ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS
CURRENT DEVELOPMENTS AT EU LEVEL

ADAM DANIEL NAGY
GOVERNANCE, INFORMATION & REPORTING (ENV.D.4)
DG ENV
1. Historical perspective

2. The evolution of the case-law at EU level + political developments

3. What now?
Some 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

"Who should have access to a Ferrari?"
1. Historical perspective

4 instruments to implement the Aarhus Convention at the EU level

- For the EU: Regulation 1367/2006

- For the Member States:
  - Pillar I + Art. 9(1): Directive 2003/4
Recent changes in the Treaties regarding access to justice:

Adoption of the Lisbon Treaty

- Article 6 (ex-article 6 TUE) Lisbon Treaty
  - the Charter of Fundamental Rights of the European Union has the same legal value as the Treaties.
- Charter of Fundamental Rights Art 37 and Art 47.
  - Article 19 TUE
  - (...)Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.
1. Historical perspective

The Aarhus Convention and access to justice

3 pillars within the 3rd pillar
Access to justice in the context of
- Access to information
- Public participation
- Access to justice in general
1. Historical perspective

2 important aspects to access to justice:

• **Entitlement** (who has standing)

• **With procedural guarantees, such as**
  - Effective
  - Timely
  - Injunctive relief is available – to avoid irreversible damages to the nature
  - Not prohibitively expensive
Under Article 9 (1) of the Aarhus Convention

Access to justice
- administrative level
- judicial level

Access to information Directive 2003/4/EC

- Who has access and what can be challenged:
- any applicant who considers that his request for information has been ignored,
- wrongfully refused (whether in full or in part),
- inadequately answered or otherwise not dealt with in
1. Historical perspective - The first pillar - Member States

What can be challenged?
- In accordance with the provisions of Articles 3, 4 or 5,
- the acts or omissions of the public authority to be reconsidered

What bodies?
- Authority concerned or another public authority or reviewed administratively by an independent and impartial body established by law.
**Procedural aspects** at first instance

Any such procedure shall be expeditious and either free of charge or inexpensive.

**Procedural aspects** at second instance

In addition to the review procedure referred to in paragraph 1,

review procedure before a court of law or another independent and impartial body established by law.
• Furthermore
• MS may provide that third parties incriminated by the disclosure of information may also have access to legal recourse.
• Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article.
1. Historical perspective – the 2nd pillar
Member states level

- Article 9 (2), (4) of the Aarhus Convention
- Directive 2003/35/EC amended the environmental impact assessment and IPPC Directives also on A2J
- Recently reference to A2J included in the SEVESO III Directive (industrial hazards)
  - Inclusion of access to justice provisions subject to public participation
1. Historical perspective – the 2nd pillar member states level

- Who can challenge?
- Standing for public concerned individuals and their associations—sufficient interest or impairment of a right
- eNGOs are deemed to have an interest
1. Historical perspective – the 2nd pillar
Member states level

- Review body:
- Independent body of law or court of law
- Challenge what:
- Substantial and procedural legality of decisions or omissions by public authorities
Procedural guarantees – Reviews should be:

- Covering substantial and procedural aspects,
- Timely,
- Not prohibitively expensive,
- Fair, equitable,
- Injunctive relief (implicit based on Krizan-case),
- Information to be provided to the public concerned on access to justice.
1. Historical perspective – The 3rd pillar
Member States level

Article 9 (3) and (4) of the Aarhus Convention

- Reservation in 2005/370/EC: Council Decision
- EU rules on the subject:
  - 2004/35/EC Environmental Liability Directive,
  - Proposal for a Ship recycling Regulation.
1. Historical perspective – The 3rd pillar member states level

Main elements:

Two levels:

1) Administrative complaints
2) Judicial review, without prejudice
1) Administrative complaints

Who can complain?

Natural or legal persons

- affected or likely to be affected by environmental damage or
- (b) having a sufficient interest in environmental decision making relating to the damage or, alternatively,
- (c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,
- NGOs.
1) Administrative complaints

Review body:
Administrative competent authority

Provedural aspects:
– Need to provide evidence on the possible damage,
– Reasons for negative decision,
– Give possibility for operator to comment, enter the procedure.
2) Judicial review

The persons referred to in Article 12(1) (natural + legal persons, NGOs) shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive.
2) Judicial review
However:
This Directive shall be without prejudice to any provisions of national law which regulate access to justice and those which require that administrative review procedures be exhausted prior to recourse to judicial proceedings.
1. Historical perspective – The 3rd pillar
Member states level

- Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law

- Some elements:
  - Non-binding,
  - Horizontal, covering health, competition, environment, etc.
  - Covering collective litigation (2 or more persons litigating)
1. HISTORICAL PERSPECTIVE – THE 3RD PILLAR
MEMBER STATES LEVEL

