

# **European Implementation of the Aarhus Convention – Access to Justice**

## **Third Aarhus Workshop**

17<sup>th</sup> November 2020

14.00 to 17.00 (CET)

# Welcome remarks

Dr. Michael Zschiesche, Managing Director and Chairman of the Board,  
Head of the Department Environmental Law & Participation of the  
Independent Institute for Environmental Issues (UfU e.V.)

# Agenda

14.15 to 14.55	<b>Session A (background)</b>	<p>PRESENTATION 1</p> <p><b>Background of the discussion</b></p> <p><b>What is wrong with access to justice in the European Union?</b></p> <p>with subsequent round of questions</p> <p>PRESENTATION 2</p> <p><b>The way forward</b></p> <p><b>Does the amendment to the Aarhus Regulation help?</b></p> <p>with subsequent round of questions</p>
14.55 to 15.00		<i>Break</i>
15.00 to 15.50	<b>Session B (about hurdles)</b>	<p>PANEL discussion 1</p> <p><b>What are the access to justice hurdles at European Union level from a German, Portuguese, Slovenian and European perspective?</b></p> <p>with subsequent round of discussion</p>
15.50 to 16.40	<b>Session C (about improvements)</b>	<p>PANEL discussion 2</p> <p><b>How could access to justice at European Union level be improved?</b></p> <p>with subsequent round of discussion</p>
16.40 to 16.50		<p>Introduction</p> <p><b>German Portuguese Slovenian Civil Society Declaration</b></p> <p>with subsequent round of questions</p>
16.50 to 17.00		The way forward
17.00 to 17.30		<i>Questions &amp; Answers</i>

# About UfU

- NGO and scientific institute
- Offices in Berlin & Halle (Saale)
- around 40 employees, 4 departments
- National, EU & international projects
- Further information:  
<https://www.ufu.de/en/>

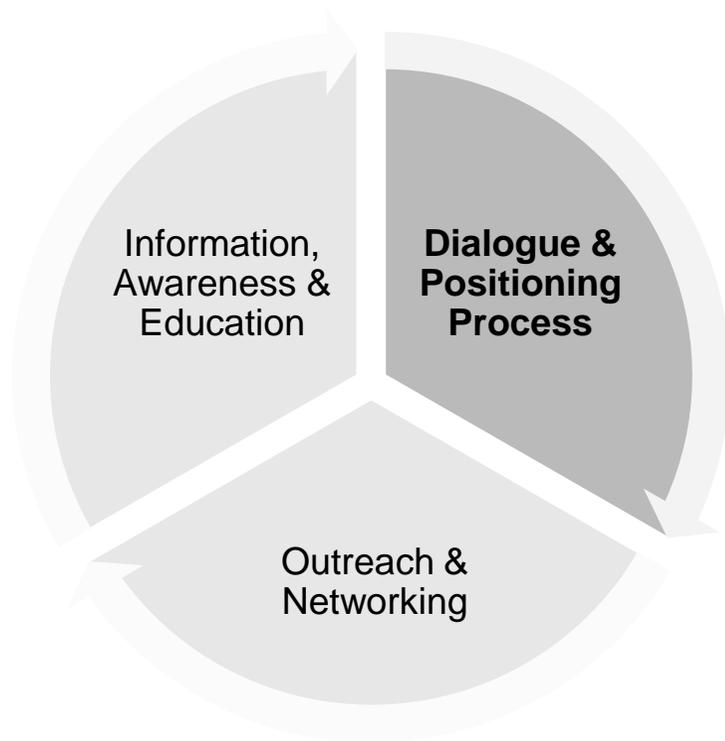
Energy  
Efficiency &  
Energy  
Transition

Climate  
Protection &  
Transformative  
Education

Nature  
Protection &  
Environmental  
Communication

Environmental  
Law &  
Participation

# European Implementation of the Aarhus Convention in the Digital Age (EU-AarKo)



- Duration: 04/2020 - 12/2021
- Further information:
- <https://www.ufu.de/en/project/eu-aarko/>

# Session A

**Background of the discussion**

# Background of the discussion

What is wrong with access to justice at European Union level?

