AARHUS CONVENTION AND THE EU: PARTICIPATORY AND PROCEDURAL RIGHTS

PARTICIPATORY AND PROCEDURAL RIGHTS IN ENVIRONMENTAL MATTERS

Trier, 4-6th March 2015
Content

- The spirit of access to justice
- Case-law of the Court of Justice of the EU on access to justice in environmental matters
- Driving forces behind the case-law
- National trends and considerations of judges applying EU law
- Conclusions
Introduction

Some preliminary considerations

"The fish cannot go to court." AG Sharpston at the Trianel hearing

"The environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations." AG Kokott

AG Sharpston comparing courts to Ferraris in the Trianel-case, high quality, but accessible only to few.
Introduction - Courts are Ferraris? In what sense?
Introduction - Can Fish go to Court?
THEY CANNOT AND THEY DO NOT HAVE FERRARIS EITHER
Case-law of the Court of Justice of the EU

Access to justice
Art. 9 (2)
- C-427/07: Commission vs. Ireland: justice
- C-263/08: DLV: justice for NGOs (2000 members-too strict)
- C-115/09: Trianel: justice for NGOs, based on public interest activity
- C-128/09: Boxus
- C-182/10: Solvay
- C-416/10: Krizan: interim relief
- C-420/11: Leth; Wells (C-201/02), Case C-404/13 - effective remedies
- Edwards C-260/11 and C-530/11 Com vs UK: costs
- Altrip C-72/12 - scope of review

Art. 9 (3)
- C-237/07: Janecek: air+planning
- C-240/09: "Slovak Bears": justice in nature
Case-law of the Court of Justice of the EU

An impressive body of CJEU case law:

- **C-237/07-Janecek**: air+planning - Standing 9(3)

  "42. ...where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan..."

**Broader consequences:**

- Can be applied to other EU legislation with a health element (water, waste, etc.)
- Could be interpreted to be covering also NGOs, not only individuals
- Covers not only plans under air quality, but also others with an environmental aspect
Case-law of the Court of Justice of the EU

- An impressive body of CJEU case law:
- **C-240/09 Slovak Bears**
- 50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is **consistent with the objectives** laid down in Article 9(3) of the Aarhus Convention.
Case-law of the Court of Justice of the EU

- Para 52: Article 9(3) of the Aarhus Convention does not have direct effect in EU law.
- Court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention.
- And the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken liable to be contrary to EU environmental law.

Broader ramifications:
- NGO standing across the full-breadth of EU ENV secondary law
Case-law of the Court of Justice of the EU

- **Trianel-case (C-115/09):**
  - Building of a coal-fired power-plant
  - Public participation during the permitting procedure
  - In DE law even an NGO needed to prove impairment of a right (shutznormtheorie)
  - The DE court asked whether the NGOs should have a privileged status based on EU law (EIA and IPPC Directives).
Case-law of the Court of Justice of the EU

- At the occasion of the hearing of the case
- both parties and the ones intervening had the possibility to defend their respective views
- Advocate-General Eleanor Sharpston in her wisdom asked the following questions based on an imaginary situational exercise:
  - Let us imagine two situations:
    - First scenario: building of a power plant next to a river
    - A Village in the vicinity of the planned construction
    - Does anybody have standing? Answer: YES
    - Second scenario: same power plant, but no villages nearby, in fact no inhabitants in a very large diameter
    - Would anybody have standing? NO (in contradiction with Aarhus)
- The situational exercise effectively demonstrated the flaw in the German system, namely that there are situations, where nobody can challenge an omission, act or a decision affecting the environment.
Case-law of the Court of Justice of the EU

- Swedish case (Djurgaarden)
- Main facts: not possible for to go to court after having participated at the previous level of the administrative process
- To make things worse: only NGOs who have at least 2000 members
- Court rules:
  - Access to justice regardless of the role played in the previous stage of participation
  - Standing is too restrictive in this national case
- As a consequence: was changed to 100 members
Case-law of the Court of Justice of the EU

- Costs related rulings (1 IE and 2 UK cases):
  - Mere discretionary practice in Member States is not an acceptable way of transposing EU law,
  - Meaning of legal costs: any costs having to do with participating in the procedure (lawyers, evidence, experts, court duties),
Case-law of the Court of Justice of the EU

- Costs related rulings (1 IE and 2 UK cases):
  - Objective and subjective criteria to be assessed,
  - A number of considerations to determine whether or not costs in a specific case are prohibitive or not (Take into account personal means, frivolous nature, legal aid, etc.)
  - All instances are covered by the requirement of not prohibitively costly procedures
  - Mutatis mutandis: all access to justice rules are to cover all instances
  - Injunctive relief is also covered by the requirement
Case-law of the Court of Justice of the EU

