ENVIRONMENTAL MATTERS IN THE ECJ CASE-LAW

(Interpretation of the Aarhus Convention in EU law)

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"*Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change*." Article 191 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) defines this way the main directions of the EU environmental policy. These fields cover, however, primarily substantial law measures. In order to achieve the goals and to ensure that the factors of environmental protection are given sufficient consideration, it is inevitable to offer a procedural framework as well. The latter should reflect among others on the question of public participation. Environmental policy is, namely, a field where the legal regulation is highly connected to scientific questions, economic interests and to the social discussion. So, not only the general interest behind the protection of environment makes the participation of the public – including interested individuals, non-governmental organizations (hereinafter: NGOs) representing the public interest etc. – necessary in environmental matters, but also the high level of complexity behind the single issues. In order to strengthen and make more effective environmental protection policies, the European Community approved the UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters [1] (hereinafter: Convention) by Council Decision 2005/370/EC of 17 February 2005.[2] This way it has become part of the environmental policy of the European Union. In the following, the paper aims to give a general overview of, how the Court of Justice of the European Union (hereinafter: ECJ) interprets the rights and obligations stemming from the Convention, as well as the EU law complementing it. [3]

THE CONVENTION IN EU LAW

The first question is to interpret the role of the Convention in EU law. "*[B]y becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of European Union law a general principle of access to environmental information*"[4], including in EU law at the same time the right to participate in environmental decision-making and the right to review procedures to challenge public decisions alleged to violate environmental law. In line with the objectives of the Convention, the EU "*has already adopted a comprehensive set of legislation which is evolving and contributes to the achievement of the objective of*

the Convention (…)".[5] In line with Article 216 Paragraph (2) TFEU "*[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States.*" Being an integral part of the legal order of the European Union,[6] the ECJ has jurisdiction to give preliminary rulings concerning the interpretation of the Convention. [7]

DIRECT APPLICABILITY

"*The Court has consistently held 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.*"[8]

The question whether the Convention can be referred to directly arose with regards to the *locus standi* of NGOs.[9] A possible solution [10] for the difficulties of public participation in judicial and administrative proceedings could be to rely on Article 9 of the Convention. However, the ECJ has declared that the direct effect would be contrary to the principles of EU law. This statement can be lead back to the two following factors. Certain provisions of the Convention request a measure by the Member States (or the EU): e.g. in connection with the provisions of Article 9 Paragraph (3) of the Convention, ECJ ruled that direct applicability is excluded, as the criteria under which members of the public are entitled to litigation have to be determined by national law. So '*the provision is subject, in its implementation or effects, to the adoption of a subsequent measure'*. [11] In other cases the soft-law nature of the provisions excludes direct applicability due to the not sufficiently precise nature. E.g. as regards Article 9 Paragraph (5) of the Convention "*[I]t follows from that provision, under which each party to the Convention is obliged to 'consider' the establishment of 'appropriate assistance mechanisms' to remove or reduce financial and other barriers to access to justice, that it does not include an unconditional and sufficiently precise obligation and that it is subject, in its implementation or effects, to the adoption of a subsequent measure.*"[12]

Certainly, this is also a consequence of the fact that the Convention was designed with the national legal orders in mind, and not the specific legal features of institutions of regional economic integration, such as the European Union, even where those institutions can sign and accede to the Convention.[13] All these circumstances result in the fact that generally the direct applicability of the Aarhus Convention cannot be invoked.

INTERPRETATION PRINCIPLES

The next question is, whether there are any special interpretation principles, which the ECJ relies on in connection with the Convention. Undoubtedly, the general principles, like the need for an autonomous interpretation of European Union law,

principles of equality and effectiveness, [14] the uniform application throughout the European Union, should be respected [15] by the institutions and national administrations as a result of the theories of direct effect and primacy.[16]

First of all, it has to be clarified that according to ECJ, the Aarhus Convention Implementation Guide [17] "*may be regarded as an explanatory document, capable of being taken into consideration, if appropriate, among other relevant material for the purpose of interpreting the Aarhus Convention, the indications contained therein have no binding force*".[18] This conclusion undermines the fact that the Convention, by becoming an integral part of EU law, has also gained an autonomous meaning within its system, which might even differ from the general interpretation. The major factor behind this phenomenon might be that the Union's environmental policy, as well as the general aims of EU law (especially the market freedoms) give a special framework to the Convention. This is results in a special situation with respect to the EU law, implementing the Convention: "*It follows that, for the purposes of interpreting Directive 2003/4, account is to be taken of the wording and aim of the Aarhus Convention, which that directive is designed to implement in EU law*"[19]. However, as already asserted above, the aim of the Convention is interpreted autonomously by ECJ.[20] Another consequence of this approach – and of that about direct applicability – is that the Convention cannot be relied on in order to assess the legality of an EU legislative act implementing the Convention.[21]