• Some elements:
• **Scope and subject coverage**: is to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law
• **Aarhus element**: Member States should ensure that the collective redress procedures are fair, equitable, timely and not prohibitively expensive,
• **Two main actions can brought:**
• claim cessation of illegal behaviour collectively (*injunctive collective redress*) and claim compensation collectively by two or more natural or legal persons in mass harm situations
1. **Historical perspective – access to justice at EU level**

- Aarhus Regulation and access to justice
- Most important elements:
- Specific criteria for NGO (one option is to use this in a draft instrument at MS level access to justice),
- Scope of review, only acts of individual scope
- Two on-going cases calling this latter into question, namely T-338/08, *Stichting Natuur en Milieu v Commission* and T-396/09,*Vereniging Milieudefensie v Commission*. 
2. THE EVOLUTION OF THE CASE LAW AT EU LEVEL

An impressive body of CJEU case law:

- C–237/07 Janecek: air+planning+standing for individuals
- C–427/07 Commission vs. Ireland: justice and costs
- C–263/08 DLV: justice for NGOs
- C–115/09 Trianel: justice for NGOs
- C–128/09 Boxus
- C–182/10 Solvay
- C–240/09 "Slovak Bears": justice in nature
- C–416/10 Krizan: interim relief
- C–420/11 Leth; Wells (C–201/02); – effective remedies
- Edwards – costs+on-going infringement Com vs UK

All providing building blocks for the Commission for future action on access to justice
Building blocks of an impressive body of CJEU case law:

- C–237/07 Janecek: air+planning
- Standing for individuals with a health–related interest

Useful for the A2J Directive:
- 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
Building blocks of 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.
2. The evolution of the case law at EU level

Building blocks of an impressive body of CJEU case law:

- C-240/09 Slovak Bears

Useful for the A2J Directive:
- NGO standing across the full-breadth of EU ENV secondary law,
- Zero option not acceptable, not giving any rights to NGOs.
2. The evolution of the case law at EU level

Building blocks of an impressive body of CJEU case law:

- within effective access to justice – effective remedies
  - C–420/11 Leth – Wells C–201/02;
- and Interim measures
  - C–416/10 – Križan

Remedies: re–considering, revoking or suspending the administrative act, ordering to act, compensation, etc.

Interim measures: proportionate, serving to avoid damage to the environment, etc.
2. The evolution of the case law at EU level

- **CJEU Case–law in the pipeline:**
  - **C–530/11**: cost of justice AG Kokott Opinion Delivered
  - **C–72/12** Altrip: Trianel II

- **Infringement actions**: Belgium, Germany, UK, Austria, Ireland, Slovenia, SK, CZ, MT...
3. What now?

Is the status quo sustainable?


Specific provisions aimed at ensuring reasonable access to justice are currently restricted to a few areas of EU environment law. A 2003 Commission proposal aimed at facilitating wider access has not progressed but the wider context has changed, in particular the Court of Justice has confirmed recently that national courts must interpret access to justice rules in a way which is compliant with the Aarhus Convention. National courts and economic as well as environmental interests face uncertainty in addressing this challenge. The Commission considers it appropriate to explore how greater certainty could be provided for national courts and economic and environmental interests. Possibilities include:

Defining at EU level the conditions for efficient as well as effective access to national courts in respect of all areas of EU environment law.
3. What now?

The reaction from the other institutions:

1) Council conclusions of 11 June 2012 (document 11186/12)

II. Better implementation, enforcement, monitoring and strengthening of environment policy and legislation

6. (...)REITERATES the need for ensuring a full implementation of environmental policies and legislation at EU level, and therefore ENCOURAGES the Commission and as appropriate the Member States, while respecting the principle of subsidiarity, to further develop and implement the objectives and initiatives set out in the Communication such as:

- improving complaint handling at national level, including options for dispute resolution, such as mediation;

- improving access to justice in line with the Aarhus Convention,”“
The reaction from the other institutions:

2) European Parliament report of 29 February 2012 (document A7–0048/2012) 68. Underlines that the 7th EAP should provide for the full implementation of the Aarhus Convention, in particular regarding access to justice; stresses, in this connection, the urgent need to adopt the directive on access to justice; calls on the Council to respect its obligations resulting from the Aarhus Convention and to adopt a common position on the corresponding Commission proposal before the end of 2012;”

+ new report by EP
The reaction from the other institutions:

2) new report by EP in 2013

42. Calls on the Commission and the Member States to explicitly define a specific timeframe in which court cases relating to the implementation of environmental law shall be resolved, in order to prevent the implementation of the environmental law and delays in court cases from being used as an excuse to avoid compliance and hinder investments; calls on the Commission to assess how many investments have been held back because of delays in legal proceedings relating to irregularities on the implementation of environmental legislation;

