

Access to Justice in EU Environmental Matters

EXPERT GROUP MEETING

Brussels, 27th November 2014

General considerations for the legal instrument

- Transposing the requirements of Article 9(2),9(3) and (4) Aarhus Convention
- A material scope limited to A2J for EU environmental law only.
- Establishing minimum requirements
- Respecting legal traditions and legal systems in the MS
- Codification of the existing case law of the CJEU on A2J.
- Definition of legal terms and concepts.

Legal Standing

- **Article 9(2) of the Aarhus Convention**, which requires that **members of the public concerned** (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have 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 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.
- **Article 9 (3) of the Aarhus Convention**, provides that each party to the agreement shall ensure that **members of the public**, as defined in Article 2 (4) of the Aarhus Convention, where they meet the criteria, if any, laid down in its 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.

Personal scope

- **Article 9 (2):**

Members of the **public concerned**: One or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups, affected or likely to be affected by, or having an interest in decisions, acts or omissions of public authorities concerning environment.

- **Article 9(3):**

Members of the **public**: one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups

Material scope

- **Article 9(2):**

Any decision, act or omission subject to subject to the provisions of article 6 (*public participation*) (...).

- **Article 9(3):**

acts and omissions by (...) public authorities
(-> *plans and programs, measures without a mandatory public participation requirement*)

Precedure/scope of review

In what procedure?

Article 9(2): court of law and/or another independent and impartial body established by law (Judicial review)

Article 9(3): Administrative or judicial procedures

What is the scope of review?

Article 9(2): the substantive and procedural legality

Article 9(3): no explicit requirements are laid down

Assumptions

- One stop shop
- Judicial review only
- Acts and omissions by private persons (natural or legal) shall not fall within the scope.
- The level of review identical in Art. 9(2) and Art.9(3)
- Same legal standing requirements in Art. 9(2) and Art. 9(3)
- Legal persons shall have a privileged status in the context of Article 9(3) to the same extent laid down in Article 9(2).

Legal standing

- the personal scope ("public" and "public concerned")
- the material scope
 - Any decision, act or omission subject to subject to the provisions of article 6 (public participation) (...).
 - acts and omissions by (...) public authorities (-> *plans and programs, measures without a mandatory public participation requirement*)

Existing provisions on legal standing

Article 11 (1) of the EIA Directive 2011/92:

- *1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:*
 - *(a) having a sufficient interest, or alternatively;*
 - *(b) maintaining the impairment of a right, where administrative*
 - *procedural law of a Member State requires this as a precondition;*
- *have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.*

Logical consequence ?

- Member States shall ensure that, in accordance with the relevant national legal system, members of the **public concerned**,
 - having a sufficient interest, or alternatively;
 - maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,have access to a review procedure to challenge the substantive or procedural legality of **decisions, acts or omissions of public authorities, excluding plans and programs, with public participation requirements.**
- In addition, Member States shall ensure that, in accordance with the relevant national legal system, members of the **public** under the same conditions as first bullet have access to a review procedure to challenge the substantive or procedural legality of
 - **acts or omissions of public authorities without public participations requirements,**
 - **plans and programs.**

Standing for legal persons

- it is an independent non-profit-making legal person in accordance with a Member State's national law or practice;
- it has the primary stated objective of promoting environmental protection in the context of environmental law;
- it has existed for more than two years and is actively pursuing the objective referred to under (b);
- the subject matter in respect of which the request for internal review is made is covered by its objective and activities.
- a reasonable minimum number of members, which takes into account the interests of legal persons of local relevance,
- requirements on financial transparency

Prior Participation

Procedural guarantees:

- the administrative procedure and the possibility to participate was adequately announced to the public,
- the public could participate in the procedure in an effective manner,
- the timeframe granted for participation was sufficient, taking into account the specificities of the individual case,
- the members of the public had access to all relevant information,
- the comments made by the members of the public concerned were duly taken into account.

Partial preclusion

Procedural guarantees:

- the preclusion does not apply on facts which just intend to amend already introduced arguments in the administrative procedure,
- preclusion does not apply to the facts raised already at the administrative phase, regardless of the author of the comments or administrative actions taken by the parties to the proceedings.
- the courts are entitled to consider completely new facts in exceptional cases, for instance when the claimant was not aware of these facts during the administrative procedure.
- The preclusion does not apply on legal arguments or new subjective rights invoked.

Scope of review

Substantive legality

- the facts related to the contested matter have been fully assessed by the public authority,
- the applicable law has been correctly interpreted and applied,
- the decision is not based on arbitrary considerations,
- the public authority does not exceed the bounds of its discretion,
- Criteria pursuant to Article 263 TFEU (lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers).

Procedural legality:

- competence of the public authority,
- procedural requirements, in particular public participation requirements.

Costs

Art. 9(4) AC: Procedures shall not be prohibitively expensive.

- Objective criteria:
 - an objective analysis of the amount of the costs
- Subjective criteria:
 - the claimant's financial situation
 - whether the claim had 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 the applicable procedure and the potentially frivolous nature of the claim at its various stages,
 - costs already incurred at earlier levels in the same dispute.
- Legislative provisions to reduce cost exposure
 - cost shifting rules,
 - cost capping mechanisms, particularly for lawyer fees,

Assistance mechanisms

Article 9 (5) requires parties to *"consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers (...) to access to justice."*

An appropriate legal aid scheme, applicable for natural and legal persons, may help to reduce the cost exposure for the litigant.

Efficiency of the procedures

- The **efficiency** of court procedures, (e.g. number of hearings, requirements for legal representations, etc.) has an impact on the costs of a case.
- The more efficient, the less costs it may produce, which may also help to fulfil the requirements of non-prohibitive expensive costs.

Timeliness

- Article 9(4) of the Aarhus Convention requires that procedures shall be timely.

Effective remedies

Article 9(4) of the Aarhus Convention requires that the procedures shall provide effective remedies.

- re-considering, revoking or suspending the administrative decision or act,
- in the case of an omission, ordering the appropriate action to be taken,
- ordering compensation for the damage sustained, in case of pecuniary damage, if the existence of a direct causal link is found between the breach alleged and the damage sustained;
- ordering other corrective or compensation measures for the damage sustained.

Injunctive relief

Article 9(4) of the Aarhus Convention requires that the procedures shall provide injunctive relief as appropriate.

- the possible damage to the environment that can be avoided by granting an injunction,
- the need for a temporary, permanent or partial injunction to avoid unreasonable damage to the environment and/or to private interests,
- the balance between the public interest of protecting the environment and the specific private interests involved, when adopting a decision on any interim measure,
- the advantages gained by the injunction will exceed the eventual harm caused by the injunction.

Procedural guarantees to avoid the misuse of procedural rights

- Member States should remain responsible for introducing national measures aiming at preventing the abuse of rights in particular by frivolous or vexatious claims.