implementation and influence of the Aarhus Convention in Spain' in this book, 6.

[141] Blanca Lozano Cutanda and Carmen Plaza, 'The Europeanization of National Procedural Rules in the Field of Environmental Protection', see footnote 136, 323.

[142] See Jorge Agudo González, 'The implementation and influence of the Aarhus Convention in Spain' in this book, 5.

[143] Decision V/9K on compliance by Spain with its obligations under the Convention, ECE/MP.PP/2014/2/Add.1.

[144] See Jorge Agudo González, 'The implementation and influence of the Aarhus Convention in Spain' in this book, 3.

[145] 'Report from the Kingdom of Spain on the experiences acquired in the implementation of Directive 2003/4/EC of the European Parliament and the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC' available at http://ec.europa.eu/environment/aarhus/pdf/reports/spain_en.pdf accessed 21 july 2016, 3, 4.

access to environmental information, which is the basis for a legal culture of more openness.

4.2.4 Romania: modifying rules but only modest impact on the legal culture on access to environmental information

In Romania, the rules of the Aarhus Convention and the Directive have been implemented by governmental decision in 2005.[146] The specific problem in the Romanian legal order concerns the enforcement of these new rules. According to the national report, requests have been rejected as this implies additional organizational work, and no clear procedures are established on who is competent to provide the information.[147] Moreover, a delivery of unsorted piles of information by public authorities is aimed at discouraging requests. As far as the dissemination of environmental information is concerned, public authorities only partially comply with the law.[148] Pursuant to the observations made in the national report, only some information which is required by law is transmitted, websites are poorly organized and the quality of information is often not sufficient. An additional complication consists in the coexistence of two separate regimes, as next to the rules implementing the obligations of the Aarhus Convention a general Freedom of Information Act provides for different rules, especially as far as time-limits and exemptions are concerned.[149] Some of the problems of enforcing the Romanian legislation on access to environmental information have become subject to a communication to the Aarhus Compliance Committee in a case concerning the construction of a nuclear power plant[150] which culminated in the finding that Romania did not comply with the Aarhus Convention.[151]

In conclusion, the Romanian rules have been broadened but so far, there seems to be no significant impact on the ideas, custom or behavior in society, meaning that a legal culture of openness has not yet been established.

4.2.5 Conclusion

To conclude, in environmental matters, the provisions of the Aarhus Convention have extended and strengthened the *rules* already applicable to access to information in the legal systems under analysis in this book.

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[146] Governmental Decision n 878/2005, OJ 760, 22 august 2005.

[147] Dacian C. Dragos and Bogdana Neamtu, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania' in this book, 5.

[148] Ibid, 7 ff.

[149] Law n 544/2001, OJ 663, 23 october 2001.

[150] Aarhus Convention Compliance Committee ACCC/C/2010/51 Romania, available at http://www.unece.org/env/pp/compliance/Compliancecommittee/51TableRO.html accessed 21 july 2016.

[151] Decision V/9j on compliance by Romania with its obligations under the Convention, ECE/MP.PP/2014/2/Add.1.

Thereby, the foundation for the development of a common European legal culture is reinforced. However, as the effectuation of the rules encounters several problems at the national level, a common European culture has not yet been entirely achieved. Nevertheless, through the influence of European and international law, the different national legal systems are developing towards a common European culture on access to environmental information.

5 A legal culture of openness at the Union level?

The focus of this chapter has so far been on the influence of international and European rules on the legislation and legal cultures of the Member States of the Union. As the Union itself is also a contracting party to the Aarhus Convention,[152] some remarks about the impact of the international rules on the European framework on access to environmental information have to be made. To begin with, it has to be noted that, originally, the administrative system of the Union was marked by a culture of secrecy.[153] In article 47 of the ECSC Treaty it was stipulated that the High Authority may gather information but that it shall 'not divulge information which by its nature is considered a professional secret and in particular information pertaining to commercial relations'. It was only the result of a declaration annexed to the Treaty of Maastricht which prompted the adoption of first rules on access to documents held by the Commission in a Code of Conduct which were implemented by Decision 93/731.[154] Also the Council adopted a decision on access to documents in 1993.[155] These rules, however, were very restrictive, as they only concerned documents produced by these institutions and they were accompanied by many exemptions. It should be noted that the rules of Directive 90/313/EEC did not apply to the institutions of the Union, but only the Member States.

A further step aiming at the creation of a legal culture of more openness was set with the adoption of Regulation 1049/2001/EC which provides for rules on access to documents held by the European Parliament, the Council and the Commission.[156] Accordingly, natural persons residing in the Union and legal

[152] Council Decision (EC) 2005/370 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124/1.

[153] Stuart Bell, Donald McGillivray, Ole W. Pedersen, *Environmental Law*, see footnote 22, 320.

[154] Council and Commission, Declaration (EC) on a Code of Conduct concerning public access to Council and Commission documents, OJ L340/41; Council Decision (EC) 93/731 on public access to Council documents, OJ L340/43; Commission Decision (ECSC) 94/90 on public access to Commission documents, OJ L 46/58; Ralph Hallo, 'Public Access to Environmental Information' [1997] European Environment Agency Experts, Corner 13.

[155] Council Decision (EC) 93/731 on public access to Council documents, see footnote 154.

[156] European Parliament and Council Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L145/43.

persons with a registered office in a Member State have a right of access to documents of the institutions,[157] other persons may be granted access.[158] However, the regulation provides for an extensive list of mandatory ('shall') exemptions from disclosure, where this would undermine 'public security, defense and military matters, international relations and the financial, economic or monetary policy of the Member States or the Union.'[159] Moreover, a request for disclosure has to be denied where rules on data protection are concerned.[160] Where commercial interests (including intellectual property) are at stake, where the information relates to court proceedings and legal advice and where documents concern inspections, investigations and audits, disclosure has to be refused if there is no overriding interest of the public for disclosure.[161] Furthermore there is a special clause for 'sensitive documents'.[162] Requests for disclosure have to be handled promptly[163] and charges may be required.[164] Failures to comply with the obligations are, first, internally reviewable in the institution, and in a second step, court proceedings may be brought, and a complaint can be lodged with the Ombudsman.[165] Finally, authorities are obliged to set up registers on documents[166] and have to draw reports on requests for access.

In addition, specific rules on access to environmental information are enshrined in Regulation 1367/2006/EC (the 'Aarhus Regulation'), which was adopted in order to implement the obligations of the Aarhus Convention.[167] The 'Aarhus Regulation' stipulates that, in principle, the rules of Regulation 1049/2001/EC are applicable for requests for environmental information.[168] As far as the list of exceptions is concerned, the 'Aarhus Regulation' provides for some modifications: with regard to some reasons listed in article 4 (2) of Regulation 1049/2001/EC, an overriding public interest shall be deemed to exist where information concerns the emissions on the environment, and all grounds for refusal shall be interpreted restrictively, taking the public interest into account, and whether emissions on the environment are concerned.[169] Tanking a close look at the modifications of the exemptions of Regulation 1367/2006/EC, it

[157] Art 2(1) ibid.

[158] Art 2(2) ibid.

[159] Art 4(1) ibid.

[160] Art 4(1)b ibid.

[161] Art 4(2) ibid.

[162] Art 9 ibid.

[163] Art 7(1) ibid.

[164] Art 10(1) ibid.

[165] Arts 7(4), 8 ibid.

[166] Art 11 ibid.

[167] European Parliament and Council Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L264/13.

[168] Art 3(1) ibid.

[169] Art 6(1) ibid.

appears that they are broader than what is allowed by the Aarhus Convention.[170] For example, an exemption for the protection of financial, monetary or economic policy of the parties is not included in the Aarhus Convention.[171] Moreover, it is noted that the Aarhus Convention allows an exemption from the obligation to disclose information where this concerns the confidentiality of commercial and industrial relations, where this is protected by law or where this protects a legitimate economic interest,[172] but in the European Regulation, the second half of this sentence, concerning the protection by law or the legitimate interest, is simply omitted.[173] Next to these and other possible problems on the compatibility of the Union exemptions with the requirements of the Aarhus Convention,[174] the Union authorities often fail to comply with the delays prescribed by the Regulation[175] which has been an issue with respect to several cases in front of the European courts.[176] The ultimate question is whether the mere existence of rules proclaiming the openness of the Union and providing for rules on access to information, resulted in a change in the legal culture of the Union. *Krämer* has compiled numerous cases which clearly show that there is not yet any real culture on openness at the Union level as far as environmental information is concerned and that the Union is still 'more close to a closed than to an open society'.[177]

6 Conclusion: Has a common European legal culture developed under the 'first pillar' of the Aarhus Convention?

The central question of this book is whether a common European legal culture is emerging under the rules of the Aarhus Convention. As far

[170] Susan Wolf, 'Access to environmental information: EU compliance with Aarhus Convention' [2013] ERA Forum 14(4), 484.

[171] Article 6 (1) Regulation 1367/2006/EC, see footnote 167, 4 (1) a (iv) Regulation 1049/2001, see footnote 156, in comparison with 4 (4) Aarhus Convention.

[172] Art 4(4) d Aarhus Convention.

[173] Art 4(2) (i) Regulation 1049/2001, see footnote 156; Susan Wolf, 'Access to environmental information: EU compliance with Aarhus Convention', see footnote 170.

[174] See the analysis by Susan Wolf, 'Access to environmental information: EU compliance with Aarhus Convention', see footnote 170, 475- 491; see the arguments of the Court of Justice on the alleged incompatibility of art 4 (2) Regulation No 1049/2001 with the art 4 (1), (4) Aarhus Convention: Case C-612/13P *ClientEarth, Pesticide Action Network Europe v European Food Safety Authority, European Commission*.

[175] Ludwig Krämer, 'The EU, access to environmental information and the open society' [2013] ERA Forum 14, 471.

[176] T-449/10 *ClientEarth and Others v Commission*; T-278/11 *ClientEarth, Friends of the Earth Europe, Stichting FERN and Stichting Corporate Europe Observatory v European Commission*.

[177] Ludwig Krämer, 'The EU, access to environmental information and the open society' see footnote 175, 466.

as the 'first pillar' is concerned, this chapter has shown that there were already some common European rules which influenced the diverse national legal cultures before the Aarhus Convention was adopted, and that the experiences gained with this European instrument were taken as a basis for the creation of the broader international rules. So far, rules on the disclosure of environmental information in the national legal systems have not only been developing under the Aarhus Convention, but under European legislative instruments. However, the Aarhus Convention has further broadened the rules applicable in those Member States, which had rather restrictive rules on access to environmental information. Hence, there is now a set of rules on the disclosure of environmental information common to all Member States in the Union. Whether the existence of these rules means that there is a common European legal culture on access to environmental information is a slightly different question, which depends on the influence of the rules on the ideas and behavior of actors. As the comparison of the national reports has shown, the experiences with the new rules are very different. For some legal systems, the adaptation is easier than for others. This means that a common European legal culture of openness is not yet there, however, on the basis of common rules it is developing.

CHAPTER 12

The Second Pillar of the Aarhus Convention and Beyond

Comparative Analysis of the Implementing Systems Vis-À-Vis their Legal Culture

Margherita Poto

"Today we are faced with a challenge that calls for a shift in our thinking, so that humanity stops threatening its life-support system. We are called to assist the Earth to heal her wounds and in the process heal our own - indeed to embrace the whole of creation in all its diversity, beauty and wonder. Recognizing that sustainable development, democracy and peace are indivisible is an idea whose time has come"

Wangari Maathai

1 Introductory remarks[1]

The present contribution gives an overview of the extent of implementation of the Second Pillar of the Aarhus Convention (hereinafter, AC or Convention). It explores the legal culture where the AC principles have been applied and studies how the legal culture itself has contributed to facilitate, delay or even disrupt the participatory process in environmental decision-making.[2]

Because of the manifold if not shifty connotations of the concept "legal culture," one challenging aspect in drafting this contribution has been to identify the interactions between the AC and the legal cultures of the contracting parties.[3] The legal scholarship has analysed legal cultures' peculiarities, rather than providing a shared definition. Some authors observed that legal culture is not a static entity, for it develops according to the degree of autonomy of a legal system from society.[4] Ralf Michaels underscores that sometimes the concept

[1] This work has served as fundamental starting point for further studies on environmental participation and has been inspirational for the publication: Margherita Poto, 'Strengths and weaknesses of environmental participation under the Aarhus Convention: what lies beyond rhetorical proceduralisation?' in Eva Lohse and Margherita Poto (eds) *Participatory Rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective* (Duncker und Humblot, Berlin, 2015). My gratitude goes to Ms Jane Murungi, University of Nairobi, Kisumu Campus, for her precious help in editing and proofreading the work. All mistakes remain mine. Comments are welcome at margherita.poto@unito.it.

[2] In the years immediately preceding the Convention, the collapse of communism in Central and Eastern Europe certainly accelerated the democratisation process. Western European countries were determined to bring democracy from the West to the East, namely into the countries of Central and Eastern Europe, the Caucasus region, and Central Asia. In the former communist countries, the process has been encountering resistance because of the structural challenges needed to completely uproot the mentality of the State as the only policy maker. In other cases (such as the European Union, France, Italy, Spain), the inertia probably depends on different factors, varying from the legal background to the political structure of the country.

[3] When using the term "contracting parties", I make no distinction between parties and signatories of the AC.

[4] Ari Afilalo, Dennis Patterson and Kai Purnhagen, 'Statecraft, the Market State and the Development of European Legal Culture' (2012) EUI Working Papers, Law 10, Department of Law, 3, available at <http://cadmus.eui.eu/bitstream/handle/1814/21674/LAW_2012_10_Patterson.pdf> accessed 16 June 2016.

refers to multiple different ideas, which are not always sufficiently separated, such as "living law" or "law in action." At other times, the term is used interchangeably with the term legal family or legal tradition.[5]

Historically, the phenomenon in Europe is linked to the replacement of nation-states with state-nations (during the 20th century), where individual legal cultures developed in the era of the nation-state had been confronted with other legal cultures, which resulted in the much-discussed "clash of civilizations."[6]

When analysing compliance with the AC in relation to the legal cultures, I have considered the constituent features of a legal system[7] (socio-political, economical, historical and cultural), on a case-by-case basis. In this regard, it has been interesting to observe the diversified interconnections between the legal culture and the AC. On one hand, the AC is the litmus test of economic and political revolutions (as in the case of the former communist countries: the Romanian example, described below, is quite representative of this trend). On the other hand, it has triggered further shifts in mentality. These openings include public participation in all phases of the decision-making process and the right/duty to participate being seen as a fundamental right of the persons, individuals or associated.

I will scrutinise a few of these interrelations, according to the following structure: (1) First, a bird's eye view of the participatory mechanisms governing the AC in three aspects: in the preparatory work, in the legal provisions of the second pillar and in the rulings of the Compliance Committee; (2) Second, with a focus on the structural difference between the European Union and the other

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5 Ralf Michaels, 'Legal Culture'in Jürgen Basedow, Klaus Hopt and Reinhard Zimmermann (eds), *Max Planck Encyclopedia of European Private Law* (OUP 2011). The author observes that "more specific concepts exist as well. Legal sociologists especially understand legal culture as the values, ideas and attitudes that a society has with respect to its law (Lawrence M. Friedman, James Q. Whitman). Sometimes legal culture itself is seen as a value and placed in opposition to the barbarism of totalitarianism (Peter Häberle); here, legal culture is used synonymously with the rule of law. Others understand culture as certain modes of thinking; they speak of episteme or mentalité (Pierre Legrand), legal knowledge (Annelise Riles) and collective memory (Niklas Luhmann), law in the minds (William Ewald) or even cosmology (Rebecca French, Lawrence Rosen). In addition, an anthropologically influenced understanding exists of legal culture as the practice of law (Clifford Geertz). Sometimes, borders are fluid, both among these concepts themselves and between them and other concepts such as legal ideology (Roger Cotterell) or legal tradition (H. Patrick Glenn, Reinhard Zimmermann). Some definitions bring different aspects together. Mark van Hoecke and Mark Warrington, for example, name six elements: legal terminology, legal sources, legal methods, theory of argumentation, legitimising of the law and common general ideology. A similar combination of disparate elements underlies the definition of the styles of legal families (Konrad Zweigert, Oliver Remien)".

6 Samuel Huntington, 'The Clash of Civilizations?'[1993] Foreign Affairs, 22-49 and the subsequent books. Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York, Simon & Schuster 1996); with special emphasis to the cultural impact Laurence Harrison and Samuel Huntington, *Culture Matters: How Values Shape Human Progress* (Basic Books, New York 2001).

7 Here I use the term "legal system" in lieu of "national system" having in mind the European Union.

parties, some comments on the rationale behind the different degrees of compliance by the contracting parties; (3) Third, a screening of the degree of compliance of the AC and its impact on the legal frameworks of compliant parties; (4) Finally, an analysis of the reasons behind non-compliance. This analysis will comprise both endogenous and exogenous factors which cause resistance from the parties.

Some concluding remarks will complete this work.

2 A participatory Convention and the threefold shift in mentality: political, diplomatic and legal

2.1 The political shift

The impact of the AC on the democratization of Europe and its contribution to open up the doors to the participatory rights, in particular for the former Communist countries, has been underlined by activists and scholars who participated in the negotiations and who contributed to keep the debate over the compliance mechanisms alive. Svitlana Kravchenko's role in encouraging the full implementation of the Convention is worthy of mention. As a supporter of the AC she recalled that "the Convention was developed in part through the efforts of the public, and its primary subject matter is the right of the public to participate in environmental decisions that may affect them."[8]

The political upheavals of the Central and Eastern European democratic spring in the late 1980s and in the early 1990s had been a driver towards the promotion of public participation in the decision-making process. "After the fall of the Berlin Wall in 1989 and the breakup of the Soviet Union in 1991, Western European countries were determined to bring democracy from the West to the East, namely the countries of Central Europe, Eastern Europe, the Caucasus region, and Central Asia. In addition to promoting electoral democracy, they worked to promote the concept of public participation in government decision-making, focusing specifically on environmental decision-making."[9]

8 Svitlana Kravchenko, 'The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements' [2007], Colorado Journal of International Environmental Law and Policy18, 1, 6. The author recalls that these features were observed by herself, who participated in most of the negotiations on behalf of the eNGO Coalition. In order to pave the way towards the democratization of the Central and Eastern Europe, the Regional Environmental Center for Central and Eastern Europe (REC) in Hungary provided support through funding, guidance, and inspiration for a whole generation of local advocates for environmental democracy (public participation in environmental decision-making) through numerous projects, including the publication of a four-volume series of books of Svitlana Kravchenko, *Doors to Democracy: current trends and practices in public participation in environmental decision making in the newly independent States* (The Regional Environmental Center for Central and Eastern Europe, 1998) .

9 Ibid, 6.

2.2 The shift in diplomatic relations

Another possible connection between the AC and legal culture is a dramatic change in the nature of international negotiations. Besides reflecting political turmoil, the AC contributed to dramatically change the scenario of the international negotiations. The choice of involving eNGOs in negotiations and not only Parties and Signatories, has been observed as a unique characteristic among environmental treaties and perhaps in international law.[10] In the document "What is the Aarhus Convention" Kravchenko describes in detail the new revolutionary method adopted to allow for broader participation in the decision-making and drafting of the document. "This was the first time an international convention was prepared with the broad and intensive involvement of environmental organizations. A coalition of such organizations, the European ECO Forum (eNGO Coalition), participated in the drafting and in all the negotiating sessions organized by the Economic Commission for Europe of the United Nations (UNECE). The coalition also organized, inside the official Aarhus Conference, a roundtable with Environmental Ministers about the practical importance of the Convention. The roundtable also discussed good and bad practices in countries and presented practical examples on how improvement can be achieved."[11] Since the main objective of the AC was to provide new avenues for participatory democracy in environmental matters, it made sense to apply those principles in the very process being used to create it.

For these reasons, the AC has not only contributed to the shift of mentality in the legal cultures of the former communist countries, but has also facilitated the introduction of new participatory mechanisms in international negotiations.

2.3 The legal shift

The crowning achievement of these participatory negotiations consisted in the recognition of the fundamental right for every person "to live in an environment adequate to his or her health and well-being", and in "the duty, both individually and in association with others, to protect and improve the environment."[12]

The right of access to information, the right to participate in decision-making, and the right of access to justice in environmental matters are nothing else but the logical consequence of this recognition. Although the AC approach towards fundamental rights and duties is strictly procedural, this does not

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[10] Ibid,10.

[11] Svitlana Kravchenko and Mary Taylor, 'What is the Aarhus Convention' (2000) UNECE document, available at<http://www.unece.org/fileadmin/DAM/env/pp/Media/citizens_rights_under_Conv_e.pdf>accessed 16 june 2016.

[12] Preamble of the AC. The full text of the Convention is available in the original wording at <http://www.unece.org/env/pp/treatytext.html> accessed 16 june 2016.

preclude an acknowledgement of the revolutionary impact of its provisions on the legal traditions of the contracting parties.

More specifically, the second part of the AC, known as the "Second Pillar", is structured to allow broader participation in environmental decision-making. Public participation covers three domains: 1) participation in the authorisation procedure for certain specific activities, mainly of industrial nature, listed in Annex I to the AC (Art. 6); 2) participation in the formulation of environmental plans, programmes, environmental policies as well as legislation, binding regulations and standards, and legislation that may have a significant effect on the environment (Art. 7 and 8); and 3) participation in decisions concerning the deliberate release of GMOs into the environment.[13]

I will use Art. 6 to further illustrate the fruitful interaction between the AC and the change of legal culture, where the active role played by the Convention indirectly encourages the adoption of harmonised mechanisms, such as the Environmental Impact Assessment (hereinafter, EIA).

In this case, legal culture is nothing else but the legislator in disguise. The AC addresses the legislator to suggest improvements in administrative performances. Peripheral to the participatory approach, but responding to the same logic of contributing to the openness and to the transparency of the public action, the EIA is associated with a particular standard form of process for the assessment of potential environmental impacts as part of the decision-making process relating to a particular proposed activity. Although known in many countries in the UN/ECE region, this does not necessarily mean that a specific regime of EIA has to be established by the parties. It just means some kind of review of the environmental impacts of particular activities has to be granted, where decision-making in relation to them takes place. The Implementation Guide of the Aarhus Convention states: "[t]his assessment is typically carried out by authorities at the level most relevant to the proposed activity or by an applicant or proponent of a project under their supervision. For example, local authorities will generally have authority to approve projects with solely local impact, while regional authorities may approve projects with an impact throughout a watershed. Some countries also require separate issuance of more than one permit, each of which may have environmental consequences."[14]

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[13] In line with Council Decision (EC) 2006/9570n the conclusion, on behalf of the European Community, of an amendment to the Convention on access to information, public participation in decision making and access to justice in environmental matters, OJ L386/46. At European level this requirement is already met by certain provisions of European Parliament and Council Directive (EC) 2001/180n the deliberate release into the environment of genetically modified organisms, OJ L106/1, and European Parliament and Council Regulation (EC) 1829/2003 on genetically modified food and feed, OJ L268/1.

[14] Stephen Stec and Susan Casey-Lefkowitz, 'The Aarhus Convention: An Implementation Guide' (2000) U.N. Doc. ECE/CEP/72, 87, available at <http://www.unece.org/env/pp/acig.pdf>accessed 16 june 2016.

The harmonisation of environmental assessment proceedings, although giving enough flexibility to the parties in interpretation and implementation,[15] is another example of how deeply the AC is contributing to affect a wide variety of issues related to the legal culture, addressing to the administrative legal systems of the parties and requiring a participated approach.

3 The Aarhus Convention Compliance: internal mechanisms and national outputs

3.1 The Compliance Committee: a new participatory approach to monitor compliance

The remarkable impact of the AC on the legal structures of the contracting parties has been certainly facilitated by the choice to assign tasks to a Compliance Committee to monitor the effectiveness of AC implementation.[16]

The composition of the Compliance Committee mirrors the idea of a "participatory structure." As for the approval of the AC itself, and consistently with the provisions about participation, the Compliance Committee adopts a completely new approach thus opening up participatory rights. It is the AC's objective to encourage "on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention."[17]

The Compliance Committee is therefore established with participatory features, namely: (1) the ability of eNGOs to nominate experts for possible election to the Committee; (2) the requirement that all Committee members be independent experts rather than representatives of States, Parties to the

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[15] Ibid, 31 ff. In the implementation guide, this case is quoted as an example of flexibility left to the parties. "In some instances, it is more or less clear that differences in national legislation or in legal systems may have an effect on the scope of a particular provision. An example is the determination of "significant" environmental effect. Under article 6, paragraph 1, Parties are obliged to apply the provisions of article 6 to decisions on proposed activities which may have a significant effect on the environment. For those proposed activities not listed in annex I, Parties must determine whether a proposed activity has a significant effect on the environment in accordance with its national law".

[16] For the first comments on the Committee see Veit Koester, 'The Compliance Committee of the Aarhus Convention, An overview of Procedures and Jurisprudence' [2007] Environmental Policy and Law 37, 2-3, 83; Jeremy Wates, 'eNGOs and the Aarhus Convention' inTullio Treves, Marco Frigessi di Rattalma, Attila Tanzi, Alessandro Fodella, Cesare Pitea and Chiara Ragni (eds),*Civil society International Court and Compliance bodies*(T.M.C. Asser Press 2005) 167.

[17] AC, art 15.

Convention; and (3) the right of any member of the public and any eNGO to file a "communication" with the Committee alleging a Party's noncompliance.[18]

The innovative mechanism was proposed during the First Meeting of the Parties[19] and its completely original approach provoked controversial reactions. It was sharply criticised by the United States[20], strongly supported by the European Union and finally approved by acclamation.[21]

The Compliance Committee is grounded on the principles of participatory democracy. In compliance with Decision I/7 of the Meeting of the Parties (2002)[22]the Compliance Committee consists of eight independent experts with

[18] See Svitlana Kravchenko, 'The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements', see footnote 8, 68,who observes that "each feature is either unique or rare in international environmental law. The combination of all three in one compliance mechanism is remarkable".

[19] U.N. Econ. & Soc. Council (ECOSOC), Economic Commission for Europe (ECE), Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 'Report of the First Meeting of the PartiesAnnex 7', U.N. Doc. ECE/MP.PP/2 (17 December 2002) available at<http://www.unece.org/env/documents/2002/pp/ece.mp.pp.2.e.pdf> accessed 16 june 2016.

[20] The United States of America government, though only a negotiating Party and not a Signatory, was extremely critical towards the implementation mechanisms, especially towards the participatory approach proposed for the Compliance Committee. The case is quoted in Svitlana Kravchenko 'The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements' see footnote 8, 3: "At the time of its adoption, the United States government sharply criticized the Aarhus Convention's compliance mechanism for its "variety of unusual procedural roles that may be performed by non-State, non-Party actors, including the nomination of members of the [Compliance] Committee and the ability to trigger certain communication requirements by Parties under these provisions."

[21] Most Western European nations had not ratified the Aarhus Convention by the time of the First Meeting of the Parties, but they participated fully as Signatories. From the West, only three countries were full Parties by the time of the First Meeting (Denmark, France, and Italy), while 18 formerly Communist countries were Parties (Albania, Armenia, Azerbaijan, Belarus, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Poland, Republic of Moldova, Romania, Tajikistan, The Former Yugoslav Republic of Macedonia, Turkmenistan, and Ukraine). Another 19 countries from the West (Austria, Belgium, Cyprus, European Community, Finland, Germany, Greece, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and United Kingdom) were eligible to participate as Signatories, as were an additional four former Communist countries (Bulgaria, Croatia, Czech Republic, Slovenia). See U.N.,'Multilateral Treaties Deposited with the Secretary General' (2009) 13, available at https://treaties.un.org/doc/source/publications/MTDSG/2009/English-I.pdf accessed 21 june 2016. See the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus Convention (Aarhus, Denmark 25 june 1998) available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> accessed 21 june 2016.

[22] U.N., Economic and Social Council, 'Report of the first meeting of the parties', Decision 1/7 Review of compliance (2002), annex, art 1, available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pd> accessed 16 june 2016.

recognised competence in the field and who serve in their personal capacity and who are nominated not only by Parties and Signatories, but also by eNGOs promoting environmental protection and falling within the scope of Article 10, paragraph 5, of the Convention.[23]This new participatory approach, having characterised the adoption of the AC, was also extended to the monitoring of AC implementation and has produced remarkable results in the functioning of the Compliance Committee, that has now a consolidated collection of cases, the *Case Law of the Aarhus Convention Compliance Committee (2004-2011)*.[24]

3.2 The European Union: a good level of compliance due to the legal tradition

Focusing on the European Union as a party of the AC, it is possible to find another connotation of the AC *vis-à-vis* the legal culture, tapping into the feature of the legal tradition.[25]

The European Union has taken a leading role in environmental protection at international level. This is particularly evident in the AC implementation. International environmental law and more specifically the procedural guarantees the AC introduced have contributed to re-shape the EU legal order. This has had two implications: on one hand, the connection between environmental protection and human rights has improved at European level, at least from a procedural perspective. These improvements relate to the improved terms of harmonisation of administrative proceedings concerning environmental impact assessments.[26]

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[23] AC, art 10 para 5 states: "Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections."

[24] This collection attempts to summarise the practice of the Compliance Committee of the Aarhus Convention. In many cases, the Committee had to interpret and apply Convention's provisions to specific situations brought to its attention by the public and parties, as well as its own rules of procedures. Therefore, substantial case law was developed by the Committee during 2004-2011. Understanding this case law may help policy makers and practitioners apply and use the Convention in a more effective and uniform way promoting common standards for practical enforcement of environmental human rights in UN ECE region. See Andriy Andrusevych, Thomas Alge and Clemens Konrad, 'Case Law of the Aarhus Convention Compliance Committee (2004-2011)'(2nd Edition, RACSE, Lviv 2011), available at<http://www.unece.org/fileadmin/DAM/env/pp/Media/Publications/ACCC_Jurisprudence_Ecoforum_2011.pdf>accessed 16 june 2016.

