



Basics of EU Environmental Law

Access to environmental information, participation of public in environmental decision-making and access to justice - the 3 pillars of Aarhus Convention.

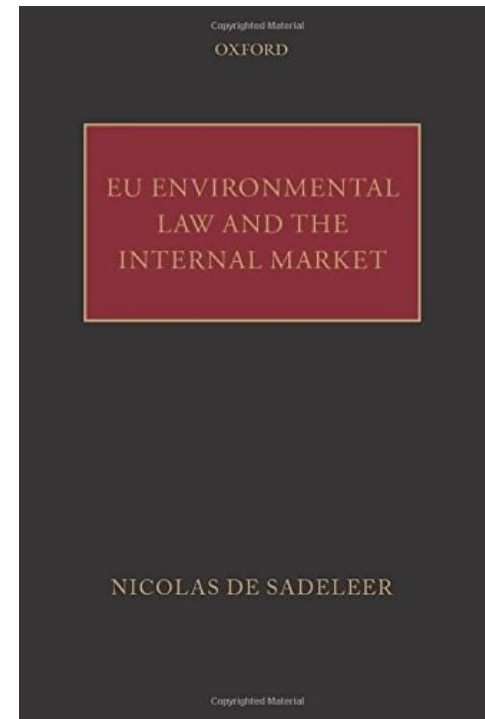
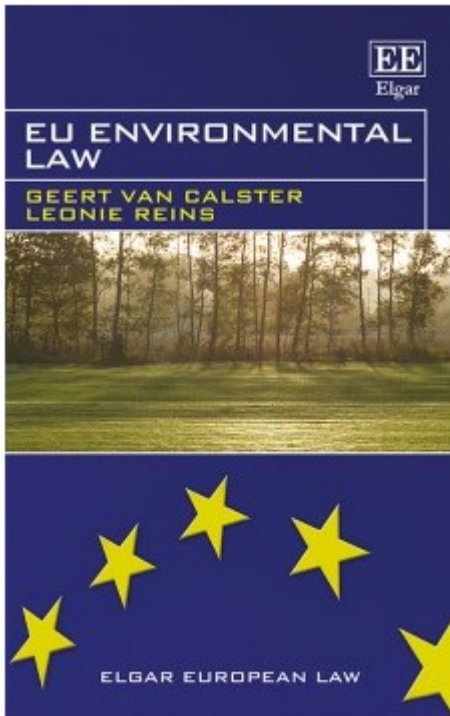


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Where to get more info on the EU environmental law?



http://www.transworld-fp7.eu/wp-content/uploads/2013/04/TW_WP_21.pdf



Where to get more info on the EU environmental law?



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Home

Training materials: Speakers' contributions

The Nature Directives

- Introduction to the Birds Directive, Habitats Directive and Natura 2000
- Implementation of Article 6 Habitats Directive
- Habitats Directive in the case law of CJEU
- Case Study on the Habitats Directive
- Case study on the Habitats Directive: Judgments and the solution

Environmental Impact Assessment (EIA)

- Introduction to the EIA and the SEA Directives
- The EIA Directive in the case law of CJEU
- Case Study on transboundary EIA
- Case Study on transboundary EIA: Speakers notes

Interaction between the EIA and the Nature Directives

- Interaction between the EIA Directive and Article 6
- Backgroundpaper on Interactions between EIA and AA
- Role of the EIA and the Nature Directives in judicial review proceedings at national level substantive and procedural aspects
- Case Study on the interaction between the EIA and the Habitats Directive
- Case Study on the interaction between the EIA and the Habitats Directive: Solution

[Back to the overview](#)

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https://www.era.int/cgi-bin/cms?_SID=NEW&_sprache=en&_bereich=artikel&_aktion=detail&idartikel=125276



Where to get more info on the EU environmental law?

http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf



www.echr.coe.int/Pages/home.aspx?p=home

Council of Europe
EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Home The Court Case-law Press Hearings Statistics Applicants Official texts Library Français