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# Contents

**01** The problem

**02** Aarhus communication

**03** EU follow-up

# Route 1: No direct access to the CJEU

- Actions for annulment (Art 263 TFEU) not available for actions seeking to protect environment
- Stringent requirements – an act must be:
  1. Addressed to a person
  2. Of direct and individual concern (25/62 *Plaumann*)
  3. for regulatory acts, of direct concern + not require implementing measures (T-600/15 *PAN Europe*)

# Route 2: Preliminary rulings

- Theory: Applicant starts a case before national courts, which refers a question on the validity of an EU act to the CJEU
- Practice:
  - Not always / unclear if national implementing rules
  - Restrictive national standing rules
  - National judges hesitant to refer questions
  - Prohibitive litigation costs
  - Takes years – judgement may be irrelevant

# Route 3: Internal review

- EU ratifies Aarhus Convention in 2005
- Art. 9(3) AC: right to challenge acts and omissions by public authorities which contravene provisions of national law relating to the environment

=> EU adopts Regulation 1367/2006 (Aarhus Regulation):  
NGOs can request “internal review”

# Route 3: Internal review

General idea (Art. 10):

- 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)

# Route 3: Internal review

Very limited because of strict requirements:

- Applicant: Only NGOs with activity > 2 years
- Definition administrative act (Art. 2) = clear that it applies only for the authorization of certain substances (incl GMOs)

See cases: T-177/13 (C-82/17 P), T-33/16, T-108/17 (C-458/19 P), T-436/17

# Aarhus communication (C32)

- Aarhus Convention Compliance Committee (ACCC): 9 independent experts, anybody can start communication
- Findings need to be endorsed by the Meeting of the Parties

# Aarhus communication (C32)

- 2008 – ClientEarth communication (C32)
- 2011: Committee findings (part I):
  - Preliminary ruling procedure insufficient
  - Awaiting CJEU ruling
- 2012 - GC: Aarhus Regulation does not comply with Art. 9(3) Aarhus Convention
- 2015 – CoJ: No, Aarhus Convention not “directly effective“

# Aarhus communication (C32)

- 2017 - Committee findings (part II) – EU violates Art. 9(3) Aarhus Convention because:
  - Annulment unavailable, prelim ruling insufficient (routes 1+2)
  - Aarhus Regulation (route 3) too limited:
    - Limitation to NGOs
    - Too limited definition of administrative acts:
      - Individual scope,
      - Adopted under environmental law
      - Legally binding and external effects

# 2017 – Meeting of the Parties

- EU only wants to “take note” of the Committee’s findings
- Pressure from NGOs, Switzerland, Norway, chair => compromise = decision postponed until 2021
- EU commitment to continue to explore ways and means to comply with the Convention

# The EU follow-up

- June 2018: Council requests Commission (Art. 241 TFEU) to prepare a study and, where necessary, a legislative amendment
- October 2019: Commission reports back to Council + sends externally prepared study (Milieu Study)
- October 2020: Commission proposal to amend the Aarhus Regulation (see next presentation)

# Questions

**Background of the discussion - What is wrong with access to justice in the European Union?**

# The way forward

Does the Aarhus Regulation amendment help?

ClientEarth

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# The Commission Proposal

Critical issues:

- Scope: Which acts/omission can be challenged by way of an internal review request?
- Time limit for NGO + EU institution
- Costs of litigation for NGOs
- The arguments the Court will consider (scope of review)

# Scope: The Commission proposal

Art. 2(g):

administrative act' means any **non-legislative act** adopted by a Union institution or body, which has **legally binding and external effects** and contains provisions that may, because of their effects, **contravene environmental law** within the meaning of point (f) of Article 2(1), **excepting those** provisions of this act for which Union law explicitly **requires implementing measures** at Union or national level;'

# Scope I: Individual scope

- Removes requirement that act be of individual scope
- Very important because currently main ground for refusal (25/43 RIRs of the Commission)
- In line with C32 (para. 51 + 94) and Milieu Study (p. 198)

Art. 2(1)(g): 'administrative act' means any non-legislative act adopted by a Union institution or body,

