

# Conference session 1: Strategic litigation to make the green transition happen.

## Summary

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ClientEarth held this first session of the conference “*Access to justice in environmental matters: obstacles, impacts and ways forward*” on 15<sup>th</sup> October.

The conference opened with the keynote speech of **Áine Ryall**, Co-Director of the Centre for Law & the Environment at University College Cork and vice-Chair of the Aarhus Convention Compliance Committee, participating in the conference in her personal capacity.

Áine Ryall welcomed the rich diversity of experiences and perspectives among speakers and participants, offering us the opportunity to reflect on the development of the right of access to justice in environmental matters, to highlight the important achievements as well as the remaining challenges.

Regarding the first session on the role of strategic litigation, Áine Ryall recognised the significant increase of the volume of strategic litigations in recent years and congratulated the determination of individuals and NGOs leading them. She also acknowledged the role of the Aarhus Regulation in this development, and the dynamism of the case law of the CJUE.

Looking to the second session on how to identify best practices and embed them among different models, Áine Ryall highlighted the importance of workshops and gatherings to share the most recent developments in law and policies between actors at national and EU level. She also underlined the importance of large-scale innovative research project involving multiple jurisdictions.

Coming to the third session on promoting access rights, Áine Ryall stressed the challenging necessity of keeping path with the rapid development of the law and jurisprudence. She pointed out the risk of fragmentation of legal principles, because of the various approaches taken by the different sources of legal authorities, at International, EU and national level. She fears for the principle of legal certainty, which she describes as the bedrock of the rule of law. Regarding this necessity to stay up to date with legal development, she welcomed the Commission notice on access to justice at EU level.

About the fourth session on the use of strategic litigation to ensure effective implementation and enforcement of environmental law, Áine Ryall commended the lasting systemic changes that strategic cases bring. She also called for the next generation of environmental lawyers to get inspired by the emergence of environmental human rights as a key strength in strategic litigation.

Finally, Áine Ryall concluded advising us to be very careful not to take our environmental rights for granted. She reminded us that economic crisis - such as the one the pandemic created - are typically the times when dangerous backsliding of rights happen, so we must be vigilant to any threats to the rule of law and to our precious democratic structures. Correspondingly, the Aarhus Convention Compliance Committee reaffirmed that *“the Aarhus Convention continues to apply and that the pandemic cannot justify any restrictions on those rights”*.

As Áine Ryall said: *“The right of A2J is essential to maintaining the rule of law, to defending Human Rights, and to preserving and protecting the environment for present and future generations”*.

**Onno Brouwer**, well-known expert in EU litigation and outspoken advocate for transparency in EU decision-making, who has brought many landmark EU transparency cases to the EU Courts, took the floor to give us his view on why transparency - or access to information - is so crucial for NGOs, journalists, academics, MEPs and many others.

The most important purpose of transparency stressed by Onno Brouwer is that it allows one to generate political debate and participate in decision-making. He reminded us of the EU treaties, and especially Article 10 of the Treaty on European Union, stating that the EU is not only a representative democracy but also a participatory democracy.

Onno Brouwer also asserted that being transparent is clearly in the interest of the EU, as allowing citizens to follow and understand EU decisions would bring legitimacy to the institutions. Anticipating criticisms, he specified that obviously some matters have to stay secret, such as defence and security, but that transparency rules should apply for most of the matters.

After giving some example, Onno Brouwer gave us an overview of progresses made with regard to transparency. He acknowledged that by now a lot of documents are made available, but expressed the need for more active dissemination because most documents are only available under request. He also highlighted the improvements made around the adoption of EU legislation, as we now have access to all trilogue documents.

However, Onno Brouwer stressed the fact that timing remains a real issue. As trilogue documents, for instance, can only allow for participation to political debate if the information is published in a timely manner.

He also highlighted as a remaining issue the impossibility to get access to documents concerning infringement proceedings. More generally, Onno Brouwer brought to our attention the current dangerous trend of the EU institutions to develop a general presumption of secrecy on more and more area. Such presumption, allowing institutions not to consider access to information requests document by document

but to rely on a general presumption for some areas, is does not comply with the transparency regulation which provides that access must be as wide as possible.

Then we had the chance to get the insights from **Aurel Ciobanu-Dordea**, director of the Directorate for Implementation and Support to the Member States of the DG Environment, is in charge - inter alia - of the enforcement of EU environmental laws and of EU's participation and obligations under the Aarhus Convention.

Aurel Ciobanu-Dordea presented the freshly published Commission proposal for a revision of the Aarhus Regulation. He emphasised the importance of administrative review to hold the European Commission accountable on consistency matters, and highlighted two major openings proposed by the Commission. First, the fact that it proposes to expend the type of non-legislative acts open to administrative review by environmental NGOs to regulatory acts. Secondly, the fact that it proposes to expend the acts subject to review beyond the ones of individual scope.