Quick Links

- Recent Judgments
- Recent decisions
- Recent press releases
- Multimedia
- Applicants
- Other languages
- Fact sheets & Country profiles
- Case-Law Information Notes
- Information visits

Grand Chamber judgment concerning Ukraine

12/10/2017
The Court decided to join 12,141 applications to the case of **Burmych and Others v. Ukraine**. The cases all concern the prolonged non-enforcement of final judicial decisions and raise issues similar to those examined in the *Tranov v. Ukraine* pilot judgment, which noted the existence of a structural problem.
The Court found that these similar applications formed part and parcel of the execution procedure set out in the pilot judgment. It therefore decided to strike them out of its list of cases and transmit them to the Committee of Ministers of the Council of Europe to be dealt with in the framework of the general measures to execute the pilot judgment in question.
Press release | Press release (in Russian)
Factsheet: Pilot Judgments | Country profile - Ukraine

Chamber

Judgment concerning Italy

12/10/2017
In the case of **Cafagna v. Italy** the Court found a violation of the right to a fair trial.
In this case, the applicant had been convicted on the basis of ...

Judgment concerning Norway

05/10/2017
05/10/2017
In the case of **Becker v. Norway** the Court found a violation of freedom of expression. ...

Official Visit

Visit by the Minister of Justice of Armenia

13/10/2017
On 13 October 2017, Davit Harutyunyan, Minister of Justice of Armenia, visited the Court and was received by President Guide ...

Visit to the Republic of Moldova

10/10/2017
From 5 to 6 October 2017, President Guide Raimond paid an official visit to the Republic of Moldova. During this visit, he was received ...

Other information

Election of a Judge

17/10/2017
The Parliamentary Assembly of the Council of Europe has elected Lado Chanturia as Judge to the Court in respect of Georgia. ...

Hearings

Fortthcoming hearing

20/10/2017
The Court will be holding a Grand Chamber hearing in the case of **Denisov v. Ukraine** on 18 October 2017.



The role of national courts

- National judges are EU judges!
- Obligation to to **ask** for a **preliminary question**
- **Secondary EU Law interpretation after CJEU**
- EU Law ex offo where possible, but
Waddenzee/Kraajiveld doctrine applies
- *Curia novit iura?*



Interim measures - C-416/10 (Križan)

Moreover, it is apparent from settled-case law that a national court seized of a dispute governed by European Union law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under European Union law.

It must be added that the right to bring an action provided for by Article 15a of Directive 96/61 must be interpreted in the light of the purpose of that directive. The Court has already held that that purpose, as laid down in Article 1 of the directive, is to achieve integrated prevention and control of pollution by putting in place measures designed to prevent or reduce emissions of the activities listed in Annex I into the air, water and land in order to achieve a high level of protection of the environment.



The role of national courts and the role of CJEU.

The three instruments in the “toolkit” of the national court

1. Consistent interpretation
2. Direct effect
3. State liability





Consistent interpretation

Marleasing: „as far as possible“

Pfeiffer: all national law

No duty before expiration implementation deadline, however,
(*Adeneler*):

courts must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise attainment of the objective pursued by that directive

Cannot depend on administrative practice (C-508/04, C-50/09)



Consistent interpretation

C-424/02: *Where technical, economic and organisational constraints so allow, Member States shall take the measures necessary to give priority to the processing of waste oils by regeneration.*

...the definition of such constraints cannot be left to the exclusive discretion of the Member States. Apart from being **contrary to the principle of the uniform interpretation and application** of Community law, interpretation by the Member States alone **would make the compatibility of processing** (...) would depend entirely on a policy assessment on the part of the Member State concerned





Consistent interpretation

Limits to consistent interpretation

- Constitutional position of national courts
- Court is not a legislator or executive authority
- To do whatever lies within their jurisdiction
- No *contra legem* (legal certainty)
- „A cow is not a horse“



Direct effect

Loosening up of the criteria through the years

- In sum: unconditional and sufficiently precise
- Kraaijeveld/ Waddenzee: reviewing available discretion
- Dieter Janecek case

Consequences:

1. national law inapplicable
2. preclude valid adoption of new national legislation
3. national law to set aside
4. cannot be applied against individuals
5. Duty for courts and public authorities alike

Problem: National authorities consider direct effect.