[25] Joanne Scott, 'From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction'[2009] Am. J. Comp. Law 57, 897; Joanne Scott and Lavanya Rajamani, 'EU Climate Change Unilateralism'[2012] Eur. J. Int'l L. 23, 469; Anthony R. Zito, 'The European Union as an Environmental Leader in a Global Environment'[2005] Globalizations 2, 363; Joana Chiavari, Sirini Withana and Marc Pallemaerts, 'The Role of the EU in Attempting to 'Green' the ICAO' [2008] Ecologic Institute, Epigov. Paper 35, 56.

[26] This has been pointed out also by the AC Compliance Committee, commenting AC, art 6(2). "Most Member States seem to rely on Community law when drafting their national legislation aiming to

As a consequence, the AC's specific procedural requirements contributed to increase the number of cases decided by the Court of Justice of the European Union (CJEU) on the Convention.[27]

On the other hand, the EU's participation in the AC (the so-called "Europeanization of the Aarhus Convention") has limited the procedural autonomy of Member States. Christine Eckes has masterfully described this second implication. "When concluding a mixed agreement, the Member States are bound to comply with their obligations under international law (here the Aarhus Convention) and to give effect to EU law, including the EU's international agreements which, pursuant to Article 216 TFEU, become "an integral part of the legal order of the European Union."[28] This leads to a situation in which the AC entails far more reaching obligations for Member States under EU law than under international law. This is the case mainly because, under EU law, not only is the international agreement itself binding, but also its interpretation by the Court of Justice of the European Union. This is not a peculiar phenomenon of the AC, but it becomes apparent and real in the application of the Convention because of its subject matter -procedural rights – and its considerable detail.

The same concept has been affirmed by the AC Compliance Committee. Commenting on Art. 6 (2), for instance, the Compliance Committee observed that "when examining compliance by the Party concerned, the Committee must take into account the structural difference between the European Community and other Parties, and the general division of powers between the Community and its Member States in implementing Community directives."[29]

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implement international obligations stemming from a treaty to which the Community is also a Party. Moreover, the provisions of the EIA Directive, including those relating to public participation, are being directly invoked in some legal acts concerning provision of Community funding, for example in Annex XXI to Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund. Thus in practice they may be applied directly by European Community institutions when monitoring compliance with the EIA Directive on the occasion of taking decisions concerning Community funding for certain activities". See the European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10 (2 May 2008)see footnote 24, para 49, 40.

[27] See Cristina Eckes, 'Environmental Policy "Outside-In": How the EU's Engagement with International Environmental Law Curtails National Autonomy'(2012)German Law Journal, Special Issue, 13, 11.The author counts four cases decided by the Court of Justice of the European Union in the years 2010-2013: Case C-182/10 *Marie-Noëlle Solvay and Others v Région wallonne*; Case C- 524/09 *Ville de Lyon v Caisse des dépôts et consignations*; Case C-266/09 *Stichting Natuur en Milieu and Others v College voor de toelating van gewasbeschermingsmiddelen en biociden;*Case C-240/09*Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.*

[28] Ibid, 1153.

[29] See the European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add10 (2 May 2008)see footnote 24, para 50, 40 ff.

3.3 The National Reports

3.3.1 Comparative data

The comparative analysis of the national reports has a common starting point for all the parties. The situation regarding the European Directive 2003/35 on public participation (hereinafter PPD) is much less positive than that for the Directive 2003/4 on access to environmental information. The survey the European Environmental Bureau (hereinafter EEB) conducted in 2007 also shared this viewpoint.[30]

Despite the delay, the parties have now reached a good level of compliance, though with some differences.

The table below shows the comparative overview of the legal systems as analysed:

	Pre AC	Post AC
EUROPEAN UNION	Already addressed by the CJEU: Timely provision of information; the appropriate quality of information provided in the context; accessible locations for information for the public during consultation periods; taking due accountof public comments in a meaningful procedure along with the explicit requirement of having legal criteria for ensuring effective participation; and providing reasons if comments are not taken on board	Directive 2003/35/EC which provides for public participation in respect of environmental decisions and the drawing up of certain plans and programmes by amending the EIA Directive

[30] Ralph Hallo,'How far has the EU applied the Aarhus Convention?' (Report prepared for the European Environmental Bureau (EEB)2007) available at <http://www.eeb.org/index.cfm/library/index.cfm?month=0&year=2007&Aarhus=1> accessed 16 june 2016.The EEB has long played an active and leading role in efforts to protect and promote the rights provided by the Aarhus Convention. The EEB decided to investigate the initial experiences of the Aarhus Directives in Member States. To do this, the EEB launched a survey of experiences and needs regarding the rights the Aarhus Convention and Directives are meant to promote. The results of this survey were presented and discussed in Brussels at an EEB seminar in June 2007.

UK	In 1960-'70s local participation grew. It stopped during the Thatcher period but resumed in mid 1990s to 2005. FOIA (Freedom of Information Act 2000)	AC and PPD are fully implemented; EIRs (Environmental Information Regulations 2004); alignment with the pre-existing structures
		Planning and Development Act 2000 introduced significant restrictions on the right to participate in the planning process, in order to discourage participation that may delay or hinder development (planning participation fee).
ITALY	Participation with some resistance; L. 241/1990	D. Lgs. 195/2005. Participation in case of environmental information (right to be informed rather than right to access)
SPAIN	Since the Act of 1889, throughout the 20th century (APA 1958) participation had been formally granted; recognition in 1978 Constitution; and formalisation in APA 1992	Act 27/2006 on Access to information, public participation and access to justice rights (IPJ Act). Participation through institutional channels.
FRANCE	Strong tradition of representative democracy; Between 1990 and 2005, the system had been consolidating towards local participation	L. 2002-285; partial implementation of artt. 6 and 7
GERMANY	Strong influence on AC via EU law; UIG 1994	UIG 2004 applicable to the federal administration. Participation for individual plans: fully implemented; Participation at planning level: needs implementation
THE NETHERLANDS	Art. 3, Awb, 1994 (General Administrative Law Act)	2010, Wabo: new environmental permit: *anyone* has the right to state his view on the draft decision (Article 3.12(5) Wabo)

IRELAND	Pre-existent good legislation on public participation: The Local Government (Planning and Development) Act 1963 allowed members of the public to 'object' to draft Development Plans. Contemporary planning law provides that 'any person' (may make a submission on a planning application. In the case of decisions made by local planning authorities, there is a right of appeal to *An Bord Pleanál*a (the Planning Appeals Board) which was established in 1977.	Participation granted with some obstacles: 1) participation fee; 2) limited period of time
ROMANIA	Several minor acts in place before the AC (mainly orders in 1990s); L. 86/2000; Ordinance n. 195/2005.	Participation is limited to consultation

3.3.2 United Kingdom: participation and political interests take it in turns

Since 2000, the impact of the AC on the UK has contributed to increase the environmental awareness. The developments of participatory democracy followed a mercurial trend, mainly influenced by the political structure of the country. An initial growth of local participation in the late 1960s and throughout the 1970s was suppressed during the Thatcher Government. Then, the technocratic approach prevailed and decisions on environmental issues became highly centralised. From the 1990s the situation improved and dialogue superseded the one-way decision making method. Two kinds of approaches characterised the dialogue: 1) stakeholder-based approaches, targeting interested actors; and 2) public deliberation methods, through citizens' juries, consensus conferences, and focus groups. Since 2005, the compliance efforts led to more sophisticated participatory ways, such as an institutionalised and professional public participation and public engagement in science and technology.

Parallel to this substantial shift of mentality on environmental issues in the UK, environmental participation has been granted by virtue of EU directives facilitating implementation of the AC on EU level.[31] After the Directive 2003/4/

[31] The United Kingdom deposited its instrument of ratification of the Convention on 23 February 2005, consequently the Convention became applicable in the UK as of 24 May 2005. The right of access to

EC on public access to environmental information, the UK accelerated the trend towards transparency, passing the Environmental Information Regulations 2004 (EIRs), and aligning them to the previous Freedom of Information Act 2000 (FOIA), which granted a general right of access to information held by public authorities.

To sum up, the reforms undertaken by the UK to comply with the AC´s second pillar had been affected by the major features of British domestic politics in three ways:

- a wave of political favour towards the transparency of the public action, after the massive centralisation of powers during *Thatcherism*;
- an acceleration due to the drive by European Union law;
- a third phase, starting from 2000s probably favoured by the increasing awareness of participation triggered by the political choices and their outcomes[32], towards an institutionalised public participation, in addition to developments of new technologies, which facilitated on-line participation.

By analysing the general trend of the AC impact on the British legal culture, it is clear that the participatory approach and the political reforms have a recipro-

information was implemented with the European Parliament and Council Directive (EC) 2003/4 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L41/26. See Ole Pederson, 'Price and Participation: The UK Before the Aarhus Convention's Compliance Committee'(2011) available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1894687>accessed 16 june 2016.

[32] It is not easy to evaluate whether the increasing awareness has been favoured by political choices, which nevertheless have contributed to raise the debate on the environmental participation and therefore are worthy to be mentioned as triggering factors of a new green conscience. The three political mandates [respectively led by Tony Blair 1997/2007, Gordon Brown (2007-2010) and David Cameron (2010-today)] have received controversial opinions regarding their environmental policies. Regarding Blair's mandate, Tony Juniper, Director of Friends of the Earth, said: "Back in 1997 Tony Blair promised to put the environment at the heart of Government but this has simply not been delivered. Climate change and major environmental issues will never be successfully tackled if they are seen in isolation or marginalised from other issues. Tony Blair needs to rise to the challenge and recognise environmental improvements as being central to the country's long term economic growth, health and security". See 'Blair's 'longest serving Labour Prime Minister' environment record attacked' (2005) available at <http://www.edie.net/news/1/Blairs-longest-serving-Labour-Prime-Minister-environment-record-attacked/9530/> accessed 16 june 2016. Regarding Brown's environmental policies, a report from the Friends of the Earth has underlined his poor performances in environmental budgets. See Friends of the Earth, 'How green was Gordon? The environmental record of Gordon Brown's budgets 1997-2007' (2007) available at <http://www.foe.co.uk/resource/briefings/how_green_was_gordon.pdf> accessed 16 june 2016. The present Prime Minister pledges to lead "the greenest government ever", promising an "environmental revolution": see<http://www.telegraph.co.uk/earth/environment/climatechange/4272196/Environmental-revolution-promised-by-David-Cameron.html> accessed 16 june 2016. The position has been sharply criticised by the opposition. See for example Johann Hari, 'Up In Flames: Cameron's pledge to lead the greenest government ever' (The Independent Saturday 14 May 2011).

cal relationship. At first environmental participation did not find the best soil of growth because of the Thatcherian centralisation of the decision-making; then the participatory approach took root and increasingly flourished in the last twenty years of green propaganda. The mercurial trend of the political choices does not allow to predict whether the implementation will continue growing or will come to a standstill. Much will depend on the future developments of the AC heritage, both at national and international level.

3.3.3 Southern Europe: individualism and centralisation as obstacles to substantial change

The compliance of the AC in the South of Europe seems to have followed a trend consistent with administrative reforms. In general, it is possible to find a skeleton of the participatory model antecedent to the introduction of the AC in the general administrative acts and law. After the Directive 2003/4/CE and as a consequence of pressure towards the Europeanisation of public administration, the Southern European countries introduced participatory rules in their environmental procedural laws. The final outputs remain anchored to a merely formal recognition of participatory rights, whereas Spain and Italy seem to still be lacking an effective model of effective environmental participation. The comparison of the country reports shows that there is an insightful account of common characteristics in the administrative reforms undertaken in Southern Europe. These common traits have already been analysed in doctrine, as follows: "Southern European countries share certain characteristics such as their welfare states; their political democratic systems; and their bureaucracies."[33]

Analysing the common features of Southern European administrative systems, it is possible to separate the phase antecedent to the reforms from the modernisation phase. From this analysis it emerges why the bureaucratic structure is not yet completely receptive to inputs coming from the values of the new participatory governance.

In the first phase anterior to substantial reforms, cultural factors and historical roots have caused a substantial resistance to the introduction of the participatory democracy values. The reasons are twofold.

On one hand, in Southern European countries, individualistic norms and values are stronger than collectivistic ones.[34] "There are many socio-cultural explanations for the relatively dysfunctional public administration systems in Southern European countries".[35] The reasons comprise the relatively low level of

[33] Walter Kickert, 'Distinctiveness of Administrative Reform in Greece, Italy, Portugal and Spain. Common Characteristics of context, administrations and reforms'[2011] Public Administration 89, 3, 801-818, available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9299.2010.01862.x/pdf> accessed 16 june 2016. The author extends his analysis to Greece and Portugal, while the present contribution is limited to the comparative study of the country reports.

[34] Ibid, 805.

[35] Ibid, 813.

collectivism and civic culture; the aversion to the state; the low esteem in which the bureaucracy is held; the relatively lowly status of civil servant; the distrust of government and politics. These reasons also explain the relative failure of administrative reforms in Southern Europe both past and present.[36]

On the other hand, the historical roots of the French Napoleonic model, common to the Southern European administrations, contributed to forge a united nation-state model, where the administration is highly centralised, hierarchical, uniform and controlled.[37]

From this common background, a season of reforms started beginning from about the mid 1970s, leading to the following institutional state reforms. In Spain, after the death of Franco, the new democratic constitution of 1978 provided for regional autonomy. In Italy, after the massive popular and political turmoil because of corruption scandals at the beginning of the 1990s, regional decentralisation became a major political reform issue and resulted in state reform at the end of the 1990s.[38]

The external pressure for reforms from the European Union played a pivotal role in this case, as well as in the other European countries. Nevertheless, the drive to modernisation and Europeanisation could not have all the expected results, due to the institutional patterns described above with their static equilibrium, and to an inertia and stagnancy in which changes were hardly possible.

This led to the present situation, where environmental participation could be introduced under the premises of European law, but where its effectiveness struggles to emerge due to the opposition from the bureaucratic structures resistant to any substantial change.

3.3.4 France: participatory rights in the tissue of representative democracy

In France the reform effort towards a participatory democracy lasted fifteen years beginning in the 1990s. This transformed public participation from isolated innovations to a generalised decision making model.[39]

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[36] Ibid, 807.

[37] Ibid, 811.

[38] Ibid, 813.

[39] See Laurent Mermet, 'Between international standards and specific national contexts, initiatives and perspectives: teachings from a French research program on public participation and environmental governance' (Conference on Environmental Governance and Democracy Institutions, public participation and environmental sustainability: Bridging research and capacity development, May 10-11 2008, Yale University, New Haven). "In just a few years starting in 1990, the entire system of environmental public policies (laws, public agencies, etc.) was strongly reinforced. In this large scale effort, public participation was used as a major tool. Local environmental action plans (*Plans Municipaux d'Environnement, Plans Départementaux d'Environnement*) were negotiated through procedures including both public participation and structured negotiation between State representatives and local or regional authorities. The revised laws on the environment were made to include new procedures involving both

The overall impression is that though the efforts towards participative democracy had been massive, the final outputs did not show a complete shift to a participatory model, nor did the participation lead to environmentally sounder decisions.

This is also confirmed in the Report prepared for the European Environmental Bureau on the AC compliance of the EU Member States.[40] "French eNGOs have been participating in EIA [...] proceedings for years. But the impact of participation varies between proceedings and authorities. [...] A recurrent problem is how notice of the opportunity to participate is given. Announcements are often buried in local newspapers and only the most careful reader can spot them."[41]

The lack of an effective transformation of the French system into a complete decentralised participatory model regarding environmental issues is symptom of a more general lukewarm attitude towards participatory democracy. Rémi Lefevbre has studied the roots of French democratic reforms and the reasons for the mentioned resistance. He concluded that "[a]lthough decentralisation has opened the way for real local government and brought citizens closer to the decisions that affect them (in accordance with the principle of making administrative acts more accessible and more widely publicised), it has not fundamentally made local government more democratic, and has even reinforced the power of local leaders."[42] According to this scholar, this is related to the characteristic of the local leaders who tend to hold multiple offices, contributing to an oligopolistic regulation of local political competition and fostering electoral irremovability. The acquired professionalism of the technocratic class and the exercise of powers on a new basis (through reinforcement of local public relations, emerging legitimacy of projects and expert knowledge) has led to a transformation of the dominant sociological profile of elected officials.

In this sense, local democracy does not mirror an effective social structure, although gender parity and awareness of "diversity" have had a marginal impact on the profile of politicians. In this sense, scholars observe that "the development of participatory measures has so far produced only cosmetic changes. The

public participation and stakeholder negotiation for planning programs for water management (*Schémas d'aménagement et de gestion des eaux*), waste management (*Schémas départementaux d'élimination des déchets*), air pollution (*Plans d'amélioration de la qualité de l'air*), etc. The authorities also experimented with alternative methods to foster debate on large technology or development projects. The most important of those experiments resulted in the creation of a Public Debate Authority (*Commission Nationale du Débat Public*) which now supervises the organization of a public debate procedure on any large project (of national or regional importance). Beyond these numerous initiatives from government, many more participatory initiatives were also launched by local authorities or stakeholders – for instance, the widespread creation of Neighbourhood councils (*Conseils de quartier*)."

40 Ralph Hallo, 'How far has the EU applied the Aarhus Convention?'see footnote 30, 26.

41 Ibid.

42 Rémi Lefebvre, 'Participatory democracy in France: subsumed by local politics' (2013) available at<http://www.metropolitiques.eu/Participatory-democracy> accessed 16 june 2016.

division of labour in the world of local politics has not been greatly challenged, and participatory democracy cannot be considered independently of representative democracy."[43]

The local political scene in France is still tightly anchored to the representative model, Cécile Blatrix observed. "Participatory democracy measures are an integral part of representative democracy. They are literally assimilated, in that the very substance of the former is converted into the latter."[44]

3.3.5 Germany: talking the talk and (not always) walking the walk

The AC compliance in Germany followed a peculiar trend, different from all the other situations already analysed. There has not been any resistance to the implementation of provisions on public participation in individual decision-making. This is probably because there were provisions pre-existent to the Convention that influenced it via European law. This is the reason, according to the country report, why Germany implemented the provisions on participation in individual activities, though a little late, and probably the delay was due to the shared competence in environmental law between Federal and *Länder* level. Federalism is considered, by the author of the national report, a national variable that might have caused delays in the transposition process.[45] On the contrary, the rules on public participation in plans and programmes were sharply criticised by the doctrine and transposed with some changes in the national legislation.[46]

Resistance, in this case, probably originated from the marked trend towards restricting the opportunity for public participation by deregulating and accelerating decision making-procedures.[47] This opinion is shared by scholars who have studied the roots of the "implementation gap" of the European legislation.

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[43] Ibid.

[44] Cécile Blatrix, 'La démocratie participative en representation'[2009] Sociétés contemporaines 74, 97 ff.

[45] See Michael Kaeding, 'Determinants of transposition delay in the European Union. Greece, Germany, Spain, the UK and the Netherlands'(2005)14, available at <http://www2.lse.ac.uk/europeanInstitute/research/hellenicObservatory/pdf/2nd_Symposium/Michael_Keading_Paper.pdf> accessed 16 june 2016.

[46] See also Ralph Hallo, 'How far has the EU applied the Aarhus Convention?', see footnote 30, 25: "In transposing the Directive, part of a parallel legislative process on the Act on Acceleration of Infrastructure Planning procedures (*Infrastrukturplanungsbeschleunigungsgesetz*), Germany dispensed with the requirement that public authorities pass documents to the person asking for them. People are now required to visit the public authority itself to obtain the information. This puts an unnecessary burden on participation. It would also be useful to have an updated overview of the relevant documents available throughout the decision-making process and not just during the time for public comments. ENGOs fear they will no longer be able to meet the federal administrative court's high standard for public comments on plans and projects."

[47] Ralph Hallo, 'How far has the EU applied the Aarhus Convention?' see footnote 30, 28.

Although Germany has been a European "leader" in terms of command-and-control environmental regulations, insisting on uniform substantive standards, it has opted for a merely formal and legalistic approach, "with informal bargaining between regulatory authorities and industry taking place "under the shadow of the law"".[48] As a consequence, "access for third parties is quite restricted, allowing for participation only in legally specified cases."[49]

The impression here is that Germany plays the role of "leader" of the reform movement at European level, but then it implements it with an original approach.

3.3.6 The Dutch consensus culture: a stagnant "polder model"?

Two are the most remarkable aspects underlined in the report on the Netherlands. On one side, it seems clear that the Dutch public participation in environmental decisions pre-existed and anticipated the advent of the AC, as in the case of Germany. On the other side, it emerges that after the AC and the European urge to implement it, the involvement of the public, rather than improving, has been slightly declining. Both the trends, the environmental participation ahead of its time and its lukewarm implementation, seem to be related to the Dutch culture.

The attention for public participation and the early involvement of stakeholders and the public are inborn traits of the Dutch administrative action, especially applied to the water planning, which can be considered as an emblem of the environmental management in the Netherlands. The rationale of the participatory culture has been depicted by Bert Enserink, Dille Kamps and Erik Monstert, in a report about water planning:[50] "The Dutch waterboards have stood at the cradle of the so-called Dutch "consensus culture" or "polder model", mainly because water and its management have shaped the Netherlands. The authors refer to a well-known Dutch expression: "God shaped the world and the Dutch shaped their own country", to illustrate the deeply rooted self-reliance of the population of the Netherlands.

As a country emerging from waters and mainly constituted by wetlands, during the centuries it had to develop drainage techniques, since water had been seen as an element to be conquered. The water flooding had always been a dramatic reality, and that is why water management was very close to the people.

As a people self-emerging from waters and incline to the consensus culture, the Dutch are also extremely reluctant to litigation and controversies. This

[48] Cristoph Knill and Andrea Lenshow, 'Coping with Europe: the impact of British and German Administrations in the implementation of EU environmental policy' [1998] Journal of European Public Policy5, 4, 597.

[49] Ibid.

[50] Bert Enserink, Dille Kamps and Erik Monstert, 'Public Participation in River Basin Management in the Netherlands, (Not) Everybody's concern' (2003) available at <http://www.harmonicop.uni-osnabrueck.de/_files/_down/Netherlands.pdf> accessed 16 june 2016.

aspect appears with crystal evidence in the Dutch expression: I will not bother you if you do not bother me. And of course if I am pre-informed about what is going on in the decision making process, I will probably be less prone to bother anyone afterwards. Participation has the great advantage to limit the potential controversies.

Participation needs to be motivated by an interest, and the participation, at least as far as water is concerned, is based on the principle: interest – payment – right to say. Those who have interests in the Waterboards, pay the taxes and therefore have the right to be part of the Board of the Waterboards. From the viewpoint of a fundamental right supporter, this aspect does not encourage an easy sleep; but it has the merit to be very practical and goal-driven: I do have the right to participate as far as I have invested my resources in the plan.

Recently, the "polder model" and its effectiveness have been disputed and considered responsible of the relatively slow economic growth.[51] The choice to limit the participation to the paying stakeholders, in the case of the Waterboards, testifies a will to limit the risk of populism. On an apparent counter-trend, the Dutch will to open up the doors to public participation: from the 1990 onwards, the participatory rights have become more and more popular, in all sectors where the environmental impact assessment is involved (high speed railroads; large scale-infrastructure projects such as the extension of the Schiphol airport and the proposed extension of the harbor of Rotterdam). But also in these cases, in practice, though public participation seems to be a right for all, it is granted only at a later stage, after the decision to start a project has already been taken.[52] This underpins that the business-oriented consensus policy is part of the Dutch legal culture.

3.3.7 Ireland: a lukewarm reception of the AC

The environment is a low priority issue in the Irish political agenda. This is the reason why coming across a well established public participation model equals to spotting a four-leaf clover in the grass. The reasons for the unusual favour towards one of the pillars of the AC are to be found in the pre-existence of the participatory model: the Local Government (Planning and Development) Act 1963 stated the right for the public to object to draft Development Plans. Similarly, contemporary planning law provides that "any person" may make a submission on a planning application. In the case of decisions made by local planning authorities, there is a right of appeal to *An Bord Pleanála* (the Planning Appeals Board), established in 1977.

Though public participation seemed to be quite well rooted long before the advent of the AC, some regressive modifications took place from the 2000s, probably to control and somehow to limit the risk of what was a hypertrophic interventionist wave: the request of a participation fee and a two week period for

[51] Ibid, 8.

[52] Ibid, 20.

the public to participate are both clear symptoms of a general will to "discourage frivolous and vexations interventions by individuals and eNGOs that might delay or hinder development".[53]

The hidden reasons and the way forward to overcome the problem of a lack of trust in the public participation's tools may be found in an interesting study conducted in 2013 by Edward Andersson, Sam McLean, Metin Parlak and Gabrielle Melvin, which draws on six innovative case studies and offers inclusive alternatives to how public services are delivered. Basically, the study suggests a new type of public service underpinned by a different way of engaging with citizens: public services as 'facilitators of change', using engagement to stimulate citizen power, build citizen capabilities, and foster community self-reliance and social resilience.

The document outlines a set of ten recommendations, dividing the "Decalogue" into three main categories: Principles; Incentives and Target. The core of the actions toward a more efficient participatory model can be identified in the general principle of an engagement that shall be designed with long-term impact and sustainability in mind (*Part I of the Decalogue, Principles*), on the basis of practical problems experienced by the citizens. The incentives shall directly address the citizens, who should be commissioned to tackle long-term social challenges (P*art II, Incentives*), in a personalised way, in order to target engagement opportunities. (*Part III, Target*).

3.3.8 Romania: an initial acceleration followed by a sharp slowdown

In Romania, the AC implementation shows similar features to the Southern European countries and to France, where quite satisfactory compliance of environmental participation at legislative level has not been matched by an equally satisfactory compliance at substantial level in the effective application of the formalised principles.

The reasons behind this "half compliance" are historically and politically different from the other systems so far analysed. They are related to the more general reform programmes undertaken after the fall of the communist regime. Cepiku and Mititelu observe that "[i]n the years following the 1989 revolution, the reform of public administration lacked a coherent vision regarding its content, the direction toward which it was headed and concrete implementation tools. The administrative environment was not extremely motivating mainly due to the existing organizational culture, a lack of experience on the behalf of administrative institutions with the reform of public management, the lack of a

[53] See Aine Ryall, 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book, ...

strategic vision, influence of politics, and the legacy of a centralized administration system."[54]

Nevertheless, as was observed in the country report, among the former communist countries, Romania has elaborated one of the most advanced sets of good governance principles, especially concerning environmental decision-making. The law has established the right of access to environmental information, together with the duty of the public authorities to provide it in a certain format, easy to reproduce and accessible via internet (G.E.O. no. 195/2005 and article 6 of G.D. 878/2005).

Notwithstanding the legal compliance described above, its implementation is still far from being complete and effective. This may be attributed to weak administrative capacity, especially in the rural areas, to deal with environmental participation on one side, and for the scarce level of information of the citizens, who are not traditionally inclined to claim their participatory rights in front of the public authority on the other side.

In both cases, it is also a matter of mindsets. On one side, the public authorities' attitude portrays an inertial resistance to opening up doors to the public. From the country report it emerges that sometimes civil servants are instructed by their superiors "not to respond to a request very quickly, even if they have the information ready, because this approach creates an expectation for similar treatment of future requests and/or requesters."[55] On the other side, citizens do not claim for transparency and openness "as they lack trust in state institutions, including courts, and harbor the belief that they cannot change the course of governmental affairs."[56]

3.3.9 Recommendations for the "not-fully compliant" countries

All in all, the effort towards democratisation and Europeanisation encounters structural and mental resistance, which suggested to the European Environmental Bureau the following recommendations[57], valid for all the "half compliant countries", no matter what reason is behind the non-compliance.

(1) Create public participation monitoring committees in all countries and at EU level;

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54 Denita Cepiku and Cristina Mititelu, 'Public Administration reforms in Albania and Romania: between the Weberian model and the New Public Management, Workshop on Public Administration in the Balkans – from Weberian bureaucracy to New Public Management'(2010) available at <http://www.balcannet.eu/papers_grecia/Cepiku_Mititelu.pdf>accessed 16 june 2016. On this topic, see also Jan-Hinrik Meyer-Sahling, 'Varieties of legacies: a critical review of legacy explanations of public administration reform in East Central Europe'[2009] International Review of Administrative Sciences, 509.

55 See Dacian C. Dragos and Bogdana Neamtu, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania' in this book, ...

56 Ibid, ...

57 Ralph Hallo, 'How far has the EU applied the Aarhus Convention?' see footnote 30, 35.

(2) Invest in awareness-raising for citizens and training in effective use of public participation rights;

(3) Give priority to training and capacity-building for officials and citizens;

(4) Establish safeguards to ensure public authorities take substantive account of public comments when making decisions;

(5) Require information to be released within reasonable timeframes to give the public long enough to become informed and to prepare and participate effectively. Current deadlines barely fulfill these conditions;

(6) Require more proactive measures to inform public, e.g. electronically, of opportunities to participate;

(7) Make notice procedures more citizen-friendly;

(8) Assert *ad hoc* groups' right to participate;

(9) Courts and administrative authorities should directly apply the Aarhus Convention and Directives where national law conflicts with or does not fully implement them.

4 Reasons behind the delayed or poor compliance

4.1 Endogenous factors

As already noted, the problematic areas in implementing the Convention depend on what I have called "exogenous factors", such as the discretion accorded to the parties in interpreting the AC rights, and the consequent challenges to deal with the legal cultures, as well as on "endogenous factors", such as the internal features of the AC itself.

