Introduction & Presentation of new access to justice resources

Csaba Kiss (Coordinator)
14 October 2021
Side Event to the Aarhus Convention MOP7
Introduction

- **ClientEarth (CE)**
- NGO using the power of law to protect people & the planet
- Offices in London, Brussels, Warsaw, Madrid, Berlin, Beijing, Calabasas (USA)
- Works in over 60 countries in Europe, Asia, Africa and the Americas
Introduction

- **Justice and Environment (J&E)**
- Network of environmental legal NGOs
- 14 member organizations
- Mission: J&E uses its legal expertise and experience to improve EU environmental laws and their implementation for the benefit of the environment and people across Europe
EARL project

• 2017-2020
• Education and Awareness Raising of Legal Professionals on environmental law and access rights
• Austria, Belgium, Estonia, France, Germany, Hungary, Poland, Slovakia, Spain
• https://www.clientearth.org/projects/access-to-justice-for-a-greener-europe/
Justice and Environment

Resources

- EARL – online resources
  - Guide on ATOJ in the EU
  - 8 country toolkits
  - Interactive platform (EE, HU, PL)
  - Lawyer database (15 MS)
  - 26 online newsletters
Resources

- EARL – replicable resources
  - 57 training events in 9 countries
  - 12 online webinars
  - 1 online conference with 285 attendees)
Resources

- EC – eJustice Fact Sheets
- All 27 EU MS
- In-depth knowledge on ATOJ
- In English, later in other EU languages
Thank you for your attention!

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2021 Guide on Access to Justice in European Union Law

Sebastian Bechtel
Environmental Democracy Lawyer
Agenda

- Presentation of the Guide
- 3 recent case highlights
- Amended EU internal review mechanism
The Guide

- Intended for lawyers, public authorities, judges and NGOs
- Updated in February 2021
- Available online + hard copies
- 4 chapters on access to justice in the MS + 1 regarding EU institutions/bodies
Chapter 1: Access to info

Implementation of Art. 9(1) AC on MS level

Some highlights:

- Information on emissions
- Public authorities for requests:
  special powers & control
- Costs
- Time (C96 and C141)
Chapter 2: Public Participation Rights

Implementation of Art. 9(2) AC on MS level

Based on legislation: EIAD, IED, Seveso III Directive

Based on case law only: appropriate assessments (Habitats), water permits (Water Framework Directive), waste permits (Waste Framework Directive)
Chapter 2: Public Participation Rights

Some highlights:
- Standing of individuals + NGOs
  - “formal criteria” for NGOs (C137)
- Scope of review (*Trianel, North East Pylon, Flausch*)
- Standard of review
Case highlight 1: 
**Stichting Varkens**

- Art. 9(2) public participation cannot be precondition for access to justice
- Art. 9(3): Limitation to right of effective remedy (Art. 52(1) Charter)
  - “proportional”, if excuse exist
  - nothing on material preclusion

No: C-826/18
Chapter 3: Contraventions of environmental law

Implementation of Art. 9(3) AC on MS level

Based on legislation: Environmental Liability Directive

Based on case law only: Any directly effective provision of EU environmental law
Chapter 3: Contraventions of environmental law

Highlights:
- Plans, permits, programmes, derogations
- ELD standing (Folk)
- Individuals standing (Burgenland + NRW)
Chapter 4: Requirements for all review procedures

Implementation of Art. 9.4 & 9.5 under EU law
Largely based on EU case law + general principles + Charter of Fundamental Rights / ECHR
Chapter 4: Requirements for all review procedures

Highlights:
- Effective remedies;
- Injunctive relief;
- Timely;
- Costs;
- Assistance + info
Case highlight 2: Deutsche Umwelthilfe

- NOx exceedances in Munich
- Minister-President of Bavaria states he will not comply with administrative court order
- Fines ineffective -> detention?
- Obligation to apply coercive measures = more dissuasive, repeated fines

No: C-752/18
Chapter 5: Decisions of EU institutions/bodies

Judicial avenues:
• No direct access to the CJEU (Art 263 TFEU)
• National courts can refer questions (Art. 267 TFEU) but
  • Needs national case
  • Restrictive national standing rules + high costs
  • National judges hesitant to refer questions
  • Takes years
Internal review - the idea

- Reg 1367/2006 (Aarhus Reg) establishes internal review
- EU institution or body adopts an administrative act or should have adopted such an act
- NGOs can request an internal review within 6 weeks of adoption

=>

1. Positive decision: Act is changed / altered

2. Negative decision: NGO is addressee, can challenge the decision before the EU General Court (Art 263 TFEU)
What will the amendment mean?