Direct effect

C-72/95 – Kraaijeveld

*where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, **the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts...***



Direct effect

C-72/95 – Kraaijeveld

Interpretation of a provision of Community law involves a comparison of the language versions (purpose and general scheme of the rules)

where under national law a court or tribunal hearing an action (...) must or may raise of its own motion pleas in law based on binding national rules which have not been put forward by the parties, it must, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State have remained within the limits of their discretion under Articles 2(1) and 4(2) of the directive, and take account thereof when examining the action for annulment



State Liability

Member States can be held responsible for legislative, executive or factual acts.

Individuals who have suffered damage have a right to reparation if:

- the rule of law infringed is intended to confer rights on individuals;
- the breach is sufficiently serious;
- there is a direct causal link between the breach of the obligation and the damage sustained (environment?)



State Liability

C-201/02 – no EIA

How far? C-420/11



EU liability?



Last seminar summary

1) Harmonization of environmental requirements

- principle of subsidiarity: cannot be sufficiently achieved by the Member States, obligation to refrain from any measure which could jeopardise the attainment of the Union's objectives

2) EU environmental law transposition and implementation.

- also during period laid for implementation, implementation and the enforcement: member states, problems of EU control: remote, burden of proof

3) The role of national courts and the role of CJEU.

- conflict: annulment, non-application (exemptions)
- CJEU: interpretation, systematic failures, financial sanctions
- national courts: consistent interpretation, direct effect, state liability



Today

- 1) Participation in general
- 2) The Aarhus Convention
- 3) Three pillars at the EU level
- 4) Three pillars at the national level



Public participation?

- Environmental democracy
- Affected and close to the source
- Fundamental rights
(to be able to assert this rights, citizens must participate)
- Helping hand
 - to further the accountability of and transparency
 - to strengthen public support for decisions
 - to promote environmental education



Public participation? Negatives?