In this second area, the lack of a clear definition of substantive environmental rights is noteworthy. The AC's Achilles' heel has been pointed out in doctrine. Michael Mason refers to this omission as "a practical obstacle impinging on its commitment to human rights, as it arguably reduces the scope for public deliberation on the appropriateness of environmental decision-making according to competing social values."[58] Similarly, A. Boyle acknowledges that the focus of the Convention is strictly procedural in content, limited to public participation in environmental decision-making, access to justice and information. "The Aarhus Convention is widely ratified in Europe and has had significant influence on the jurisprudence of the European Court of Human Rights, whose decisions are considered below. The Aarhus Convention is important in the present debate because, unlike the ECHR, it gives particular emphasis to public interest activism by eNGOs. But [...] while the Aarhus Convention

[58] Michael Mason, 'Information disclosure and environmental rights: the Aarhus Convention'[2010] Global Environmental Politics 10, 3, 26. The author continues that "[i]nformation disclosure and public participation become more a means for legitimazing rather than interrogating governance institutions and for bench-marking public authorities against procedural check-lists rather than substantive environmental standards."

endorses the right to live in an adequate environment, it 'stops short, however, of providing the means for citizens directly to invoke this right.' Moreover, it also stops short of giving the public any right to participate in decision-making on matters of policy. It is of course precisely at this point that governments make decisions about the balancing of social, environmental and economic objectives. The Convention is not completely blind to the point, because Article 7 provides that '[t]o the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.' As any good lawyer will appreciate, however, this wording has little substance and cannot be portrayed as creating rights for individuals. However, no other human rights treaty goes even this far."[59]

5 Conclusion and way forward

In conclusion, there have been ups and downs in the AC implementation over time, depending on the legal background and culture of the implementing parties. So far, however, the resulting legislation has not led to any real structural change which could impact significantly on environmental policies and most of all which could give substance to environmental rights.

Certainly, the actions mentioned in section 3.3.9 can contribute to the furtherance of the implementation process, at least at European level, if one also considers their transversal nature in relation to the legal cultures of the parties. But the effective shift is certainly more structural and has to deal with a new Copernican revolution, where the Earth has to be the center of the system and where the ecological interest has to stand out as a fundamental right of the individuals. There is no shortcut to this process. Most importantly of all, there is need to come to the common consciousness that "sustainable development, democracy and peace are indivisible"[60] and shall be pursued with a unified approach.

[59] Alan Boyle, 'Human Rights and the Environment: A Reassessment'[2007] Fordham Environmental Law Review 18, 471 ff.

[60] Wangari Maathai, 'An Unbreakable Link: Peace, Environment, and Democracy' [2008]Harvard International Review 29, 4, 46.

CHAPTER 13

Access to Justice under the Aarhus Convention: the Comparative View

Dacian C. Dragos, Bogdana Neamtu

1 Introduction

The practical application of the Convention has been the object of several representative studies.[1]The third pillar of the Aarhus Convention – access to justice - has the traits necessary to make it the most important of the 3 pillars, as it endeavors to ensure that governmental commitments to improving the state of the environment are not just dust in the eyes of environmentalists. Access to justice has the role of interconnecting the other two pillars and assuring that the access to information and participation are effective. The strive to develop a large number of mechanisms for the enforcement of environmental legislation has been a continuous preoccupation of the European Union,[2] without which the Aarhus convention would not have been so effective in the Member States. This is mainly because the Convention uses vague language when it comes to enforcement: reasonable time-frames, appropriate participation or effective remedies.[3]

This chapter will comparatively assess the different options for transposing access to justice in the Member States covered by this book, touching upon issues such as: the remedies system, standing, the extent of judicial review and other dispute mechanisms available, costs associated with the review, and will end with concluding remarks offering a synthetic view of the topics covered thus far. It tries to find common traits in order understand how the legal culture is influencing the application of the Convention and whether a new legal culture is emerging under its auspices.

2 Systems of remedies in different jurisdictions

Article 9 of the Convention provides a series of elements for the design of the remedies system by the signatory parties:

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1 Milieu Report, 'Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters' (2007) available at<http://ec.europa.eu/environment/aarhus/study_access.htm> accessed 12 july 2016; European Environmental Bureau, 'How far has the EU applied the Aarhus Convention?' (2007) available at http://www.ucastverejnosti.cz/dokumenty/aarhus-eeb-2007.pdf accessed 14.10.2016; *Implementation of the Aarhus Convention in EU Member States,* Justice & Environment, 2006, available at http://www.justiceandenvironment.org/_files/file/2010/05/JE-Aarhus-AtJ_Report_10-05-24.pdf, accessed 14.10.2016; Justice and environment, 'Report on Access to Justice in Environmental Matters'(2010) available athttp://www.justiceandenvironment.org/_files/file/2010/05/JE-Aarhus-AtJ_Report_10-05-24.pdf accessed 12 july 2016; Marc Pallemaerts, 'Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention. An IEEP report for WWF-UK' (2009) available at <http://www.ieep.eu/publications/pdfs/2009/aarhus_report.pdf> accessed 12 july 2016.

2 Martin Hedemann-Robinson,*Enforcement of European Union Environmental Law: Legal Issues and Challenges*(Routledge, 2007) VII.

3 See also the EU chapter in this book

(a) The object of the review, including concerning requests for information under pillar 1 that are not dealt with according to the Convention.

(b)An independent review procedure should be available, either before a court or an independent body. Information is provided to the public on access to administrative and judicial review procedures and the parties shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

(c) Standing. The parties have taken upon themselves to ensure wide standing for review procedures. Thus, although within the confines of their own legislation, signatories have agreed to allow members of the public invoking either a sufficient interest or a subjective right to have access to a review system. The 'sufficient interest' and the '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 the Convention.

(d) The pre-trial administrative review, as an expeditious and free of charge or inexpensive appeal for reconsideration (administrative appeal), should be available for cases when the review body is a court. This appeal shall fall under the competence of either a public authority or by an independent and impartial body other than a court of law.

(e) The effect of the decisions of the review bodies shall be binding on the public authority that acted against the Convention. Consequently, review bodies that issue only recommendations are not in line with the Convention. The decisions should be reasoned in writing, at least where access to information is refused. Effective remedies are to be provided, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

The importance of access to justice in the context of the Aarhus Convention is highlighted also by the fact that the EU Commission adopted a proposal for a Directive on access to justice in environmental matters to bind the Member States,[4] but on the other hand is contradicted by the fact that its adoption is still pending since 2003. In the absence of such a Directive, the picture of the legal instruments for the advancement of access to justice in environmental matters is a patchwork of principles, fundamental rights, and primary and secondary law provisions. A report drafted in 2013 for the European Commission on the systems of access to justice in the Member Statesby Jan Darpö points towards the need for a common legislative framework in this area in order to provide a level playing field for environmental democracy in the European Union.[5]

[4] Commission, 'Proposal for a directive of the European Parliament and of the Council 24 October 2003 on access to justice in environmental matters' COM(2003) 624 final.

[5] See Jan Darpö, 'Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union' (2013) 11, available at <http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf> accessed 12 july 2016.

At the EU level, the implementation of the Aarhus Convention (including access to justice provisions) has been approached through different legislative acts.[6] They are complemented by legislative acts aimed at Member States.[7] Of importance is also the EIA Directive which also implements the Aarhus Convention.[8]The Aarhus Regulation (EC) No 1367/2006 applicable to EU institutions provides for a two tier review system. The first instance is the internal review, followed by the court action in front of the CJEU.

The legal culture existing at the time when the Convention was implemented greatly influenced the way in which remedies for environmental cases have worked out in practice.A comparative view shows that in most countries, administrative decisions can be contested both through administrative procedures (administrative appeals, specialized tribunals, and the Ombudsman) and through the courts. In principle, administrative remedies must be exhausted before resorting to judicial review.[9]

A common feature to most of the jurisdictions analysed in this book is that it was assumed that there was no need for special legislation dealing with judicial review of decisions issued as a result of the application of the Aarhus Convention. This is explained by either the fact that the existing rules were considered generous enough in order to accommodate the requirements flowing from the Aarhus Convention or that no pressing need for specialization of the review bodies on environmental matters was felt.

The UK, Germany and Italy are some countries in which the existing judicial review system was considered appropriate to accommodate the Aarhus Convention. Accordingly no special legislation was enacted providing for judicial review mechanisms in environmental matters. As is well known, this view was often proven wrong.

For instance, the observance of Article 9 has posed particular challenges in the UK as litigation remains very expensive, and even if specialist environmental lawyers still bring cases before the courts despite the costs involved, the aver-

6 European Parliament and Council Regulation (EC) 2006/1367 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264/13.

7 European Parliament and Council Directive (EC) 2003/4on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41/26 and European Parliament and Council Directive (EC) 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156/17.

8 Jan Darpö,'The EIA Directive and Access to Justice. Some remarks on the new directive, old provisions and the rapid development of case-law' (2014) available at <http://www.jandarpo.se/upload/2014%20EIA%20and%20A2J_Final.pdf> accessed 12 july 2016.

9 Jan Darpö, 'Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union', see footnote 5, 11; see also the papers collected in Dacian C. Dragos and Bogdana Neamtu, *Alternative Dispute Resolution in European Administrative Law* (Berlin - Heidelberg, Springer 2014).

age citizen is discouraged by the costs entailed.[10]However, before resorting to judicial review, parties have other options for dispute settlement: administrative appeals (complaints to the decision making department or agency; complaints to independent complaints handlers), complaints to a Member of Parliament and complaints to the Parliamentary Ombudsman (when the complaint regards the way in which their case has been handled, and not the substantive decision).

The German review system relies upon administrative appeals and the courts, the latter being the independent body required by the Aarhus Convention. The internal administrative appeal to the public authority that issued the decision may be followed by a court action, which is conditioned by the impairment of a subjective right. As it is known, the German Government was the initiator of the dichotomy in the wording of Article 9 para 2 of the Aarhus Convention between the judicial review based on 'a sufficient interest' or on the 'impairment of a right'. Reference to the familiar category of subjective rights was not enough however to spare Germany the shock from the need to ensure wide access to justice. The traditional reading of subjective rights was found to be inconsistent with the obligations flowing from the Aarhus Convention.[11]

Alternative methods of dispute resolution are not expressly foreseen in Germany, although they are possible in practice (for instance a petition to a parliamentary petition committee, either federal[12] or at the level of the *Länder)*. A petition to the *Ombudsmen* is possible, but this is independent from the judicial review. Mediation in administrative law cases is frowned upon, but there are examples of mediation taking place (upon public pressure) in environmental matters such as the *Stuttgart21* project involving a train station. The trend might change, though, due to a recent new statute on mediation, the *Mediationsgesetz*.[13]

Italy features a system apparently similar with the German one: administrative appeals and judicial review. However, the different appeal proceedings (hierarchical administrative appeals, extraordinary appeals to the Head of State) are perceived as ineffective and the only true option is going to court.[14] Nevertheless, the access to environmental information benefits from a supplementary possibility: a petition to the local Ombudsman (when decisions are taken by the municipal, provincial, and regional bodies) or to the Commission for the Access to Administrative Documents (when the decisions are taken by the State).[15] Although both institutions lack coercive powers, their effectiveness is based on reputation. Finally, the administrative courts do not enjoy exclusivity in what regards environmental cases, as civil and criminal courts as well as the Court of Auditors might also have jurisdiction. Thus, the Ministry of

[10] Carol Day, 'United Kingdom' in this book.

[11] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-WestfaleneV v Bezirksregierung Arnsberg.*

[12] German Basic Law (*Grundgesetz*), the German constitution of the federal state, art 45.

[13] *Mediationsgesetz*(Mediation Act)of 21 July 2012 [2012] BGBl I 1577.

[14] See Alessandro Comino, 'The application of the Aarhus Convention in Italy' in this book.

[15] Decreto Legislativo (D.Lgs.) (Legislative decree) n. 195/2005, art 7.

the Environment may bring in front of the civil courts actions against those having caused environmental damages.[16] In this context, local government entities (such as regions, provinces, and municipalities), and individuals or legal persons may only submit complaints and comments, together with documents and information;[17] they do not have a right to compensation for environmental damage in abstract, but they can ask for compensation of restoration activities (removal of waste, for instance).[18]

In few jurisdictions were the legal professions aware of the shortcomings of the local rules, Special review bodies were therefore created as a result of the implementation of the Aarhus Convention. In Ireland for instance, where individuals and environmental NGOs had long complained about the lack of an independent, accessible and specialized review procedure to deal with environmental information disputes, the most significant innovation brought by the implementation of the Aarhus Convention and of the EU legal instruments accompanying was the creation of a new public body – the Office of the Commissioner for Environmental Information – competent to hear cases where an information request is ignored, delayed or denied.[19]

However, even in legal systems where special legislation was enacted, the provisions are scarce and they often simply replicate the principles already found in general administrative law acts. It is almost as if domestic law makers and most scholars were convinced that the judicial protection afforded in their respective jurisdictions could not be improved. The level of protection varying greatly from country to country, this simply defies belief and seems open to be understood as an example of solipsism in legal cultures not really open to self-scrutiny and to legal comparison.

In Spain for instance the special legislation enacted in order to implement the Aarhus Convention recalls the general administrative law act in what regards the judicial review: mandatory administrative appeal followed by court action. The author of the Spanish chapter argues that the administrative appeal (handled by the same public authority or by the superior body, when the case) does not meet the requirements of the Article 9(1) of the Convention which stipulates that the review shall be performed by an 'independent and impartial body'.[20] For cases where public functions are performed by private entities under the supervision of the State, the administrative appeal is addressed to the administrative authority which is empowered to control the activity of those private natural or legal persons. The decision is meant to exhaust the prelimi-

[16] Decreto Legislativo (D.Lgs.) (Legislative decree) n. 152/2006, art 229 (1). E.g. Corte Cass, s III, 3 October 2006, n. 36514.

[17] Decreto Legislativo (D.Lgs.) (Legislative decree) n. 152/2006, art 309.

[18] Corte Cass, s III, 22 November 2010, n. 41015.

[19] See Aine Ryall, 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book.

[20] See Jorge Agudo González, 'The implementation and influence of the Aarhus Convention in Spain' in this book.

nary administrative review procedures and opens the access to courts. This claim is applicable only to the rights to information and participation.

French law does not have special procedures for challenging environmental decisions issued by public authorities. The nature of the Aarhus Convention as a mixed agreement (comprising both international law and European law) influences its application by the French courts in a particular way. Basically, those provisions that are comprised in the first and the second pillars, both implemented by the EU Directive, have direct effect and thus individuals can invoke them in front of the courts,[21] whereas the third pillar has no direct effect due to the delay in the adoption of the Directive on access to justice. The *Conseil d'Etat* has recognized direct effects to some provisions of the Aarhus Convention, the remaining rules being instead considered as mere obligations of the signatory parties.[22]The latter is the case with Article 9 (3) and (5). It is considered devoid of direct effect in the domestic legal order.[23]

Under French law, the administrative appeal is mandatory only in certain cases such as for instance for complaints related to the access to information, where the Commission on Access to Administrative Documents (CADA) has to be addressed before the administrative courts can examine a complaint.[24]The applicant has two months to apply to the CADA, which issues an opinion, and within one month from receiving the opinion the administration informs the Commission on how the matter has been resolved. The opinion of CADA is not binding on the administration, however in 65% of the cases the public authorities follow the opinions issued by CADA.[25] The annulment action in court may be accompanied by a request for suspension of the challenged decision. Also, an interim application for access under the so-called 'useful measures' proceeding specified under article L. 521-3 of the Code of Administrative Justice is possible; in this case, there is no need for the Commission to issue an opinion. There is also the complaint to the Ombudsman, available only after all administrative remedies (administrative appeal) have been exhausted, and this complaint has no effect on court actions either. The Ombudsman, an independent authority, may investigate cases in which the administration has not acted in accordance with its mission of public service.[26] The complaint does not go directly to the Ombudsman but needs to be mediated by a Parliamentary representative, who may decide whether or not to submit the claim to the Ombudsman. The recommendations of the Ombudsman are not binding either.

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[21] Mattias Wiklund, *Access to justice in French Environmental Law* (Juridiska institutionen, Vårterminen Thesis2011) 22, cited in the French chapter.

[22] Guillaume Lefloch, 'La Convention d'Aarhus devant le juge administratif' [2008] Les petites affiches 4 – 9,4, cited in the French chapter.

[23] Conseil d'État, 28 July 2004, 5 April 2006 and 6 June 2007.

[24] Act n° 78-753 of 17 July 1978, art 20.

[25] UNECE, 'National Implementation Reports - France' (2011) available at <http://www.unece.org/fileadmin/DAM/env/pp/reporting/NIRs%202011/France_NIR_2011_eng.pdf> accessed 12 july 2016.

[26] See Act n° 73-6 of 3 January 1973, art 6.

In the Netherlands, the judicial review performed by the administrative courts based on the General Administrative Law Act is preceded by the administrative appeal (objection).[27]However, due to the fact that some environmental decisions are preceded by a more extensive procedure allowing for participation, direct access to the administrative court is foreseen since those interested have already had an opportunity to express their views.

In Romania the review system is regulated by three categories of normative acts: the general law on judicial review, the special legislation on environmental matters and by the special legislation on access to information. The administrative appeal (where it is mandatory) is followed by judicial review in court. Under the FOIA, the court action is not conditioned upon the completion of an appeal before the administrative body which issued the act or refused to answer to the request for public information. The optional administrative appeal does not have a suspensive effect on the deadline for lodging a complaint before the court of law; actions regarding the right to information are exempted from court fees. It is also possible for applicants who are dissatisfied with the answer of the public body to lodge a petition with the Ombudsman (People's Advocate in Romania). Aside from the optional appeal under the FOIA, in all other situations the provisions of the general law on administrative review (Law no. 554/2004) apply – access to a court is conditioned upon lodging an administrative appeal with the head of the public body which was initially approached with the request for environmental information. The court action regulated by Law no. 554/2004 is not exempted from court fees (which are not significant though).

3 Standing

The Convention grants those affected or likely to be affected by administrative omissions, decisions or acts occurring in the process of accessing environmental information and their associations the right to challenge these acts or omissions in front of review bodies or in court.[28]Under Article 9(3) of Convention environmental NGOs as defined in Article 2(5) shall be deemed to have sufficient interest in the case to be able to bring a court action.

Standing is a one of the key matters related to application of the 3rd pillar of the Aarhus Convention. A closer look at the different wording of paragraphs 2 and 3 of Article 9 of the Convention and their requirements reveals important differences.[29]

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[27] Algemene wet bestuursrecht AWB (General Administrative Law Act), artt 6:13, 7:1 and 8:1.

[28] See generally Mariolina Eliantonio, Chris W. Backes, C.H Remco van Rhee, Taru Spronken and Anna Berlee, *Standing up for your right(s) in Europe. A comparative study on legal standing (Locus Standi) before the EU and Member States' Courts,* (Study for the European Parliament (PE 462.478 2012, Intersentia 2013). Then refer to the book only.

[29] Justice and environment, 'Report on Access to Justice in Environmental Matters', see footnote 1, 5.

First, Article 9(2) grants the persons who are part of the 'public concerned 'as defined in Article 2(5)(4) "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 of the Convention. Article 6 concerns public participation rights in procedures for authorization of certain activities that could be harmful to the environment (listed in Annex I of the Convention). States parties to the convention may impose additional conditions for standing in courts, based either on the concept of 'sufficient interest', or 'impairment of rights'; however, the meaning of the concepts used in the text 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."

Second, Article 9(3) of the Convention requires that each Party shall ensure that members of the *public* (and here there is a difference from the 'public concerned' concept, used in the previous paragraph), where they meet the criteria, if any, laid down in national law "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".

Looking at the two paragraphs it can be observed that there are no imposed limits on how the concept "criteria laid down in national law" is to be interpreted. The question is whether the Convention requires criteria to be interpreted in such a way as to afford the widest access to justice possible. The preamble and general provisions of the Convention suggest that the general approach of the Convention is that as a principle the widest access is required. The Compliance Committee of the Aarhus Convention has stressed in the 2005/11 (*Belgium*) case,[30] that the rationales of paragraphs 2 and 3 of Article 9 of the Convention are not identical and that the Parties may not take the clause referring to criteria laid down in its national law as an excuse for introducing or maintaining such strict criteria, that might have as an effect to bar all or almost all environmental NGOs from challenging acts or omissions that contravene national law relating to the environment; the access to such procedures should thus be the rule, not the exception.[31]

The most liberal approach to granting standing for groups is when there is no requirement to be previously established as legal entities (unincorporated associations of persons with the same common interest). However, in many countries, access to review procedures is granted only to persons that claim to have been violated in their rights. The pressure from the European Commission and the Compliance Committee of the Aarhus Convention, complemented by

[30] UN, Economic and Social Council, 'Findings and Recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice' (2006), Decision ECE/MP.PP/C.1/2006/4/Add.2.

[31] SeeJustice and environment, 'Report on Access to Justice in Environmental Matters', see footnote 1, 10.

the development of the case law of the CJEU, has determined a trend towards the relaxation of standing rules in the recent years, either by requiring less criteria for standing for individuals or NGOs or by increasing the possibilities to go to court.[32] However, challenging large scale projects legally remains a difficult task, access to justice being hindered by a multitude of factors: high fees, strict rules for *actio popularis* etc.

A prerequisite for standing is often (prior) participation in the decision-making procedure that forms the basis of the contested decision. This is a questionable prerequisite, as there is a basic presumption that the authorities are acting lawfully and in the interest of the public, so to ask for participation at an early stage in order to have later standing in court is too much to ask for.[33] However, in cases where individual rights or interests are affected, the argument that those interested should have showed more interest in the preparatory stage of the decision making is reasonable. The CJEU in the *Djurgaarden* case stated that the public concerned should have access to justice "regardless of the role they might have played in the examination of that request by taking part in the procedure before that [permit] body and by expressing their views".[34]

The national legal culture has a major influence on how the remedies work in practice. In the case of standing, the division between the interest and rights doctrine is important and has had clear implications. A sort of common ground can be found in the end due to the case law of the CJUE, which is a clear indication that a new legal culture might be emerging.

3.1 Individual standing

Notwithstanding the merits of the Lisbon Treaty in widening the standing for judicial review in the EU, the major achievement of the Aarhus Convention is undeniable: it initiated the broadening of the EU concept of standing, so that it would include environmental NGOs and citizens.[35]

The parties to the Aarhus Convention may impose additional standing conditions, based either on the concept of 'sufficient interest' or 'impairment of right'.

A first batch of jurisdictions follows the 'interest' doctrine, e.g. the UK, France and the Netherlands. However, in the UK, the issue of standing receives different solutions in England, Wales, Northern Ireland and Scotland respectively. In order to determine whether an applicant has standing, the courts look at the merits of the application, the nature of the claimant's interest and the circumstances of the case;[36] the applicant needs to have 'sufficient interest' in

[32] Jan Darpö, 'Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union', see footnote 5, 10.

[33] Ibid.

[34] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, para 39.

[35] See for further details the EU chapter in this book.

[36] See for details Carol Day, 'United Kingdom' in this book.

the matter to which the application relates, so how this elusive concept is interpreted holds a great significance. Generally, in England, Wales and Northern Ireland applications from environmental groups are granted standing, due to the fact that the interpretation of the concept 'sufficient interest' is quite generous, placing in its center the interest of parties and not being held back by the theory of subjective rights.[37]In Scotland, on the other hand, the standing has been interpreted rather restrictively for a long time, due to its confinement to the rules that are specific to the protection of *rights*, stemming from private law.

Standing is generously granted in the French law, and any natural (citizen or non-citizen) or legal person, environmental group and territorial authority is entitled to go to court and raise administrative law issues. Individuals have standing if their interest, which has to be certain, direct and current, was aggrieved by an administrative act.[38]

On the opposite side of the spectrum we have Germany and to some extent Italy, Romania and Spain. Germany promotes a rights-based judicial system, which gives pre-eminence to persons that can claim the infringement of his or her own right. The system is stricter than the one envisaged by other jurisdictions.[39] It did not stand up to the scrutiny of the Court of Justice of the EU in the well-known *Trianel* case.[40]In Italy, as well, individuals cannot challenge decisions or omissions breaching environmental rules without showing they were affected to a degree which is variable in the case law. Romania follows an approach similar to the German one, but the 'legitimate interest' doctrine is also accepted.[41]In Spain, the administrative justice system set up in 1888 was built around the concept of 'the administrative act', and court actions were admissible against acts that infringed upon 'administrative rights' recognized by the law. This restrictive approach was relaxed over time by the evolution of case-law, so the need to justify a right has been relaxed.[42]Nowadays the scope of judicial review has been expanded to include actions against general acts and a new system of legal standing was put in place, based on the concept of 'direct interest'.

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[37] House of Lords, *R (on application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (2007), opinion of Lord Justice Sedley; High Court of Justice in Northern Ireland, *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety* [2005] NI 188, para 45.

[38] Conseil d'État21 décembre 1906, Syndicat des propriétaires et contribuables du quartier Croix-de-Seguey, Tivoli, Rec. Lebon 962.

[39] See the chapter on Germany in this book.

[40] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-WestfaleneV v Bezirksregierung Arnsberg.*

[41] See Dacian C. Dragos and Bogdana Neamtu, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania' in this book.

[42] See Jorge Agudo González, 'The implementation and influence of the Aarhus Convention in Spain' in this book.

3.2 Standing for NGOs, groups and *actio popularis*

Article 11 of the EU Aarhus Regulation No 1367/2006 provides for specific criteria for NGOs: (a) they must be an independent non-profit-making legal person in accordance with a Member State's national law or practice; (b) their primary stated objective must be to promote environmental protection in the context of environmental law; (c) they must have been in existence for more than two years and had have pursued actively the objective referred to under (b); (d) the subject matter in respect of which the request for internal review is made must be covered by the objective relevant under (b). The CJUE has not yet addressed the issue of standing of foreign NGOs challenging projects in states different from the one of origin.

In all countries analysed here, the NGOs do not have problems with standing to challenge decisions falling within the scope of Article 6 and therefore also under Article 9(2) of the Convention. Those decisions are usually part of EIA and IPPC procedures which are regulated by specific instruments of EU granting standing rights to NGOs.

In the Netherlands and in Italy the NGOs do not need to prove infringement of their rights to have standing in environmental cases, as protection of 'collective' or 'diffuse interests' is considered as sufficient for their standing. Judicial interpretation of the term 'affected interests' leads to the same situation in Great Britain and Ireland.[43]

In Spain, the initial situation where standing to challenge general acts was reserved to public institutions and agencies was altered by the case law which loosened these restrictions by holding that a 'direct interest' is enough in order to claim damages. The concept was legitimatized by Article 24 of the Spanish Constitution and was further confirmed by case law and then by legislation. In environmental matters the criteria based on which the interest is ascertained relates to the scope of the association according to its legal statute, foundation rules or founding agreements. Also, there should be a territorial connection between the group and the environmental issue defended by it, in order to differentiate this type of action from the *actio popularis*.[44]

In Ireland, after a period when no new legislation was considered necessary for implementing the Aarhus Convention, amendments to the Planning and Development Act of 2000 provided *inter alia* that environmental NGOs that meet certain requirements do not have to satisfy the 'substantial interest' standing test in the specific case of a challenge to a decision that is subject to EIA. It appears that this measure was prompted by the express requirement in the EIA directive (inspired by the Aarhus Convention) that environmental NGOs that meet the criteria set down in national law are *automatically* deemed to have standing to challenge decisions that are subject to EIA. Notwithstanding this welcome amendment, the European Commission did not share the Irish

[43] See Justice and Environment, 'Report on Access to Justice in Environmental Matters', see footnote 1, 10.

[44] See the Spanish chapter in this book.

authorities' assessment that the existing judicial review procedure was compatible with Aarhus and EU access to justice obligations. Infringement proceedings ensued alleging that Ireland had failed to transpose correctly the access to justice clauses in the EIA and IPPC directives.

In Germany, an applicant has to invoke an individual right stemming from public law. Consequently, in the past, NGOs had no legal standing for bringing claims in front of the administrative courts.[45] However, NGOs attempted to challenge some decisions with environmental impact in the courts by using a legal artifice, which is buying land to become a neighbor of the project that was contended. Exceptionally, in the area of natural protection law, the Federal Nature Protection Act (*Bundesnaturschutzgesetz*)[46] provided in 2002 for the possibility for environmental NGOs to challenge selected decisions in judicial review.[47] This last development was however limited in scope as it was restricted to very specific administrative decisions related to nature protection areas and national parks.[48]

Most jurisdictions analyzed in this book allow some form of *actio popularis*, subject to more or less strict conditions, the exception being the Netherlands, where the Government seems to be on the path of tightening a previously quite generous system of standing.

For instance, in the UK, groups that do not have legal personality as well as groups organized as limited companies may bring court actions in cases of controversial decisions, invoking an interest similar to the interest invoked by an individual,[49] provided it is relevant for the claim. In practice, the most important environmental NGOs in the UK are charities and/or companies limited by guarantee.[50]Also, the possibility to initiate private prosecution in the UK can also be described as a form of *actio popularis*.[51]

In the Netherlands, sentiment concerning access to justice for NGOs has changed to a sort of mistrust towards NGOs. NGOs benefit from special treatment in court proceedings, and their 'interest' is deemed to include the general and collective interests which they particularly represent in accordance with their objects as defined in their articles of incorporation and as demonstrated

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45 Carola Glinski and Peter Rott, 'Private Enforcement of the Public Interest and the Europeanisation of Administrative Law – The Trianel Judgement of the ECJ' [2011] EJRR 4, 607, 608.

46 *Gesetz über Naturschutz und Landschaftspflege* (*Bundesnaturschutzgesetz* or *BNatSchG*) (Law on Nature Conservation and Landscape Management)of 29 July 2009 [2009] BGBl I 2542, as amended by Law of 6 February 2012 [2012] BGBl I 148.

47 Then para 61 *BNatSchG*, now para 64 *BNatSchG*.

48 See the chapter on Germany in this book.

49 House of Lords, *R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses Ltd* [1982], see the opinion of Lord Wilberforce.

50 See Carol Day, 'United Kingdom' in this book.

51 Jan Darpö, 'Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union', see footnote 5, 12.

by their actual activities.[52] In the past, a generous interpretation of this provision has led to fairly easy access to justice for NGOs. In 2008, the Judicial Department of the Dutch Council of State imposed new requirements relating to the statutes of NGOs, which now need to specify the scope of their activity and territorial coverage in a more detailed way. Also, the actual activity of the NGO was looked at closely in order to establish whether it was a "proper" NGO, having continuous activity, not an NGO that was only set up in order to initiate legal action.[53] Further developments aimed at speeding up legal proceedings had the effect of restricting the annulment of a decision to cases, in which the legal provision which had allegedly been violated was meant to protect the person invoking that norm.[54] The literature suggests that the restriction will probably be less far-reaching for NGOs, as they usually defend a general interest which will often coincide with the interest protected by the allegedly violated norm.[55]As to *actio popularis*, until 2005, the Environmental Protection Act allowed for *actio popularis* in cases concerning environmental permits. The public had access to drafts of environmental permits and could express a view and after the decision had been taken had standing before the court. This was however an exception to the general rules contained in the General Administrative Law Act, and it was removed from the special act. Currently, following the approach of the Aarhus Convention, anyone can express views concerning draft permits but only interested parties have standing before the court.

