elni REVIEW

ISSN 1618-2502

No 1/2018

ENVIRONMENTAL
LAW NETWORK
INTERNATIONAL

RÉSEAU
INTERNATIONAL
DE DROIT DE
L´ENVIRONNEMENT

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elni REVIEW

CONTENTS

Editorial

The current issue of *elni Review* contains several contributions focussing on different aspects in the field of European environmental law practice.

In his profound article "The genome editing technique is covered by Directive 2001/18 – Comment on Advocate Bobek's Opinion in case C-528/16" *Ludwig Krämer* argues that genome editing must be understood as being covered by the provisions of Directive 2001/18 on the deliberate release of genetically modified organisms into the environment.

"The ECJ Rules Environmental NGOs Must Have Access to Justice in Water Law Procedures" by *Summer Kern* and *Gregor Schamschula* assesses the current developments of implementation with regard to access to justice in Austrian Water Law. The ruling in question can certainly be seen as a milestone in environmental case law.

The article by *Erjon Muharremaj* "The role of legislation and courts in the protection of the environment in the European Union and its impact on the European integration of Albania" delivers interesting insights with regard to the current state of environmental law in Albania and its shortcomings with regard to jurisdiction. This certainly will have an impact on the acquisition negotiations with the European Union.

Finally, *Martin Führ, Jaqui Dopfer, Kilian Bizer et. al.* discuss simulation games as a method for regulatory impact assessments. They set out their experiences with the method acquired during the impact assessment of the EIA Amending Directive 2014/52/EU.

The current issue of the *elni Review* delivers information about recent developments; a summarized version of the "Peoples' Climate Case"-application delivered by the applicants and a review of the book "Environmental Crime in Europe" by the editors Andrew Farmer, Michael Faure and Grazia Maria Vagliasindi.

We hope you enjoy this issue.

Nicola Below/Martin Führ

July 2018

The ECJ Rules Environmental NGOs Must Have Access to Justice in Water Law Procedures

Summer Kern, Gregor Schamschula

1 Introduction

The Aarhus Convention[1] was adopted in 1998 within the United Nations Economic Commission for Europe, following Principle 10 of the Rio Declaration on Environment and Development.[2] This principle states that "[e]nvironmental issues are best handled with the participation of all concerned citizens […]". The Convention is an international treaty with three pillars, namely (1) Access to Information; (2) Public Participation; and (3) Access to Justice. As the Implementation Guide makes clear: "The three pillars depend on each other for full implementation of the Convention's objectives."[3]

The Convention has as of the date of this publication 47 Parties.[4] Austria ratified the treaty in early 2005[5], as did the EU[6]. As made clear by the EU's declaration upon ratification, implementation of the Aarhus Convention partly falls within the competence of the EU and partly within the competence of the Member States. With regards to Art. 9(3) in particular, the EU declared upon approval of the Convention that "the legal instruments in force do not cover fully the implementation of the obligations."[7] Yet the EU has recognized the drawbacks of this lack of implementation at the EU level repeatedly, and most recently issued a Notice on Access to Justice for the Member States so as to achieve better implementation and consistency within the Member States.

1.1 The EU Guidance Document[8]

The EU tried several times to introduce a directive on the third pillar of the Aarhus Convention, yet did not succeed due to resistance by the EU Member States.[9] After the latest failed attempt, the Commission moved on to draft a guidance document ("Notice") which mainly summarizes the case law by the European Court of Justice on the topic, and draws careful inferences therefrom. The Notice was published in April of 2017. While the Notice is not issued in a binding form such as a directive, its contents, which reflect the judgments of the ECJ, are binding. The document has gained a lot of attention, but many feel it falls considerably short of what is needed.[10]

1.2 The Situation in Austria

Environmental NGOs have had neither party standing nor related access to justice rights in Austria apart from EIA[11] procedures and with respect to certain large industrial projects.[12] In nature and water protection, in air quality, forestry law and other environmental law procedures, NGOs have neither been allowed to take part in the permitting proceedings, nor been able to challenge acts and omissions in court. Furthermore, the Highest Administrative Court ruled that Art. 9(3) of the Convention is not clear enough to be directly applicable in Austria.[13] To change this situation, Austrian NGO ÖKOBÜRO handed in complaints to both the European Commission and the Aarhus Convention Compliance Committee (ACCC)[14] in 2013/2014. The EC started an infringement case against Austria in 2014,[15] but took no further official steps after the initial letter. The ACCC found Austria to be in non-compliance, which was then endorsed by the Meeting of the Parties ("MOP") to the Aarhus Convention in 2014.[16] Neither the EC's actions, nor the

1 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25.6.1998, 37770 UNTS 119.