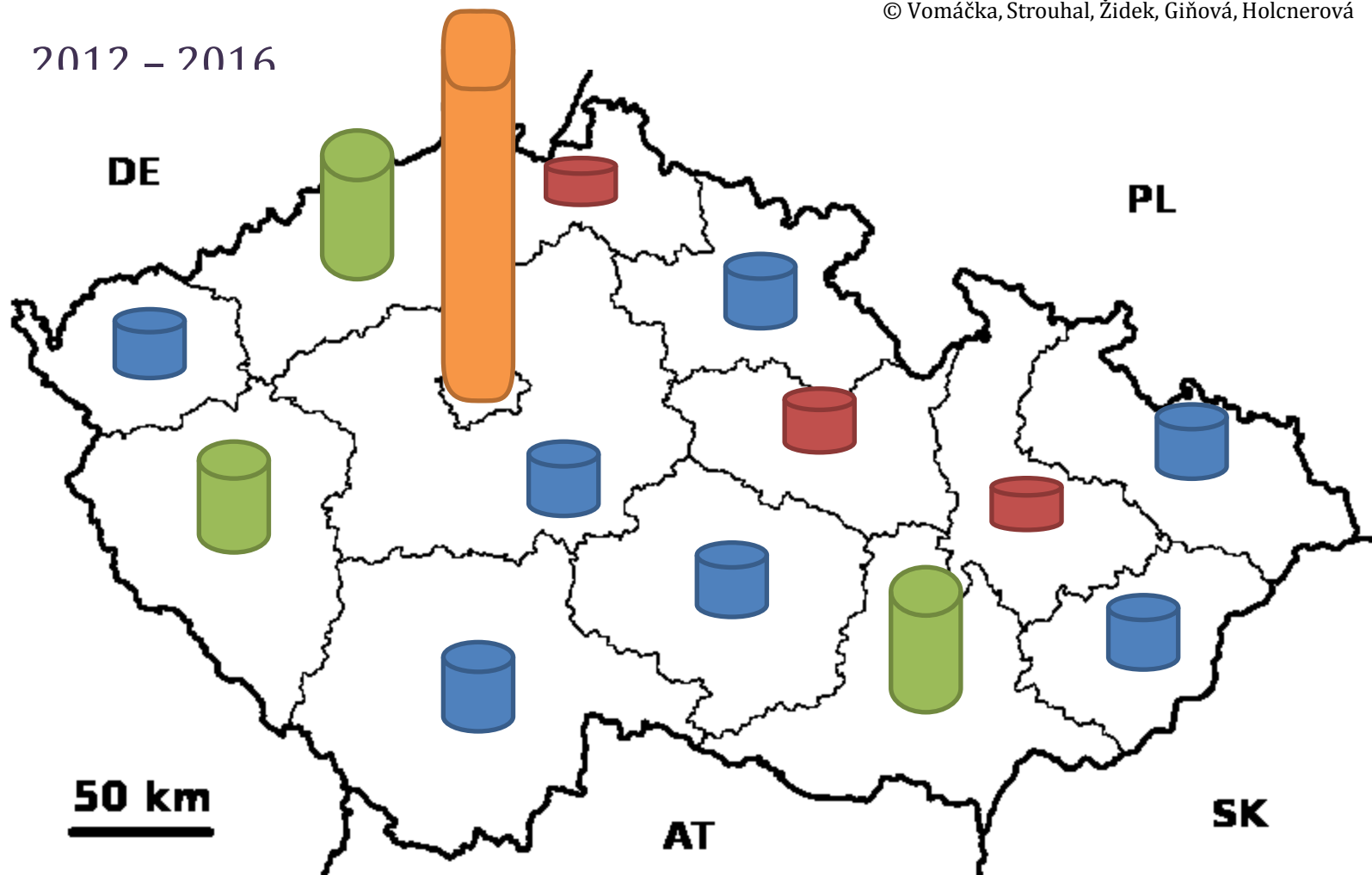
Only procedural rights

Wide scope

Free or almost free of charge

Not necessarily protection of environment – personal interests

2012 – 2016





Public participation? How?



- Petition
- Demonstration
- Referendum
- Information
- Participation in proceedings
- Judicial Protection



Balancing the system

C-115/09 Bund für Umwelt und Naturschutz Deutschland, Landesverband
Nordrhein-Westfalen eV/Bezirksregierung Arnberg **Trianel**
Kohlekraftwerk Lünen

The German system of judicial review

- involves a “careful and detailed” **scrutiny of administrative decisions**,
- admissibility criteria are such that **few are able to access this system**, particularly groups bringing actions alleging environmental harm.



Legal regulation





Effective participation?





Public participation? How?



Capercaillie - a large, turkeylike Eurasian grouse of mature pine forests. The male has a courtship display in which it fans the tail and makes an extraordinary succession of sounds.



Marina Isla de Valdecañas





Public participation? How?

Marina Isla de Valdecañas

- The tourist resort in the province of Caceres, which comprises hotels, 200 luxury villas, a golf course and a marina.
- It was declared illegal by a Spanish Supreme Court ruling of 6 February 2014. The resort is located within a Natura 2000 protected area.
- The ruling comes after almost a decade of court proceedings, and at this stage the resort is already close to completion.

The Aarhus Convention – national level

Various restrictions:

Costs of the proceedings? *Costs follow the event rule?*

Lilian Pallikaropoulos from Rugby – £ 90.000



Maximum, legal aid, moderation, C-260/11 (*Edwards*)



Sources of legal regulation

Participation at the national level

IL

+

EU

+

NL

= 28 different systems



International level

- Principle I of the Stockholm Declaration on the Human Environment (1972)
- Principle 10 of the Rio Declaration on Environment and Development
- UN General Assembly resolutions (1982) on the World Charter for Nature and (1990) on the need to ensure a healthy environment for the well-being of individuals
- The Aarhus Convention
- Principle of EU environmental law
- Customary international law?