In France, bringing a court case in the name of others (collective interest) has been allowed since 1906.[56] Since the 1970s, interest groups active in the field of environmental protection have become more visible. Generally the courts hold that an association may bring legal action on behalf of collective interests, as long as such interests fall within the scope of its mandate, without reference to any requirement for authorization.[57] The French Environmental Code promotes a system of accredited associations for environmental protection. As a consequence, a NGO challenging an administrative act must have been created and must have deposited its statutes before the decision contested was issued.[58] The specialisation condition also applies: an environmental protection association may bring proceedings in administrative courts for any complaint related to its purposes.

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52 Hanna Tolsma, Kars J. de Graaf and Jan H. Jans, 'The Rise and Fall of Access to Justice in the Netherlands' (2009) available at <http://ssrn.com/abstract=1383478> accessed 12 july 2016.

53 See Barbara Beijen, 'The Aarhus Convention in the Netherlands' in this book.

54 René Seerden and Danielle Wenders, 'Administrative law in the Netherlands' in René Seerden (ed), *Administrative law of the European Union, its Member States and the United States*(Antwerpen: Intersentia 2012) 142.

55 Ibid.

56 Conseil d'État 28 décembre 1906, Syndicat des Patrons Coiffeurs de Limoges.

57 See Giulia Parola, 'The Aarhus Convention – The Legal Cultural Picture, Country report for France' in this book.

58 Ibid.

In Italy, in principle it is easier for individuals than for associations to invoke an interest in court proceedings against environmental decisions. This may be explained by the fact that usually an environmental issue also involves an infringement of individual rights.[59]If this is not the case, standing is ruled out since *actio popularis* is not allowed, generally. Regarding the standing for groups, Italian law requires environmental associations to be declared 'representative enough' by ministerial decree in order to seek the annulment of unlawful acts and take part in proceedings for environmental damages.[60] While some judgments acknowledge standing only for national environmental organizations – thus excluding regional/local ones and even their territorial/local chapters[61]– others allow actions brought by spontaneous committees for the protection of the environment in specific areas.[62] The latter approach is based on the distinction between *ex lege* and 'factual' standing. Although the law gives standing only to those organizations recognized as such by ministerial decree, the courts have expanded the scope of the legal standing by applying a set of criteria that need to be fulfilled by organizations seeking judicial review.

In Spain, *actio popularis* is permitted by the Constitution provided a specific legislative act allows such actions,so there is the possibility of *actio popularis* in specific areas.[63] *Actio popularis* has been integrated into the national legal system, also being expressly recognised in some areas concerning environmental decision making – namely town planning, costs protection, national parks, and cultural and heritage patrimony – and for any criminal environmental offence included in the Criminal Code.[64]

The issue of NGOs and their legal standing in environmental matters has been discussed in Ireland as well. The High Court upheld the rights conferred upon NGOs by the Aarhus Convention and EU law - for instance, an unincorporated association was declared capable of challenging a planning decision.[65]

Also in Romania, both legislation and jurisprudence recognize standing to everyone, either directly or through environmental NGOs, in environmental matters. In theory, the general rule of the Environmental Protection Act shall

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[59] See Alessandro Comino, 'The application of the Aarhus Convention in Italy' in this book.

[60] L. n. 349/1986, art 18(5).

[61] *E.g.* Cons Stato, s VI, 9 March 2010, n. 1403, in Foro amm Cds 2010, 656; Cons Stato, s IV, 10 October 2007, n.5453, inForo amm CdS 2007, 2861; Cons Stato, s IV, 14 April 2006, n. 2151, inGiur it 2006, 1743; Cons Stato, s V, 17 July 2004, n. 5136, inForo amm CdS 2004, 2192.

[62] Cons Stato, sVI, 23 May 2011, n. 3107, in Guida Diritto 2011, 24; E.g. ConsStato, s VI, 17 March 2000, n. 1414, inForo amm 2000, 944; T.A.R. Puglia Bari, s III, 19 April 2004, n. 1860, inForo amm TAR 2004, 1167; T.A.R. Veneto Venezia, s III, 1 March 2003, n. 1629; T.A.R. Marche Ancona. 30 August 2001, n. 987, in Riv giur edilizia 2001, I, 1204.

[63] See Jorge Agudo González, 'The implementation and influence of the Aarhus Convention in Spain' in this book.

[64] Justice and environment, 'Report on Access to Justice in Environmental Matters', see footnote 1, 10.

[65] High Court of Ireland,*Sandymount and Merrion Residents Association v An Bord Pleanála* [2013] IEHC 291.

also be applicable for granting standing based on the *actio popularis* principle in civil procedures, whenever environmental rights are infringed.

In Romania anyone can trigger enforcement actions if there is a breach of environmental law. A Governmental Ordinance from 2005 introduced the system of *actio popularis* in environmental matters, thus giving also NGOs standing to sue public authorities for breaches of the environmental legislation. According to Article 5 the only condition for an NGO to gain standing is to have in its charter, as its mission, the protection of the environment. In the situations regulated by the Ordinance NGOs have been representing the rights and legitimate interests of determined natural persons since 2005. Law no. 544/2004 which is the framework law on the review of administrative acts goes a step further as it grants standing also to groups of natural persons who are not organized as a legal person.[66]

However, some cases from Romania (and also Croatia) show that despite very progressive regulation of standing conditions, the judicial protection of the environment is not always working sufficiently well. This attests to the difficulty of legal transplants between too divergent legal cultures – not to say cultures *tout court* – and points to the need not to limit the comparison to the law in the books. Romania has adopted in its law the most progressive solutions in terms of standing but the existing socio-legal framework seems not ready yet to take this on board.

4 The intensity and scope of the review

Article 9(2) of the Aarhus Convention requires Parties to ensure that members of the public concerned have access to a review procedure to challenge the procedural and substantive legality of any decision, act or omission subject to the provisions of Article 6 of the Convention. Furthermore, Article 9(3) does not make a distinction between substantive or procedural legality. It refers to acts or omissions which contravene its national law relating to the environment. Consequently, review procedures should regard acts or omissions which infringe the national law relating to the environment, regardless of their procedural or substantive nature.

Darpöhas argued that the relationship between standing and the scope of the review can be described by the following statement: "the wider the entrance, the smaller the room". This means that those systems that allow court actions easily will restrict the scope of judicial review, typically limiting it to legal issues. On the other hand, systems with more restrictive standing requirements more

[66] See for details Dacian C. Dragos and Bogdana Neamtu, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania' in this book.

often offer a review based on the substantive legality, or even on the merits of the contested decision.[67]

At EU level, in a case regarding the substantial and procedural legality–the *Altrip* case[68] –a German court had denied an NGO standing considering that the claim brought merely raised issues as to the regularity of an environmental impact assessment rather that challenging its substance. The Court of Justice of the EU, to which the case was referred to by a German court, held that:

Subparagraph (b) of Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not precluding national courts from refusing to recognize impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, that will be the case only if the court of law or body hearing the action does not in any way make the burden of proof fall on the applicant and makes its ruling, where appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of all the documents submitted to it, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337.

For a future Directive on access to justice, Darpöpro poses an intermediary solution, with a review that is between full merit review and a strictly procedural review.[69]

All jurisdictions analysed here display as a common feature *the lack of special review arrangements for environmental matters*. The review is based on the common rules of procedure, which in most cases are specific to administrative law, so the effectiveness of the implementation of the Aarhus Convention is subjected to the limits of the review system itself.

The administrative appeal is the first step of the review process and it does not a have many common features in the jurisdictions analysed here.

For instance, in the UK administrative appeal system seems rather unorganized and chaotic, with more than 60 different appeal routes identified in 2003, and even more complicated lately (2011),[70] although a new Environment Tribunal was established to hear cases in this field.[71] When litigation occurs as

[67] Jan Darpö, 'Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union', see footnote 5, 16.

[68] Case C-72/12 *Gemeinde Altrip and Others v Land Rheinland-Pfalz*.

[69] Jan Darpö, 'Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union', see footnote 5, 11.

[70] See the studies cited in Carol Day, 'United Kingdom' in this book.

[71] See generally for administrative appeals and other forms of ADR in the UK: David Marrani and Youseph Farah, 'ADR in theadministrative law: a perspective from the United kingdom' in Dacian C. Dragos and

a result of a licensing system, the person aggrieved by the act may address an administrative appeal to an authority belonging to a different part of the administration (local – central for instance). The appeal has a *devolutive* effect – it is heard *de novo* by the appellate body, which decides on merits. The appeal cannot be exercised by third parties – they can only bring judicial review proceedings. The precondition for judicial review is to have exhausted all other remedies – including alternative remedies such as statutory appeals and appeals to relevant tribunals.[72]

Generally, courts competent to deal with issues stemming from the application of the Aarhus Convention are the same courts that deal with administrative law matters generally. No special arrangements were considered necessary for the implementation of the Convention from this point of view. A legality review is performed as a rule, with some incursions into the merits of the case in situations where discretion was (mis)used in the decision making process. The scope of the review is not unitary in the jurisdictions analysed here: some courts feel safer to rely on procedural issues (UK, Romania), others have more impetus on analyzing the substantial issues as well (Netherlands, Spain) or concentrate solely on substantial issues (Germany, France).

For instance, in the UK judicial review is not concerned with the merits of a decision, and the courts have no power to substitute their judgment for that of the decision-maker. As to the scope of the review, the procedural issues are more likely to find their way into a court judgment. In practice, the substantive legality of the decision can be assessed only by applying the *Wednesbury* unreasonableness test.[73]When assessing the level of compliance of the UK legal system with the Convention, the Aarhus Convention Compliance Committee concluded that despite some notable exceptions, the UK does not meet the standards for review required by the Convention as it regards substantive legality, as the threshold for review imposed by the *Wednesbury* test is very high, and it considers that applying a 'proportionality principle' could provide a more adequate standard of review in cases within the scope of the Convention.[74]

In Spain, the review is focusing mainly on substantial issues. Although legality is interpreted narrowly, in complex procedures involving wide discretion (environmental ones, for instance, which provide authorities with discretionary powers, usually, many interests are involved and technical knowledge is needed) the approach followed in the case law was more nuanced: as a rule, procedural irregularities are considered not as important as substantive ones (based on the assumption that they do not influence the decision). Judicial review focuses on the reasons given for decisions and looks for abuse of discretion (arbitrariness) or breaches of fundamental principles (proportionality).

Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014) 259.

72 See the figures given in Carol Day, 'United Kingdom' in this book.

73 Ibid, for details.

74 Ibid.

The Netherlands stand out in terms of specificities of the review system. First, the review performed by administrative courts has as a starting point the grounds of appeal brought forward by the complainant, which may be both procedural and substantive in nature. Then, a special procedure, to be found only in this legal system, and, in a comparable form, in the UK, is the *administrative loop*, which provides an avenue for courts to offer final dispute settlement.[75] It entails a communication between the court and the authority that issued the decision that is vitiated, in order to have a new decision issued during proceedings and then the court analyses the second decision as well, thus solving the matter for good. Another specificity is that Dutch courts have the possibility to uphold an illegal decision if the provision that was breached did not harm the interested parties.[76] This provision used to apply only to procedural requirements, however, on 1 January 2013 the provision was broadened to cover substantive norms as well.[77] Also, the courts have wide powers to either order the administrative authority to take a new decision, or to replace the annulled decision with their own judgment. The complainant may also ask for damages, but shoulders the burden of proof.[78]

The legal system in Italy is mostly based on a review of legality, therefore, discretionary measures are not assessed in depth – the court will seek for apparent inconsistency and irrationality in the procedures followed or the reasons given. However, the courts have acknowledged that there are complex factual decisions and that they involve the *technical discretion* of the decision maker.[79] This discretion can be reviewed by courts, depending on its complexity: when the complexity is high, the court will look only whether the procedures for technical assessments were duly followed, but in simple matters they can also decide on the substance. Consequently, there is 'strong' control, which permits the courts to substitute their own assessment to the one of the public authority, and 'weak' control, where the court looks at reasonableness, adequacy, correctness and reliability, but does not make the decision in the place of the administrative authorities.

In Germany, both the appeal body and the court will check the substantive legality of the decision challenged. Procedural provisions do not entail individual rights. As a consequence, administrative acts, in principle, cannot be annulled on procedural grounds such as the lack of public participation

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75 See for detailsPhilip Langbroek, and others, 'The Dutch System of Dispute Resolution in Administrative Law' in Dacian C. Dragos and Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law,*see footnote 71, 113-151.

76 Algemene wet bestuursrecht AWB (General Administrative Law Act), art 6:22.

77 See for details Barbara Beijen, 'The Aarhus Convention in the Netherlands' in this book.

78 Algemene wet bestuursrecht AWB (General Administrative Law Act), art 8:73.

79 See Elio Casetta, *Manuale di diritto amministrativo*(Giuffré, 2011) 463; Fabio Cintioli, *Giudice amministrativo, tecnica e mercato* (Milano, Giuffré 2005), cited in Alessandro Comino, 'The application of the Aarhus Convention in Italy' in this book.

only.[80]However, in cases where an EIA has not taken place at all, the decision can be annulled based on provisions from the Environmental Remedies Act (*Umweltrechtsbehelfsgesetz or UmweltrechtsbehelfsG*).[81]The author of the German chapter rightly argues that incomplete participation procedures cannot lead to annulment and constitutes a violation of Article 9(2) of the Aarhus Convention that requires the Parties to allow challenges of both the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 of the Convention. However, the effectiveness of the German system of review can be an argument counterbalancing this lapse.

In France, in full jurisdiction proceedings, the court can quash the decision or can substitute it by one of its own or modify it (for instance by imposing new technical standards for an activity that the operator will have to comply with) and may award damages. In environmental cases, this applies to the liability of public authorities and for litigation on classified installations.[82] Annulment proceedings can be brought against environmental permits and the court can either annul the decision or send it back to the original authority for a new decision.[83]

Ireland was at the core of the issues regarding judicial review, its costs and effectiveness. In *Commission v Ireland*,[84] the CJEU determined that Ireland had failed to transpose the obligation to 'ensure that practical information is made available to the public on access to administrative and judicial review procedures.', so new legislative amendments were necessary in order to cover this aspects. The standard of judicial review remains however a significant issue in practice,[85] as it is not clear whether the narrow set of principles set down by the Supreme Court[86]is too restrictive to deliver effective judicial protection. Recent developments in the case law are more in line with the Aarhus and EU access to justice obligations.[87]

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[80] Verwaltungsverfahrensgesetz (VwVfG) (Administrative Procedure Act), para46.

[81] First sentence of the *Umweltrechtsbehelfsgesetz*(Environmental Appeals Act) [2006] BGBl I 2816, para 4, 1.

[82] Mattias Wiklund, *Access to justice in French Environmental Law*, see footnote 21, 35, 36.

[83] See for detailsGiulia Parola, 'The Aarhus Convention – The Legal Cultural Picture, Country report for France' in this book.

[84] Case C-427/07 *Commission v Ireland*.

[85] See furtherÁnne Ryall, 'Study on the Implementation of Article 9(3) and 9(4) of the Aarhus Convention in 17 Member States of the European Union: Report on Ireland' (European Commission, DG Environment, September 2012), in particular section C.3 and section F of the report. Text available at<http://ec.europa.eu/environment/aarhus/access_studies.htm> accessed 12 july 2016.

[86] *O'Keeffe v An Bord Pleanála* [1993] 1 IR 139.

[87] *Sweetman v An Bord Pleanála (No 1)* [2007] IEHC 153; *Klohn v An Bord Pleanála* [2008] IEHC 111; *Cairde Chill an Disirt Teo v An Bord Pleanála* [2009] IEHC 76; *Usk and District Residents Association Ltd v An Bord Pleanála* [2009] IEHC 346; and *Hands Across the Corrib Ltd v An Bord Pleanála and Galway County Council* [2009] IEHC 600. See also the judgment of Charleton J in *An Taisce v Ireland, the Attorney*

In Romania, the review by courts is limited to procedural aspects; they seldom go into the merits of the case. The intensity of the review of discretionary decisions is weak. Complex factual decisions exceed the knowledge of the judges who rule on these cases.

In conclusion, the legal culture of judicial review existent in the jurisdictions analysed has not been influenced by the implementation of the Aarhus convention to a notable extent. The review systems in place prior to of the implementation of the Aarhus Convention were relied upon in order to secure the remedies available to those invoking the Aarhus convention. The review is on legality and exceptionally on merits, and substantial issues as well as procedural ones may be at the core of the annulment of decisions issued in environmental proceedings depending on the pre-existing legal traditions.

5 Injunctive relief, damages

The basic requirement of the Aarhus Convention that the environmental procedure is effective implies that injunctive relief must also be available. In countries where an administrative appeal or the judicial review proceedings do not entail the automatic suspension of the contested decision, the availability of injunctive relief is decisive in environmental cases.[88]The injunctive relief is of utmost importance in such cases due to the irreversible implications that proposed activities or on-going activities present for the human health and the environment. In this field, post-factum compensations are often not enough to counterbalance the harm that has been done, so swift action is needed during administrative and court proceedings.

In EU law the standard of review as regards injunctive relief was set in *Factortame*:[89]courts have an obligation to award injunctive relief, but only on the basis of a specific request, and they cannot go *ultra petita*.

Article 9(4) of the Aarhus Convention requires Member States to "[...] provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive".

The Implementation Guide[90] of the Aarhus Convention offers further guidance on this matter:

> "When irreversible damage from a violation has already occurred, a remedy often takes the form of monetary compensation. When initial or additional damage

General and An Bord Pleanála [2010] IEHC 415 quashing permission to use a quarry granted by *An Bord Pleanála*.

88 Jan Darpö, 'Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union', see footnote 5, 42.

89 Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others:* see for details the EU law chapter in this book.

90 United Nations, The Aarhus Convention: Implementation Guide(2014) p.15

> may still happen and the violation is continuing, or where prior damage can be reversed or mitigated, courts and administrative review bodies also may issue an order to stop or to undertake certain action. This order is called an "injunction" and the remedy achieved by it is called "injunctive relief". In practice, use of injunctive relief can be critical in an environmental case, since environmental disputes often involve future, proposed activities, or on-going activities that present imminent threats to human health and the environment. In many cases the resulting damage to health or the environment would be irreversible. Compensation in such cases is often inadequate."

The Križan-case[91] is the application of the *Factortame* ruling to Aarhus-type cases. The Court invoked the irreversibility of the damage to the environment, if there was no right for the public to ask the court or competent independent and impartial body to order interim measures such as to prevent pollution, including, where necessary, the temporary suspension of the disputed permit.

The jurisdictions analysed in this book offer different solutions to this issue. The solutions range from automatic suspension to suspension granted by court. Most of the jurisdictions opted for suspension decided by the court. Germany stands alone in having administrative appeals suspending the contested decisions. Other measures are also available: orders of action, for instance.

In the UK, an application for judicial review does not have any automatic suspensive effect, but an interim injunction is at the disposal of the court at any time in the course of the proceedings. However, it is conditioned upon the agreement of the claimants to reimburse the defendant for any loss suffered by reason of the injunction if it subsequently emerges that it should not have been granted. Both the Compliance committee[92] and the European Commission (when bringing the UK to court) have stressed that such orders are beyond the reach of most applicants.[93] The dangers of not granting interim relief are reflected by the *Lappel Bank* case: while reference by the House of Lords to the Court of Justice was pending, the contested development went ahead and the protected area became a car park.[94]

In Spain, the legislation includes a general reference to injunctive remedies, but they are not detailed. In addition, general legal remedies are available, including injunctive remedies and damages. In the Netherlands, injunctive remedies are also available on the basis of the General administrative law act,[95] provided an urgent interest is invoked (cutting a tree for instance) and the

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[91] Case C-416/10 *Jozef Križan and others v Slovenská inšpekcia životného prostredia*.

[92] Compliance Committee, 'Communications from the public' available at <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html>accessed 12 july 2016.

[93] See also Ole W.Pedersen,'Price and Participation: The UK Before the Aarhus Convention's Compliance Committee'(March 25, 2011), available at <http://ssrn.com/abstract=1894687> or <http://dx.doi.org/10.2139/ssrn.1894687> both accessed 12 july 2016.

[94] SeeCarol Day, 'United Kingdom' in this book.

[95] Algemene wet bestuursrecht AWB (General Administrative Law Act), art 8:81.

court upon a light assessment feels that there is scope for a successful claim on merits. The same conditions apply in Italy.

In France[96], urgency and the appearance of unlawfulness may bring the court to suspend the enforcement of a (negative) decision or of some of its effects. Articles L. 554-11 and L. 554-12 of the Code of Administrative Justice-[97]provide special suspension procedures for environmental cases dispensing the claimant from the need to demonstrate urgency. These procedures cover project permits that are not preceded by an environmental impact assessment, respectively planning decisions subjected to prior public inquiry that lack such participatory stages or have been issued an unfavorable opinion by the inquiry commissioner.

In Germany, injunctive relief can be granted upon the request of the applicant. In those exceptional cases where the appeal has no suspensive effect, the injunctive relief may target the suspension of the decision.[98]Conversely, in cases of inaction of the public authorities, the court may issue an interim order requiring the public authority to act (for instance, to provide the requested information).[99]

In Romania, under Law no. 544/2004 on judicial review[100] it is possible to request through an injunctive relief the suspension of the execution of the administrative act whose annulment is requested by the claimant but only under well justified circumstances and in order to prevent an imminent damage. The claimant can lodge a complaint with the court either when he/she lodges the administrative appeal with the issuing administrative body or alongside with the court action in which the annulment of the administrative act is required. Until the judicial case is solved, the claimant has the possibility to approach the court with a separate action regarding the granting of an injunction. The Public Prosecutors' Office (Public Ministry) can also ask the suspension of the execution of the act provided that a major public interest is at stake, capable of disturbing the functioning of a public service of national importance. In order to prevent any abuses of the public authorities, the law states that if the public authorities issue a new administrative act similar in content to the one challenged, the new act is automatically/*de jure* suspended. In this case, the administrative appeal to the issuing authority is no longer mandatory.

Applications for damages are admissible in all jurisdictions analyzed here based on the general rules of civil liability. In France, for instance, they are possible in full-jurisdiction procedures[101]regardless of whether the harm accrued to persons or properties or to the environment itself. Although NGOs have been

[96] Code of administrative justice, art L. 521-1.

[97] Code of Administrative Justice, arts L. 554-11 and L. 554-12.

[98] Verwaltungsgerichtsordnung(VwGO) (Administrative Procedure) para 80.

[99] Ibid, para 123.

[100] Law no. 544/2004, arts 14 and 15.

[101] TA Versailles, 21 novembre 1986, *Association de défense de la qualité de vie et du cadre de vie du village de Lésigny*, Revue juridique de l'Environnement 1987, 79.

put in the position to prove damages that are linked to the interests they defend, the Court of cassation has recognized the widest possibilities for the NGOs to bring such cases to court.[102]

6 Costs

The cost of litigation in environmental cases is another debated issue in doctrine[103] and case law. Article 9(4) of the Aarhus Convention requires that the justice-related procedures under it shall not be prohibitively expensive. Article 9(5) provides that appropriate financial mechanisms shall be considered to ensure this aim. Following this provision, the parties have an obligation to ensure that the costs for access to justice are not prohibitively expensive.

Darpöargues that costs of the judicial procedure in environmental matters (high court fees, "the loser pays principle" in relation to the liability cost for the lawyers of the developer and/or the authorities, compulsory use of attorneys in court, expenses for expert witnesses and high bonds for obtaining injunctive relief) have a "clear chilling" effect or even constitute an obstacle to access to environmental justice.[104]Moreover, uncertainty as regards the cost issue is affecting the readiness of individuals or NGOs to challenge administrative decisions in environmental matters.

Legal aid may play a role in this context. The EU Charter of Fundamental Rights requires that legal aid is granted to further the effectiveness of judicial protection. Reading the Aarhus Convention and the Charter together, for a procedure that is not costly, legal aid is not mandatory. However, it is not prohibited either.[105]

The Implementation Guide provides some elements for determining what can be considered prohibitively expensive. Moreover, several options were considered in order to limit the cost of environmental procedures, and that includes cost-capping linked to national salaries, an objective measurement, one-way cost-shifting, etc.[106]

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[102] Cour de Cassation, 2nd Civil Chamber, 7 December 2006 N° 05-20297, and Cour de Cassation, 2nd Civil Chamber, 5 October 2006N° 05-17602, in Case law of the Highest Court, Hamangiu, 2017. See Mattias Wiklund, *Access to justice in French Environmental Law*, see footnote 21, 37.

[103] Jan Darpö, 'Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union', see footnote 5.

[104] Ibid, 38.

[105] Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*.

[106] Jan Darpö, 'On costs in the environmental procedure see study on costs'(January 2010) available at <https://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/Costs_JD_31012011.pdf> accessed 12 july 2016.

The scope of the 'prohibitively expensive' concept was determined in the *Commission of the European Communities v Ireland*[107], in the sense that it covers only the costs arising from participation in such procedures. Advocate-General Kokott argued in the aforementioned case that court costs in environmental proceedings in general can be considered to be in the realm of public interest, and, therefore, it is not acceptable to require public interest litigants to pay all the costs in relation to their tasks of pursuing protection of the environment. These arguments were then used in the *Edwards* case,[108] where the court added that national courts are to take into consideration all of the relevant legal provisions, including any cost protection regime, when assessing if costs are prohibitive or not.[109] Both subjective and objective arguments are to be used, as the court considers the individual situations and the means available to the litigants (for instance NGOs), keeping in mind also that environmental cases are public interest litigation with the aim of protecting the environment. The discretion of the courts is to be exercised also within the limits of Article 3(8) of the Convention, which protects litigants from being punished just for exercising their rights.

In the infringement case against the UK on this topic,[110] the Court of Justice held:

> As regards the system of cross-undertakings imposed by the court in respect of the grant of interim relief, which, as is apparent from the documents submitted to the Court, principally involves requiring the claimant to undertake to compensate for the damage which could result from interim relief if the right which the relief was intended to protect is not finally recognized as being well founded, it is to be recalled that the prohibitive expense of proceedings, within the meaning of Articles 3(7) and 4(4) of Directive 2003/35, concerns all the financial costs resulting from participation in the judicial proceedings, so that their prohibitiveness must be assessed as a whole, taking into account all the costs borne by the party concerned, subject to the abuse of rights.

Studies[111] dealing with access to justice show that there are still considerable gaps as regards the implementation of this article. The two most recent ones are the Darpö study[112] covering the factual aspects and the Maastricht study[113] on the economic implications of access to justice.

[107] Case C-427/07 *Commission v Ireland*.

[108] Case C-260/11*The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and others*. Ibid, opinion of AG Kokott, para 93.

[109] Ibid, para 38.

[110] [111] Case C-530/11 *Commission* v *United Kingdom*.

[112] Jan Darpö, 'Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union', see footnote 5,42.

[113] 'Possible initiatives on access to justice in environmental matters and their socio-economic implications' (Faure, Maastricht University Faculty of Law METRO 2013, DG ENV.A.2/ETU/2012/0009rl)

Usually fees are imposed for judicial review, and not for administrative appeals. In general, they are not a significant obstacle per se. The average fee is 100-200 € in the first instance and 500 € at the appeal stage, with the exception of the United Kingdom, where at the Supreme Court the fee exceeds the equivalent of 5,000 €.[114]Generally, costs are incumbent on the losing party according to the "loser pays principle", except in cases where the court has discretion as to the award of costs and decides differently.

The national systems presented in this book offer a mixed picture, with the UK and Ireland being the most controversial jurisdictions.

The specifics of the judicial review procedure in front of the Administrative Appeals Chamber of the Upper Tribunal (AAC) and of UK's Supreme Court have raised concerns regarding the costs.[115]The general principle in court cases is that the party that lost the litigation bears the costs, but the judge has sometimes discretion as to any award of costs.[116] In tribunal appeals, on the other hand, each party normally bears their own costs; however, based on an Order for Costs the tribunal can consider that a party has acted unreasonably in bringing, defending, or conducting proceedings and therefore can impose the costs on that party. The courts can use their discretion also by issuing a Protective Costs Order (PCO) which is exonerating the claimant from paying the costs to a successful defendant or allowing that his or her liability to pay will be limited to a particular amount. PCOs were until recently fairly rare,[117] but the Court of Appeal allowed that a PCO may be made at any stage of the proceedings; the court has discretion on this matter, provided some conditions are met. If the claimant had lawyers working *pro bono*, the chances of the applications are higher. This jurisprudence was followed by the Scottish Court of Session. The high costs of litigation may be compensated by legal aid. When a 'significant wider public interest' is invoked, the Legal Aid Service will assess the likely benefits of the proceedings against the likely costs, taking into consideration also the prospects of success.[118]

In Spain, free legal assistance is available for NGOs which comply with legal standing requirements.[119]In the Netherlands, the procedure before the administrative court is deemed to be fairly accessible and effective in terms of time and costs. Procedures before a civil court are more expensive and more complicated. The administrative appeal procedure is free of charge and in courts there is no obligation to have legal representation, but a registry fee has to be paid for court

available at <http://ec.europa.eu/environment/aarhus/index.htm> accessed 12 july 2016.

[114] Jan Darpö, 'Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union', see footnote 5, 16.

[115] See for details Carol Day, 'United Kingdom' in this book.

[116] See Civil Procedure Rules, Part 44.3(2).

[117] See Carol Day, 'United Kingdom' in this book.

[118] See Legal Aid Agency, website available at <http://www.legalservices.gov.uk/civil/guidance/full_reports.asp>accessed 12 july 2016.