2 Rio Declaration on Environment and Development, 13.6.1992, UN Doc A/CONF151/26 (vol I); 31 ILM 874 (1992).

3 Implementation Guide, at p. 20; https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf.

4 www.unece.org/env/pp/ratification.html (9.3.2018).

5 Austrian BGBl III 2005/88.

6 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 2005 L 142/1ff.

7 https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en#EndDec (26.3.2018).

8 Communication from the Commission, 28.4.2017, C(2017) 2616 final, http://ec.europa.eu/environment/aarhus/pdf/notice_accesstojustice.pdf (9.3.2018)..

9 See fn. 8 *supra* at p. 6.

10 Comments by the environmental NGO Justice & Environment, http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2017/J_E_Comments_EC_Communication_A2J_Final.pdf (9.3.2018).

11 Environmental impact assessments according to the EIA directive 85/337/EEC, of which there are about 30 every year in Austria.

12 So called "Seveso" and "IPPC" projects, which are either more likely to have a big outfall or store dangerous goods according to directives 96/82/EG and 2010/75/EU respectively.

13 VwGH 27.04.2012, 2009/02/0239.

14 The compliance mechanism of the Aarhus Convention is open to the members of the public; the ACCC reviews cases and issues findings and recommendations, which are submitted to the Meeting of the Parties (MOP).

15 C(2014)4883 final.

16 MOP decision V/9b; following the review of the ACCC during the intersessional period, the most recent MOP in 2017 reaffirmed its earlier decision concerning non-compliance in decision VI/8b.

ACCC findings or even the decision of the MOP have led to further steps in implementing access to justice.

2 ECJ Case C-664/15

2.1 The case(s)

Despite the ruling of the Highest Administrative Court of Austria that the Convention is not directly applicable, in 2015 two cases[17] were combined which argued that the Convention is part of EU law and therefore the EU directives such as the WFD[18] have to be interpreted in a way which allows for access to justice for NGOs. One of the cases, C-663/15, was about the permission of a hydropower plant in Tyrol, while the second case, C-664/15, concerned the permission for a snow cannon in Lower Austria. The Austrian Court asked the ECJ for a preliminary ruling and posed three questions to the ECJ:

1) Does Article 4 of the WFD or this directive as a whole confer on an environmental organisation, in a procedure which is not subject to an environmental impact assessment under EIA Directive, rights for the protection of which it has access to administrative or judicial procedures under Article 9(3) of the Convention?
2) Is it necessary under the provisions of the Aarhus Convention to be able to assert those rights at the stage of the procedure before the administrative authority or is the possibility of being granted judicial protection against the decision of the administrative authority sufficient?
3) Is it permissible for national procedural law to require the environmental organisation — like other parties — to raise its objections not only in an appeal, but in good time at the stage of the procedure before the administrative authorities, failing which it loses its status as a party and is also no longer able to bring an appeal?

Those questions were later amended by the ECJ for the oral hearing.[19] Due to a formality, the case C-663/15 was dismissed by the referring court after the oral hearing of the ECJ in May of 2017 and thus removed from the ECJ as well.[20] The preliminary questions stayed with the ECJ, however, as case C-664/15 was still ongoing.

2.2 Opinion of Advocate General (AG) Sharpston

On October 12th, 2017 AG Sharpston delivered her opinion in the case C-664/15. She maintained that the question of the meaning of Art. 9(2) of the Aarhus Convention had already been dealt with in the earlier ruling to C-243/15 and assumed for purposes of the case at issue that significant effects could be excluded and that Art. 6(1)(b) and by extension 9(2) did not apply. Accordingly, she limited her analysis to the effects of Art. 9(3) of the Convention, arguing *inter alia* that this provision itself, in conjunction with directly applicable provisions of EU environmental law, such as the WFD, meant that party standing and access to justice rights should be accorded environmental NGOs. In other words, even where significant impacts could be excluded, such rights pertain.

2.3 The ruling

While not following the lines of AG Sharpston's opinion in all details, the ruling of the ECJ came to many similar conclusions. In particular, the Court affirmed C-243/15 and found that the question of whether an environmental NGO has a right under Art. 9(3) to challenge a permit issued per the WFD only arises when a court's review of the circumstances comes to the conclusion that significant negative impacts are excluded; otherwise the procedure would fall under Art. 6(1)(b) and, by extension, Art. 9(2) would be the relevant access to justice provision. Where such impacts can be excluded, then Art. 9(3) would be the legal basis for access to justice rights. Interpreting this provision in conjunction with Art. 47 CFR, the Court went on to explain that, "*although Member States have some discretion in establishing standing criteria*" according to their national laws, these may not be so strict that it is practically impossible for ENGOs to challenge acts and omissions within the meaning of Art. 9(3) of the Convention. Not only must national courts interpret national procedural rules to allow such challenges, but also, where such an interpretation is not possible, they must disavow such rules of their own motion.