Internal review of all non-legislative acts with legal and external effects - examples:

• Commission decisions approving the list of new fossil fuel energy infrastructure projects (the so-called PCI list);
• Commission decisions regulating real driving emissions tests for motor vehicles;
• Council decisions to determine total allowable catch limits (fisheries);
• Decisions of the European Chemicals Agency (ECHA), European Food Safety Authority (EFSA) etc
• …
Still to improve …

- Standing for individuals: very restrictive criteria
- Challenging legislative acts?
- Scope: Commission State Aid Decisions – Example: Approving EU Member State funding to hydro power plants that violate the Water Framework Directive

-> ACCC/C/2015/128 = next presentation
Thank you!

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Selected Access to Justice Findings of the Aarhus Convention Compliance Committee

Summer Kern, Lawyer

Thursday, 14 October 2021, 10:00-11:30 CET

Side Event to the 7th Meeting of the Parties to the Aarhus Convention

“Recent developments regarding access to justice ACCC & case law”
Overview

• Discuss selected new access to justice findings concerning the rights to:
  
  – Challenge certain decisions of the EU
  – Bring judicial challenges when blocked by NGO recognition requirements
  – Individual use rights

• Present interlinkages with statements and rulings of other bodies

• Not present a comprehensive, exhaustive review
  
  – Time allowing: Discuss cases concerning concept of what is “fair” under article 9(4)
  – Mention other cases of interest
C128 (EU)

- Concerns state aid decisions by the European Commission

- Access excluded by
  - Aarhus Regulation
  - CJEU jurisprudence

- **Committee found**: This violates article 9(3) and 9(4) of the Convention
Article 9(3): “…each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public 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.”

- Communicants and observers:
  - All members of the public blocked
  - No access
  - Some state aid decisions have the potential to contravene provisions of its national (EU law). Articles 11, 191 & 194 TFEU, secondary legislation…
The Commission in 2019 SWD, pp. 22-23:
- Article 9(3) of the Aarhus Convention does not require that the challengeable act has an environmental purpose
- To be compliant, the EU system of redress needs to allow for the scrutiny of all Union acts for compliance with Article 11 TFEU

The CJEU in Austria v. Commission C-594/18 P
- Articles 11, 194 and other rules apply to state aid decisions
- Therefore the Commission must check that state aid does not violate EU law on environment and refuse it if it does
C128 conclusions

• Given above, no legal argument to deny access to justice. Not after C32, and this context harder

• Find a productive way forward
C137 (Germany)

- Concerns effect of a recognition criterion to have a “democratic structure”
  - entails not only membership in the organization, but full voting rights
  - Need this recognition to bring legal challenges and blocks many, including major NGOs like WWF and Greenpeace

- **Committee found**: This violates article 9(2) in conjunction with article 2(5)
C137 conclusions

• Selected take-aways:
  – 9(2) imposes nothing more than meeting 2(5) for NGOs
  – NGO work to protect the environment is not a popularity contest
  – Consider also Djurgården (C-263/08); AG Sharpston’s Opinion
C135 (France)

- Concerns an individual who sought to challenge a ministerial order. Denied standing despite arguments that:
  - There are certain provisions regarding the right to participate in, and initiate proceedings against, decisions that affect the environment
  - The fact he took part in the public participation procedure during the preparation of the challenged order
  - He has an interest in wildlife and its preservation

**Committee found**: No violation of Article 9(3) for denial of standing
C135 conclusions

• No actio popularis
• Factors raised not sufficient to establish 9(3) standing for individuals
• Dicta regarding use rights
  – Genesis in Sierra Club v. Morton fn
  – Commission’s Notice on Access to Justice, paras. 48-55 but especially para. 56
  – CJEU (Folk, Burgenland, NRW)
  – Ukraine’s Supreme Court judgment
• Way(s) forward with use rights?
Fairness (Article 9(4))

- **C90 (UK)**
  - Developers having access to full merits review, but other members lacking this fails to ensure procedures are fair

- **C131 (UK)**
  - Time limits to bring judicial review
  - Costs issues
Thank you for your attention!

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The sole responsibility of this material lies with the author (J&E).