[119] IPJ Act, art 23(2) and Act 1/1996 of 10 January.

proceedings (in general € 156 if the appeal is lodged by a natural person and € 310 for appeals lodged by a legal person).[120]The fee is reimbursed by the administrative authority when the claimant prevails in court.[121] This compensation usually does not fully cover the costs, so persons with a low income are left with the option of asking for legal aid.

Italy features also high costs of litigation in front of administrative courts, because in addition to the fees for administrative proceedings, which amount to € 600,[122]there are also lawyers' fees. The "loser pays principle" can be derogated from and the court can order each party to bear their own costs, in particular, when the case involves complex and novel issues of law (which happens fairly often). Legal aid can be accessed only by individuals and not NGOs.[123]

In France, provisions on fees, costs and the burden of costs are to be found in the procedural, civil, administrative and criminal codes.[124] The applicants need to be represented by lawyers in front of courts, and at higher instances (courts of appeal, the *Conseil d'Etat),* by specially qualified lawyers. The costs of the litigation follow the losing party, but the court has discretion to decide otherwise.[125]The system of financial aid helps to overcome cost barriers, as applicants with income below certain thresholds may apply for legal aid.[126]The legal aid may cover not only costs borne in court, but also legal advice and assistance in non-judicial procedures.

Ireland stands out in terms of legal arrangements for access to justice in environmental matters in the context of the Aarhus Convention. The legal challenge brought against Ireland by the Commission for failing to properly implement the Directive 2003/35/EC has touched upon costs as well. The CJEU ruled that Ireland had failed to transpose the obligation to ensure that costs in cases involving the EIA directive and the IPPC directive are 'not prohibitively expensive.'[127]Although the Irish legislation allowed courts judicial discretion to depart from the general rule that *costs follow the even t*(English–type rule), the CJEU determined that such discretion was not enough to insure the adequate transposition of the obligation that the costs involved in judicial review procedures must not be 'prohibitively expensive.' In the summer of 2010, as a

[120] Algemene wet bestuursrecht AWB (General Administrative Law Act), art 8:41(3).

[121] Ibid, art 8:74.

[122] Decreto del Presidente della Repubblica (D.P.R.)(Decree of the President of the Republic) May 30, 2002, n. 115, art 13.

[123] Decreto del Presidente della Repubblica (D.P.R.) (Decree of the President of the Republic) n. 115/2002 art 119.

[124] Nouveau code de procédure civile (New code of civil precedure) art 700 ; Code de procédure pénale (Code of Criminal Procedure), art 457-1 ; Code de justice administrative (Code of Administrative Justice), art L. 761-1.

[125] Milieu report, 'Inventory of EU Member States' measures on access to justice in environmental matters' available at <http://ec.europa.eu/environment/aarhus/study_access.htm> accessed 12 july 2016.

[126] Act n° 91-647 of 10 July 1991.

[127] Case C-427/07 *Commission v Ireland.*

consequence of this ruling, new legislation providing for a special costs regime for judicial review proceedings involving a challenge to a decision, act, or failure to act under any provision of Irish law that gives effect to the EIA directive, the IPPC directive, or the Strategic Environmental Assessment (SEA) directive was introduced.[128]Under this new regime, each of the parties to the proceedings bears their own costs (American–type rule), subject to certain exceptions.

In Romania the fees for starting a court action are not very high, environmental cases are, however, expensive in terms of the technical expertise they can sometimes require. The strategy used by the public authorities (Ministry of the Environment) to discourage NGOs from going to court is to hire expensive lawyers, as according to the Romanian law the complainant, upon losing the case, will have to reimburse the other party for all the legal expenses incurred during the court action. Procedural breaches are easier to invoke by individuals and NGOs, because challenging an environmental report on its merits would mean a counter-expertise, which is costly. Limited legal aid is available, however, only to individuals with limited financial resources and residence in Romania or in another Member State of the European Union. NGOs are not eligible for legal aid.

7 Conclusions: a mixed picture in need of unity?

The jurisdictions analysed in this book offer a mixed picture as to the implementation of the Aarhus Convention and its 3rd pillar. Generally, the existing remedies systems serve as basis for the application of the new provisions. However, national legal developments started to be assessed also against the Aarhus Convention, and this has produced different dynamics in the legal culture.

In some countries, the implementation of the Access Convention has even witnessed an adverse effect in terms of access to judicial review. Thus, in Spain, for instance, although the legal system granted a broad acknowledgement of legal standing related to the protection of collective interests, the implementation of the Aarhus Convention has seen a limitation of the *locus standi*.

In other countries, the implementation of the Convention has relied upon the existing legal framework, but the latter has seen changes. Thus, in the Netherlands, quite independently from the Aarhus Convention there were some relevant changes in the national law, most importantly the abolition of the *actio popularis* in environmental law, the stricter norms for allowing NGOs standing and the introduction of a *Schutznormtheorie*. All of these developments posed questions concerning the conformity with the Aarhus Convention. However, the main conclusion seems to be that even with these limitations, Dutch law still complies with the obligations from the Convention, even though one may

[128] European Parliament and Council Directive (EC) 2001/42on the assessment of the effects of certain plans and programmes on the environment, OJ L 197/30.

wonder whether limiting access to justice is not contrary to the spirit of the Convention.

In Italy and Ireland, the full implementation of all the three pillars of the Aarhus Convention is facing obstacles. Ireland signed the Aarhus Convention in 1998, but it was the last Member State of the European Union (EU) to ratify it, mainly due to the serious implications of the expansive approach to access to justice articulated in the Convention for the Irish legal system. Overall Ireland's response to the Aarhus Convention, and the related EU measures, may be described as defensive, minimalist and tardy.[129]

In Germany, access to justice relied on the existing rules as well. The most important change regarded the *locus standi* for NGOs, and new legislation gave NGOs the power to ask for a judicial review in (some) environmental matters. The new provisions were received with reluctance and were restrictively interpreted. However, many court cases led to the decision of the Court of Justice of the European Union in the case *Trianel*[130]where it was established that the German provisions were neither consistent with EU nor with international law[131] because there was still a condition requiring individual rights to be impaired. The amendments proposed by the Federal Government not only suggest deleting the provision in question, but also introduced new measures to restrict judicial review –regarding the substance of the case. The court now is limited to check compatibility with procedural rules. Moreover, the general rules about injunctive relief become inapplicable. The legislative proposal argues that the modifications of the general administrative court procedures stem from a need to balance environmental protection and the interests of those who are affected negatively by court proceedings. Despite criticism, the new provisions were adopted in 2013.

Generally speaking, France has been partly proactive in ensuring its compliance with the Aarhus Convention and with EU legislations by enacting legislation implementing the three pillars. Costs remain a restrictive barrier, as many review procedures require the presence of expensive legal experts and legal aid is not effective in counterbalancing this limitation.

In Romania, the perception of the Aarhus Convention regarding access to justice in environmental matters is not necessarily positive. It is the first time that an international treaty was perceived as introducing less favorable provisions compared with the ones existing in the national legislation. Court proceedings are lengthy in Romania, even when the law mandates an expeditious procedure. The confusion concerning different pieces of legislation coexisting together also impacts implementation with regard to the third pillar.

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[129] See Aine Ryall, 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book.

[130] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-WestfaleneV v Bezirksregierung Arnsberg.*

[131] See Bilun Müller, 'Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law' [2011] Journal of Environmental Law 23, 505 ff.

Overall, the effectiveness of the justice in environmental matters seems to be helped by the fact that there are intermediate steps in the review procedure (administrative appeals, for instance). The review of merits conducted by a specialized tribunal or by a hierarchic superior body has the advantage of expertise. The suspensive effect also helps in securing that irreversible effects are not taking place. The costs for the parties are commonly low.

The studies carried out on this topic suggest that the Commission should forward the idea of a common legislative framework for bringing Member States in line with Articles 9(3) and 9(4) of the Aarhus Convention.[132] We agree that a Union directive on access to justice in environmental matters is needed. Until that happens but also afterwards, the jurisprudence will continue to play a dynamic role in this area.

The central questions underlying this book is whether a common European legal culture is emerging under the rules of the Aarhus Convention. As far as the 'third pillar' is concerned, this chapter shows that the systems regarding remedies already in place at the date of implementation were generally relied upon in the implementation process. In most jurisdictions the reflex was to consider domestic rules quite effective and thus in line with the requirements stemming from the Aarhus Convention. This was specifically the case concerning standing, the standard and the scope of review and also eminently practical matters such as costs. The legal cultures expressing themselves in most jurisdictions were very much content with themselves.

Therefore, the entry into force of the Aarhus Convention by itself did not have much of an impact on the jurisdictions analyzed here. Judgments by the Court of Justice of the European Union had. Even lacking EU secondary law properly implementing the provisions making up the third pillar of the Aarhus Convention and simply reasoning on the principle of effectiveness, the Court of Justice has already managed to widen standing in environmental matters in Germany and lower costs to bring actions in environmental matter in Ireland and in the UK. Passing the new directive on access to justice will reinforce this trend and anyway sooner or later the Court of Justice will have to go deeper on the issues concerning the standard and the scope of review.

Is this the dawn of a new legal culture as regards remedies in environmental matters in the EU? Clearly jurisdictions are reacting differently under pressure. Ireland is adapting, and so is the UK. Germany is trying to keep its peculiar balance between standing and standard of review by compensating wider standing with a lighter standard of control. Apparently the German legal culture has quite strong feelings about how a judicial review system should be structured. It remains to be seen whether lower standard of review will withstand scrutiny in the Court of Justice, and something similar might happen as well with reference to the new Dutch provisions.

[132] Jan Darpö, 'Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union', see footnote 5,43.

It is, in any case, submitted that the question raised at the beginning of the previous paragraph begs a timid yes. As it can be inferred from the above comparison similar rules are emerging in many jurisdictions for instance concerning interim relief, although this is not happening in a coordinated manner. The specificity of the national legal systems has still a major role in shaping how the provisions of the Convention are safeguarded.

Finally, the constant 'nudging' of the Compliance committee of the Aarhus Convention has also had some positive influence on the remedies systems in national jurisdictions or at least in the way some provisions are interpreted.

Environmental NGOs (eNGOs) or:

Filling the Gap between the State and the Individual under the Aarhus Convention

Roberto Caranta

Non-governmental organisations promoting environmental protection give expression to the collective interest. Because they represent a number of different parties and interests, they protect general objectives. This gives them the requisite 'collective dimension'. They also contribute specialised knowledge which helps to distinguish important cases from cases of lesser significance. They speak with one voice on behalf of many, with a level of technical specialisation which is often not available to the individual. By so doing, they can rationalise the way in which the various conflicting interests are voiced and placed before the authorities.

Advocate General Sharpston, opinion in Case C-263/08 Djurgården-Lilla Värtans Miljöskyddsförening ECLI:EU:C:2009:421, paragraph 61

1 Introduction.

Following the French revolution public law very much adheres to a bipolar model. On the one hand the State – or a parcel thereof – is representing the general interest. On the other hand the individual is expressing his or her own specific if not egoistic interests.[1]

Besides being very simplistic, this opposition is badly equipped to deal with conflicting general interests. To give just an example, economic development is often at odds with preserving the environment. The State is supposed to represent both interests, but in practise it is sacrificing one – often the environment – to the benefit of the other, and this very so much so in times of crisis. The sacrifice is often manifest in the limitation of rights, including participation and access to justice rights[2] (even if, to be fair, the pushback against participation which is experienced in a number of countries often predates the current crises).[3]

An individual may well oppose or challenge the decisions taken by the public authority. However he or she faces an uphill struggle, the individual against the community, the part against the whole, and so on. Early XX century collectivist ideologies were very much ready to efface the individual on the altar of what were perceived as public/general/national/working class interests. In the developed countries the widespread recognition of individual fundamental rights following WWII has gone a considerable way in redressing the balance. A gap

[1] Please refer to Roberto Caranta, 'Civil Society Organisations and Administrative Law' [2013] Hamline L. Rev. 36, 40 ff.

[2] See with reference to the Dutch Crisis and Recovery Act Barbara Beijen, 'The Aarhus Convention in the Netherlands' in this book, ...; see also Jan H. Jans, 'The Netherlands' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law* (Groningen, Europa Law Publishing, 2013) 342 ff.

[3] E.g. Ánne Ryall, 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book, ... and Bilun Müller, 'The Aarhus Convention – The Legal Cultural Picture. Country Report for Germany' in this book ...

in knowledge and resources between the State and the individual may however hinder the latter from challenging the former. This even more so when what is a stake (the environment) is not susceptible of appropriation and the individual is therefore fighting in everybody's rather than in his or her interest. As it was remarked, "ordinary citizens may often be ill equipped to participate effectively. Ordinary citizens may not have the time, money, knowledge or inclination to become informed and effective participants committed to enforcing their rights".[4] As already recalled, at time what is at stake cannot even be construed as an individual right. Anyway, in some jurisdiction, distrust of the legal machinery runs so deeply to be alone sufficient to stop individuals from engaging in decision making processes.[5]

Political scientists have been for years relying on the idea of 'civil society' as opposed to the State. The dualism civil society/State is substituted to the dualism individual/State and this in principle allows for a more balanced dynamic between the two poles. In keeping with the Western legal tradition interests are predicated of either natural or legal persons. In case of civil society, general interests are usually predicated of NGOs.[6]

However, unless and until the civil society is taken on board by the law, it amounts to an – admittedly – useful descriptive category but nothing more. Legal battles are still waged between the State and the individuals, even if at a meta-legal level individuals may to some point – again potentially limited by the law – act on behalf of the civil society or sections thereof. Just to give an instance, a small landlord (or lady) might act against a development project in the interest of wider sections of the society only is so far as the law of the land allows owners the raise issues going beyond those affecting the market value of their land.[7]

This will often depend on choices made by courts in granting standing based on generally vague black letter rules. Traditions and cultural preferences are going to be very relevant. They normally find expression in general prin-

4 Derek R. Bell, 'Sustainability through democratisation? The Aarhus Convention and the future of environmental decision making in Europe' in John Barry, Brian Baxter and Richard Dunphy (eds), *Europe, Globalisation and Sustainable Development* (London, Routledge 2004) 100; the notion of 'rights' referred to here belong to the social sciences rather than to the law: see also Andrew Dobson, *Citizenship and the Environment* (Oxford, OUP, 2004) 84 ff and 93 ff; this seems to be very much the case in a number of Eastern European countries: Bogdana Neamtu and Dacian C. Dragos, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania' [2015] SSRN, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591824, accessed 27 september 2016.

5 Bogdana Neamtu and Dacian C. Dragos, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania', see footnote 4, 2.2.3.

6 Roberto Caranta 'Civil Society Organisations', see footnote 1, 48 ff.

7 One case having a 'representative' plaintiff might have been Case C-260/11 *Edwards and Pallikaropoulos v Environment Agency and others*; see para 12 of the conclusions; on different techniques employed by e-NGOs to try and overcome limitations to standing see Bilun Müller, 'The Aarhus Convention – The Legal Cultural Picture. Country Report for Germany' in this book, III, 1, c).

ciples.[8] In Germany, for instance, empowering individuals meant dispensing with the idea that (some) environmental rules were aimed to only protect the general interest and to accept that individual rights such as health were at stake.[9] Once this was admitted, German law had to evolve further to allow eNGOs to represent environmental interests which cannot be connected to any individual right.[10] NGOs faces similar hurdles in other EU Member States.[11]

The Aarhus Convention is of specific relevance in this framework and deserves to be considered a major step from the descriptive to the prescriptive or normative approach to the role of NGOs in environmental law. The 'public' (the word chosen by the Convention to refer to both individuals the 'civil society') is quite at its centre. Moreover, and more to the point for this paper, the Convention makes a special place to eNGOs seen as an indispensable tool in somewhat filling the gap between the State and the individual.[12] Environmental NGOs are called to give a louder voice to civil society.[13]

The implementation of these provisions faces however major obstacles. In some countries the bipolar structure of public law is so ingrained in the legal culture to make accommodating the special role of eNGOs difficult. In other jurisdictions the public is not much used to voice its concerns and even less so to organise itself to this end. In the latter case, the issue is not so much in the legal culture as it is the culture *tout court*. One could also say that civil society, far from being a normative idea, lacks even descriptive power.

After analysing the provisions in the Aarhus Convention specifically devoted to eNGOs and discussing their meaning in the light of the case law, this chapter will examine the practice in the jurisdictions covered in this book starting, for its obvious relevance, from the EU and later moving on to the EU Member States which were specifically analysed here. A comparative analysis extended to some other jurisdictions and conclusions will close the present chapter.

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8 For the different cultural relevance of principles and rules see Bilun Müller, 'The Aarhus Convention–The Legal Cultural Picture' in this book, Intro

9 Case C-237/07 *Dieter Janecek v Freistaat Bayern*, para 38 and cases referred therein; a similar problem was faced in Austria: Case C-570/13 *Karoline Gruber v Unabhängiger Verwaltungssenat für Kärnten and Others*, para 40.

10 Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg;* see the discussion below §3.1.

11 See the summary by Csaba Kiss, 'Problems and Questions of Public Interest Environmental Litigation in Hungary and in the EU' in Gyula Bandì (ed), *Environmental Democracy and Law* (Groningen, Europa Law Publishing, 2014) 183 ff.

12 A special place is made to eNGOs also in other pieces of EU environmental law which will not be discussed here: see, with reference to Directive 2004/35/EC on environmental liability, OJ L143/56: see Mariolina Eliantonio, 'The Proceduralisation of EU Environmental Legislation: International Pressures, Some Victories and Some Way to Go' [2015] REALaw 4, 114 ff.

13 See also Derek R. Bell, 'Sustainability through democratisation', see footnote 4, 100 ff.

2 The eNGOs in the Aarhus Convention.

What makes the Aarhus Convention special is that, consistently with the idea to promote bottom up democracy, eNGOs were already involved in the drafting of the convention. The European ECO Forum, a coalition of such organizations took an active part in all the negotiating sessions organized by the Economic Commission for Europe of the United Nations (UNECE).[14]

The parties acknowledged already in the preamble to the Aarhus Convention "the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection". 'Organisations' are also specifically mentioned with reference to access to "effective judicial mechanisms".[15]

Under Article 2 of the Convention NGOs are included in both the definition of 'public' and 'public concerned'. The 'public' includes both individuals and "in accordance with national legislation or practice, their associations, organizations or groups". The 'public concerned' means the those affected or likely to be affected by, or having an interest in, the environmental decision-making; it is also expressly provided that "non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest".[16]

The reference to domestic rules or practices cannot be read as giving *carte blanche* to the parties. Under Article 3(4) of the Convention must not just recognise, but shall support eNGOs and make sure national legal systems are "consistent with this obligation". While the actual scope of the obligation is somewhat indeterminate, it is clear that the parties shall make the establishment and the operation of eNGOs easy, basically refraining from adopting any rule unreasonably restricting the freedom of association or otherwise limiting the remedies which may be pursued by eNGOs. As it was made clear by the Compliance Committee, the reference to national criteria cannot be taken as "an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act or omissions that contravene national law relating to the environment".[17] Therefore, in construing the discretion afforded to the domestic legislature to determine certain criteria which must be satisfied by an organisation in order for it to challenge

[14] See Margherita Poto, 'The Second Pillar of the Aarhus Convention: a comparative analysis of the implementing systems *vis-à-vis* their legal culture', in this book ...

[15] Jan H. Jans, 'Judicial Dialogue, Judicial Competition and Global Environmental Law' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law,* see footnote 2, 155.

[16] See also the *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters* available at http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppppdm/ppdm-recs.html accessed 29 september 2016.

[17] See the Findings and Recommendations in ACCC/C/2005/11 (Belgium) - ECE/MP.PP/C.1/2006/4/Add.2, para 35.

an infringement of environmental law, it is "beyond doubt that *the obligation to guarantee access to justice is sufficiently clear to preclude a rule which would have the object or the effect of removing certain categories of non-legislative decisions taken by public authorities from the scope of the review to be conducted by the national courts*".[18]

The use of the word 'support' might even be read as requiring the parties to take positive actions to the benefit of eNGOs.

Back to Article 2, the 'public concerned' is made up by those "affected or likely to be affected by, or having an interest in, the environmental decision-making"; under Article 2(5) eNGOs meeting any requirements under national law are deemed to have an interest. The latter means that eNGOs are held to be concerned, without any need to specifically show an interest. Again, Article 3(4) precludes the parties from imposing stricter requirements than are reasonably justified to the establishment and operation of eNGOs.

Being 'concerned' by virtue of the law, eNGOs enjoy the rights provided under the Three Pillars of the Aarhus convention (access and information, participation to decision making procedures and access to justice).

Even if no specific mention of eNGOs in made in Articles 6 to 8 of the Aarhus Convention concerning participation to different administrative and regulatory procedures, they role is obviously specifically relevant. Beside expounding the views of civil society they may bring considerable expertise to the discussion.[19] Additionally, eNGOs should ideally be involved in proceedings going beyond the adoption of decision on specific activities. As it was remarked, "The non-specialist public will rarely be engaged by large scale debates, which are to some degree abstract. The real life conflicts and distributive impacts (e.g. the amenity effects of wind farms) become apparent the closer we get to a real development, as does what a lay person might contribute".[20] Under Article 7 on participation concerning plans, programs and policies, the competent public authority is tasked with identifying "the public which may participate". In principle, being more representative, focused and with deeper pockets than individuals, eNGOs should be involved to speak along members of the civil

[18] See the conclusions by AG Jääskinen to Joined Cases C-401/12 P to C-403/12 P *Vereniging Milieudefensie e Stichting Stop Luchtverontreiniging Utrecht v Council of the European Union, European Parliament and European Commission*, para 94 (emphasis in the original); concerning the discretion of the parties see also para 103.

[19] See the conclusions by AG Sharpston to Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, para 61; see also, with a more general reference to 'the public', Gerd Winter, 'National Administrative Procedural Law under EU Requirements' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law*, see footnote 2, 17, and Maria Lee and others, 'Public Participation and Climate Change Infrastructures' [2013] Journ. Environ. Law 25, 37 ff.

[20] Maria Lee and others, 'Public Participation and Climate Change Infrastructures', see footnote 19, 48.

society if not on behalf of it.[21] 'Professionalism' in participation is creeping in many jurisdictions.[22] The recognition of a privileged role for eNGOs might also apply with reference to the provision in Article 8 about proceedings for the preparation of executive regulations and/or generally applicable legally binding normative instruments. Under Article 8 that the public should be given the opportunity to comment, if not directly, "through representative bodies". Even if one cannot exclude that such bodies could be set up through *ad hoc* electoral processes, recourse to eNGOs seems the easiest and more straightforward way to comply with the requirement. Following the advice of the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, "public authorities may find it useful to involve NGOs or other members of the public with relevant expertise in advisory bodies related to the decision-making procedure".[23]

As already recalled talking about the preamble to the Aarhus Convention, the possible role of eNGOs is specifically highlighted concerning access to justice. Here again financial resources and expert knowledge are a precondition for meaningful, if not necessarily always successful, involvement.

Article 9(2) allows the parties to make access to courts conditional on either having a sufficient interest or maintaining impairment of a right. The alternative depends on domestic approaches to standing which are very diverging in Europe, ranging from the more or less liberal (sufficient interest) to the very restrictive (impairment of a right).[24]

In principle, eNGOs have it easier. The same provision states that NGOs meeting the requirements referred to in Article 2(5) – which, as already recalled, cannot be used to unreasonably limit the establishment or operation of NGOs – are deemed to have either a sufficient interest or a right being impaired according to what is the criterion for standing in the given jurisdiction.

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[21] Gerd Winter, 'National Administrative Procedural Law under EU Requirements' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law,* see footnote 2, 18; see also Gyula Bandì, 'Introduction into the Concept of Environmental democracy' and Gerd Winter 'Theoretical Foundations of Public Participation' both in Gyula Bandì (ed), *Environmental Democracy and Law,* see footnote 11, 3 ff and 23 ff; for a critical assessment of participation as a factor in legitimacy see however Sidney Shapiro and Richard Murphy, 'Public Participation Without a Public: The Challenge for Administrative Policymaking' [2013] Missouri L. Rev. 78, 493 ff.

[22] Carol Day, 'United Kingdom' in this book, refFN46; Giulia Parola, 'The Aarhus Convention – The Legal Cultural Picture' in this book, II.B.b.3.

[23] *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters,* see footnote 16, 11.

[24] See generally Jan Darpö, 'Article 9.2 of the Aarhus Conventions and EU Law' [2014] Journ. Eur. Env. & Planning *Law* 11, 378 ff, Mariolina Eliantonio and others (eds), *Standing up for Your Right(s) in Europe* (Cambridge, Intersentia, 2013) 67 ff, and Jan Darpö, 'Synthesis Report of the Study on the Implementation of Article 9(3) and 9(4) of the Aarhus Convention in Seventeen of the Member States of the European Union' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law,* see footnote 2, 176 ff.

Finally eNGOs have a role to play also in the international law mechanisms set up to assess the parties' compliance with the Aarhus Convention. Under Article 10(5) thereof, any eNGOs having informed the Executive Secretary of the UNECE of its wish to be represented at a meeting of the Parties "shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections".

In their first meeting in 2002 the parties – not without some resistance from the US – decided to shape in a strongly participatory way the Compliance Committee foreseen by Article 15 of the Convention. Environmental NGOs may name candidates to the 8 members committee, which are then elected by the meeting of the parties on a consensus basis or, lacking consensus by secret ballot.[25]

The usual reasons concerning resources and expertise also strongly point to e-NGOs as the main beneficiaries of the possibility given to the public by the same Article 15 to communicate to the Compliance Committee information as to perceived non-compliance with the obligations flowing from the Convention.

3 Environmental NGOs and EU law

As is well known, the EU is a party to the Aarhus Convention along with its Member States and other European and non-European countries. As a consequence under EU law the Convention has the characteristics of a mixed agreement which is applicable to EU institutions but also to the public authorities of the Member States when they are implementing EU law.[26]

The latter is actually the normal situation since most activities having some impact on the environment are today regulated under EU law which was cast or recast to have the same or a wider scope of application than the Aarhus Convention.[27] Concerning for instance the First Pillar, Directive 2003/4/EC on public access to environmental information was drafted with the view of the accession of the EC to the Aarhus Convention.[28] This is also the case with reference to the Second Pillar, whose provisions are implemented towards the EU Member States by Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment

[25] Margherita Poto, 'The Second Pillar of the Aarhus Convention' in this book, §.

[26] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, para 30 and case-law cited therein; see also the conclusions by Advocate general Sharpston, para 43 ff.; see the discussion in Jan H. Jans, 'Judicial Dialogue, Judicial Competition and Global Environmental Law' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law*, see footnote 2, 150 ff.

[27] E.g., with reference to the right of access, Recital 8 of Regulation (EC) 1367/2006.

[28] Recital 5 of the European Parliament and Council Directive (EC) 2003/4 on public access to environmental information makes it clear that "Provisions of Community law must be consistent with that Convention with a view to its conclusion by the European Community", OJ L41/26.

and amending with regard to public participation and access to justice Directives 85/337/EEC and 96/61/EC (the 'Public Participation Directive').[29] A number of specific pieces of secondary legislation might also be relevant in the context of the Second pillar, such as Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. The situation is different with reference to Third pillar, waiting for the adoption of a general directive on access to justice (sectoral rules have been enacted in Directive 2003/35/EC).[30] This delay might have affected the degree of convergence in the laws of the Member States concerning specifically judicial remedies.[31] As it will be seen, however, moving from the mixed agreement doctrine, the case law of the Court of Justice has quite limited the procedural autonomy of the Member States.[32]

As it is amply illustrated in the report on the EU, the convergence in scope of the Aarhus Convention and of EU law means that in most cases EU Member States must comply with the Convention not just as a matter of international law but as a matter of EU law[33] (with limits possibly stemming from the direct effect doctrine).[34] The concepts and definitions to be found in the Aarhus Convention are 'adopted' by EU law and become EU law concepts. As such they must be given 'an autonomous and uniform interpretation throughout the European Union".[35] This means that Convention rights are strengthened by the well developed EU case law on different aspects such as the preference for teleological interpretation, the reference to the general principles and the protection of fundamental rights.[36] In this context, the Convention ends up benefiting

[29] See Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 4.3.

[30] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, para 32; see also Council Decision (EC) 2005/370 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L124/1.

[31] See the comparative analysis by Jan Darpö, 'Synthesis Report of the Study on the Implementation of Article 9(3) and 9(4) of the Aarhus Convention in Seventeen of the Member States of the European Union', see footnote 24, 169 ff.

[32] See also Jan H. Jans, 'Judicial Dialogue, Judicial Competition and Global Environmental Law' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law,* see footnote 2, 145.

[33] See generally Jan H. Jans and Hans Vedder, *European Environmental Law. After Lisbon* (Groningen, Europa Law Publishing, 4th ed 2012) 183 ff and, with specific reference to the Aarhus Convention, Jan Darpö, 'Article 9.2 of the Aarhus Conventions and EU Law', see footnote 24, 373 ff.

[34] See the contributions collected by in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law,* see footnote 2, and specifically Ludwig Krämer, 'Direct Effect and Consistent Interpretation: Strength and Weaknesses of the Concepts' and Angel-Manuel Moreno Molina, 'Direct Effect and State Liability', therein 53 and 75 respectively.

[35] Case C-260/11 *Edwards and Pallikaropoulos v Environment Agency and others,* para 29.

[36] For some indications see the conclusions by AG Kokott to Case C-260/11 *Edwards and Pallikaropoulos v Environment Agency and others,* para 30.

from the strong enforcement mechanism based on the concerted actions of the Commission, the national courts and the Court of Justice. In the end at least in some Member States the most significant impacts of the Aarhus Convention has come about primarily as a result of their duty to implement the EU directives mentioned above.[37]

Enforcement is not as strong against EU institutions. The Convention apply to them as a matter of pure international law, and questions as to whether some of its provisions are directly effective and as such may be invoked in court – included by e-NGOs – often are answered in the negative.[38]

So far the EU institutions have normally chosen to implement the obligations flowing from the EU participation to the Convention by enacting distinct rules applicable either to EU institutions or to EU Member States public authorities.[39] More specifically, Regulation (EC) No 1367/2006 lays down rules on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.[40]

Rules binding on the Member States have instead been dispersed in a number of directives such as those recalled above.[41] This was probably inevitable considering the different procedures foreseen in the Treaties for the adoption of rules applicable to the EU institutions and the EU Member States. However, added to the facts that different measures were often taken with reference to the different obligations flowing under the various pillars of the Convention, this results in a quite complex regulatory regime, with the Court of Justice called to bridge the distance. EU rules applicable to the EU institutions and EU rules applicable to the public authorities of the EU Member States will be analysed in turn in this section of the chapter.