Solvay and Boxus cases:

Main facts of the cases:
Possibility to challenge in court legislative acts
The EIA Directive does not allow challenging legislative acts under Article 1 (4)
Wallone decree adopting administrative permits (Airport)
Court ruled:
National courts to assess whether or not the legislative act was adopted with the sole purpose of circumventing the EIA Directive’s access to justice rules
National judges as Constitutional judges
National practices and access to justice

- Some examples of national systems that can be considered to be not compliant with Aarhus
- Prohibitively expensive rules extending to cross-undertakings in damages, in a ES case 41 million EUR were set as a requirement
- In a common law jurisdiction a claimant was charged 1 million EUROS for going to court
- 5 years of existence was set as a precondition for standing for NGOs (in CY and SI, but now is reduced)
- NGOs penalised for going to court in the interest of the environment
- Some examples of courts not looking into the merits of the case at all
Case-law - Questions on access to justice still open

There is until now no case-law on the following issues:

- **non-discrimination principle** - what are the conditions applicable to NGOs coming from another Member State?
- **Preclusion**, what are the limits - on-going DE and AT cases
- Is there a limit to the requirement for **period of existence** for NGOs (ad-hoc, 1-3 years?)
- What is **timely** procedure? Environmntal cases should get a **special priority** status under procedural law?
Case-law - Questions on access to justice still open

There is until now no case-law on the following issues:

- **Screening decisions** under the EIA Directive - can these be challenged or not (already before the CJEU).

- **Scope of review scrutiny by judges**, what is exactly the limit of substantive and procedural legality?

- Are Article 9 (4) requirements also applicable to Article 9 (3) cases?

- Does Article 9 (4) have direct effect?
Case-law of the Court of Justice of the EU

Two main driving forces of developing case-law:
1) Role of the Commission and related powers granted by the Treaty
Article 17 EU and role of «Guardian of the Treaties»
Specific powers of articles 258 TFEU et 260 TFEU

2) Role of national judges and role of the Court of Justice of the European Union
The concept of «direct effect»
The possibility to ask questions from the European Court of the European Union (preliminary references)
Case-law of the Court of Justice of the EU - driving forces (1) - Commission

- Article 17 TUE

“1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall **ensure the application of the Treaties**, and of measures adopted by the institutions pursuant to them. It shall **oversee the application of Union law** under the control of the Court of Justice of the European Union. (...)

2. Union **legislative acts** may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. (...)

Case-law of the Court of Justice of the EU - driving forces (2) - Commission

- Arts. 258, 259 & 260 TFEU. - Art 258 states:

“If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a **reasoned opinion** on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may **bring the matter before the Court of Justice of the European Union**.”

- Purpose: to enable the Court of Justice to determine whether a MS has fulfilled its obligations under EU Law
Before bringing the case before the Court, the Commission conducts a preliminary investigation (pre-litigation phase) in which the MS concerned is given the opportunity to reply to the complaints addressed to it.

- If this does not result in the MS terminating the failure, an action of infringement may be brought before the Court.
- If the Court finds that an obligation has not been fulfilled, the MS must bring the failure to an end without delay.
- In case of non-compliance with this first judgment, the Court may impose on the MS a fixed or periodic financial penalty.
Case-law of the Court of Justice of the EU - driving forces (4) - The Courts

- Two main components:
- **Preliminary reference:** possibility for the national judge to ask the ECJ about interpretation of a given provision of EU law
- **Concept of “direct effect”:** the national judge is bound to enforce the rights conferred to individuals by a provision of EU law (EU law derived rights)
The national judges' perspective:
Approach to judicial review

• Why referring a question to the ECJ?
  □ An interpretation problem related to EU law: how shall I as national judge interpret Article 4(2) of a given Directive?
• □ A problem which is not hypothetical
• □ A problem which was not already solved
• See also:
The national judges' perspective: Approach to judicial review

- The text of Article 267 TFEU has not been much modified compared to old Article 234 EC
- This mechanism is in place since the beginning of the EU source of the EU law precedence and EU legal order: Case C-6/64, Costa/ENEL

“By the terms of this article, however, national courts against whose decisions, as in the present case, **there is no judicial remedy**, must refer the matter to the Court of Justice so that a preliminary ruling may be given upon the « interpretation of the treaty » whenever a question of interpretation is raised before them.”