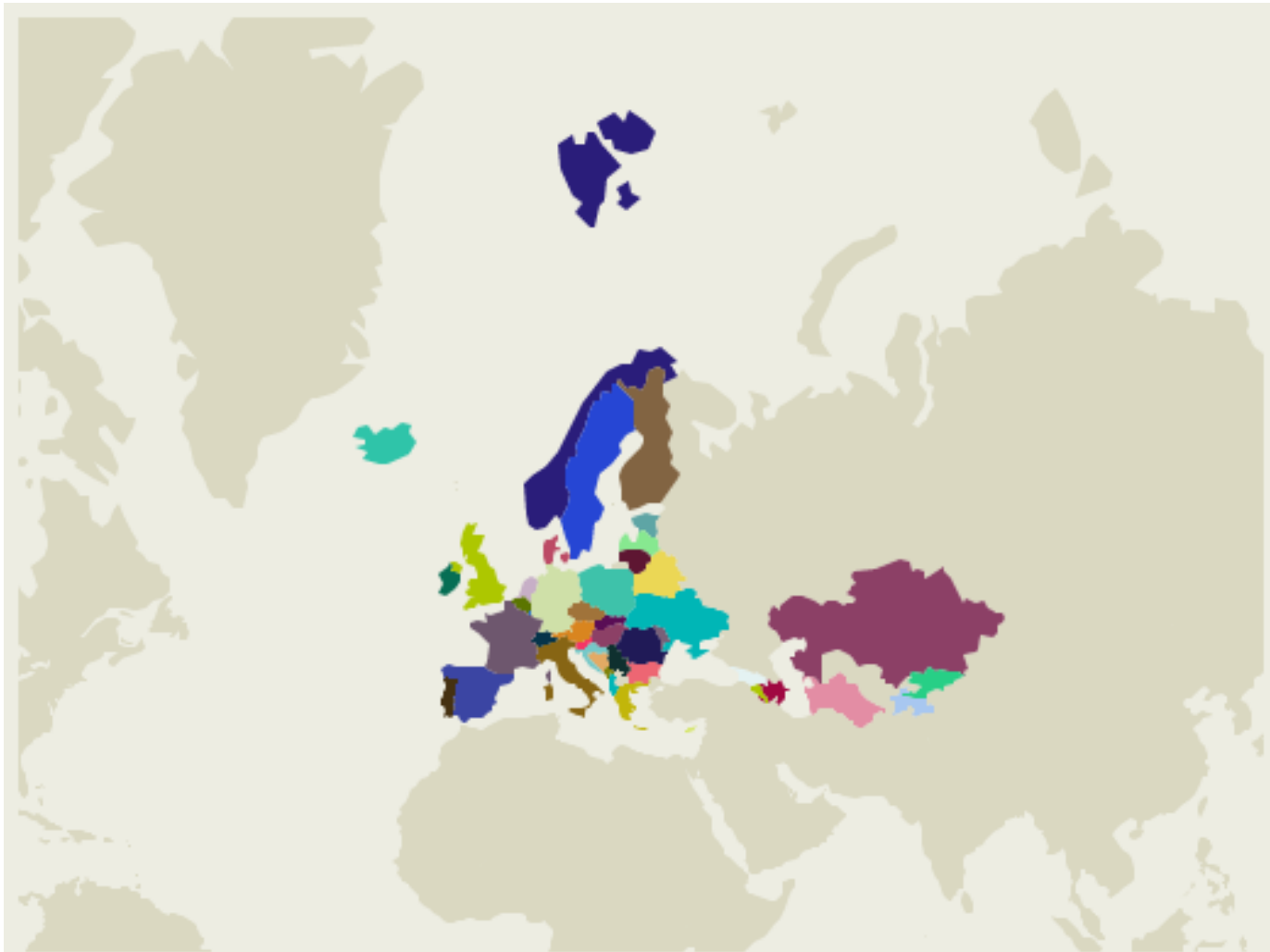
The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters



AARHUS CONVENTION
for our environment



The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters





The Aarhus Convention

- Adopted on 25 June **1998** in the Danish city of Aarhus (Århus)
- Entered into force in 2001
- **All Member States and EU are parties**
- Links environmental rights and human rights
- Acknowledges that we owe an obligation to future generations
- Establishes that sustainable development can be achieved only through the involvement of all stakeholders
- Links government accountability and environmental protection
- Focuses on interactions between the public and public authorities in a democratic context.



The Aarhus Convention

- ***Rights-based approach***
- ***A 'floor', not a 'ceiling',***
- ***Non-discrimination***
- ***Definition of public authorities***
- ***Non-compliance mechanism***
- **GMO amendment**



The Aarhus Convention

“The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

“The public concerned” means 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.

<https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

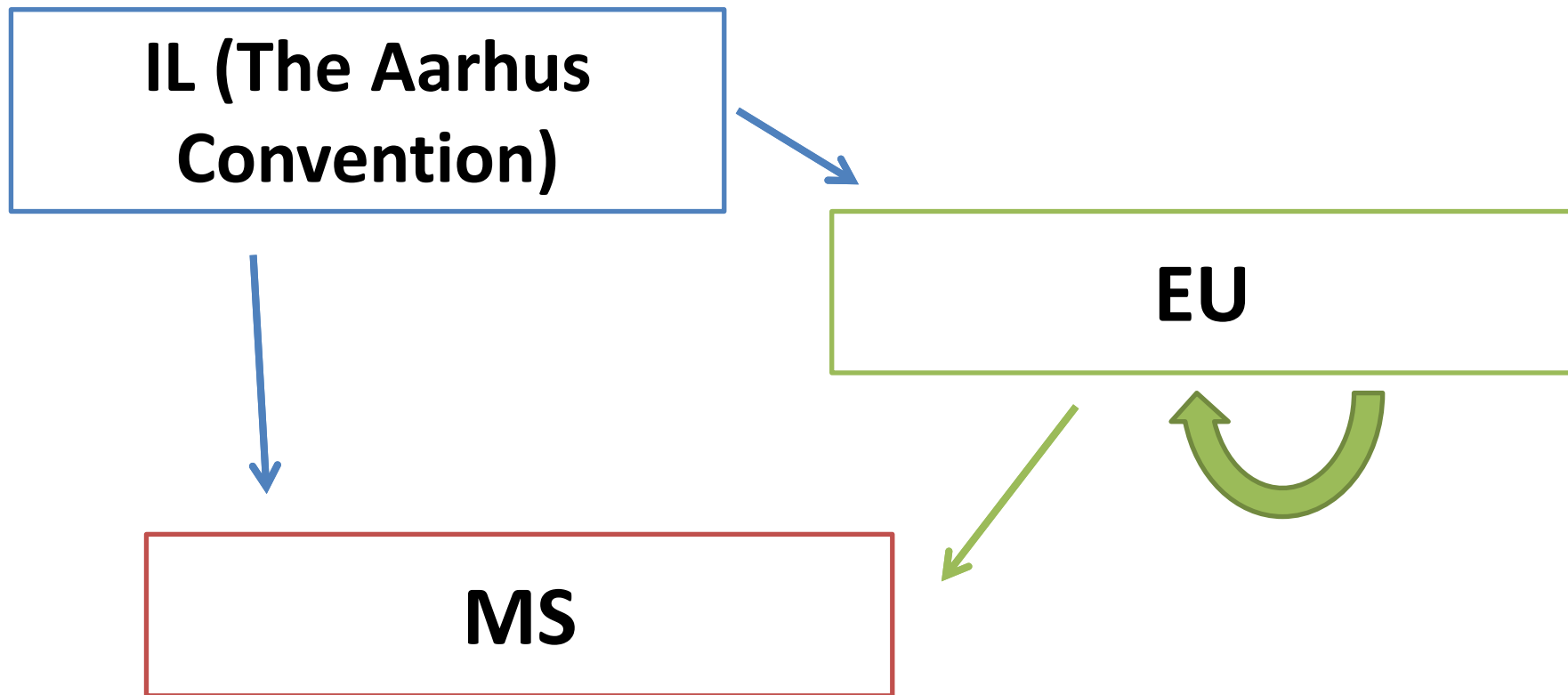


The Aarhus Convention

- Meeting of the Parties
- Bureau
- Working Group of the Parties
- Compliance Committee



The Aarhus Convention



Art. 216 (2) TFEU



The Aarhus Convention

- Binding nature? Direct application?
- C-240/09: As far as possible





The Aarhus Convention – EU law

- [Directive 2003/4/EC](#) of the European Parliament and of the Council of 28 January 2003 on **public access to environmental information**
 - [Directive 2003/35/EC](#) of the European Parliament and of the Council of 26 May 2003 providing for **public participation** in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC
 - + number of other environmental directives
-
- Proposal for a Directive of the European Parliament and of the Council on **access to justice**

[Regulation \(EC\) N° 1367/2006](#) of the European Parliament and of the Council on the **application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies**

(information - extends [Regulation \(EC\) No 1049/2001](#))
+ petitions (EP), ombudsman



The Aarhus Convention – EU level

Information (also Art. 15 TFEU, Art. 42 Charter)

- Wide definition of information (up-to-date, accurate and comparable)
- Active (treaties, report on the state of the environment, .../passive)