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37 See for instance Bilun Müller, 'The Aarhus Convention – The Legal Cultural Picture' in this book, 2.c); Ánne Ryall, 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book, (intro text corrsp to fn 6) ff with reference to the Irish case law. Jurisdictions whose legislation was already very much in line with the Aarhus Convention were not much affected either by the Convention or by EU law: e.g. Barbara Beijen, 'The Aarhus Convention in the Netherlands' in this book, §§ 3.2.1, 3.2.2 and 4.

38 Joined Cases C-401/12 P to C-403/12 P *Vereniging Milieudefensie e Stichting Stop Luchtverontreiniging Utrecht v Council of the European Union, European Parliament and European Commission* being the most recent instance of a very rigid case law; the more liberal approach followed by the General Court in Case T-396/09 *Vereniging Milieudefensie e Stichting Stop Luchtverontreiniging Utrecht* was rejected by the Court of Justice

39 The measures enacted so far are listed by Eva Kružíková, 'Implementation of Public Participation Principles' in Gyula Bandì (ed), *Environmental Democracy and Law,* see footnote 11, 141 ff.

40 Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, § 3.1.

41 The picture is much more complex though: see Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 3.3.

3.1 Rules applicable to the EU institutions

Environmental NGOs have quite early understood the growing importance of the EU arena for effectively pursuing their goals. Some of the early cases on right of access to the documents held by EU institutions were indeed brought by eNGOs which are still very active on what in the meantime has become the First Pillar of the Aarhus Convention.[42]

The place left to the civil society in the EU has however traditionally been limited. Governance always very much tilted towards an elitist technocratic pattern.[43] A bureaucratic ethos having its origin in the diplomatic services of most of the founding Member States has been reinforced by heavy doses of New Public Management insisting on efficient output rather than democratic inputs in the decision making processes.[44]

Faced with egregious shortcomings in the model, including blundering through the BSE or Mad Cow crises and widespread corruption, the 2001 White Paper on governance recognised the relevance of participation and civil dialogue only to a limited extent. The Commission was afraid of strengthening participation too much – as it sees it – along the US model: "Creating a culture of consultation cannot be achieved by legal rules which would create excessive rigidity and risk slowing the adoption of particular policies. It should rather be underpinned by a code of conduct that sets minimum standards".[45] Accordingly, shortly after the publication of the White Paper, the Commission adopted a very conservative Communication "Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission".[46] The idea was there that interest groups fulfilling a number of good governance criteria, namely representativeness,

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[42] See, also for references to older cases, T-545/11 *Stichting Greenpeace Nederland and PAN Europe* v *Commission*, – appeal pending as Case C-673/13 P; T 214/11 *ClientEarth and PAN Europe* v *EFSA*, appeal pending as Case C-615/13 P C'è la sentenza; T 111/11 *ClientEarth* v *Commission*, – appeal pending as Case C-612/13 P (c'è la sentenza).

[43] This approach, resting on the acknowledged absence of a *demos* capable to provide democratic legitimacy has been championed by Giandomenico Majone, 'Europe's "Democratic Deficit": The Question of Standards' [1998] Eur. Law Journ. 4, 5; see also a number of writings collected in Giandomenico Majone, *Regulating Europe* (London, Routledge, 1996); technocratic resistance to participation is of course not confined to the EU: e.g. Maria Lee and others, 'Public Participation and Climate Change Infrastructures', see footnote 19, 43 ff, and, speaking of the past, Carol Day, 'United Kingdom' in this book, § B.

[44] See Carol Harlow and Richard Rawlings, *Process and Procedure in EU Administration* (Oxford, Hart, 2014) spec. 20 ff.

[45] *European Governance. A White Paper* COM (2001) 428 final, 17; for a critique Anne Meuwese, Ymre Schuurmans and Wim J. Voermans, 'Towards a European Administrative Procedure Act' in Kars J. de Graaf, Jan H. Jans, Sacha Prechal and Rob J.G.M. Widdershoven (eds.), *European Administrative Law: Top-Down and Bottom-Up* (Groningen, Europa Law Publishing, 2009) 3.

[46] COM (2002) 704 final.

accountability, and transparency, have the right to be consulted.[47] The approach to consultation was however again bureaucratic and managerial and it has been criticised as "a negation of the very concept of civil society".[48]

Neither does EU law generally encourage litigation by public interest organisations. As it is well known, the case law of the Court of Justice on standing is quite restrictive. Under Article 263(4) TFEU, natural or legal persons may institute proceedings against an act which is not addressed to them and entails implementing measures only if that act is of direct and individual concern to them.[49] According to a settled case-law "persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed".[50] True to fill a gap in the EU system of judicial protection the Lisbon Treaty has given standing to non-privileged applicants to challenge regulatory acts which do not entail implementing measures and are of direct concern to them.[51] However the Court of Justice has been strict in defining 'regulatory acts' and quite ready in finding that implementing measures were required.[52]

The reasoning behind this overall restrictive approach to standing is that those who are indirectly and/or not individually concerned may always challenge implementation measures in front of either the EU or national courts according to their respective competences. National courts may in turn raise preliminary references questions as to the validity of the EU legal act being implemented by the challenged measure.[53]

Legal culture is not much relevant here. Worried about its case load, the Court of Justice is preferring an interpretation favouring (a measure of) decen-

47 See the analysis by Daniela Obradovic and Jose M. Alonso Vizcaino 'Good governance requirements concerning the participation of interest groups in EU consultations' [2006] Common Market L. Rev. 43, 1049 ff; also refer to Roberto Caranta 'Civil Society Organisations', see footnote 1, 62 ff.

48 Carol Harlow and Richard Rawlings, *Process and Procedure in EU Administration*, see footnote 44, 111.

49 See, putting the issue in the context of EU environmental law, Jan H. Jans, 'Judicial Dialogue, Judicial Competition and Global Environmental Law' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law*, see footnote 2, 160 ff.

50 Case C-274/12 P *Telefónica SA v European Commission*, para 46; Case 25/62 *Plaumann* v *Commission*, para 107; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato «Venezia vuole vivere», Hotel Cipriani Srl and Società Italiana per il gas SpA (Italgas) v European Commission*, para 52; and C-583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, para 72 are referred to.

51 See the analysis in C-583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, para 57.

52 E.g. C-583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, paras 58 ff, and Case C-274/12 P *Telefónica SA v European Commission*, paras 34 ff; instead no implementing measures were required in Case T-262/10 *Microban International and Microban (Europe)* v *Commission*, paras 28 ff.

53 Case C-274/12 P *Telefónica SA v European Commission*, paras 57 ss; C-583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, paras 93 ff.

tralisation in validity review. Recourse to the Court of Justice is however more delayed than really avoided. This approach is particularly detrimental to NGOs – including eNGOs – because they expound collective or group interests. As such they can hardly ever be directly or even less so individually concerned.[54] True NGOs may avail themselves of domestic remedies which must be effective as now also provided under Article 19 TEU.[55] This however entails a dispersion of litigation efforts and extra costs because eNGOs might have to challenge the effectiveness of domestic procedural rule before even being allowed to challenge the substantive legality of EU provisions.[56]

Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies must be read against a bureaucratic culture not very favourable to the empowerment of the civil society in the decision making processes taking place at the EU level and against a case law which very much limits actions by non-privileged applicants. Manifesto-like declaration in official but not binding documents try to tell another story, but it is doubtful whether they are to be believed.[57]

The Regulation itself does not much deal specifically with eNGOs. Sure when defining 'the public' under Article 2 (1)(b) associations, organisations and groups are included. Also eNGOs benefit from the non-discrimination as to their seat rule laid down in Article 3. As members of the public eNGOs are in line to be granted participation rights concerning plans and programmes under Article 9. However EU law fails in specifically stressing the role of civil society organisations in this framework.

Environmental NGOs are instead given a specific role in Article 10 on requests for internal review of administrative acts.[58] Under this provision any non-governmental organisation meeting the criteria set out in Article 11 "is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act". The provision, which is exploiting one possibility left open by Article 9(3) of the Aarhus

54 As required for instance by C-583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, para 75.

55 See to this effect C-583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, paras 100 ff.

56 See also Mariolina Eliantonio and others (eds), *Standing up for Your Right(s) in Europe*, see footnote 24, 25 ff; Marcel Szabó, 'Public Participation - Human Right or an Instrument of International Administrative Law' in Gyula Bandì (ed), *Environmental Democracy and Law*, see footnote 11, 103 ff.

57 For a more optimistic take Gyula Bandì, 'The Three Pillars of Environmental Democracy in a European perspective' in Gyula Bandì (ed), *Environmental Democracy and Law*, see footnote 11, 42 ff, and (possibly) Daniela Obradovic, 'EC rules on public participation in environmental decision-making operating at the European and national levels' [2007] Eur. Law Rev. 840.

58 See Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 4.1.

Convention is not really explained in the recitals, gives eNGOs a role to watch over the compliance with the obligations flowing from the Aarhus Convention.[59] The mechanism of preliminary review foreseen in Article 10 of Regulation (EC) No 1367/2006 is more structured than the one foreseen under Article 15 of the Aarhus Convention (communication as to possible breaches). Indeed the request is directed to the institution or body having taken, or having failed to take, a decision. Under Article 10(2) of the Regulation the request opens a review procedure with the EU institution or body under a duty to consider it (unless it is held to be clearly unsubstantiated) and to give a reasoned reply in a short term. Moreover, under Article 12, the concerned eNGO may bring an action for annulment or failure to act against the institution or body thought of not having duly addressed the request.[60]

Article 10 of Regulation (EC) No 1367/2006 was at the centre of litigation in the very recent *Vereniging Milieudefensie* case.[61] Two Dutch eNGOs had submitted a request to the Commission for internal review of its decision to allow the Netherlands to postpone the deadline for attaining the annual limit values for nitrogen dioxide in nine zones. The Commission rejected that request as inadmissible on the grounds that the decision was not a measure of individual scope and that it could therefore not be considered an 'administrative act', within the meaning of Article 2(1)(g) of Regulation No 1367/2006, as such capable of forming the subject of the internal review procedure provided for under Article 10 thereof. The General Court concurred in the qualification of the decision as an act of general scope and in finding the action inadmissible. However, it upheld the second plea, put forward in the alternative, alleging the illegality of Article 10(1) of the Regulation by reason of its incompatibility with Article 9(3) of the Aarhus Convention in so far as it provides an internal review procedure only in respect of an 'administrative act' (defined in Article 2(1)(g) as 'any measure of individual scope').[62]

According to Advocate General Jääskinen, the internal review mechanism laid down in Article 10(1) of Regulation No 1367/2006 "was introduced in order not to interfere with the right to access to justice under the Treaty, under which a person may institute proceedings with the Court of Justice against decisions of which it is individually and directly concerned."[63] In a framework which allows sparingly actions brought by non-privileged applicants it is easy to understand why Advocate General Jääskinen claimed that by establishing a review procedure Article 10 Regulation No 1367/2006 "facilitated access to justice for non-

[59] Aarhus Convention, Recital 20.

[60] See, also for further references, Jan H. Jans, 'Judicial Dialogue, Judicial Competition and Global Environmental Law' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law,* see footnote 2, 163 ff.

[61] A parallel case was Case T-338/08, *Stichting Natuur en Milieu and Pesticide Action Network Europe* v *Commission*.

[62] Case T-396/09 *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* v *Commission*.

[63] Ibid, para 123 of the conclusions of AG Jääskinen.

governmental organisations. Such organisations do not normally have to have a sufficient interest or to maintain the impairment of a right in order to exercise that right in accordance with Article 263 TFEU. The regulation therefore effectively affords such groups the status of addressees".[64]

The Court of Justice however hold otherwise and reaffirmed its case law to the effect that "the provisions of an international agreement to which the European Union is a party can be relied on in support of an action for annulment of an act of secondary EU legislation or an exception based on the illegality of such an act only where, first, the nature and the broad logic of that agreement do not preclude it and, secondly, those provisions appear, as regards their content, to be unconditional and sufficiently precise".[65] According to the Court of Justice these (restrictive) conditions are neither met by the Aarhus Convention nor by Article 9(3) thereof.[66] In passing one might remark that, unlike in cases where national measures are challenged, the Court of Justice nowhere in this and in parallel judgments refer to the aim of a wide access to justice pursued by the Aarhus as a possible reason to instead narrowly interpret rules limiting the application of the Convention rights.[67]

Given that the Court of Justice has refrained from declaring the illegality of Article 10(1) of Regulation No 1367/2006 in that it limits the review procedure to the challenging of measures of individual scope the opening for eNGOs is still quite limited. As the General Court remarked in *Stichting Natuur en Milieu*, a case parallel to *Vereniging Milieudefensie*, an "internal review procedure which covered only measures of individual scope would be very limited, since acts adopted in the field of the environment are mostly acts of general application".[68]

In conclusion, one could hardly claim that the EU is going out of its way to empower eNGOs to act on behalf of civil society at EU level. While the right of access is recognised, participation is channelled through a technocratic bureaucratic culture and access to courts suffer from Treaty rules limiting standing and which are conservatively interpreted by the Court of Justice. This situation has not been much altered by Regulation No 1367/2006.

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[64] Ibid, para 124; see also fn 168 to that point: "It is clear from the legislative work preceding the adoption of the Aarhus Regulation that '... the establishment of a right of access to justice in environmental matters for every natural and legal person has not been considered a reasonable option. This would imply an amendment of Articles 230 and 232 of the EC Treaty and could hence not be introduced by secondary legislation. The proposal [therefore made provision] to limit legal standing to the "qualified entities"'. See proposal for a regulation COM (2003) 622 final, 17".

[65] Joined Cases C-401/12 P to C-403/12 P *Vereniging Milieudefensie e Stichting Stop Luchtverontreiniging Utrecht v Council of the European Union, European Parliament and European Commission*, para 54.

[66] Paras 60 and 68; see also Joined Cases C-404/12 P and C-405/12 P *Council and Commission* v *Stichting Natuur en Milieu and Pesticide Action Network Europe*.

[67] Contrast Case C-515/11 *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland*, para 28 and case-law cited; see also the conclusions by AG Sharpston, paras 42 and 43.

[68] Case T-338/08, *Stichting Natuur en Milieu and Pesticide Action Network Europe* v *Commission*. para 76.

3.1 Rules applicable to the public authorities of the Member States

Unsurprisingly EU is somewhat 'more binding' when it comes to the Member States and this is even truer with the case law. The legislation is however very much piecemeal and subject to constant change. Just to provide an instance of how deep in despair a non-expert on environmental law may be drown or rather drawn just consider that Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment was first amended by Directive 2003/35/EC – the 'Public Participation Directive' – then recast by Directive 2011/92/EU (codification) which in turn was amended by Directive 2014/52/EU.[69]

Directive 2003/35/EC – the 'Public Participation Directive' – is the most relevant piece of legislation concerning participation.[70] As it is made clear by Article 1, the directive has the objective to contribute to the implementation of the obligations arising under the Aarhus Convention.[71] More specifically, the directive provides for public participation in respect of the drawing up of certain plans and programmes relating to the environment (Article 7 of the Aarhus Convention), and improves participation and provides rules on access to justice within the scope of Directives 85/337/EEC and 96/61/EC the in force.[72]

The recitals to the directive stress that effective public participation, including by associations, organisations and groups, increases "the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken".[73] They acknowledge that some existing EU legislation, such as Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the

[69] See the analysis by Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, esp. 3; see more generally Mariolina Eliantonio, 'The Proceduralisation of EU Environmental Legislation', see footnote 12, 100 and, with specific reference to rules on participation Daniela Obradovic, 'EC rules on public participation in environmental decision-making operating at the European and national levels', see footnote 57, 840.

[70] See Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 3.3, Gyula Bandì, 'The Three Pillars of Environmental Democracy', see footnote 57, 56 ff; and Mariolina Eliantonio, 'The Proceduralisation of EU Environmental Legislation', see footnote 12, 106 ff.

[71] See also Case C-416/10, *Jozef Križan and Others v Slovenská inšpekcia životného prostredia,* para 77, and further references therein.

[72] See now Recitals 18 ff of European Parliament and Council Directive (EU) 2011/92 on the assessment of the effects of certain public and private projects on the environment (codification), OJ L26/1.

[73] European Parliament and Council Directive (EC) 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L332/91, recitals 3 and 4; see also recital 16 of European Parliament and Council Directive (EU) 2011/92, see footnote 72.

environment – EIA Directive, and Directive 96/61/EC concerning integrated pollution prevention and control – IPPC Directive, should be amended to ensure that they are fully compatible with the provisions of the Aarhus Convention, in particular Article 6 and Article 9(2) and (4) thereof.[74] Other relevant legislation already provides for public participation in the preparation of plans and programmes and, for the future, public participation requirements in line with the Aarhus Convention will be incorporated into the relevant legislation from the outset.[75]

The text of Directive 2003/35/EC is very close to the Aarhus Convention. Under Article 2(1) concerning public participation concerning plans and programmes 'the public' means "one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups". EU law has refrained from being more directive, as it could very well have been, instead very much leaving intact the margins of domestic choice left open by the Aarhus Convention. The same is true with reference to Article 2(3) empowering the Member States to identify the public entitled to participate, "including relevant non-governmental organisations meeting any requirements imposed under national law, such as those promoting environmental protection".

Article 3 of Directive 2003/35/EC, amending Directive 85/337/EEC, also includes a definition of 'the public concerned' meaning "the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures" but also, in line with Article 2(2)(5) of the Public Participation Directive, "non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest".[76] As Advocate General Sharpston remarked, "Unlike natural or legal persons, non-governmental organisations promoting environmental protection *always* have the status of 'the public concerned' provided that, in accordance with Article 1(2), they comply with 'any requirements under national

74 Council Directive (EC) 2003/35, recital 11.

75 Ibid, recital 10; see also art 2(5), under which the provisions laid down in the same art 2 "shall not apply to plans and programmes set out in Annex I for which a public participation procedure is carried out under Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment or under Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy".

76 Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd,* para 40.

law'".[77] These definitions are today found in Article 1(2)(d) and (e) of the EIA codification Directive 2011/92/EU.[78]

Here again and very much in line with the Aarhus Convention, Directive 2003/35/EC leaves intact the discretion of the Member States. Additionally one might wonder why the definition of the 'public concerned', expressly referring to eNOGs, is found in Articles 3 and 4, amending sectoral legislation, but was instead missing from Article 2? The least to say is that this is unfortunate.

The provisions of the Public Participation Directive amending Directives 85/337/EEC and 96/61/EC also have specific provision on the right of access to justice worded along Article 9 of the Aarhus Convention. More specifically, Article 3(7) of Directive 2003/35/EC adds a new Article 10a to Directive 85/337/EEC providing for access to justice and making clear that any non-governmental organisation meeting the requirements laid down in national law shall be given standing to challenge the substantive or procedural legality of decisions, acts or omissions covered under the directive. The provision has now been codified in Article 11(1) of Directive 2011/92/EU which was left unchanged by Directive 2011/92/EU. Identical provisions have been included in a new Article 15a of Directive 96/61/EC. Here again the provisions apply within the scope of Directives 85/337/EEC (now Directive 2011/92/EU) and 96/61/EC.[79]

The reason why Directive 2003/35/EC provides rules on access to justice only in the areas covered by the two other directives just mentioned is given in a statement by the Commission published at the end of the Public Participation Directive. The Commission intended to present a proposal for a directive addressing the implementation of the Aarhus Convention in respect of access to justice in environmental matters in the first quarter of 2003.[80] But this never became law and new initiatives are expected.[81]

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[77] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd,* para 44; see the discussion by Gyula Bandì, 'The Three Pillars of Environmental Democracy', see footnote 57, 59 ff.

[78] The same definitions are also found in art 2 of Council Directive (EC) 96/61 concerning Integrated Pollution Prevention and Control (IPPC), OJ L257, as amended by Article 4 of the Public Participation Directive. On the notion of 'public concerned' see now Case C-570/13 *Karoline Gruber v Unabhängiger Verwaltungssenat für Kärnten and Others*, paras 35 ff; see also the conclusions by AG Kokott, especially paras 37 ff.

[79] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, para 86.

[80] See Council Decision (EC) 2005/370 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters; the proposal had been prepared by a study later published as Nicolas de Sadeleer, Gerhard Roller and Miriam Dross, *Access to Justice in Environmental Matters and the Role of NGOs* (Groningen, Europa Law Publishing 2005).

[81] More details in Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 4.4.

Another very relevant piece of legislation is Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. Article 6 thereof regulates 'Consultations' providing *inter alia* that the public "shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure". Under 6(4) it is up to the Member States to identify the public "including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned". The provision is implementing the Aarhus Convention laying down 'minimum rules' concerning consultation,[82] and eNGOs are specifically referred to.[83]

The discretion apparently left by EU secondary law to the Member States has been much constrained by the case law based on the requirement of the 'wide access' to justice which comes with those provisions.[84] As Advocate General Sharpston remarked, "Given the rich variety of legal traditions and legal systems across the [then] 27 Member States, it seems desirable to adopt an approach towards interpreting the directive that is more likely to achieve a uniform interpretation".[85]

Concerning specifically the role of eNGOs, the so-called *Slovak Brown Bear* case set the stage for making spectacular developments possible,[86] while the judgments in *Djurgården*[87] and *Trianel*[88] stand out for having fully realised the potential of civil society organisations in helping the enforcement of environmental law.[89]

In the older case, an association established in accordance with Slovak law whose objective is the protection of the environment requested to be a 'party' to an administrative proceedings relating to the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas, or the use of chemical substances in such areas. This was refused

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[82] Case C-567/10 *Inter-Environnement Bruxelles ASBL, Pétitions-Patrimoine ASBL and Atelier de Recherche et d'Action Urbaines ASBL v Région de Bruxelles-Capitale,* para 21.

[83] The relevance of consultations was stressed by AG Bot in Case C-474/10 *Department of the Environment for Northern Ireland v Seaport (NI) Ltd and Others,* para 28.

[84] See Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 4 and 4.3.

[85] Conclusions to Case C-515/11 *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland,* para 28.

[86] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.*

[87] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd.*

[88] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg.*

[89] Enforcement is mentioned in the 18th Recital to the Aarhus Convention; see also Gyula Bandì, 'The Three Pillars of Environmental Democracy', see footnote 57, 65 ff.

and the association challenged the decision, the legal issue morphing from one of participation to administrative procedures into one of right of access to courts. Because the EU rules applicable to the circumstances of the case were not among the few for which Directive 2003/35/EC provides rules on access to justice, the referring court basically asked whether Article 9(3) of the Aarhus Convention should be provided with direct effect in the Member States as a matter of (then) EC law. While Advocate general Sharpston proposed a negative reply,[90] the Court of Justice decided otherwise, stressing that "Where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, it is clearly in the interest of the latter that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply".[91]

This said, the reasoning of the Court is not the most straightforward possible. But the conclusion is. According to the Court, Article 9(3) of the Aarhus Convention does not "contain any clear and precise obligation capable of directly regulating the legal position of individuals".[92] However, and, although drafted in broad terms, its provisions are "intended to ensure effective environmental protection".[93] Therefore, "it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention".[94]

No direct effect, but still a duty of interpreting domestic rules consistently with the objectives of the Aarhus Convention having been incorporated into EU law.[95] In the end, it is for the referring court to interpret, to the fullest extent possible, the domestic rules so as to enable an eNGOs "to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law".[96]

Basically, the *Slovak Brown Bear* case showed that the reticence of the EU law makers – the Council first and foremost – to lay down generally applicable rules on access to justice could be short-circuited by case law developments, in this

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[90] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.*

[91] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky,* para 42.

[92] Ibid, para 45.

[93] Ibid, para 46.

[94] Ibid, para 50.

[95] See Jan H. Jans, 'Judicial Dialogue, Judicial Competition and Global Environmental Law' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law,* see footnote 2, 160; Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 4.5.

[96] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky,* para 51.

case benefiting eNGOs which enjoy a special place in Article 9(3) of the Aarhus Convention.

In a following case the Djurgården-Lilla Värtans association for environmental protection had challenged the development consent to carry out the works for the construction of a one kilometre tunnel to house electric cables replacing above the ground high tension cables and accessory facilities for the abstraction and disposal of groundwater. It was denied standing because it did not reach the minimum 2000 members required under Swedish legislation – along with activities in the country for at least three years – to benefit from privileged standing.

Advocate general Sharpston concluded that eNGOs "have an *automatic* right of access to justice".[97] The presumption in their favour introduced by Article 1(2) of Directive 85/337/EEC as amended by Directive 2003/35/EC, "when applied in conjunction with Article 10a, means that they benefit from a more advantageous regime than natural or legal persons who are not committed to promoting environmental protection".[98] Indeed, "such organisations have a special supervisory role".[99] It is sensible to make a special place to eNGOS both generally and with specific reference to access to justice as a way to channel and filter disputes, both potentially limiting the case load and providing courts with expert knowledge: "these associations often have technical knowledge that individuals generally lack. Bringing this technical information into the process is advantageous, because it puts the court in a better position to decide the case".[100]

The Advocate General also very much downplayed the generic reference to the "national legal system" at the opening of Article 10a of Directive 85/337/EEC. She considered that it merely means that the provisions on access to justice apply within the procedural framework of each Member State which rules questions such as "the jurisdiction of national courts, time-limits, legal capacity and so forth".[101]

The real issue is the extent of the discretion in laying down 'requirements' for eNGOs left to the Member States under Article 2(5) of the Aarhus Convention and the corresponding provisions of EU law. The Advocate General was

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[97] See the discussion in Jan Darpö, 'Article 9.2 of the Aarhus Conventions and EU Law', see footnote 24, 382 ff.

[98] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, paras 43 and 50; see also para 44, the AG making clear that standing is not linked to the previous participation in the administrative procedure leading to the decision being challenged (see also at 71); on this aspect Gerd Winter, 'National Administrative Procedural Law under EU Requirements' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law*, see footnote 2, 20 ff.

[99] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, para 50.

[100] Ibid, para 62.

[101] Ibid, para 45; see also her conclusions in Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, para 55.

ready to concede that "that clause does give Member States a certain amount of leeway".[102] However, "despite that latitude", Member States must adopt all appropriate measures consistent with the objectives pursued by EU rules implementing the Aarhus Convention, so as not to deprive them of their effectiveness,[103] including "giving the public concerned wide access to justice".[104] This means that the clause "cannot be interpreted in a way that makes it more difficult for such organisations to have access to administrative and judicial procedures".[105] Therefore, national law requirements placed on eNGOs "must be objective, transparent and consistent with the aims" of EU environmental law.[106]

According to Advocate General Sharpston, the requirement of having at least 2000 members meets neither the criterion of transparency, because there is no definition of 'member' in the Swedish legislation, nor – and it is submitted, more importantly – that of consistency with the aims of EU law.[107] The national rules at issue rather "close the door to many groups which would have a legitimate interest in access to justice" and penalise "local environmental organisations harshly, denying them access to the courts even when the project under assessment has exclusively local impact". The practical effect of the provision is "to eliminate from the judicial landscape not only local environmental organisations but also many others which have a national or, even more tellingly, an international dimension".[108]

The reasoning of the Court of Justice in *Djurgården* is somewhat terser, but still built around the principle of effectiveness and equally damning for the Swedish legislation at issue.[109] Indeed the national rules laying down the requirements applicable to eNGOs must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337/EEC on judicial remedies.[110] Accordingly, a national law may require that such an association "has as its object the protection of nature and the environment".[111] It is conceivable that the condition that an environmental protection association must have

[102] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, para 68.

[103] Ibid, para 69; the Advocate General is here referring specifically to Council Directive (EEC) 85/337 on the assessment of the effects of certain public and private projects on the environment, but as paragraph 80 makes it clear, the reasoning has much more general potential application.

[104] Ibid, para 73; see also Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 4.

[105] Ibid, para 72.

[106] Ibid, para 74.

[107] Ibid, para 76 ff.

[108] Ibid, para 78.

[109] See also Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 4.3.

[110] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, para 45.

[111] Ibid, para 46.

"a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active". However, that number cannot be fixed at such a level that it runs counter to the objectives of EU and "in particular the objective of facilitating judicial review of projects which fall within its scope".[112] Moreover, Directive 85/337/EEC does not exclusively concern projects on a regional or national scale, but also projects more limited in size which locally based associations are better placed to deal with. But the membership threshold set by the Swedish rules deprive local associations of any judicial remedy.[113] Neither it may be asked from local association to contact national ones having the required membership, because "the associations entitled to bring an appeal might not have the same interest in projects of limited size" and would be likely to receive numerous requests of that kind "which would have to be dealt with selectively on the basis of criteria which would not be subject to review".[114]

The shock wave of this judgement was felt well beyond Sweden,[115] as a number of Member States had similar limitations.[116]

The limits to the choices of the Member States when designing the access to justice of eNGOs were again at the centre of *Trianel*. The preliminary decision and a partial permit for a coal-fired power station given to Trianel Kohlekraftwerk Lünen were challenged in court by the Nordrhein-Westfalen branch of Friends of the Earth Germany. The eNGO claimed that the preliminary decision and permit contained formal and substantive defects and alleged that the project infringed the protective and precautionary principles of the anti-pollution laws and the requirements of the water and nature protection laws.[117]

The claimant had however to fight traditionally very strict German standing requirements according to which "applications for the review of administrative actions are admissible only if (a) they are based on a legal provision whose purpose is to protect individual rights and (b) the individual applicant falls within the scope of its protection.[118] While specific environmental legislation existed dispensing eNGOs from the need to show (b), they still could only act when the provisions allegedly infringed could be said to confer rights on

[112] Ibid, para 47.

[113] Ibid, para 50.