# Scope II: External effects

- No change – EC claims not necessary
  - Ground for unjustified refusals
    - Ex: Approval of MS Transport Programme
  - Ignores:
    - C32 (para. 103)
    - Milieu Study: “reduces effectiveness” + room for clarification
- => Align with CJEU case law

Art. 2(1)(g): ‘administrative act’ means any non-legislative act adopted by a Union institution or body, which has legally binding and external effects

# Scope III: Under environmental law

- Clarifies that Regulation applies to acts “contravening environmental law” regardless of subject area / adoption
- In line with C32 (para. 100), Milieu Study (p. 198)
- Important because confusion in the past
  - Example: PCI list = EC refused RIR in 2013 *inter alia* for not being adopted “under environmental law”

Art. 2(1)(g): ‘administrative act’ means any non-legislative act adopted by a Union institution or body, which has legally binding and external effects and contains provisions that may, because of their effects, contravene environmental law within the meaning of point (f) of Article 2(1),

# Scope IV: Implementing measures

- New exclusion
  - No clear explanation when will apply
  - Potential to prevent RIR for most acts
  - NGOs must await damaging measure
  - False reliance on national courts
- = most problematic issue

Art. 2(1)(g): ‘administrative act’ means any non-legislative act adopted by a Union institution or body, which has legally binding and external effects and contains provisions that may, because of their effects, contravene environmental law within the meaning of point (f) of Article 2(1), excepting those provisions of this act for which Union law explicitly requires implementing measures at Union or national level;

# Scope: Our recommendation (part 1)

- Align wording on binding effects with CJEU case law
- Ensure that all acts that “contravene” the law can be challenged
- Remove exception for implementing measures

Art. 2(1)(g): ‘administrative act’ means any non-legislative act adopted by a Union institution or body, which has legally binding ~~and external~~ effects and contains provisions that may, ~~because of their effects,~~ contravene environmental law within the meaning of point (f) of Article 2(1), ~~excepting those provisions of this act for which Union law explicitly requires implementing measures at Union or national level;~~

# Scope V: State Aid

- Currently excluded – proposal silent
- Important – Ex: Effectively shapes energy market

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Art. 2(2): Administrative acts and administrative omissions shall not include measures taken or omissions by a Union institution or body in its capacity as an administrative review body, such as under:

- (a) Articles 101, 102, 105 and 107 TFEU (competition rules);
- (b) Articles 258, 259 and 260 TFEU (infringement proceedings);
- (c) Article 228 TFEU (Ombudsman proceedings);
- (d) Article 325 TFEU (OLAF proceedings).

# Scope V: State Aid

- Currently excluded – proposal silent
- Important – Ex: Effectively shapes energy market
- C32: No exclusion for administrative review but no evidence of breach

->

- CJEU: State aid decisions must comply with EU environmental law (*Austria v EC*)
- C128: pending before ACCC

Art. 2(2): Administrative acts and administrative omissions shall not include measures taken or omissions by a Union institution or body in its capacity as an administrative review body, such as under:

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- (c) Article 228 TFEU (Ombudsman proceedings);
- (d) Article 325 TFEU (OLAF proceedings).

## Scope: Our recommendation (part 2)

- Remove open-ended exclusion of administrative review
- Remove exclusion for state aid

Art. 2(2): Administrative acts and administrative omissions shall not include measures taken or omissions by a Union institution or body ~~in its capacity as an administrative review body, such as~~ under:

- ~~(a) Articles 101, 102, 105 and 107 TFEU (competition rules);~~
- (b) Articles 258, 259 and 260 TFEU (infringement proceedings);
- (c) Article 228 TFEU (Ombudsman proceedings);
- (d) Article 325 TFEU (OLAF proceedings).