The second major interpretative principle is that there is a "presumption" for the public participation. This results in the fact that exemptions and limitations should be understood in a restrictive way. At the same time, provisions determining the entitlement for public participation should not be implemented in a less favorable manner: "*Therefore, although the national legislature is entitled, inter alia, to confine the rights whose infringement may be relied on by an individual in legal proceedings contesting one of the decisions, acts or omissions referred to in Article 11 of Directive 2011/92 (...), the provisions of that article relating to the rights to bring actions of members of the public concerned by the decisions, acts or omissions which fall within that directive's scope cannot be interpreted restrictively*."[22]

From this follows that the ECJ interprets the Convention along the general principles of EU law, taking – within the limits of this framework – the aims and the particular characteristics of environmental cases into account.

ACCESS TO INFORMATION

The first pillar of the Aarhus Convention is access to information: the obligations stemming from the first pillar have been transposed into the EU legal order by Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC. In the Member States, usually separate acts realise the transposition of the Convention (and the Directive) into the national legal

orders.[23] "*In adopting Directive 2003/4, the European Union intended to implement the Aarhus Convention by providing for a general scheme to ensure that any natural or legal person in a Member State of the European Union has a right of access to environmental information held by or on behalf of the public authorities, without that person having to show an interest*."[24]

The interpretation that access to information is not limited as regards the personal scope, is in line with the fact that access to information rights are usually derivable from the general regimes of information rights foreseen under human rights obligations, e.g. Article 42 (the Right of access to documents) of the Charter of Fundamental Rights of the European Union (hereinafter: ChFR)[25]. Furthermore, this way the access to justice rights with regards to access to information have a firm legal background, even in the case of NGOs. As far as the interpretation is concerned, the Directive itself establishes a duty for the restrictive interpretation of the grounds for refusal and the evaluation of the public interest served by disclosure in the particular case [Article 4 Paragraph (2)]. This obligation has been confirmed by the ECJ as well: E.g. "*the disclosure of information must be the general rule and the grounds for refusal referred to by those provisions must be interpreted in a restrictive way*."[26] However, this does not preclude an authority, when weighing the public interests served by disclosure against the interests served by refusal to disclose, in order to assess a request for that information to be made available to a natural or legal person, to evaluate cumulatively the grounds for refusal set out in the relevant provisions.[27]

This way, the ECJ case-law as regards access to information in environmental cases seems to establish a balance between the general right of access to public data and the need for the proper and efficient working of public administration or the judiciary involved in environmental cases.

PARTICIPATION IN DECISION-MAKING

The second pillar of the Convention is the public participation in decision-making, more precisely at three fields: a.) participation by the public that may be affected by or is otherwise interested in decision-making on a specific activity; b.) the participation of the public in the development of plans, programmes and policies relating to the environment; c.) participation of the public in the preparation of laws, rules and legally binding norms. The primary aim of this pillar is, that "*before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to a requirement for development consent and an assessment with regard to their effects.*"[28]

The implementation of the second pillar into EU law has been carried out through Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment. This, however, cannot be separated from the Environmental Impact Assessment (EIA) Directive, the Strategic Environmental Assessment Directive (SEAD) and the Water

Framework Directive (WFD). As regards the application of the Aarhus Convention to EC decision-making, Regulation 1367/2006 is the main reference point.

"*Both types of EC measures stipulate that public participation should be realised through commencing of consultations with civil interest groups by the Member States authorities and the EC institutions respectively prior to environmental decision-taking. However, the operationalisation of these requirements leads to the establishments of different sets of standards for carrying out consultations at the European and national levels*."[29]

ACCESS TO JUSTICE

The third pillar of the Convention is the access to justice pillar. This should safeguard the rights stemming from the two above mentioned pillars and establishes a third autonomous right.