[114] Ibid, para 51.

[115] Which reduced the number to 100: Jan Darpö, 'Sweden' in Mariolina Eliantonio and others (eds), *Standing up for Your Right(s) in Europe*, see footnote 24, 543.

[116] See Jan H. Jans, 'Judicial Dialogue, Judicial Competition and Global Environmental Law' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law,* see footnote 2, 158 ff.

[117] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*; see also the analysis by Mariolina Eliantonio, 'The Proceduralisation of EU Environmental Legislation', see footnote 12, 108 ff.

[118] See the AG's conclusions Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, para 29; for the background see Bilun Müller, 'The Aarhus Convention – The Legal Cultural Picture' in this book, III, 2 a).

individuals.[119] German law, starting from the position that environmental rules normally aims at protecting the general interest rather than individual rights, had in the past to accommodate the notion that environmental rules may be invoked by individuals when their health is at stake.[120] Here the perspective was somewhat reciprocal and concerned standing to enforce rules protecting the environment without affecting human health. The point is that, "as a general rule, legal provisions aimed at protecting the environment may not necessarily also confer rights on individuals".[121] Directive 2009/147/EC on the conservation of wild birds is a good instance in point. Breach of Article 6 thereof forbidding trade of protected birds is sure to harm bird populations. It can hardly be said to affect the health of the human population or of any human individual.[122] As Eleanor Sharpston, once again the Advocate General in the *Trianel*, remarked, eNGOs are there exactly for this, and often they are "seeking to act on behalf of the environment itself".[123]

Building on her conclusions in *Djurgården*, the Advocate General reaffirmed her view "that Article 10a of the EIA Directive gives environmental NGOs that satisfy the definition in Article 1(2) of that Directive automatic *locus standi* before national courts".[124] In her opinion,

the special role, and corresponding rights, accorded to environmental NGOs under the Aarhus Convention [...] result in a particularly strong and effective machinery for preventing environmental damage. An environmental NGO gives expression to the collective interest and may possess a level of technical expertise that an individual may not enjoy. To the extent that a single action brought by an environmental NGO may replace a plethora of equivalent actions that would otherwise be brought by individuals, the effect may be to streamline litigation, reduce the number of claims pending before the courts and improve the efficiency with which limited judicial resources are used to dispense justice and protect rights.[125]

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[119] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, para 33 of the conclusions; see also para 47.

[120] Case C-237/07 *Dieter Janecek v Freistaat Bayern*, para 38 and cases referred therein.

[121] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, para 34.

[122] See the discussion in Ludwig Krämer, 'Direct Effect and Consistent Interpretation: Strength and Weaknesses of the Concepts' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law*, see footnote 2, 63.

[123] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, para 1; see also para 37; see also from a more theoretical point of view Andrew Dobson, *Citizenship and the Environment*, see footnote 4, 111 ff.

[124] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, para 50.

[125] Ibid, para 51; additionally "quality and the legitimacy of decisions taken by the public authorities" are mentioned in para 52; see also paras 79 ff.

Concerning the specific German rules on standing, the Advocate general remarked that they "merely enable them to stand in for individuals (if their *locus standi* were dependent on the impairment or threatened impairment of individual rights enjoyed by others)".[126] True EU law permits Member States to determine what 'constitutes a sufficient interest and impairment of a right' in accordance with the requirements of national law.[127] However that determination "must be done 'consistently with the objective of giving the public concerned wide access to justice'. The objective of providing 'wide access' to justice gives the parameters within which Member States' legislative discretion may be exercised".[128]

The Court of Justice moves from the assumption that EU environmental law "must be interpreted in the light of, and having regard to, the objectives of the Aarhus Convention, with which – as is stated in recital 5 to Directive 2003/35 – EU law should be 'properly aligned'".[129] This means that, whichever option a Member State chooses for the admissibility of an action, eNGOs are entitled "to have access to a review procedure before a court of law or another independent and impartial body established by law".[130] The procedural autonomy the Member States enjoy cannot be abused to deprive eNGOs of "the opportunity of playing the role granted to them both by Directive 85/337 and by the Aarhus Convention".[131]

Having grounded its reasoning on the principle of effectiveness, the Court of Justice held that the German approach allowing eNGOs to rely only on the same rights as individuals would

contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organisations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest. As the dispute in the main proceedings shows, that very largely deprives those organisations of the possibility of verifying compliance with the rules of that branch of law, which, for the most part, address the public interest and not merely the protection of the interests of individuals as such.[132]

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[126] Ibid, para 61; industry was not extraneous in shaping this restrictive rule: Bilun Müller, 'The Aarhus Convention – The Legal Cultural Picture' in this book, III, 2 a).

[127] See the conclusions by AG Kokott in Case C-427/07 *Commission* v. *Ireland*, para 66.

[128] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, para 70; see also para 71; on the same lines Case C-72/12 *Gemeinde Altrip and others v Land Rheinland-Pfalz*, para 43.

[129] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, para 41; see also Case C-260/11 *Edwards and Pallikaropoulos v Environment Agency and others*, para 26.

[130] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, para 42.

[131] Ibid, para 44.

[132] Ibid, para 46.

While *Djurgården* and *Trianel* still leave some problems open, such as which minimum requirements, including membership numbers and the role of international eNGOs, they provide a very robust framework for the involvement of civil society organisations in national proceedings liable to affect the environment. More specifically, the objective of allowing a wide involvement of e-NGOs is the quite demanding yardstick against which domestic rules are to be judged.[133]

The more recent *Altrip* case has reaffirmed this principle also stressing again that claimants – and not just eNGOs – may raise any plea in domestic courts, and this concerning both the substantive and procedural legality of decisions, acts or omissions affecting the environment.[134]

4 The role of eNGOs in selected Member States

The national reports and the existing literature provide a picture of still divergent approaches to the role of eNGOs which in some measure corresponds to different legal or bureaucratic cultures.[135] Often distinctions run between pillar and pillar of the Aarhus Convention as much as between jurisdictions. In Germany for instance participation in proceedings does not pose challenges for eNGOs, but access to justice does.[136]

A big issue in a number of countries, such as Italy and Romania, is that both public administrations and courts don't see much benefits from the meaningful involvement of the civil society in the decision making procedures.[137] The crisis has only heightened this attitude, providing ammunition to those seeing

[133] See also Case C-72/12 *Gemeinde Altrip and others v Land Rheinland-Pfalz*, para 44.

[134] Case C-72/12 *Gemeinde Altrip and others v Land Rheinland-Pfalz*, paras 48 ff (also for a qualification concerning non-substantive procedural defects); this both reaffirms and qualifies Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*; see also the conclusions by AG Cruz Villalón Case C-72/12 *Gemeinde Altrip and others v Land Rheinland-Pfalz*, paras 66 ff; see Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 4.3.; Jan Darpö, 'Article 9.2 of the Aarhus Conventions and EU Law', see footnote 24, 371 and 376 ff; Mariolina Eliantonio, 'The Proceduralisation of EU Environmental Legislation', see footnote 12, 110; Gerd Winter, 'National Administrative Procedural Law under EU Requirements' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law*, see footnote 2, 21 ff.

[135] The bureaucratic culture may be considered to be a sub-group of the overall legal culture in those jurisdiction where administrative action is very much 'legalised' in the sense that most top civil servants are legally trained and they face legal scrutiny from specialised courts or similar bodies (e.g., courts of auditors) having developed special bodies of law for the control of administrative action.

[136] Bilun Müller, 'The Aarhus Convention – The Legal Cultural Picture' in this book.

[137] Alessandro Comino, 'The application of the Aarhus Convention in Italy', in this book, 3.1; Bogdana Neamtu and Dacian C. Dragos, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania', see footnote 4, 2.2.5.

environmental participation as a hurdle slowing decisions which could help the recovery.[138]

Bureaucratic resistance to participation usually leads to what is at best formal compliance with legal requirements flowing from the Aarhus Convention, including those on participation and access to justice. More specifically, decision makers don't really address the concerns raised in the administrative proceedings,[139] while courts do not much probe whatever reason is given to disregard those concerns and are quite ready to leave decisions standing.[140]

In more than a way, bureaucrats and judges in some Southern European countries share the same culture grounded on a top-down model of administrative decision making.[141] This may be coupled with a neo-corporatist bend which seems to be at the heart of the Spanish choice to have the most important eNGOs represented in the Environment Assessment Council which is consulted on the elaboration of policies.[142] The same mindset, reinforced by a wide spread belief that authority cannot be challenged and by week civil society structure, is found in some Eastern European countries, such as Romania[143] and Hungary.[144]

The attitude of some Southern and Eastern European countries contrasts not just with that of jurisdictions long used to participation, like the Netherlands,[145] but also with that of more recent converts, like the United Kingdom where, following the Localism Act 2011, community groups have been given a major role not limited to consultation.[146] France itself reconsidered what was originally

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[138] Giulia Parola, 'The Aarhus Convention – The Legal Cultural Picture' in this book, II.B.b.2; see also Ánne Ryall 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book, § 3, stressing that the pushback against participation predates the crisis in Ireland; the same is true of Germany: Bilun Müller, 'The Aarhus Convention – The Legal Cultural Picture' in this book, II,2,e.

[139] E.g. Bogdana Neamtu and Dacian C. Dragos, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania', see footnote 4, 2.2.5.; Jorge Agudo González, 'The Implementation and Influence of the Aarhus Convention in Spain' in this book, § 3.2.d.

[140] Alessandro Comino, 'The application of the Aarhus Convention in Italy', in this book, 4.1.; the standard of review is a concern also to Ánne Ryall, 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book, § 5(2).

[141] See Jorge Agudo González, 'The Implementation and Influence of the Aarhus Convention in Spain' in this book, § 3.2.d.

[142] Jorge Agudo González, 'The Implementation and Influence of the Aarhus Convention in Spain' in this book, § 3.2.b; the French Grenelle Environment Roundtables by contrast seems to focus more on policy orientation: Giulia Parola, 'The Aarhus Convention – The Legal Cultural Picture' in this book, II.B.b.1.

[143] Bogdana Neamtu and Dacian C. Dragos, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania', see footnote 4, 1.1.3.

[144] Benedek Jávor and Zsolt Beke, 'Participation and Indifference' in Gyula Bandì (ed), *Environmental Democracy and Law*, see footnote 11, 243 ff.

[145] Barbara Beijen, 'The Aarhus Convention in the Netherlands' in this book, §§ 3.2.1, 3.2.2.

[146] Carol Day, 'United Kingdom' in this book, refFN84.

a very top-down approach, even if concerns are raised as to the effectiveness participation.[147]

Unsurprisingly, the specificities of each jurisdiction and their legal traditions show up stronger with reference to access to justice.[148] France has an 'objective' legality review system meaning that court scrutiny is considered to be beneficial for the general interest rather than just for the individual one. This inevitably leads to a quite generous approach to standing, including standing of NGO which was already recognised in 1906.[149] Jurisdictions having been influenced by the French 'objective' legality review model are still today, and very much independently from the Aarhus Convention, generally ready to give standing to eNGOs. This is for instance the case both with reference to Spain,[150] Portugal,[151] Belgium,[152] Romania,[153] and Italy.[154]

Quite independently from any influence from France, common law jurisdictions too are generally quite generous in allowing standing.[155] The same is true in Denmark[156] and, with qualifications, in Sweden.[157]

Germany (and Austria) instead stand out for a quite restrictive approach focused on individual rights as the basis of standing. Deep rooted cultural preferences – and convergent pressure from industry – still lead Germany to resist

[147] Giulia Parola, 'The Aarhus Convention – The Legal Cultural Picture' in this book, II.A and II.B.b.5.

[148] See also the conclusions of the comparative study by Mariolina Eliantonio and others (eds), *Standing up for Your Right(s) in Europe*, see footnote 24, spec. 62 ff and 119 ff; unlike the present study, that one also much focused on civil and criminal actions, with a similar divergent picture: *ibidem* 50 ff and 90 ff.

[149] Giulia Parola, 'The Aarhus Convention – The Legal Cultural Picture' in this book, III.B.b.2; see also Olivier Dubos, 'France' in Mariolina Eliantonio and others (eds), *Standing up for Your Right(s) in Europe*, see footnote 24, 254 ff.

[150] Jorge Agudo González, 'The Implementation and Influence of the Aarhus Convention in Spain' in this book, § 4.1.

[151] Alexandra Aragão, 'Portugal' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law,* see footnote 2, 351 ff.

[152] Luc Lavrysen and others, 'Belgium' in Mariolina Eliantonio and others (eds), *Standing up for Your Right(s) in Europe*, see footnote 24, 168 and 171 ff.

[153] Bogdana Neamtu and Dacian C. Dragos, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania', see footnote 4, 3.2.

[154] Alessandro Comino, 'The application of the Aarhus Convention in Italy', in this book 4.1; see also Roberto Caranta 'Italy' in Mariolina Eliantonio and others (eds), *Standing up for Your Right(s) in Europe*, see footnote 24, 398 ff.

[155] Carol Day, 'United Kingdom' in this book, refFN119; Ánne Ryall 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book § 4 and 4.2. REF FN 95 Yvonne Scannell, 'Public Participation in Environmental Decision-Making in Ireland' in Gyula Bandì (ed), *Environmental Democracy and Law,* see footnote 11, 210 ff.

[156] Peter Pagh, 'Denmark' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law,* see footnote 2, 276.

[157] Jan Darpö, 'Sweden' in Mariolina Eliantonio and others (eds), *Standing up for Your Right(s) in Europe*, see footnote 24, 542 ff.

wide access to courts.[158] The same cultural traditions seems to be at play in countries which have been influenced by the German approach, such as Croatia[159] and the Czech Republic.[160]

On the contrary in the Netherlands somewhat restrictive standing rules do not apply to NGOs even if the case law has become more demanding of lately requiring some link to the territory and the subject matter involved in a push to limiting access of NGOs whose main purpose is litigation.[161] A partially similar development to widen standing has taken place in Scotland thanks to changes in the case law: while it is still true that "nature itself may not have rights, civil society has the right to stand up for it".[162]

The case of the Netherlands and of Scotland shows how legal traditions may evolve because of changes in the set of values shared by the local legal community quite independently from outside influences. The ongoing resistance in Germany to the contrary may point to strong cultural forces countering those influences. The question is how long this may last.

Highlighting how traditions structure the legal systems, the organisation of the legal profession in common law countries, while generous on standing, normally leads to very high litigation costs which can put off even major e-NGOs.[163] Quite independently from a well-established legal tradition, the latter may also be the case in Romania, were hiring expensive lawyers is a tactic used to discourage litigation.[164]

Legal traditions or bureaucratic preferences are again relevant in limiting convergence.

5 Comparative conclusions

NGOs play a very relevant role in the protection of the environment in the EU.[165] Many of the cases discussed here have been brought by

[158] Bilun Müller, 'The Aarhus Convention – The Legal Cultural Picture' in this book, III, 2 a); Verena Madner, 'Austria' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law*, see footnote 2, 218.

[159] Lana Ofak, 'Croatia' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law*, see footnote 2, 250 ff.

[160] Vojtech Vomacka and Ilona Jancarova, 'Czech Republic' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law*, see footnote 2, 263 ff.

[161] Barbara Beijen, 'The Aarhus Convention in the Netherlands' in this book, § 4.

[162] Carol Day, 'United Kingdom' in this book, refFN121.

[163] Ánne Ryall 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book § 4.

[164] Bogdana Neamtu and Dacian C. Dragos, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania' see footnote 4, 3.3.5.

[165] See also Case C-530/11 *Commission* v *United Kingdom*, para 47; it might be discussed whether what are seen here in action are EU-NGOs rather than coalitions of domestic NGOs: see Christopher Rootes, 'Is

eNGOs.[166] They have brought many other relevant cases which were not analysed here because they did not turn around on issues specifically focusing on their being active participant in administrative procedure or their standing to challenge decisions, acts or omission affecting the environment.[167]

Empowerment of eNGOs is a necessity in the logic of the Aarhus Convention and of environmental law generally.[168] As it was already recalled, some EU Member States still very much think of remedies – and to some extent of participation – as tools to protect individual human rights. The Aarhus Convention goes past this tradition. The point was very well articulated by Advocate General Kokott in her conclusions in *Edwards*, a case on costs of judicial proceedings.[169] She pointed out that "legal protection under the Aarhus Convention goes further than effective legal protection under Article 47 of the Charter of Fundamental Rights [...]. Article 47 expressly relates to the protection of *individual* rights".[170] On the contrary, legal protection in environmental matters "generally serves not only the individual interests of claimants, but also, or even exclusively, the public".[171]

Although the general principle of effective judicial as developed by the Court of Justice has a much wider scope than the protection of *individual* rights, encompassing not just natural but also legal persons and thus in principle NGOs,[172] this is still very relevant since the public might also include future generations which are completely left out in any scheme based on a traditional

there a European environmental movement?' in John Barry, Brian Baxter and Richard Dunphy (eds), *Europe, Globalisation and Sustainable Development*, see footnote 4, 47 ff.

[166] This was already the case pre-Aarhus, see Case C-435/97 *World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others*.

[167] Recent cases of this latter type are Case C-404/13 *R* ex parte *ClientEarth* v *The Secretary of State for the Environment, Food and Rural Affairs*.

[168] Marcel Szabó, 'Public Participation - Human Right or an Instrument of International Administrative Law' in Gyula Bandì (ed), *Environmental Democracy and Law*, see footnote 11, 110 ff. This even if lobby groups might be a reason for concern: *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters*, see footnote 16, 10; this echoes worries widespread in the US: see Sidney Shapiro and Richard Murphy, 'Public Participation Without a Public: The Challenge for Administrative Policymaking', see footnote 21, 492.

[169] Case C-260/11 *Edwards and Pallikaropoulos v Environment Agency and others*; for more detailed information on the background to the case see Carol Day, 'United Kingdom' in this book, refFN146.

[170] Case C-260/11 *Edwards and Pallikaropoulos v Environment Agency and others*, para 39 (emphasis in the original).

[171] Ibid, para 40.

[172] For the definition of 'legal person' see Mariolina Eliantonio and others (eds), *Standing up for Your Right(s) in Europe*, see footnote 24, 19 ff. Which in turn does not means that people should be left at the door: see Marcel Szabó, 'Public Participation - Human Right or an Instrument of International Administrative Law' in Gyula Bandì (ed), *Environmental Democracy and Law*, see footnote 11, 97 ff.

individual rights centred approach.[173] As was already pointed out, "Recognition of the public interest in environmental protection is especially important since there may be many cases where the legally protected interests of particular individuals are not affected or are affected only peripherally. However, the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations".[174]

In terser terms, the Court of Justice stressed the need to take into account "both the interest of the person wishing to defend his rights and the public interest in the protection of the environment" in assessing the reasonableness of the costs of litigation.[175] This is because "members of the public and associations are naturally required to play an active role in defending the environment".[176]

Up to now EU law – and the EU Courts – might be seem as empowering eNGOs against the Member States rather than against the EU institutions, and this even more so when access to justice is considered. Because EU law has to a large extent – and further developments concerning access to justice are foreseeable – 'domesticated' the rules of the Aarhus Convention, these rules have been translated into EU law provisions. The notions used and sometimes and to a certain extent defined in the Aarhus Convention have become EU law notions.[177] *Edwards* is again a very good case in point. The Court of Justice was asked by the UK Supreme Court help in understanding the notion of 'non-prohibitively expensive' remedy, which is not defined in the Aarhus Convention.[178] The Court of Justice made it clear that "the need for the uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and

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[173] On the problem of future generations see Gyula Bandì, 'Introduction into the Concept of 'Environmental democracy' in Gyula Bandì (ed), *Environmental Democracy and Law*, see footnote 11, 8, and, with specific reference to the experience of the Hungarian Ombudsman for Future Generations, Fülöp Sándor, 'Clarification and Networking. Methodologies for an Institution Representing Future Generations' and István Sárközy, 'The Hungarian Parliamentary Commissioner for Future generations' both in Gyula Bandì (ed), *Environmental Democracy and Law*, see footnote 11, 155 ff and 273 ff respectively.

[174] Case C-260/11 *Edwards and Pallikaropoulos v Environment Agency and others*, para 42.

[175] Ibid, para 39.

[176] Ibid, para 40; see also Jan Darpö, 'Article 9.2 of the Aarhus Conventions and EU Law', see footnote 24, 372.

[177] On the importance of this aspect please refer to Roberto Caranta 'Les exigences systémiques dans le droit administratif de l'Unione européenne' in Claude Blumann and Fabrice Picod (eds), *Annuaire de Droit de l'Union Européenne 2012* (Editions Panthéon Assas, 2014) 21.

[178] The case law on this aspect is discussed in more details by Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 4.3 AFTER FN 175.

the purpose pursued.[179] This means that, even if the Aarhus Convention does not "specify how the cost of judicial proceedings should be assessed in order to establish whether it must be regarded as prohibitively expensive, that assessment cannot be a matter for national law alone".[180]

The 'harmonising role' of EU secondary law implementing the obligations flowing from the Aarhus convention coupled with an ever richer case law of the Court of Justice interpreting those provisions has also touched upon rules concerning the role of e-NGOs sketching some of the lines of an emerging *jus commune* in environmental matters which is spilling from substantive to – both administrative and to some extent judicial – procedural law limiting the so called procedural autonomy of the Member States.[181] These findings are in line with those of political scientists concerning the progressive 'Europeanisation' of EU environmental law and policy.[182]

Differences still remain among domestic jurisdictions. Some of them are due to the way the legal culture has developed some core concepts, such as those opening to doors to access to court. Bureaucratic preference are relevant too. In the end the piecemeal implementation of the obligations following from the Aarhus Convention has probably not helped in fostering a more participatory legal, bureaucratic and in the end political culture,[183] so much so that awareness is still a problem in some regions.[184]

In practice the role of eNGOs is yet not playing the same all over Europe. This is one reason calling EU institutions to finally adopt general rules on access to justice in environmental matters binding on the Member States to fully enlist public interest litigants and the domestic courts in enforcing environmental law.[185] Access to justice is the pillar of the Aarhus Convention not just helping the other pillars stand but ensuring the effectiveness of EU environmental

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[179] Case C-260/11 *Edwards and Pallikaropoulos v Environment Agency and others*, para 38; Case C-204/09 *Flachglas Torgau GmbH v Bundesrepublik Deutschland*, para 37 is referred to.

[180] Ibid, para 40; see also, concerning the notion of 'public authority' Case C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and Others*, para 42.

[181] As remarked by Jan H. Jans, 'Judicial Dialogue, Judicial Competition and Global Environmental Law' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law,* see footnote 2, 145, EU substantive environmental law is highly harmonised; procedural law (and especially judicial procedural law) is still to some extent the preserve of the Member States.

[182] Duncan Liefferink, Andrew Jordan and Jenny Fairbrass, 'The Europeanisation of national environmental policy: a comparative analysis' in John Barry, Brian Baxter and Richard Dunphy (eds), *Europe, Globalisation and Sustainable Development*, see footnote 4, 147 ff.

[183] For the difficulties flowing from this approach see for instance Jorge Agudo González, 'The Implementation and Influence of the Aarhus Convention in Spain' in this book, § 3.2.a.

[184] Ánne Ryall 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book, § 2 (in fine).

[185] See also the recent open letter some leading e-NGOs by http://www.eeb.org/index.cfm/library/letter-to-european-commission-on-access-to-justice-directive/, accessed 28 september 2016.

law.[186] Consequently eNGOs pursuing the objective of protecting the environment need to be given "standing thus ensuring an environmental watchdog role".[187] Enforcement through infringement procedures is not only slow, but depends on the stretched resources of the Commission leading to discretionary decisions as to which cases deserve priority.[188] More generally pure judicial legislation is haphazard, depending on which cases are brought, and when, and is due to leave gaps.[189]

In this framework, specific provisions are to concern eNGOs, including on issues such as minimum duration of past activities, minimum number membership, structure, registration or accreditation, etc.[190] For instance at present seniority requirements as a condition to the participation of eNGOs in administrative proceedings vary very much, from no requirement[191] to one year in Ireland[192] and two years in Spain.[193] One might question whether all these approaches are in line with the aim of the wide access possible should be kept in mind.[194] Rules on legal aid to the benefit of eNGOs should also be considered in the light of *Edwards*.[195] This should include the costs related to expertise.[196] Wide access should also guide in choosing between criteria privileging large, well-established e-NGOs and opening the game to every association, including small

[186] Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 4.

[187] Ibid, 4.

[188] Ánne Ryall 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book § 5(1).

[189] Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 4.3 and before ref to fn 250.

[190] Deeper analysis in Adam Daniel Nagy, 'The Aarhus- *acquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 4.3. fn 191 ff, and Mariolina Eliantonio, 'The Proceduralisation of EU Environmental Legislation', see footnote 12, 112 ff.

[191] In France the association must have existed before the decision was taken: Giulia Parola, 'The Aarhus Convention – The Legal Cultural Picture' in this book, III.B.b.2

[192] Ánne Ryall 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book § 4.2.

[193] Jorge Agudo González, 'The Implementation and Influence of the Aarhus Convention in Spain' in this book, § 3.2.a

[194] See the analysis by Jan Darpö, 'Synthesis Report of the Study on the Implementation of Article 9(3) and 9(4) of the Aarhus Convention in Seventeen of the Member States of the European Union', see footnote 24, 193 ff.

[195] Notwithstanding Case C-260/11 *Edwards and Pallikaropoulos v Environment Agency and others*, costs are still a problem in some countries. Bogdana Neamtu and Dacian C. Dragos, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania' see footnote 4, 3.3.5; for a detailed analysis see Carol Day, 'United Kingdom' in this book, refFN153.

[196] Which are a problem for instance in Portugal: Alexandra Aragão, 'Portugal' in Jan H. Jans, Richard Macrory and Angel-Manuel Moreno Molina (eds), *National Courts and EU Environmental Law*, see footnote 2, 353.

ones who might be better connected to local realities according to what is already the practise in countries such as Spain.[197] At the same time, as the Romanian report shows, the role of large 'foreign' eNGOs may be very relevant in places where the structuring of civil society is still in its infancy.[198]

While the US experience should make as cautious about the risk that participation is hijacked by the high and (economically) mighty, it seems that general interest oriented NGOs are instead those benefiting from open and effective participation rules in the EU.[199]

New EU rules on access to justice – and a more general codification of piecemeal environmental legislation – are needed also because, besides EU law, other elements of convergence are at work, and not always for good. Whichever the jurisdiction, technocrats resent participation.[200] One may assume that resentment is stronger with NGOs which may more easily challenge the technocrats' expertise.[201] Moreover, industry and many politicians[202] are resisting civil society involvement seen as the source of delays in the completion of projects, an attitude strengthened by the crisis but already strong before.[203]

Rules will not and need not to lead to uniformity throughout Europe. Neither a common legal culture requires uniformity. It just needs near sameness of principles, basically convergent interpretation techniques and sufficiently similar rules to make it sensible for domestic actors to look to how problems are solved in neighbouring jurisdictions.[204]

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[197] Jorge Agudo González, 'The Implementation and Influence of the Aarhus Convention in Spain' in this book, § 4.1; the case for transboundary public participation is pleaded by Marcel Szabó, 'Public Participation - Human Right or an Instrument of International Administrative Law' in Gyula Bandì (ed), *Environmental Democracy and Law,* see footnote 11, 108.

[198] Bogdana Neamtu and Dacian C. Dragos, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania' see footnote 4, 1.1.3 and 2.2.3.

[199] The US experience is criticised by Sidney Shapiro and Richard Murphy, 'Public Participation Without a Public: The Challenge for Administrative Policymaking', see footnote 21, esp. 501 ff; the risk seems rather to lie outside participation rules in shady lobbying: Roberto Caranta 'Civil Society Organisations', see footnote 1, 68 ff.

[200] Maria Lee and others, 'Public Participation and Climate Change Infrastructures', see footnote 19, 43 ff.

[201] Including in courts: see again the conclusions to Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd,* para 62.

[202] This seems to be the case in Ireland: see Yvonne Scannell, 'Public Participation in Environmental Decision-Making in Ireland' in Gyula Bandì (ed), *Environmental Democracy and Law,* see footnote 11, 194.

[203] See e.g. Bilun Müller, 'The Aarhus Convention – The Legal Cultural Picture' in this book, II,2,e.; Ánne Ryall 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book, § 3.

[204] Please refer to Roberto Caranta 'Pleading for European Comparative Administrative Law: What is the Place for Comparative Law in Europe?' in Kars J. de Graaf, Jan H. Jans, Sacha Prechal and Rob J.G.M. Widdershoven (eds), *European Administrative Law: Top-Down and Bottom-Up*, see footnote 45, 155.

We are somewhere halfway. When the river will be crossed it will become very difficult for the Court of Justice not to reconsider some of its more restrictive approaches to standing.

CHAPTER 15

The Impact of the Convention of Aarhus on the Emerging European Legal Culture

Anna Gerbrandy & Laurens van Kreij

1 Introduction[1]

The contributions discussing Aarhus in several Member States have provided a picture of the implementation process and the influence of the Aarhus Convention for each Member State. This way, its implementation in the United Kingdom, Ireland, the Netherlands, France, Spain, Italy, Germany, Romania and Sweden have been mapped. A comprehensive account of the Aarhus Convention's influence may be observed by reading these contributions.

The first 'medial' chapter has discussed the legal characteristics of the implementation process in the European Union for each pillar of the Aarhus Convention. Three comparative chapters – a chapter for each Convention pillar – add to the picture by providing insight into the different ways the Convention has been incorporated into national law in these member states. The current chapter – the second of the two 'lateral' chapters – will continue to build upon the foundations thus laid. It discusses the influence of the Aarhus Convention on a European legal culture. As resolving that discussion conclusively is nearly impossible, the aim of this contribution is more modest. It tries to expose and analyse some elements of the convergence of the implementation of the Aarhus Convention and a European legal culture.

To do so, first the concept of European legal culture in general is analysed in section 2. Then, an outline of the legal culture as embodied by the Aarhus convention is the object of section 3.Some threads, as shaped by – amongst others – the authors contributing to this book, of the Conventions' influence on legal culture are discussed in section 4. The combination of these three analyses should provide insight into the question of whether the Aarhus convention has been influential in shaping the European legal culture generally or whether its influence has been very limited (section 5). We conclude in the last section 6.