# Time limits (Art. 10)

Proposal extends:

- Time limit for request (NGO): 6 -> 8 weeks
- Time limit for reply (institution):
  - 12 weeks -> 16 weeks
  - 18 weeks -> 22 weeks

= overall positive

# Missing: Cost regulation

- More recent issue: not part of C32
- EC usually uses internal counsel, other EU bodies (EFSA, ECHA, EIB..) external
  - Example: 24.000 € cost demand from Frontex for one instance

=> Needs amendment to ensure:

- Compliance: Art. 9(4) Aarhus Convention: procedures may not be “prohibitively expensive”
- Equal treatment with MS
  - CJEU case law on costs: *Edwards*, *Klohn* etc

# Missing: Scope of review / effective remedies

- Aarhus Regulation only permits to challenge RIR reply before the General Court, not the underlying act / omission that contravenes environmental law (T-108/17 *ClientEarth*, para 30)
- Milieu Study: limits effectiveness of RIR (p. 126)
- C32: No non-compliance but dependent on wide interpretation of Aarhus Regulation

=>

- On remedies – limited by Treaties
- On scope of review: Can include wording on review of “procedural + substantive legality”

# Our recommendation on costs + scope of review

Within limits of the Treaties:

- Ensures that the Court reviews all aspects of the RIR decision
- Ensures cost predictability, especially on remuneration of external agents, advisers and lawyers

Article 12(1): The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty **to review the substantive or procedural legality of the internal review decision.**

New Article 12(3): **Without prejudice to the Court's prerogative to apportion costs, it must be ensured that court proceedings initiated under this provision are not prohibitively expensive. Union institutions and bodies referred to in Article 10(1) shall not request that applicants pay costs exceeding a reasonable amount and shall, in any event, not request costs other than travel and subsistence expenses. In particular, Union institutions and bodies shall not request applicants to pay the remuneration of agents, advisers or lawyers.**

# Summary

## Strong points of proposals:

- Deletion: “individual scope”;
- Deletion: “under environmental law”
- Extended time limits

## To address by the co-legislators:

- Remove exclusion: requiring national implementing measures
- Remove exclusion: Commission state aid decisions
- Clarify: “external effects” & “because of their effects“
- Introduce: Cost regulation
- Introduce: Expand scope of review

# Conclusion: Does the Aarhus Regulation amendment help?

- Yes, very important improvement, if done well
- But cannot compensate all short comings:
  - (1) To challenge EU acts:
    - No possibility to challenge legislative acts
    - No standing for individuals
    - No review of the underlying decision= would require change in CJEU jurisprudence
  - (2) To challenge national acts:
    - accompanying Communication insufficient= would require Directive / at least sectoral provisions

# Questions

**The way forward -**

**Does the amendment to the Aarhus Regulation help?**

# Session B

**Access to justice hurdles at EU level**

# Panel discussion

**Access to justice hurdles at European Union level from a German, Portuguese, Slovenian & European Perspective**

# Session B: A2J hurdles at EU level



**Dr. Raphael Weyland**

Head of Brussels Office  
at NABU, in association  
with BirdLife Europe



**Catarina Grilo, PhD**

Director of Conservation  
and Policy at ANP,  
Portugal in association with  
WWF



**Senka Šifkovič Vrbica**

PIC Slovenia (Legal-  
Informational Centre for  
NGOs)



**Sebastian Bechtel**

Environmental  
Democracy Lawyer at  
ClientEarth Brussels



**Dr. Raphael Weyland**

Head of Brussels Office at NABU, in association  
with BirdLife Europe

**The issue as such:** The fact that NGOs like NABU cannot directly institute a proceeding before the Court of Justice of the EU is one of the biggest concerns.

**The side-implications:** The chosen approach implies that legal proceedings linked to challenging EU acts are complex, time-intensive, uncertain and, at the end, expensive.

**Missing directive and implementation:** No ambitious implementation of e.g. Art. 9 (3) Aarhus Convention on the ground, we need a “EU Access to Justice Directive“.

**Catarina Grilo, PhD**  
Director of Conservation and  
Policy at ANP, Portugal in  
association with WWF



1. In Portugal, **hurdles** in access to justice on environmental matters **start even before bringing a case to court**. Access to environmental information and the right to public participation in environmental decision-making can be pre-conditions to access to justice.
2. Access to **environmental information** is benefiting from digitalization, but this is not a silver bullet.
3. **Poorly designed participation processes:** Public participation in environmental decision-making in Portugal is equated with public consultation, which is poorly designed.