An interesting situation comes from the reservation made by the EU at the time joining the Convention (Council Decision 2005/370/EC), namely, on the Member States having the primary obligation to fulfil the obligations arising from the Convention until the Community decides to adopt *"provisions of Community law covering the implementation of these obligations*". So, in lack of a common regulation in the field of access to justice, the requirements Member States should ensure while implementing the third pillar of the Aarhus Convention and fulfilling their obligations stemming from Article 47 ChFR can be derived from general human rights standards and principles of EU law. The most important requirement is to safeguard the principles of effectiveness and equivalence.

Concerning the personal scope EU law puts the obligation on Member States "*to grant standing either (a) to bodies which have a sufficient interest, or (b) to those which 'are maintaining the impairment of a right*."[30]

The Member States' wide margin of appreciation in granting NGOs access to justice is absolutely in accordance with the competences of the EU being limited in the field of civil procedural law: it assures the possibility to take account of the different tests for standing in the various national legal systems and helps courts to focus on those cases where a significant chance of success can be presumed. However, it might result in a significant restriction of environmental cases to be brought to court, because in lack of provisions motivating litigation (legal aid, representation, reduction of or exemption from procedural charges) even those applicants might reside from litigation whose plea would be well-founded.

Currently there is only one piece of EU legislation which is aimed at implementing the obligations from the third pillar: Regulation 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 (hereinafter: Regulation). However, as even the title suggests, the scope of this regulation is limited: it only applies to "*Community institutions or bodies*" meaning „*any public institution, body, office or agency*

established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity" [Regulation Article 2 Paragraph 1 Point c)].

At this point, the role of ECJ is much more direct, then as with regards to the two aforementioned pillars: Article 10 Paragraph 1 of the Regulation makes it possible for NGOs (meeting the requirements in Article 11) 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.*" If the Community institution or body fails to act or the NGO does not agree with the outcome, it may institute proceedings before the ECJ in accordance with the relevant provisions of the Treaty. However, in case of pieces of EU-legislation the indirect connection of the litigants with the subject of the claim usually results in the entire denial of process capability as a consequence of Article 263 Paragraph (4) of the TFEU. [It makes litigation only possible against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. In case of public participation the individual concern can be a problematic point.]

According to ECJ the national rules established must ensure 'wide access to justice' and, second, render effective the provisions on judicial remedies. [31] That is why in case of parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, the entitlement to bring actions before the competent courts is sufficiently safeguarded. However, in case of the representation of public interest in broader sense, further steps might be necessary to ensure the same level of protection.

CLOSING REMARKS

From this brief analysis it is apparent that ECJ has integrated the Convention in its jurisprudence, not only as part of EU law, but also as a reference point for the interpretation of the EU acts implementing this international agreement. This way, the interpretation of public participation rights in environmental matters is determined by the general principles of EU law, as well as the aim and purpose of the Convention. A possible problem might be that the directly, immediately enforceable rights of the NGOs and individuals interested in the protection of the environment are rather limited at EU level and at the level of national laws as well. These circumstances demonstrate that the mere implementation of the single pillars does not necessarily lead to a coherent system, especially when taking the aims of the Convention into account. More efficiency can be expected either from more formalized models of participation or from more explicit ways, preconditions of public participation. In latter context the evolving case-law of ECJ plays an important role.

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[1] United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in