This latter point cannot be understated. It essentially accords direct effect to Art. 9(3) in conjunction with relevant provisions of EU law.

Moreover, with respect to the issue of participation in the administrative procedures themselves (assuming Art. 6(1)(b) is not applicable), the Court indicated that such rights do not arise via Art. 9(3). However, the Court indicated clearly its view that full and active participatory rights can bring great benefits to environmental proceedings and highlighted provisions of EU environmental law which indicate an obligation for Member States to provide such

17 VwGH Ra 2015/07/0051 and Ra 2015/07/0055.

18 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJL 2000/327, p 1ff.

19 The amended questions widened the scope of the court from only Art. 9(3) of the Convention to include Art. 9(2), as was done in the ruling to the case C-243/15, which was decided after the preliminary questions were sent to the court, but before the oral hearing.

20 The original permission for the hydropower plant, which was challenged by the NGO WWF Austria was rescinded due to it wrongfully permitting two different building plans and had to undergo a new procedure. This led to the appeal of WWF being without grievance and thus the case was repealed. Apparently the ECJ was not informed until July of 2017, which led to frustration with AG Sharpston as seen in her opinion, recital 30.

participation. In light of these considerations the Court found that as a minimum, where the national law at issue conditions the right to judicial review on participation in the administrative procedures, then the combined provisions of Art. 9(3) of the Convention, Art. 47 CFR, and Art. 14(1) of the WFD dictate that ENGOs must be given such participation rights.

Finally, the Court found that procedural rules which could result in the loss of party status (and therefore access to justice rights) for a failure to submit an application for party status or to submit objections during the course of the administrative procedure itself would not *a priori* run afoul of Art. 9(3) and (4). Such rules could serve legitimate interests. However, such rules as applied in the case before would be unfair, as the ENGOs could not be considered as submitting cognizable claims in the first place. To bar such claims on the basis that they had not been timely brought was therefore not acceptable. The Court made clear that this aspect of its judgment was to be evaluated on a case-by-case basis, taking into account all relevant circumstances and the national law(s) at issue.

2.4 Impact in Austria

As indicated above, Austria has not implemented the Convention's provisions on access to justice into national law, even after the European Commission opened an infringement procedure, and despite the MOP's endorsement of the ACCC's findings that Austria is in non-compliance due to the lack of implementation of Art. 9(3) of the Convention. The ECJ ruling in the case C-243/15 in November 2016 encouraged some NGOs to apply for standing in ongoing nature protection cases. These applications were, however, denied by competent authorities, courts, and even the Highest Administrative Court.[21]

The new decision in C-664/15, however, has been met with considerably more acceptance domestically, as it concerned an Austrian case and paints a more encompassing picture of the role of the Convention within EU law. Some proceedings where NGOs petitioned for legal standing had even been suspended pending the ECJ ruling. Thus for example in February 2018, two months after C-664/15 was decided, the Regional Administrative Court of Tyrol cited the ruling to grant an NGO legal standing in a water protection case.[22] The Highest Administrative Court recently took up the issue with a ruling in a case of air quality protection,[23] also citing the ECJ and granting the NGO ÖKOBÜRO standing in an environmental matter not yet directly dealt with by the ECJ. It extended, in accordance with the Convention, the right to access to justice to include omissions by public authorities.[24] Especially after this decision by the Highest Administrative Court, it is highly likely that other regional authorities will follow and finally grant legal standing to NGOs in areas such as water and nature protection, maybe even forestry, waste management, building code cases and more. While these rulings, like the one by the ECJ, can be applied directly and give NGOs de-facto access to justice, a legislative implementation would be beneficial, as it could clearly lay out details such as time limits, legal notices for parties to proceedings and such. In its programme presented in December 2017, the newly appointed government of Austria promised "*a solution to the question of the Aarhus Convention*" but has yet to follow up with details.

2.5 Impact in the EU

Gaps and failures in the implementation of Art. 9(3) of the Aarhus Convention have been and remain a considerable problem within the Member States. Austria has been a serious example of just how drastic such shortcomings can be, yet it is hardly alone. Germany had similar issues for example and, like Austria, was found to be in non-compliance with the Convention for its failure to ensure adequate access to justice rights. Germany has since addressed some of these shortcomings with its recent "Umwelt-Rechtsbehelfsgesetz", the law governing access to justice for environmental NGOs. Yet issues remain.