**Non-compliance of the EU:** By signing the Aarhus Convention, the EU is equal to other Parties (EU members) of the Convention so there is no excuse for exception or deviation in understanding and fulfilment of the AC obligations, including Article 9.

**Restricted appeals:** The legal framework for current environmental protection challenges requires the legal frame to move into the 21st Century. How can we protect it if we can't challenge decisions that don't respect e.g. the Paris Agreement commitments?

**No common legal frame:** There is a need for a common legal frame for exercising the right for access to justice – a Directive.



**Senka Šifkovič Vrbica** PIC  
Slovenia (Legal-Informational  
Centre for NGOs)

# Session B: A2J hurdles at EU level



**Dr. Raphael Weyland**

Head of Brussels Office  
at NABU, in association  
with BirdLife Europe



**Catarina Grilo, PhD**

Director of Conservation  
and Policy at ANP,  
Portugal in association with  
WWF



**Senka Šifkovič Vrbica**

PIC Slovenia (Legal-  
Informational Centre for  
NGOs)



**Sebastian Bechtel**

Environmental  
Democracy Lawyer at  
ClientEarth Brussels

# Session C

**Improving access to justice at EU level**

# Panel discussion

**How could access to justice at European Union level be improved?**

# Session C: Improvements



**Dr. Maria Alexandra  
de Sousa Aragão**  
Professor at University  
of Coimbra, Portugal



**Dr. Vasilka Sancin**  
Associate Professor at  
University of Ljubljana,  
Slovenia  
Director of Centre for  
International and  
Business Law



**Sebastian Bechtel**  
Environmental  
Democracy Lawyer at  
ClientEarth Brussels



**Dr. Maria Alexandra de Sousa Aragão**  
Professor at University of Coimbra, Portugal

Regarding the Proposal of an EU Regulation

**What needs to be clarified?**

The 'Trojan horse' concept of "provisions which may, because of their effects, contravene environmental law" (article 2 (1) (g)).

**What needs to be refined?**

The simplistic argument that giving more time to the EU institutions and bodies will always have the benefit of allowing an in-depth analysis and no drawbacks.

**What needs to be rethought?**

The 'blind' transference of responsibility from the European courts to the national courts when examining EU law, even when it is the validity of an EU provision that is at stake.

1) Ensure access to administrative review also to individuals when acts directly address a person,

2) Broaden access to other representatives of civil society, not only NGOs, for all administrative acts of "general scope" (e.g. academic institutions),

3) Ensure that factual OR legal substantiation giving rise to serious doubts suffices for the purposes of admissibility.



**Dr .Vasilka Sancin**

Associate Professor at University of Ljubljana, Slovenia  
Director of Centre for International and Business Law



**Sebastian Bechtel**  
Environmental Democracy Lawyer  
at ClientEarth Brussels

1. The **amendment of the Aarhus Regulation** is a crucial first step to improve access to justice on EU level and thereby ensure protection of people, the planet and the rule of law.
2. In order to deliver, the Commission's **proposal must still be improved** by the European Parliament and Council.
3. Most importantly, the **internal review mechanism** must become available for all relevant acts of the EU bodies and institutions, including, for instance, state aid decisions and regardless of whether they entail implementing measures.

# Civil Society Declaration

“Access to Justice for Citizens & NGOs at European Union Level”