2 European legal culture

The concept of 'legal culture' is a bewildering one. The term can refer to quite diverse ideas: sometimes as an 'extended understanding of the law' or 'living law', sometimes as legal family.[2] An extensive definition might be 'public knowledge of and attitudes and behaviour patterns towards the legal system'.[3] It comprises both an internal element and an external element. The first element relates to the culture of society's members as specialists being involved and participating in the legal system, such as lawyers and judges. The

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[2] Ralf Michaels, 'Legal Culture' in Jürgen Basedow, Klaus J Hopt and Reinhard Zimmerman (eds), *Max Plank Encyclopedia of European Private Law* (Oxford University Press 2011) 1.

[3] Lawrence M. Friedman, *The legal system: a social science perspective* (Russell Sage Foundation 1975) 193.

external element relates to how the legal system is viewed by others.[4] This extensive definition of a legal culture encompasses phenomena as 'legal terminology, legal sources, legal methods, theory of argumentation, legitimizing of the law and common general ideology'.[5] Butthe concept of 'legal culture' may also mean to relate to a discussion of the relationship between law and culture, e.g., law's dependence on culture; to law's recognition of culture, e.g., culture's (in) visibility for the law; law's domination of culture, e.g., law as creating a cultural group; a cultural defence, e.g., in criminal law; law as a cultural projection, e.g., law portrayed in popular culture; or law as protecting cultural heritage.[6]

A broad understanding of legal culture entails 'relatively stable patterns of legally oriented social behaviour and attitudes. The identifying elements of legal culture range from facts about institutions, such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behaviours, such as litigation or prison rates and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities'.[7]

The country reports discuss the national legal systems vis-à-vis the Aarhus Convention both in a technical manner and in the form of ideas, values, and opinions. They describe the way in which the legal norms of the Aarhus convention have been implemented, whether and how this influenced the behaviour of public authorities, citizens and their collectives. These patterns are then taken as indications for the extent in which particular values and mentalities are embodied by the domestic legal culture.[8]Therefore, it is the latter, broad concept – stable patterns of legally oriented social behaviour and attitudes – that is used in this contribution.

The perspective will be an internal one: the perspective of legal specialists. Not only are the contributions to this volume from lawyers, but the content of their contributions relates primarily to the implementation and influence of the Aarhus Convention on legal institutions. Their criticisms are voiced and shaped by the fact that they are lawyers discussing the legal implications of the Aarhus Convention in a particular legal system. The external perspective, i.e. the values, beliefs, attitudes or actions of *non-specialists*, plays a minor role in the discussion.

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4 Evandro Menzes de Carvalho, 'Culture and Legal Culture: A Semiotic Approach' in Evandro Menzes de Carvalho (ed), *Semiotics of International Law: trade and translation* (Springer 2011) 11. He further breaks this down in a path that studies the material form of culture (such as actual practices) and immaterial form of culture (such as a 'body of knowledge').

5 Mark van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' [1998] ICLQ 17, 495-536.

6 Discussed by Roger Cotterrell, 'Law in Culture' [2004] Ratio Juris 17, 1-14.

7 David Nelken, 'Using the Concept of Legal Culture' [2004] AJLP 29, 1-26, who identifies two problems in employing the concept of legal culture.

8 On how legal norms shape legal culture, see Genevieve Helleringer and Kai Purnhagen, *Towards a European Legal Culture* (Beck 2014) 10-12.

There are three aspects to be discussed beforehand. The first problem related to the concept of legal culture is its purported use. What are scholars referring to when invoking the concept of legal culture? Are they engaging in a descriptive analysis, an explanatory analysis or an evaluative analysis?

A descriptive analysis, for this publication, would be to describe the influence of Aarhus on (elements of) European legal culture. This is the main part of this contribution: it is a demonstration of some gradual changes in the understanding of legal culture, without pretending to be exclusive. An explanatory analysis, as is sometimes described, would either use legal culture as explanation for a legal factor or aspect of the law, or would use the concept as 'needing explanation'.[9] In this contribution the question might shift to the focus of the 'Aarhus legal culture' and explain why this would have a different 'feel', distinct from 'European legal culture'. This element will only be implicitly dealt with in this contribution. The external perspective – which would widen the perspective to asking whether the values and perceptions towards the legal system of the public might have changed under the influence of (the implementation of) the Aarhus Convention – plays only a minor role in the discussion, as explained above. An evaluative analysis would add, I would suggest, a third layer: how can this influence of the Aarhus Convention on European legal culture be evaluated, and on the basis of which criterion is such evaluation possible? It is possible to assess whether a European legal culture currently lives up to the values the Aarhus convention relies upon. This is part of the aim of this contribution, albeit a secondary one: it rather aims at demonstrating whether the legal culture of the Aarhus convention has, through implementation by the signatory states and the European Union, contributed to a common understanding of its values throughout the states discussed. This relates very much to the unit of analysis.

The second aspect concerns the unit of analysis.[10] In this book the unit of analysis is both the nation-state – as in the country chapters on several jurisdictions, e.g., Scotland as separate from England which concerns a slightly different unit – and Europe in this concept of 'European legal culture'.

The European unit refers to the smaller unit of the European Union and its Member States. As they are both members of the Aarhus Convention there is a direct line of influence (Aarhus – EU – Member States) and an indirect line of influence (Aarhus – Member States – EU) within this unit. The justification for taking the influence on European legal culture (or the legal culture of the EU) can thus be found in the fact that the EU and its Member States are parties to the Aarhus Convention.

The justification can also be found in the idea of Europeanisation of law, which may be defined as the gradual movement of national laws being influenced by the EU and by each other, moving towards a 'unified' (or less different)

9 See especially David Nelken, 'Using the Concept of Legal Culture', see footnote n 7, 21.

10 Ibid, 12.

coherent system of Europeanised national law of Member States.[11] This Europeanisation, in turn, relates strongly to the idea of a European *ius commune*.[12] This can be understood as a description of reality, in the sense that the legal phenomena and principles which are to a certain degree common to national systems, are threads of a 'common law', law common to European states, which can be found already in medieval civil law.[13]It can also be understood, if taken as European culture, as a shared value-system.[14]When seen from a political and symbolic point of view however, Europeanisation and a *ius commune* also carry a strong normative content as in the sense that a further Europeanisation – of national legal systems or national legal culture – based on a shared *ius commune* is perceived as a loss of sovereign national powers or constitutional identity or culture.

Europeanisation in this sense is strongly linked to the building of the European project. Europeanisation of national law is seen as a requirement or instrument to shape the EU,[15]which' weight is carried by the integration-through-law idea.[16] Europeanisation, unification, harmonization and codification are all instruments in this greater project. The legal part of Europeanisation as a process could be seen as a part of the greater idea of Europeanisation of culture and a European identity.

However, tension exists between the centralizing forces of Europeanisation and the idea of national identity and diversity.[17] Therefore it seems important not to confuse a descriptive and explanatory assessment of the influence of Aarhus on European legal culture (and Europeanisation of European law as part of that European legal culture) and the normative assessment of that description.

The third aspect relates to this. There is a difference between the Europeanisation of law and European legal culture. The country reports relate mostly

[11] In the context of the influence of Union law on the public law of Member States in general, see Jan H. Jans and others, *Europeanisation of Public Law* (Europa Law Publishing 2015) 4. On Europeanisation in general, see Claudio M.Radaelli, 'Europeanisation: Solution of problem?' [2004] EIoP 8.

[12] Anna Gerbrandy, *Convergentie in het mededingingsrecht: de invloed van het EG-recht op materiële toepassing, toegang, bewijs en toetsing bij de Nederlandse mededigingingsbestuursrechter, bezien in het licht van effectieve rechtsbescherming*(Boom JuridischeUitgevers 2009) 77-83.

[13] Peter Stein, *Roman Law in European History* (Cambridge University Press 1999) 74, 75; Peter De Cruz, *Comparative Law in a Changing World*(Cavendish Publishing Limited 1995) 57-58.

[14] But see for critique also Ralf Michaels, 'Legal Culture', see footnote n 2, 4.

[15] Mauro Cappelleti, Monica Seccombe and Joseph Weiler, 'Integration Through Law: Europe and the American Federal Experience' in Mauro Cappelleti, Monica Seccombe and Joseph Weiler (eds), *Integration Through Law* (W. de Gruyter 1986) 4; Renaud Dehousse and Joseph Weiler, 'The Legal Dimension'in William Wallace (ed), *The Dynamics of European Integration* (Pinter 1990) 243.

[16] Mauro Cappelleti and Joseph Weiler, *Integration Through Law* (W. de Gruyter 1988); Antoine Vauchez, *'Integration-through-Law' Contribution to a Socio-history of EU Political Commonsense* (EUI Working Paper 2008) 1. For critique, see Daniel Augenstein, EmiliosChristodoulidis and Sharon Cowan, *'Integration through Law' Revisited: The Making of the European Polity* (Ashgate 2013).

[17] Leonard Besselink, 'National and constitutional identity before and after Lisbon'[2010] ULR6, 36-38.

to the influence on the legal systems of the Member States. This contribution therefore certainly encompasses the Europeanisation of national laws. As the law is part of legal culture – being phenomena or 'institutes' of legal culture – the Europeanisation of national laws has implications, or is in itself part of European culture. However, it is difficult to differentiate between the various concepts of a European legal culture and Europeanisation of legal culture. We believe that for the purposes of this contribution, which is concerned mostly with discussing a movement or trend, they seem to overlap. In another, conceptual discussion however, the concepts need to be distinguished.

Above explanations entail the following for the remainder of this contribution. We will map the influence or contribution of the Aarhus Convention on the Europeanisation of law. We will try to find strands of reasoning that go beyond the Europeanisation of law and discuss the influence of the Aarhus Convention on a supposed emerging European legal culture. Doing so, it isuseful to discuss the culture of the Aarhus Convention itself and where it might have a different 'feel' to it, separated from the EU and its Member States.

3 The legal culture of the Aarhus Convention

Legal norms may shape a legal culture.[18]The legal provisions of the Aarhus Convention and its pillars are the black-letter result of certain ideas, values and mentalities. Hence, the Aarhus Convention may be said to have a legal culture of its own.

The parties to the Aarhus Convention have recognized that in order to secure and enhance human well-being, and the protection of basic human rights connected thereto, protection of the environment is key.[19]The protection of human well-being, human rights and – functional thereto – the protection of the environment, are aims, goals or aspirations which do belong to the legal culture of the Convention. Protection of the environment is, however, not an obligation binding upon the parties to the convention. The norms that *are* binding upon parties, however, flow from these aspirations. The provisions in the Convention which do contain obligations and are binding upon the parties, aim at achieving the realisation of the abovementioned principles of environmental protection. They may be divided into three pillars.

The first pillar obliges the parties to guarantee effective access to information. It does so by obliging the 'passive' disclosure of information on request,[20] and the 'active' collection and dissemination of environmental

[18] Ralf Michaels, 'Legal Culture', see footnote n 2, 3; Genevieve Helleringer and Kai Purnhagen, 'On the Terms, Relevance and Impact of a European Legal Culture'in Genevieve Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture* (Beck 2014) 10-12.

[19] Aarhus Convention, Preamble and art 1.

[20] Aarhus Convention art 4.

information.[21]This pillar serves to equip citizens with the necessary environmental information, to an extent in which they can effectively fulfil their participatory role in environmental decision-making.[22]Secrecy, openness and various degrees in which they appear, are notions that *Grashof*, in the comparative chapter on the first pillar in this book, uses to describe and characterize the legal culture related to access to information within the several member states.[23] It is therefore convenient to describe the first pillar of the Aarhus convention in the same way. The Convention promulgates openness to a wide degree.[24] It insists, however, not on total openness. Instead, transparency may be the degree of openness with which we may characterize the obligations under first pillar, as also indicated by the preamble of the Convention. Fulfilment of these obligations by the Member States may lead to a legal culture in which environmental information possessed by the state can be accessed and is disseminated in a *transparent* manner: the public may effectively gather most of the environmental information, although such access is conditional upon requirements and in some cases may be refused.[25]This transparency may be functional for raising public awareness, but mainly serves public participation under the second pillar.

The second pillar obliges the parties to guarantee effective public participation.[26]It may be useful to characterize the degree of public participation by referring a degree of inclusiveness, or to equal co-decision on the one hand, and to purely autonomous decision-making by the public authority on the other. The second pillar strives to achieve a maximum amount of co-decision. Arguments put forward by the public must be duly assessed and balanced against all other interests.[27]Co-decision, however, in a sense where the public is guaranteed to have its opinion influence the outcome of a decision, is not assured by the Convention. It is the public authority that eventually decides, because of balancing different interests. The second pillar contains various instruments to enhance involvement of the public, by means of transparent and effective co-decision, such as timely and effective notification of both the proposed activity and the decision-making procedure, reasonable access to procedural information, and an opportunity to have its voice heard. A legal culture that complies with the obligations contained by the second pillar of the Aarhus Convention, is

[21] Aarhus Convention art 5; ...Nagy, 'The Aarhus-*aquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 2.

[22] ... Nagy, 'The Aarhus-*aquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 2.

[23] FranziskaGrashof, 'Towards a common European legal culture under the 'first pillar' of the Aarhus Convention?', 2; Ralph Hallo, 'Directive 90/313/EEC on the freedom of access to information on the environment: its implementation and implications' in Ralph Hallo (ed) *Access to environmental information in Europe: the implementation and implications of Directive 90/313/EEC* (Kluwer International 1996).

[24] Aarhus Convention art 4 (1, 2) and 5.

[25] Aarhus Convention arts 4 (3, 4).

[26] Aarhus Convention arts 6, 7, and 8.

[27] Aarhus Convention arts 6 (8) and 8 (last sentence).

one in which the public opinion is duly considered, by profoundly balancing the interests put forward by the public against all other interests involved. Together with the first pillar, this may, according to the preamble, further the accountability in environmental decision-making, further transparency in decision-making, strengthen the legitimacy for decisions on the environment, enhance the quality and implementation of the decisions, and may raise public awareness of the environment.

As *Poto* illustrates, co-decision is embodied not only by the Convention's provisions, but also by the negotiations and drafting prior to its establishment. International environmental organizations, being neither parties nor signatories, were actively involved in the preparation of the Convention. She describes this as a 'unique characteristic among environmental treaties'.[28]

The third pillar obliges parties to guarantee judicial protection in environmental matters.[29]The former two pillars contain diverse mechanisms to make the right to access to information and the right to participation in environmental decision-making effective. The third pillar adds to this, as it aims to establish judicial review mechanisms to guarantee the effectiveness of the abovementioned rights by restoring breaches and sanctioning violations of the Convention's rights.[30]The legal culture of the Aarhus Convention is thus characterized mainly by the values as contained by the two pillars discussed before, and the third pillar does not distinctively add to its legal character.

It can be noted that the diverse ideas, values, aspirations and mentalities which can be seen, may overlap and may be, in multiple ways, related to each other. Transparency and the inclusion of public interests in the decision-making process are the core values embodied by the Convention's pillars, to be made effective by judicial protection. Thereby, the Convention aims to do more: to enhance accountability of government authorities vis-à-vis the public, the enhancement of legitimacy for the decisions of those authorities, and awareness among citizens – and the public in general – about their environment and governmental decisions having an impact thereon. The empowerment of the public and enhancement of an environmental democracy,[31] serve the ultimate aim is to protect the environment and thereby further human wellbeing and the protection of human rights.

The country reports in this book show to what extent these notions are embodied by legal cultures before Aarhus and thereafter. The respective

[28] Margherita Poto, 'The Second Pillar of the Aarhus Convention and beyond: comparative analysis of the implementing systems *vis-à-vis* their legal culture' in this book, 4.

[29] Aarhus Convention art 9.

[30] ...Nagy, 'The Aarhus-*aquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 15; Dacian C.Dragos andBogdanaNeamtu, 'The access to justice under the Aarhus Convention: the comparative view',1.

[31] Stephen Stec, 'EU Enlargement, Neighbourhood Policy and Environmental Democracy' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (the Avosetta series 9, Europa Law Publishing 2011) 41.

comparative chapters show, per pillar, the extent in which the cultures have thereby grown towards each other, and to what extent these respective notions are now common to multiple national legal cultures. The next section will provide for a synthesis and will demonstrate whether – and if so, to what extent – the Aarhus Convention has been influential in shaping a common European legal culture.

4 The Aarhus Convention's influence on European legal culture

In order to see whether the legal cultures have grown towards each other, a comparison must be made between the legal culture(s) before and after the ratification of the Aarhus Convention. The comparison is structured in a way that resembles the third section.

4.1 Transparency

Before the Aarhus Convention was ratified, the presence of transparency in access to environmental information knew two stages. These stages were separated by Directive 90/313/EEC, which provided for norms on access to environmental information already in 1990.[32]

Before Directive 90/313/EEC, the legal systems analysed in the chapters of this book show a wide diversity of rules on access to environmental information and rules on general access to information held by public authorities. E.g., Sweden already had a legal framework on access to environmental information, and openness on the side of public authorities can said to be a tradition within their legal cultures.[33] Germany however, had no such framework.[34] The other systems seem to lie between these two extremes.[35] Hence, the notion of transparency on the side of public authorities was very different and not common at all in the legal cultures analysed in the earlier chapters.

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[32] Council Directive (EEC) 90/313 on the freedom of access to information on the environment; see also... Nagy, 'The Aarhus-*aquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book' in this book.

[33] FranziskaGrashof, 'Towards a common European legal culture under the 'first pillar' of the Aarhus Convention?' in this book, p. 3.

[34] BilunMüller 'The Aarhus Convention – The Legal Cultural Picture' in this book, p. 1-2 and 6; Franziska Grashof,'Towards a common European legal culture under the 'first pillar' of the Aarhus Convention?' in this book, p. 4.

[35] Franziska Grashof, 'Towards a common European legal culture under the 'first pillar' of the Aarhus Convention?' in this book, 2& 5.

Directive 90/313/EEC marked a 'radical break'.[36] It obliged some states to enact provisions on environmental information which they did not have before, and others to widen their narrow provisions.[37]After implementation of the Aarhus Convention, all European Member States had a framework of rules on access to environmental information.The legal cultures which were previously marked by secrecy, changed. Thereby, the previously divergent national legal cultures grew closer to each other; however, sharp contrasts in the legal cultures persists as the effectuation of legal provisions differs among countries. France and Sweden, for example, had a culture that seemed to reflect the legal provisions of Directive 90/313/EEC, while the German and Italian legal cultures of secrecy have shown a limited sensitivity to the new legal rules. Due to Directive 90/313/EEC, a minimal though rudimental form of transparency can said to be common to the legal cultures of the states under consideration.[38]

The provisions of the Aarhus Convention and ofthe corresponding Directive 2003/4/EC[39]go further than Directive 90/313/EEC.By adopting the Aarhus convention, the states chose to 'strive for more openness than before', and have reinforced 'the foundation for the development of a common European legal culture' that was laid by Directive 90/313/EEC.[40]Member States had to broaden, extend and strengthen the already applicable rules on access to environmental information which pushed their legal cultures to develop towards those that were already sufficiently transparent. Thereby, the first pillar of the Aarhus Convention and Directive 2003/4/EC have not initiated, but fostered the growth towards a common legal culture of transparency on environmental information. *Grashof* notes that the effectiveness of the provisions in the Member States differs among them.[41]In sum, despite substantial legislative improvement throughout the states discussed, legal provisions' effective influence on the values, ideas, behaviour or attitudes of the public and the authorities remain very diverse.

4.2 Public Participation

Multiple states had legal frameworks on public participation in general administrative decision-making prior to 1990. Germany, for example, already had a tradition of public participation in individual decision-making,

[36] Ralph Hallo, 'Directive 90/313/EEC on the freedom of access to information on the environment: its implementation and implications', see footnote n 23, 1.

[37] Franziska Grashof,'Towards a common European legal culture under the 'first pillar' of the Aarhus Convention?' in this book, 5.

[38] Ibid, 8.

[39] European Parliament and Council Directive (EC) 2003/4 on public access to environmental information and repealing Council Directive 90/313/EEC.

[40] Franziska Grashof, 'Towards a common European legal culture under the 'first pillar' of the Aarhus Convention?' in this book, p. 8.

[41] Ibid, 17 &19.

while participation in the development of environmental plans and normative instruments did not usually occur.[42] Ireland, on the other hand, has a long and proud tradition of public participation in environmental matters.[43]A substantial involvement of the public in decision-making by public authorities on issues of a *general* administrative nature was already common to the national legal systems and their cultures, albeit in very diverse traditions. Mostly after 1990, the participatory role of the public asserted itself also in environmental matters. Although the public's role seemed a merely consultative one, public deliberation gained more weight and public awareness rose. One cause of this development probably lies in the earlier versions of the EIA directive[44] and the SEA directive,[45]which already contained provisions guaranteeing a consultation of the public in the assessment of the environmental impact of certain public and private projects. Endogenous domestic factors may be a second reason. A trend towards a process of environmental decision-making in which the public's opinion is considered is common to the states and their legal cultures.

Aarhus and the implementing European directives, again, induced legal action in many states. Overall, the legal frameworks of the countries analysed in this book seem to be in line with the Aarhus obligations.[46] The effectiveness of these provisions, however, has been contested.[47]They seem to have barely improved administrative and public attitudes towards public participation; often little value is attributed to public considerations; public hearings are badly announced and timeframes seem insufficient. Non-governmental organizations (NGOs) seem to be aware of their participatory rights and often exercise them. Overall public awareness is, however, conceived as suboptimal, which is sustained probably by a general distrust in public administration. In most legal cultures, the public does not have an adequate participatory role in environmental decision-making, when evaluated by the aims of the Aarhus convention. Aarhus has thus led to common legal cultures only to the extent that the legal frameworks contain adequate provisions on participatory rights. Despite the fact that a common legislative minimum-standard is now in place throughout the Member States discussed in this book, there is substantial reason to believe that the Convention of Aarhus has not yet shaped a single, solid and unified common

[42] BilunMüller'The Aarhus Convention – The Legal Cultural Picture. Country report for Germany' in this book, 10.

[43] See AineRyall, 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in this book, 9-10.

[44] Council Directive (EEC) 85/337 on the assessment of the effects of certain public and private projects on the environment.

[45] Council Directive (EEC) 92/43 on the conservation of natural habitats and of wild fauna and flora.

[46] Margherita Poto, 'The Second Pillar of the Aarhus Convention and beyond: comparative analysis of the implementing systems *vis-à-vis* their legal culture', 12.

[47] Margherita Poto, 'The Second Pillar of the Aarhus Convention and beyond: comparative analysis of the implementing systems *vis-à-vis* their legal culture', 28;see also Franziska Grashof, 'Towards a common European legal culture under the 'first pillar' of the Aarhus Convention?' in this book, 11.

attitude or behaviour towards public participation in environmental decision-making. Change with regard to this aspect in the legal cultures of the Member States, however, is underway and has been furthered by the legal obligations arising from the Aarhus Convention.

4.3 Effectiveness through environmental justice

Contrary to the former two pillars, which resulted in legislative action for most contracting parties, the third pillar's provisions on access to justice in environmental matters did not cause many legislative proposals or amendments. As far as new legislation was enacted, it usually restated general administrative law.[48] This hasled *Dragos* and *Neamtu*even to the impression that 'domestic law makers and most scholars were convinced that the judicial protection afforded in their respective jurisdictions could not be improved´.[49]Legislators considered their domestic legal systems already sufficiently in line with the Aarhus obligations. A reason for this limited legislative action may lie in the fact that no specific European Directive was enacted especially for the implementation of the third pillar.[50] This apparent vacuum is filled, firstly, by the directives, which aimed at implementing the former two pillars, which contain provisions on judicial protection,[51] and, secondly, the existence of judicial protection as a longstanding and important element of European Union law in general.[52]

The authors of the contributions to this book sketch a mixed picture regarding the compliance with the provisions of the Aarhus Convention.[53]It is mixed in two ways. It is both a positive and a negative picture: most consider their legal systems to be sufficiently in line with the Aarhus obligations,[54]but meanwhile

[48] Dacian C. Dragos and BogdanaNeamtu, 'The access to justice under the Aarhus Convention: the comparative view'in this book, 3.

[49] Ibid.

[50] The European Commission has proposed a directive (Commission, 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters', COM(2003) 624) specifically for implementing the third pillar of the Convention, but this proposal was repealed on 21st of May 2014.

[51] European Parliament and Council Directive (EC) 2003/4 on public access to environmental information and repealing Council Directive 90/313/EEC, art 6 and European Parliament and CouncilDirective (EC) 2003/35 providing for the public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, arts 1 and 3.

[52] ...Nagy, 'The Aarhus-*aquis* in the EU – developments in the dynamics of implementing the three pillar structure' in this book, 16.

[53] See e.g. Dacian C. Dragos and BogdanaNeamtu, 'The access to justice under the Aarhus Convention: the comparative view'in this book, 22.

[54] Ibid, 26-28; Jorge AgudoGonzález, 'The implementation and influence of the Aarhus Convention in Spain' in this book, 27;Carol Day, 'United Kingdom' in this book, 20;Giulia Parola, 'The Aarhus

many legal systems remain to attract criticism. This critique is mixed, as it focuses on a variety of distinct elements of judicial protection.[55]The foremost issues occurred with regard to Germany, asexemplified by the *Trianel* case[56] on the incompatibility of German standing rights for NGOs, and the infringement proceedings against Ireland on the costs and supply of information in judicial proceedings.[57]The authors criticize the – mainly indirect – costs also in other states.[58]Furthermore, the intensity and scope of review,[59] the – thereto related – limited technical expertise of judges[60] and the limited availability of appeals pose obstacles to effective judicial protection in environmental matters.

It can therefore not be said that the third pillar of the Aarhus Convention has substantially influenced the convergence of legal cultures surrounding the effective judicial protection in environmental matters. Effective judicial protection was already, to a large extent, common to the legal cultures of the Member States of the European Union. Perhaps one of the sole ways in which Aarhus' third pillar, with support of the European Commission and the Compliance Committee of the Aarhus Convention, achieved a change in legal policy, is that standing rights for non-governmental organizations have been relaxed.[61] Overall however, there already was a European legal culture deemed capable of ensuring the effectuation and thus the realization of the values embodied by the other two pillars.

5 Conclusion

The aim of this contribution was to discuss how the Aarhus Convention has been influential in shaping a common European legal culture , by particularly pointing to various patterns of legally oriented social behaviour and attitudes, as expressed by ideas, values, aspirations and mentalities. These

Convention – The Legal Cultural Picture, Country report for France' in this book, 24-25.

55 See for example Giulia Parola, 'The Aarhus Convention – The Legal Cultural Picture, Country report for France' in this book, 24-25; Jorge Agudo González, 'The implementation and influence of the Aarhus Convention in Spain' in this book, 27; Dacian C. Dragos andBogdanaNeamtu, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania' in this book, 26-27.

56 Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eVv Bezirksregierung Arnsberg.*

57 Case C-427/07 *Commission v Ireland.*

58 Carol Day, 'United Kingdom' in this book, 27-32;Alessandro Comino, 'The application of the Aarhus Convention in Italy' in this book, 18-19; Giulia Parola, 'The Aarhus Convention – The Legal Cultural Picture, Country report for France', 22-23; Dacian C. Dragos and BogdanaNeamtu, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania' in this book, 21.

59 Carol Day, 'United Kingdom' in this book, 26-27.

60 Dacian C. Dragos and BogdanaNeamtu, 'Mimicking environmental transparency: the implementation of the Aarhus Convention in Romania' in this book, 17, 18.

61 Ibid, 7.

have been not only the opinions of legal specialists - the other authors contributing to this book - but they have also shed light on the attitudes of, amongst others, the opinions of the public or public authorities.

Aarhus did have an impact on bringing together the legal cultures of the states discussed, in particular, with regard to the legal frameworks of the states discussed, albeit that its influence was a strengthening of the foundations lead earlier by secondary European law. The notion of transparency took solid ground in most of the legal cultures, particularly after Aarhus. However, the same cannot be said of the inclusiveness of the public in environmental policy-making; compliant legal frameworks are in place, but the limited effectiveness leaves room for improvement. Although the Convention was not a revolution, it has reinforced the way towards a shared European culture which embodies a true environmental democracy, wherein the environment is protected on behalf of the citizens and their wellbeing. It is important to note that the implementation of the Aarhus Convention, and thus growth of a *common* legal culture, may not have been as successful as it is now, if it were not for pre-existing European law and post-Aarhus legislation on the implementation of the Aarhus Convention in the Member States. It appeared that European law laid the foundations for the further development of an environmental democracy and subsequently, by means of the post-Aarhus directives, harmonized the legal systems of the Member States.

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Effective procedures
Effective remedies
EIA
Environment Code
Environmental Charter
Environmental Democracy
Environmental Impact Assessment
Environmental Information
Environmental Interest
Environmental Justice
Environmental Management Act
Environmental Protection
EU law
Euratom Treaty
European Ius Commune
Europeanisation
Evaluative Analysis
Exceptions on the right to access to information
Explanatory Analysis
Framework Law
Freedom of Information Act
Freedom of Information Law
General Procedural Rules
Governmental Decision (G.D.) no. 878/2005
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Harmonized Legal Systems
Nationally Significant Infrastructure Projects
Human Rights
Injunctive relief
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IPJ Act
Judicial Protection
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Legal Methods
Legal Sources
Legal Terminology
Legitimate Interest
Lisbon Treaty
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National Legal Systems
NGOs
Openness

Office of Parliamentary Ombudsman
Passive Disclosure Of Information
Plaumann doctrine
Pop-up'
Protection Of Human Well-Being
Protection Of The Environment
Public Authority
Public Concerned
Public Interests
Public Participation
Regulation (EC) 1829/2003
Regulation EC/1049/2001
Schutznorm
Sedley requirements

Special legislation
State
Strategic Environmental Assessment
Sufficient Interest
Third Party Right of Appeal
Timely And Effective Notification
Transparency
Uniform public preparation
procedure
Wednesbury test