

Jerzy Jendrośka
Access to justice: overview of the legal
framework and key implementation
issues

Access to Justice in EU and the Member
States

ELNI online webinar

14 July 2020

Content

- A2J: legal framework
 - Situation before Aarhus Convention
 - A2J pillar in Aarhus Convention
 - A2J in EU
- A2J: key implementation issues
 - Overview
 - Standing
 - Review procedures

A2Justice: pre-Aarhus situation in EU

- Vague provisions only in Directive A2Info 90/313
- Diversified practice in Member States
- Limited international law (Lugano Convention!)
- Field considered generally as not a matter for harmonisation

Aarhus Convention - fundamental assumptions (see Preamble)

- Environmental protection is essential for human-being and there is a „duty, both individually and in association with others to protect and improve the environment”
- Traditional legal instrument do not guarantee sufficient protection of neither individual interests nor of public interests related to environmental issues.
- In particular, under traditional approaches „trees do not have standing” and „fish can not go to court” and environmental NGOs are best suited to fill the gap.

A2J - key issues in negotiations

- separate A2J pillar at all
- court, administrative review and ombudsman
- A2J in relation to public participation
- citizen's suit or actio popularis
- criteria for standing and rights of NGOs
- timely procedures
- injunctive relief
- assistance mechanism

Art.9 - access to justice

- Art.9.1-3: review procedures in 3 situations
- Art.9.4: requirements concerning
 - remedies
 - procedures
- Art.9.5: practicalities
 - information
 - assistance

Art.9.1,2 and 3: review procedures

- Art.9.1 (relation to Art.4) :
 - redress in case of abusing right to information
- Art.9.2 (relation to Art.6 and possibly other provisions) :
 - redress in case of abusing right to participate and/or
 - basis to challenge substantive and procedural legality
- Art.9.3 (relation to Art.1) :
 - separate right to file a public interest law suit
 - only enforcement action or catch-all provision?

Access to Justice – harmonization of laws in EU Member States

- Art.9.1 – Access to Information Directive
- Art.9.2
 - EIA Directive (art.6.1 a)
 - IED (IPPC) Directive ((art.6.1 a)
 - Seveso III Directive ((art.6.1 a or b?)
 - Habitat decisions – Case Case C-243/15 LZK II)
- Art.9.3
 - Directive 2004/35 on Environmental Liability
 - *draft Directive on Access to Justice/ Interpretative Guidance* in Commission Notice C(2017) 2616 final
 - Verdict in Case C-240/09 LZK I:

A2J key implementation issues - overview

- Often problem with jurisprudence and not legislation
- Overview of cases
 - Art.9.1 – relatively rare (mostly timeliness)
 - Art 9.2 -
 - Lack of access to justice in individual cases
 - Lack of effective access to justice
 - Scope of review
 - Art.9.3 - general legislative failures
 - Art. 9.2 and 3 - criteria for standing for NGOs and some individual members of the public (tenants)
 - Art.9.4 -
 - Costs
 - Effective remedies
 - Timeliness

The public – art.2.4

- *one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;*
- Meant to cover all legally allowed forms of assembly – not only those having legal personality
- Wording following Council of Europe conventions

Types of NGOs „promoting environmental protection” – existing practice influencing Aarhus negotiations

- Traditional large membership associations (like RSPB or Danish Society for the Conservation of Nature)
- Grassroots groups created to address environmental issue in their vicinity
- Expert organizations (usually established as foundations)
 - Scientist (originally)
 - Lawyers (later)

The public concerned – art.2.5

„the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”

- Subset of „the public” – ie meant to cover all legally allowed forms of assembly
- Those „promoting environmental protection” – based on existing practice
- Requirements under national law – meant to ascertain if indeed they „promote environmental protection”

Standing – basic premises

- Always natural persons and NGOs
 - Preamble: *effective judicial mechanisms should be accessible to **the public, including organizations**, so that its **legitimate interests are protected and the law is enforced***
- Without discrimination – art.3.9
 - *the public shall have accessto justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a **legal person**, without discrimination as to where it has its registered seat or an effective centre of its activities.*