# Trio Declaration: Overview

**Background & Objective**

**Three Major Steps of Reform**

**1.**  
**Internal Administrative Review of  
Acts Adopted by EU Institutions  
and Bodies**

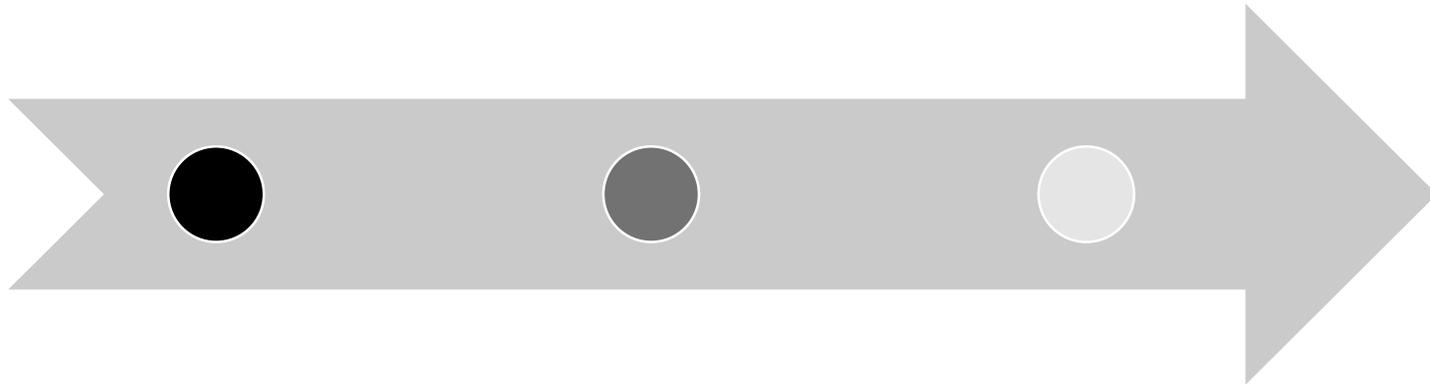
**2.**  
**Revising the Concept of  
Individual Concern for Direct  
Access to the General Court**

**3.**  
**Promotion of the  
Implementation of Access to  
Justice at Member State Level**

**Further Calls on EU Institutions and Bodies**

November:  
**Third digital  
Aarhus Workshop**

December:  
**Publication of the  
Declaration**



November:  
**Circulation of the  
revised Declaration**

# Next steps

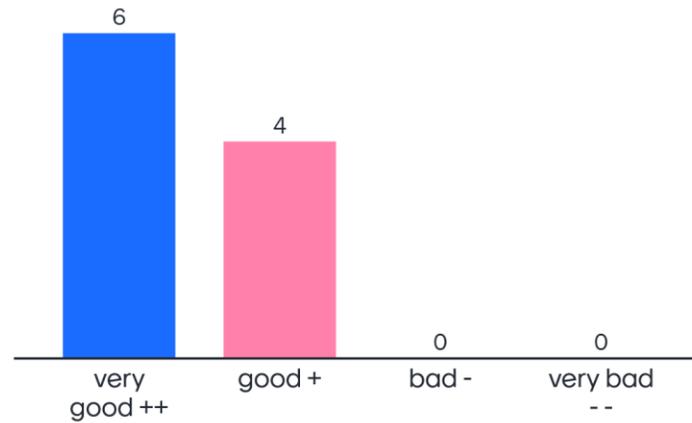
EU Council Presidency	2020	Events	Location
Croatia	11. May	1 <sup>st</sup> Aarhus Workshop	<i>virtual</i>
	30. June	2 <sup>nd</sup> Aarhus Workshop	<i>virtual</i>
Germany	1.-3. July	24 <sup>th</sup> Working Group of the Parties (Part I)	<i>virtual</i>
	28.-29. Oct.	24 <sup>th</sup> Working Group of the Parties (Part II)	<i>hybrid</i>
	17. Nov.	<b>3<sup>rd</sup> Aarhus Workshop</b>	<i>virtual</i>
	19. Dec.	EU Environment Council	Brussels?
<b>2021</b>			
Portugal	Feb.	25 <sup>th</sup> Working Group of the Parties	Geneva?
	Spring	<b>4<sup>th</sup> Aarhus Workshop</b>	<i>virtual</i>
		Meeting BMU – UBA – Environmental NGOs	Berlin?
Slovenia	Autumn	7 <sup>th</sup> Meeting of the Parties (MoP)	Geneva?
	6.-10. Sept.	<b>5<sup>th</sup> Aarhus Workshop</b>	Ljubljana

# Results

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# Contact

Kathleen Pauleweit, LL.M.

[kathleen.pauleweit@ufu.de](mailto:kathleen.pauleweit@ufu.de)

Independent Institute for Environmental Issues (UfU)

Department Environmental Law & Participation

Greifswalder Str. 4

10405 Berlin