

# Challenging activities that harm the environment :

## Article 9.2 of the Aarhus Convention

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# Part I: The right to go to Court – Article 9.2 AC

We will cover:

1. What decisions can be challenged?
2. By whom (legal standing)?



# What measures can be challenged?

- Premise of Article 9.2 AC:

Where persons have a right to participate in environmental decision-making, they should also be able to challenge any aspect of the resulting decision in court.



Article 6 AC: right to public participation in permitting decisions on specific activities listed in Annex I + other activities that may have a significant effect on the environment.



# What measures can be challenged?

- Decisions covered by Article 6 AC:
  - Article 6(1)(a): decisions on whether to permit proposed activities listed in annex I
    - E.g. oil and gas refineries, thermal and nuclear power stations, installations for the production/processing of metals, minerals and chemicals, waste incineration/landfills, waste-water treatment plants + many more!
    - Any activities subject to an Environmental Impact Assessment (EIA)
  - Article 6(1)(b): decisions on proposed activities not listed in annex I which may have a significant effect on the environment
  - Decisions which change or extend permitted activities



# Implementation in EU law

- Implementation of Articles 6(1)(a) and 9(2) AC in legislation:
  - Directive 2011/92/EC on Environmental Impact Assessment Directive
  - Directive 2010/75/EU on Industrial Emissions
  - Directive 2012/18/EU on dangerous substance (Seveso III)
- Implementation of Article 6(1)(b) and 9(2) AC through CJEU case law



# Implementation in EU legislation

- Environmental Impact Assessment Directive (2011/92):
  - EIAs must be carried out in relation to all activities likely to have a significant impact on the environment:
  - All activities listed in Annex I
  - Activities listed in Annex 2, if certain criteria are met
  - Article 11 EIAD: access to justice in relation to all decisions subject to public participation, including:
    - An EIA that is vitiated by error;
    - Decision not to submit a project to EIA (screening decision);
    - Final permitting decision
    - Final permitting decisions that are ratified by legislative act.



# Implementation in EU legislation

- Industrial Emissions Directive (2010/75)
  - Requires industrial installations carrying out activities listed in Annex I to operate in accordance with a permit;
  - Article 24: public participation rights in permitting procedure
  - Article 25: Access to justice to challenge decisions subject to public participation:
    - Decisions granting a permit for new installation;
    - Decision granting a permit for any substantial change;
    - Decision granting or updating a permit that includes a derogation from usual emissions limits;
    - Decision updating a permit due to causing significant pollution.



# Implementation in EU legislation

- Seveso III Directive on prevention of major accidents involving dangerous substances
- Article 15: public participation in certain decisions relating to “establishments” where dangerous substances are present
- Article 23: access to the same procedures to challenge decisions subject to public participation as those set up to implement EIAD.
  - Decisions on specific activities relating to Article 15





## Implementation through CJEU case law

- Permitting decisions subject to the Habitats Directive (92/43):
- Article 6(3): Public participation in permitting decisions for projects that are likely to have a significant effect on a Natura site
- C-543/15 Slovak Bears II: Article 9.2 AC +Article 47 CFR = right to challenge decisions falling within the framework of Article 6(3) Habitats Directive, e.g.
  - Decision related to a request to participate in the permitting procedure:
  - The assessment of the need for an appropriate assessment
  - Outcome of the appropriate assessment



## Implementation through CJEU case law

- Permitting decisions subject to the Water Framework Directive (2000/60):
- C-664/15 Protect: Right to public participation under Article 6(1)(b) AC + access to justice under 9.2 AC + 47 CFR if the project would have a significant adverse effect on the state of the water
- Where no such adverse effect, access to justice under Article 9.3 AC + Art 47 CFR



# Who can go to court (legal standing)?

- Article 9.2 AC: two criteria for legal standing:
  1. member of the “public concerned”
  2. Having either “a sufficient interest” OR “impairment of a right”



# Legal Standing

## Criteria 1: public concerned:

- Article 2.5 AC: public affected or likely to be affected by, or having an interest in, the environmental decision-making
  - Includes legal and factual interest
- Depends on the nature and size of the activity
- Must take into account:
  - Impact of normal operation plus possible accident
  - Impact on measurable factors (property, health) plus unmeasurable factors (quality of life)
  - Prior participation in the decision-making procedure



# Legal standing

- Criteria 2: sufficient interest or impairment of a right
  - Member State discretion to set criteria
  - BUT: Must be consistent with objective of giving public concerned wide access to justice
  - i.e. national courts may not interpret criteria in a way that significantly narrows down standing
  - Must comply with Article 3.9 AC – non-discrimination



# Legal standing: sufficient interest

- Generally less problematic to gain standing
- Conditions for sufficient interest:
  - Must consider all relevant aspects of a specific act that could affect the interests of an applicant, i.e. cannot depend on one isolated factor, e.g. distance from the permitted activity