Aurel Ciobanu-Dordea also reminded the audience that the EU is a system of multi-level governance, with the legislation adopted at EU level but the execution depending on the member states. Therefore, he highlighted the importance of the system of requests for preliminary ruling, as it allows to control that the implementation at national level complies with the EU legislation. Aurel Ciobanu-Dordea insisted on the major role of this system, stressing that it gives the CJUE the opportunity to provide a European wide response to existing challenges at national level, and raise questions from the tiniest corners of Europe to the attention of the whole EU society.

Finally, Aurel Ciobanu-Dordea shared with us some insights and affirmed the willingness of the European Commission to act and take infringement proceedings if no ameliorations at national level on access to justice provisions are achieved.

Finally, **Anaïs Berthier** took the floor to close this panel. She is senior lawyer at ClientEarth, Head of EU affairs, and was previously responsible of the Environmental Democracy programme where her work focused on ensuring the implementation and enforcement of the Aarhus Convention.

First, she started by congratulating the increasingly active role of the civil society in putting pressure on decision makers at EU and national level, acknowledging that consequently the environment is higher than ever in the political agenda.

However, she formulated her regrets not to see part of the population being provided with procedural rights, and especially the right to go to Court. Indeed, she considers that providing access to justice to the members of the public at national and EU level is key to the success of the EU Green Deal and to achieving the green transition, and is therefore part of the solution to the current environmental crisis.

To illustrate the remaining issues on access to justice rights, Anaïs Berthier denounced the well-known and long lasting implementation gap at EU level, pointing at the CJEU's Plauman judgment. She explained that this restrictive judgement not complying with the Aarhus Convention leads to a paradoxical situation in environmental matters: namely that the more people are impacted by a decision, the less chances they have to get legal standing before the Court. But keeping some hope regarding the evolution of the CJEU's jurisprudence, she also brought to the audience's attention some recent positive streams inside of the CJEU, such as the opinion of the Advocate General Bobek.

Then, Anaïs Berthier commented the Commission proposal for a revised Aarhus regulation, which she considers partly unsatisfactory for the following reasons:

Firstly, she highlighted the fact that the proposal adds a new barrier when it states that only “acts which do not entail implementing measures” can be challenged. She stressed that it creates uncertainties to clarify in Courts and therefore delay the processes and create more litigation. She also explained that challenging the EU act behind the implementing measures will require the use of the preliminary ruling procedure, which is not direct access to the Court and therefore do not comply with the Aarhus Convention. More importantly, she underlined that remaining access to justice issues in some Member States make this preliminary ruling procedure quasi inoperative.

Secondly, Anaïs Berthier expressed her disappointment not to see the proposal deleting the exemption that prevent state aids related decisions to fall under the scope of the Aarhus Regulation, as those decisions have a significant impact on the environment at national level.

Thirdly, she said she regrets not to see the proposal addressing the imbalance between the access that the industry has to the CJEU and the access environmental NGOs have. Indeed, she explained that industries can challenge the initial decisions adopted by the EU institutions while NGOs can't.

Finally, she pointed out the inexistence of a provision on the cost. She explains that such provision would have been especially relevant given the current trend to condemn NGOs to pay the cost of the opposing parties and of the interveners, which adds a new barrier to access to justice for NGOs.

Overall, she assured that ClientEarth welcome the proposal, which she said contains big and positive steps, but she hopes that the above-mentioned shortcomings will be addressed during the legislative process.

To wrap up her intervention, Anaïs Berthier also mentioned access to justice issues at national level. She deplored the lack of a Directive on access to justice in environmental matters, and explained that this legislative gap results in many discrepancies on the way access to justice is provided across the member states.

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All the interventions completed, the speakers answered the participants' questions and reacted to each other's presentations.

Onno Brouwer commented on both presentations saying, *“politics are short terms because politicians mind about the next elections, whereas NGOs and citizens have a long term view. We are reaching in a sense the limit of what representative democracy can do to protect the environment. That's why we have such an urgency to have more access to justice not only at national level but also at EU level.”*

Then Aurel Ciobanu-Dordea reacted to Anaïs Berthier's intervention. First, he answered concerning the new barrier brought with the provision requiring implementing measures. He stated that this provision is not isolated from judicial review, which can only be sorted at the level where the implementing measures are taken. Therefore, he explained that if the implementing measures are taken at EU level, they can be challenged at EU level.

Then, reacting to Anais's aspirations for a Directive on access to justice in environmental matters, Aurel Ciobanu-Dordea expressed the worthlessness of such a legislative proposal, explaining that in the last 10 years the CJUE has so significantly clarified the rights of access to justice in national courts in environmental matters that we can now use the case-law of the CJEU. Anaïs Berthier expressed her surprised regarding this statement, reminding that such a legislative proposal was in the past supported by the European Commission and only stopped by the lack of political willingness in the Council. She emphasises that case law is not always complied with by national jurisdictions, and moreover do not create legal certainty. She also affirmed that all the issues are not yet addressed by the case law, and that a legislative proposal would help pushing for more ambitious reforms, systems and procedures at national

level. To this response, Aurel Ciobanu-Dordea clarified his position, saying that what he meant is that the Commission doesn't need to bring such a legislative proposal because it would be anyway mutilated during the trilogue. He concluded saying *"Let's look at the provision on access to justice in the Climate law at the end of the legislative process!"*

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