Also, the ruling has to be regarded as adding meaningfully to the ECJ jurisprudence on the question of access to justice in rulings such as *Janecek*[25] and more recently C-243/15. This jurisprudence interprets major procedures with projects having a potentially significant impact on the environment as falling under Art. 6(1)(b) of the Aarhus Convention, with the right to appeal such decisions coming under Art. 9(2). While the ECJ did not exhaustively specify which parts of EU environmental law might be covered in this ambit, it stated that, at a minimum, procedures according to Art. 4(7) WFD and Art. 6(4) Habitats-Directive fall within this scope.

In other cases where potentially significant impacts can be excluded, Art. 9(3) of the Convention comes into play. It is likely that the ECJ will be invited to elaborate more about the definition of "*potentially significant impacts*" sooner or later, as the Convention allows for different solutions depending on the provision triggered (Art. 9(2) vs. (3)).

It will be interesting to see whether Member States will implement different regimes for projects with or

21 VwGH 23.5.2017, Ra 2017/10/0058.

22 LVwG Tyrol 21.2.2018 LVwG-2018/44/0055-6.

23 The case was about the question whether a registered NGO can challenge an air quality plan by a regional government, citing that its measures were not adequate.

24 VwGH 19.2.2018 Ra 2015/07/0074-6.

25 ECJ 25.7.2008 C-237/07.

without significant impacts, or if they prefer other solutions.[26] In addition, the ECJ defined a clear set of rules for how to interpret EU legislation in light of the Aarhus Convention. Some Member States, however, might take different approaches for EU law and national law, as the potential fines by the ECJ outweigh the consequences for breaches of international law, which the ACCC and MOP might impose. Due to the principle of equivalence with EU law, its legal protection must not be weaker than the one set out for national law.[27] Therefore, the standard set by the ECJ sets a minimum requirement, which cannot be undercut. It has to be noted though, that while the sanctions possible within the Aarhus Convention[28] might not "hurt" as much as financial sanctions within an EU infringement procedure, that does not weaken the legal obligation to fulfil the duties of the Member States in implementing the rules of the Convention. As Germany said in its recent amendment of its laws on access to justice: *Pacta sunt servanda*.

3 Conclusion

The ruling by the ECJ in the case C-664/15 can certainly be seen as a milestone in environmental case law. The system in which the ECJ incorporates the Convention into EU law, compiled in April 2017 by the European Commission in its guidance document, was meaningfully explicated and supplemented by this ruling. This ruling has made clear that, even where significant effects can be excluded, access to justice must be given to ENGOs both to ensure their rights under EU environmental law, as well as to ensure that the Member States live up to their obligations under such laws. It has also affirmed the great value in according full participatory rights with respect to such procedures under EU environmental law, and the necessity of giving such rights where access to justice is conditioned on the existence and exercise of such rights. The ruling also clarified considerably the Court's view on certain time-related rules, which can cut off such rights, indicating that the fairness and thus viability of such rules are to be assessed individually and considering the case at issue.

Finally, this ruling goes quite some way in clarifying further the difference between the regimes required by Art. 6(1)(b) and 9(2) of the Convention on one side and Art. 9(3) on the other. And while questions regarding the details remain unclear, especially the question on where to draw the line in between the two articles, the system itself can be seen as rather extensive and encompassing key EU environmental legislation, most noticeably the Habitats-Directive, the Water Framework Directive, the Birds Directive[29] and the Air Quality Directive.

Other questions remaining are the legal implementation in the Member States, a possible divide between law determined by EU legislation versus national legislation and a possible lack of access to justice with regards to the EU institutions themselves. The impact of the decision however is clear, as the ruling comes closer to filling the gap left by not having an access to justice directive.

26 *I.e.* procedures to determine which procedure is the correct one.

27 ECJ 1.12.1998, Rs. C -326/96, recital 18.

28 The extreme end of the scale includes cautions and suspensions of rights and privileges under the Convention.

29 Council Directive 2009/147/EC on the conservation of wild birds.

Imprint

Editors: Nicola Below, Martin Führ, Andreas Hermann, Gerhard Roller, Julian Schenten and Claudia Schreider

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The Editors would like to thank **Michelle Monteforte** and **Vanessa Cook** (both Öko-Institut) for proofreading the *elni Review*.

We invite authors to submit manuscripts to the Editors by email.

The *elni Review* is the double-blind peer reviewed journal of the Environmental Law Network International. It is distributed once or twice a year at the following prices: commercial users (consultants, law firms, government administrations): € 52; private users, students, libraries: € 30. Non-members can order single issues at a fee of € 20 incl. packaging. The Environmental Law Network International also welcomes an exchange of articles as a way of payment.

The *elni Review* is published with financial and organisational support from Öko-Institut e.V. and the Universities of Applied Sciences in Darmstadt and Bingen.

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The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.
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sofia

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.
The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.
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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled “Publications of the Environmental Law Network International”. Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

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