# Legal standing: impairment of a right

- Requirement to show that applicant's subjective rights have been impaired
- C-115/09 Trianel: Member States have significant discretion to determine impairment of a right
- Possibility to enlarge definition: expansive approach to the rights capable of being impaired, e.g. use rights for the purpose of research, fishing, hunting, etc.
  - Commission Notice on Access to Justice, para 55
  - AG opinion in C-529/15, para 77



# Legal standing: special case of NGOs

Criteria 1: public concerned:

- Article 2.5 AC:

“non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”





# Legal standing: special case of NGOs

- ACCC/C/2009/42 (Armenia): Requirements under national law:
  - Must be clearly defined
  - Should not cause excessive burden on NGOs
  - Should not significantly restrict access to justice
- CJEU C-268/08 Djugarden: requirement for NGOs to have at least 2000 members went beyond limits of State's discretion because it ran counter to objectives of access to justice (excluded all but 2 NGOs in Sweden from courts)
- Requirements must not discriminate against foreign NGOs  
(Article 3.9 AC)



# Legal standing: special case of NGOs

Criteria 2: sufficient interest or impairment of a right

- Article 9.2 AC: de lege standing
- Environmental NGOs meeting requirements under national law shall be deemed to have sufficient interest or to have rights capable of being impaired
  - C-115/09 Trianel + C-137/14 Commission v Germany (EIA Directive)
  - C-243/15 Slovak Bears II (Habitats Directive)
  - C-664/15 Protect: requirement to set aside national standing rules that conflict with Art 9 AC+Art 47 CFR



# Part 2: Rights when in court

1. The legal framework
2. Scope of review
3. Standard of review
4. Injunctive relief
5. Remedies
6. Costs



# (1) The legal framework

Main EU & international law sources:

1. EU law principles: effective judicial protection (Art 19(1) TEU) and sincere cooperation (Art 4(3) TEU)
2. Human rights: right to an effective remedy (Art 47 Charter of Fundamental Rights, based on Art 6+13 ECHR)
3. Art 9(2), (4) and (5) Aarhus Convention



## (2) Scope of review

- Definition: range of legal arguments and provisions of law that a court must consider
- Basic rule: right to “challenge the substantive or procedural legality”

Art 9(2) Aarhus Convention, Art 11 EIA Directive, Art 25 IED, Art 23 Seveso III



## (2) Scope of review

- Elaboration by CJEU:
  - Caveat: Acceptable to limit scope of review on rights held by individuals in rights-based systems *C-137/14, Commission v Germany, para. 91; C-115/09 Trianel, paras 36 and 45; C-570/13 Gruber, para. 40.*
    - Individuals will effectively have less rights than NGOs ( because *de lege* standing)
  - Prevents specific limitations, such as material preclusion + requiring applicant to show procedural error vitiated decision *C-137/14, Commission v Germany, paras 60 + 79-80*



## (2) Scope of review

- On what rules can you base your challenge?

- CJEU: as a matter of EU law at least:

- 1. rules of national law implementing EU environmental law and/or

- 2. rules of EU environment law having direct effect.

Under EIA Directive: Cases C-115/09 *Trianel*, paras 48-9 & C-137/14 *Commission v Germany*, para. 92.

Under Habitats Directive: Case C-243/15 *Slovak Bears II*

- ACCC: Not only provisions that “serve environmental protection” = also national + EU law not related to the environment

ACCC: ACCC/C/2008/31 (Germany), ECE/MP.PP/C.1/2014/8, para. 78

## (3) Standard of review

- Definition: level of scrutiny to be applied by the judge
- Basic EU rule: left to procedural autonomy limited by principles of:
  1. Equivalence: not “less favourable than those governing similar domestic actions”
  2. effectiveness = “it must not be made impossible in practice or excessively difficult to exercise rights conferred by EU law”

*C-71/14 East Sussex, para. 52*





## (3) Standard of review

- Discretion does not bar review *C-72/95 Kraaijeveld and Others, para. 59*
- System must allow “to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness” of a decision *C-71/14 East Sussex, para. 58*
- necessary to take into account the purpose of the act and to ensure that its effectiveness is not undermined *C-723/17 Craeynest, para. 46*

⇒ In practice, CJEU requires quite substantial review

Examples: IED: *C-416/10 Krizan*, para. 89; EIA: *C-75/08 Mellor*, para. 59; Habitats: *C-127/02 Waddenzee*, paras 66-67; compare also: *C-723/17 Craeynest*, para. 56 on Air Quality Directive



## (4) Injunctive relief

- Definition: Court order to prevent harm pending final judgement
- Basic rule: Art 9(4) Aarhus: injunctive relief shall be provided as appropriate to ensure adequate & effective remedies



## (4) Injunctive relief

- EU law implementation through CJEU case law:
  - Must generally be available for EU law infringements + conflicting procedural rules must be set aside *C-213/89 Factortame, para. 23*
  - Applied under IED: public concerned should have right to ask to prevent pollution, including where necessary for a temporary permit suspension *C-416/10 Krizan, paras 107-109*