The CJEU-national judges dialogue
The national judges' perspective: Approach to judicial review

Court of Justice at the APEX

May refer (must do so if no application possible under national law) question on the validity or interpretation of EU Law

Preliminary ruling

EU Member States' Courts or Tribunals
The national judges' perspective: Approach to judicial review

Action at the level of national courts: the concept of direct effect
- A key-concept for EU law
  - Case 26/62 Van Gend en loos
  - Cases 41/74, Van Duyn and 148/78 Ratti
- Direct (and indirect) effect of EU law makes national judges « EU law judges »
The national judges' perspective:
Approach to judicial review

**Van Gend en Loos - Facts**
- Appeal by individual before Dutch administrative tribunal against payment of a newly-increased import duty charged by the Netherlands contrary to Art. 12 of the EEC Treaty (now Art. 30 TFEU)

**Issue**
- Could individuals rely on this before national courts?

**Judgment of ECJ**
- Treaty more than an agreement which merely creates mutual obligations between contracting states
- Also confers rights on individuals, which arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way on individuals as well as on Member States and EU institutions
- Therefore, Art. 12 EEC Treaty interpreted as being directly effective, as this was a means of ensuring uniform application in all MS
The national judges' perspective: Approach to judicial review

- Conditions for direct effect

**Problem:**
- Some Treaty provisions drafted in general terms and not all are designed to be applied directly by national courts

**Solution:** ECJ established criteria for direct effect
- Essentially, the provision must be ‘self-executing’, i.e.:
  - Intended to confer rights to individuals
  - Sufficiently clear and precise
  - Unconditional
The national judges' perspective: Approach to judicial review

- The concept does not only deal with directives but with all areas of EU law (Treaties, Regulations, Directives, Decisions)
- Regulations and decisions: direct effect
- Main source of problems when applying direct effect: directives
- Conditions for direct effect of directives:
  - Conditional on transposition and implementation
  - Directives can only have vertical direct effect, not horizontal
The national judges' perspective: Approach to judicial review

• Therefore, the national judge became **EU judge**
• What are the actual obligations?
• **Preliminary references** under certain conditions
• Give **direct effect** to certain provisions of EU law if conditions are fulfilled
• And give also **indirect effect** to EU law
The national judges' perspective: Approach to judicial review

What is indirect effect?

- It means that even in cases where there is no clear provision for instance by a Directive
- The judge is still obliged to ensure that the objectives of the instrument is fulfilled (useful effect)
- This can be done in a number of ways
- There are a number of rulings that give more details (Becker 8/81, Kraaijeveld C-72/95, Linster C-287/98, AG Leger)
The national judges' perspective: Approach to judicial review

- Essentially this means that citizens who should have had a right ensured in national law, based on EU law, but due to inappropriate transposition by MS should not be in a less favourable situation.

- There are a number of pleadings possible to remedy this unlawful situation: pleading based on effectiveness, pleading for consistent interpretation, pleading for substitution or exclusion (after AG Leger in Linster)

- In the Aarhus area, the consistent interpretation doctrine playes a role in the Slovak Brown Bear ruling
The national judges' perspective: Approach to judicial review

- Main considerations in the SK BB ruling:
  - Aarhus Convention as international treaty became part of EU legal order,
  - Article 9 (3), despite the fact it is vague,
  - establishes rights for citizens based on EU law
  - The question the CJEU asked itself: What can a judge do if there is a missing step, i.e. no legislation at EU and/or national level?
  - It should to the fullest extent possible interpret/bend/stretch the texture of law that is visible
The national judges' perspective: Approach to judicial review

- Main considerations in the SK BB ruling:
  - The situation is clear if there is already national law, judges can interpret their law in light of AC or bend their rules so that they become conform to Aarhus and EU law
  - But what if there is nothing in EU secondary or national law?
  - What did the CJEU mean when it said: „interpret to the fullest extent possible...”?
  - However, the objective of Aarhus is clear: citizens still need to have their Aarhus rights enforced...
Where do we stand now?

- Access to justice gap being filled in by court case-law (MS and EU level) and follow-up by Commission,
- Developing CJEU case-law,
- Developing national case-law,
- National courts’ case-law trends - popping up rulings also at national level (DE: air quality in Darmstadt; SE wolves cases based on the SK brown bear ruling and Janecek)
The recent trends and future plans

- Main problems encountered on access to justice
- The general and special uncertainties on the
- The Court of Justice of the EU defined what not to do, not what to do;
- Some specific areas of problems:
  - costs of bringing actions;
  - Standing uncertainties, etc.
- The efficiency of national court procedures.
The recent trends and future plans

- Judiciary knows what not to do, as signalled by the Court, but does not know what to do
- Negative guidance given by the Court

Therefore, positive guidance is needed that would be provided for by an EU initiative.
Conclusion (rather the start of the discussion)

- In view of recent trends:
- Further national cases on Aarhus can be expected
- More preliminary references "popping up" to clarify the situation
- Action likely at EU level and also at national level
Thank you for your attention!