Approaches to standing

- Art 9.1 - Access to information
 - any person requesting information
- Art. 9.2 - Public participation
 - members of the public concerned
 - sufficient interest or impairment of rights
 - including environmental NGOs from art.2.5
- Art.9.3 – „Citizen’s suit”
 - members of „the public” (art.2.4)
 - criteria to be laid down in national law

Criteria for NGOs

- Tendency to apply the same criteria for art.9.2 and for art. 9.3 – not justified under Aarhus
- Art.9.2 and 2.5 only those „promoting environmental protection”
 - „requirements under national law” meant to ascertain if indeed they „promote environmental protection”
- Art.9.3 – any legally existing associations, organizations or groups
 - not only „ „promoting environmental protection” - could also be those monitoring transparency, rule of law etc
 - „criteria..in national law” cannot „effectively bar all or almost all environmental organizations „

Environmental NGOs – non-controversial criteria applied in various jurisdictions

- Legally accepted form of assembly (fundamental)
- Environmental protection as a statutory goal (fundamental)
- Transparency (non-controversial)
- Not-for profit (non-controversial)
- Geographic scope of activity (non-controversial)

Controversial or doubtful criteria for environmental NGOs

- Prior participation (not allowed)
- Existence (for example 3 years) – excludes grassroots groups (highly controversial)
- Membership –excludes foundations (highly controversial)
- Public support (highly controversial)
- Environmental protection as exclusive/dominant goal – may exclude NGOs dealing with sustainable development - controversial
- Active and permanent performance - discretionary?
- Democratic structure - discretionary?

Review procedures - access to information (Art.9.1)

- Reasons:
 - Request ignored
 - Request wrongfully refused
 - Request inadequately answered
 - Request otherwise not dealt in accordance with Article 4 of the Convention

Review procedures

- Administrative review
 - Expeditious
 - Free of charge or inexpensive
 - Administrative appeal or ombudsman
- Court review
- Final decision
 - Binding
 - Reasons stated in writing

Review - public participation (Art.9.2)

- Criteria for standing
 - Sufficient interest
 - Impairment of a right
 - Status of NGOs
- Reasons
 - Substantive or procedural legality
 - Decision, act or omission subject to Article 6
 - other provisions??
- Court review and administrative review

Citizen's suit – Art 9.3

- Reasons
 - acts or omissions
 - private persons or public authorities
 - which contravene provisions of national law relating to the environment
- Review
 - Administrative or judicial
- Members of the public meeting the criteria

Art.9.3 - role

- In addition and without prejudice to the review procedures under 9.1 and 9.2
- Relation to the right (art.1)
 - of every person
 - of present and future generations
 - in an environment adequate to health and well-being

Art 9.3 – scope

- To challenge acts or omissions
 - by private persons or public authorities
 - which contravene provisions of national law relating to the environment
- Review
 - administrative or
 - judicial

Remedies – Art.9.4

- Adequate
- Effective
- Include injunctive relief

Review procedure

- Fair and equitable
- Timely
- Not prohibitively expensive

Information and assistance – Art. 9.5

- Information
- Assistance

Information and assistance – Art. 9.5

- Information - relation to
 - Art.3.5
 - Art.4.7
 - Art.5.7b)
- Assistance - relation to Art.3.2

Access to Justice - Art. 9.2 vs 9.3

- Role of article 9.2 envisaged by drafters
- Role of article 9.3 envisaged by drafters
 - only enforcement action or catch-all provision?
- Personal scope
 - Members of the public concerned vs members of the public
 - Wide access to justice vs criteria, if any
- Administrative vs other remedies
 - Art. 9.2 – possibility of administrative review
 - Art.9.3 – „administrative or judicial procedures”
- Scope of review
 - Substantive and procedural legality of any decision, act or omission
 - Acts or omissions by private persons and public authorities