## (4) Injunctive relief

- Details left to procedural autonomy of Member States as long as effective & equivalent remedies ensured – useful to refer to:
  1. ACCC: court with discretion but must make own assessment of the risk of environmental damage in light of all the facts and arguments significant to the case, taking into account public interest in environmental protection + precaution [ACCC/C/2013/89 \(Slovakia\)](#), paras 77 & 97.
  2. May be useful to refer to CJEU case law by analogy  
[Good analogy could be: C-441/17 R Commission v Poland](#), paras 172-173



# (5) Remedies

Definition: What the court can order as final relief

Basic rules:

- Art 9(4) Aarhus: procedures shall provide “adequate and effective remedies”
- EU law :
  - Courts should nullify the unlawful consequences of a breach of EU law (C-201/02 *Wells*, paras 64-65; Art 4(3) TEU + Art 47 Charter)
  - Conditions are left to procedural autonomy as long as the principles of effectiveness + equivalence are observed (C-201/02 *Wells*, para. 67 and C-420/11 *Leth*, para. 38)



## (5a) EIA remedies

- If no EIA has been carried out prior to development consent:
  - Court must take all „general or particular measures necessary“ to ensure that an EIA is still carried out
  - This includes: “subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted” *C-201/02 Wells, para. 65*
  - annulling permit not itself violation of right to property under art. 17 Charter *C-416/10 Križan, para. 116*
  - Exceptionally, activity may continue until replacement EIA is carried out *C-411/17 Inter-Environnement Wallonie, paras 175-82*



# (5a) EIA remedies

- Court must always „make good any harm caused by the failure to carry out an [EIA]“ *C-201/02 Wells, para. 66*
  - Applies even if time-line to challenge the absence of EIA has passed, as long as damage claim is in time *C-348/15 Stadt Wiener Neustadt, paras 47-48*
- Can also give rise to a personal damage claim under state liability  
*C-420/11 Leth*
- Should equally apply to IED + Seveso III



## (5b) Habitats remedies

If no appropriate assessment carried out: must still carry out appropriate assessment (art 6.3) + if it shows (risk of) deterioration, assess (art 6.4):

1. Should project still be carried out for imperative reasons of public interest?
2. If yes, are there viable alternative solutions while “weighing the environmental consequences of maintaining or restricting the use of the works at issue, including closure or even demolition, on the one hand, against the important public interest that led to their construction, on the other”
3. If not: take all compensatory measures to ensure the overall coherence of the Natura 2000 site

*Case C-399/14 Grüne Liga Sachsen and Others, paras 68-77.*





## (5b) Habitats remedies

CJEU: Exceptionally, activity may continue until replacement assessment is carried out *C-411/17 Inter-Environnement Wallonie, para. 176*

but:

- Art 6(2) applies independently => if deterioration of habitat prior to replacement assessment, authority must take “appropriate steps”

*C-141/14, Commission v Bulgaria, para 52 and C 404/09, Commission v Spain, para 124*



## (6) Costs

- Art 9(4): proceedings not “prohibitively expensive” and cost awards must be “fair”
- Must consider costs incurred as a whole  
*C-260/11 Edwards, para. 28; ACCC/C/2012/77 (UK), para. 72*
- May neither be:
  - Subjectively unreasonable (not “exceed financial resources of person concerned”) nor
  - Objectively unreasonable



## (6) Costs

- Subjectively unreasonable (“exceed financial resources of person concerned”)
  - Not “average claimant” but applicant *C-260/11 Edwards, para. 41*
  - Fact that applicant not actually deterred insufficient *C-260/11 Edwards, para. 49*
  - CJEU *Edwards* criteria = take into account:
    1. the situation of the parties concerned,
    2. whether reasonable prospect of success,
    3. importance of what is at stake for claimant + env. protection
    4. complexity applicable law + procedure
    5. whether claim is frivolous (at different stages)
    6. where appropriate, costs already incurred at earlier levels in the same dispute

*C-260/11 Edwards, para. 42.*



## (6) Costs

- Objectively unreasonable

- Infringement if judge cannot take into account at all

- C-530/11, Commission v UK, para. 57*

- Otherwise few CJEU guidance

- *Raison d'être*: members of the public and associations are naturally required to play an active role in defending the environment – possibility to judge against? *C-260/11 Edwards, para. 40*

- ACCC: If a new fee for NGOs is introduced consider:

- the contribution made by challenges brought by NGOs to improving environmental protection and implementation of environmental legislation;
    - the expected result of the introduction of a new fee on the number of challenges brought by NGOs;
    - the fees for access to justice in environmental matters as compared with fees for access to justice in other matters.

- ACCC/C/2011/57 (Denmark), para. 48*



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\* Guide on access to justice in environmental matters at EU level:

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