Environmental Matters, adopted on 25 June 1998, Aarhus. Retrieved 5 February 2017 from: http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf
[2] OJ 2005 L 124, p. 1
[3] The length of the paper being limited, this analysis cannot aim to introduce all relevant questions of the judicature. It is rather intended to show the major reference points concerning the application of the Convention in the context of EU law.
[4] C-204/09, Flachglas Torgau GmbH v. Bundesrepublik Deutschland, judgment of 14 February 2012. [ECLI:EU:C:2012:71] para 30.
[5] Council Decision 2005/370/EC of 17 February 2005 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 Recital (7)
[6] C-243/15, Lesoochranárske zoskupenie VLK v. Obvodný úrad Trenčín, judgment of 8 November 2016, [ECLI:EU:C:2016:838] para 45. similarly: C-344/04, The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v. Department for Transport, judgment of 10 January 2006. ECR [2006] I-403, para 36.
[7] C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, judgment of 8 March 2011 [ECLI:EU:C:2011:125], para 30.
[8] Joined Cases C-401/12 P to C-403/12 P, Council of the European Union and Others v. Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht, judgment of 13 January 2015 [ECLI:EU:C:2015:4], para 54.
[9] For a detailed analysis of the problem, see: REHBINDER, E.: Germany-Allemagne. in: EBESSON, J. (ed.) Access to Justice in Environmental Matters in the EU, the Hague, Kluwer Law International, 2002. p. 237.; CHALMERS, D. – DAVIES, G. – MONTI, G.: European Union Law: Text and Materials. Cambridge, Cambridge University Press, 2014, pp. 444-457.
[10] How can NGOs support the Access to Justice Directive of the EU?, Justice and Environment, 2012. Retrieved 7 February 2017 from http://www.justiceandenvironment.org/_files/file/2012/Access%20to%20Justice%202012_toolkit.pdf
[11] C-240/09, para 45.; similarly: C-243/15, para 52.
[12] C-543/14, Ordre des barreaux francophones et germanophone and Others, Jimmy Tessens and Others, Orde van Vlaamse Balies, Ordre des avocats du barreau d'Arlon and Others v. Conseil des ministres, judgment of 28 July 2016 [ECLI:EU:C:2016:605], para 55.
[13] C-612/13 P, ClientEarth v. European Commission, judgment of 16 July 2015 [ECLI:EU:C:2015:486] para 40.
[14] These principles usually do not govern the specific procedure, but affect rather the national procedural norms governing the administrative process in lack of Community rules.
[15] C-204/09, para 37.
[16] CRAIG, P. – DE BÚRCA, G. (eds.): The Evolution of EU Law, Oxford, 2011, pp. 323-362. MELLADO RUIZ, L.: 'Los principios comunitarios de eficacia directa y primacía frente a la funcionalidad del principio de autonomía procedimental:

proceso de convergencia y estatuto de ciudadanía' in: FERNÁNDEZ MARÍN, F. – FORNIELES GIL, Á. (eds.), Derecho Comunitario Y Procedimiento Tributario, Atelier, Barcelona, 2010, pp. 24-42.

[17] The Aarhus Convention: An Implementation Guide (second edition). Published: June 2014. Retrieved 07 February 2017 from: https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

[18] C-279/12, Fish Legal and Emily Shirley v. Information Commissioner and Others, judgment of 19 December 2013 [EU:C:2013:853], para 38; similarly: C-204/09, para 36; C-182/10, Marie-Noëlle Solvay and Others v. Région wallonne, judgment of 16 February 2012. [ECLI:EU:C:2012:82] para 28.

[19] C-442/14, Bayer CropScience SA-NV and Stichting De Bijenstichting v. College voor de toelating van gewasbeschermingsmiddelen en biociden, judgment of 23 November 2016 [ECLI:EU:C:2016:890] para 54.

[20] C-515/11, Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland, judgment of 18 July 2013 [ECLI:EU:C:2013:523] para 32.

[21] E.g. Joined cases C-404/12 P and C-405/12 P, Council of the European Union and European Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe, judgment of 13 January 2015 [ECLI:EU:C:2015:5] paras 46, 53

[22] C-570/13, Karoline Gruber v. Unabhängiger Verwaltungssenat für Kärnten and Others, judgment of 16 April 2015 [ECLI:EU:C:2015:231] para 40.

[23] These acts might implement the pillars of the Convention separately or the whole Convention in one act, e. g. in Spain: Ley 27/2006 de 18 de julio, por la que se regulan los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente.

[24] C-524/09, Ville de Lyon v. Caisse des dépôts et consignations, judgment of 22 December 2010 [ECLI:EU:C:2010:822] para 36.

[25] PEERS, S. – HERVEY, T. – KENNER, J. – WARD, A. (eds.): The EU Charter of Fundamental Rights: A Commentary, Hart Publishing, 2014.

[26] C-442/14, para 56.

[27] C-71/10, Office of Communications v. Information Commissioner, judgment of 28 July 2011 [ECLI:EU:C:2011:525], para 28.

[28] C-215/06, Commission of the European Communities v. Ireland, judgment of 3 July 2008 [ECLI:EU:C:2008:380], para 49.

[29]OBRADOVIC, D.: EC rules on public participation in environmental decision-making operating at the European and national levels, *European Law Review*, 2007, p. 844. Retrieved 22 January 2017 from http://users.uoa.gr/~gdellis/IIG/5__Obradovic.pdf

[30] C-115/09, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, opinion of AG Sharpston delivered on 16 December 2010 [ECLI:EU:C:2010:773)], paras 42-44.

[31] C-263/08, Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd, judgment of 15 October 2009, [ECLI:EU:C:2009:631], para 45.