3) Committee of the Regions report of 30 November 2012 (document ENVE-V-024)
The proposal for a 7th Environmental Action Programme (represents the Trilogue agreement, consensus to be built on) "63. In order to maximise the benefits of EU environment legislation by improving implementation, the programme shall ensure that by 2020:
(e) The principle of **effective legal protection** for citizens and their organisations is facilitated. This requires, in particular:

v. Ensuring that national provisions on access to justice reflect the case law of the Court of Justice of the European Union, and promoting *non-judicial conflict resolution* as a means of finding amicable and effective solutions for conflicts in the environmental field............."
3. What now?

In view of the foregoing:

Very recent withdrawal of the access to justice Directive under exercise of simplification (REFIT) by Commission

Furthermore, there are a number of proposals which the Commission will propose to withdraw. Seven proposals identified in this category include access to justice in the environmental field15;”

15 The Commission will consider alternative ways of meeting its obligations under the Aarhus Convention and is conducting an impact assessment while awaiting an ECJ judgement.


3. What now?

- The Study phase
  The "Darpö studies": state of play in 28 MS, to be finalised during September of 2013

  The "Maastricht study": economic aspects of access to justice
3. What now?

- The discussion phase
  - Discussion in Council Working Group 7th EAP and 13th May – historical moment – positive signal for going ahead with Impact Assessment
  - Internal discussions
  - Expert groups of judges
  - NGOs
  - Business
  - Academia
  - On-going public consultation + expert meetings
3. What now?

- The study– Impact assessment phase

A number of options are considered, such as

**Option 1**: business as usual (soft law approach)

**Option 2**: addressing existing gaps in Member States provisions (infringement)

**Option 3**: drafting a new proposal in accordance with developments of the case-law

**Option 4**: retain COM(2003) 624 (NOT AN OPTION ANYMORE)

Studies pointing in the direction of a new proposal under option 3 – less legal uncertainty and less costly in the long run

**Option 5**: A regulation?

**Option 6**: Relying on sectoral legislation (IED, SEVESO, EIA, etc.)
3. What now?

Main characteristics of an Impact Assessment

- Problem-definition
- Objectives
- Options – Impacts
<table>
<thead>
<tr>
<th>Problem definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>The general and special uncertainties on the</td>
</tr>
<tr>
<td>- Court's case-law trends;</td>
</tr>
<tr>
<td>- Standing;</td>
</tr>
<tr>
<td>- The degree of scrutiny that national courts should apply to the issues presented to them;</td>
</tr>
<tr>
<td>- The costs of bringing actions;</td>
</tr>
<tr>
<td>- The remedies that national courts should employ;</td>
</tr>
<tr>
<td>- The efficiency of national court procedures;</td>
</tr>
<tr>
<td>- Role of alternative dispute resolution mechanisms</td>
</tr>
</tbody>
</table>
3. What now?

Objectives
"ensuring that national provisions on access to justice reflect the case-law of the Court of Justice of the European Union, and promoting non-judicial conflict resolution as a means of finding amicable solutions for conflicts in the environmental field."

Access to justice meaning standing, standard of review, costs, timeliness, efficiency, remedies, interim measures. Non-judicial conflict-resolution, based on the logic of resolving conflicts in an efficient and effective manner.
3. What now?

4 options - Main considerations:

- Cost of the options
- Impact on courts and administrations
- Impact on the EU and MS
- Impact on health and environment
- Impact on the internal market – avoiding pollution havens
- Legal certainty
- Questions addressed such as: "Is it better to solely rely on the Courts' case-law or to adopt certain minimum standards at EU level?"
3. **What now?**

- The drafting phase – Provisions of a Directive?
- Main elements:
  - 1) Definitions – Material scope?
  - 2) Standing
  - 3) Requirements of review (applied to all instances)
  - 4) interim measures + remedies
  - 5) reporting
3. **What now?**

- **Main considerations**
- Logical to build on existing provisions such as in EIAD, IED, SEVESO
- Ensure procedural guarantees
- Costs should not be excessive
- Procedures should be timely
- Injunctive relief, remedies
- Mediation as a complementary tool
- Reporting requirements on certain aspects of the proceedings
Next steps:

- public consultation closed for further considerations see explanatory document
- 631 contributions were received, majority support for an EU instrument
- [http://ec.europa.eu/environment/consultations/pdfs/access.pdf](http://ec.europa.eu/environment/consultations/pdfs/access.pdf)
- Going to the Impact Assessment Board with IA report during autumn
3. What now?

Thank you for your attention!

adam-daniel.nagy@ec.europa.eu