- Exceptions (concerning possible infringements, adversely affect the protection of the environment)
 - wider than AC!



The Aarhus Convention – EU level

Public participation concerning plans and programmes relating to the environment (EIA, IPPC)

- partnership, consultation (EAP, Green books)
- **internal review of administrative acts** (Any NGO which meets the criteria – independence, objective of promoting environmental protection, active for 2 years)
- The non-governmental organisation which made the request for internal review may institute proceedings before the Court of Justice



The Aarhus Convention – EU level

Public participation – problems: narrow scope of acts:

‘administrative act’ means any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects;

Wide exceptions from administrative acts and administrative omissions in Art. 2 (2).:

2. Administrative acts and administrative omissions shall not include measures taken or omissions by a Community institution or body in its capacity as an administrative review body, such as under:
 - (a) Articles 81, 82, 86 and 87 of the Treaty (competition rules);
 - (b) Articles 226 and 228 of the Treaty (infringement proceedings);
 - (c) Article 195 of the Treaty (Ombudsman proceedings);
 - (d) Article 280 of the Treaty (OLAF proceedings).

This provision provides illustrative list of exceptions (“such as”) and goes far beyond Art. 2 (2) of Aarhus (which applies only to decisions of court)



The Aarhus Convention – EU level

C 401/12 P to C 403/12 P: Art. 9 (3) decision

- Kind of disappointing.
- Setting aside a ruling of the General Court it upholds the validity of EC regulation No 1367/2006 that strictly confines access to justice to administrative acts of only individual (!) scope.
- There is now a specific “Aarhus gap”. The Court of Justice does not bridge the gap by a strong interpretation in the light of Aarhus.



The Aarhus Convention – EU level

Access to justice

- scope of review
- individual concern - strictly individual economic interests 25/62 (*Plaumann*).

- T-585/93 (*Greenpeace*)
NGOs + locals



- T-142/03 (waste management in Belgium)



The Aarhus Convention – EU level

Only the Commission turns out to be personally affected

What about the Charter ? (Art. 42, 47)



The Aarhus Convention – national level

Participation at the national level



= 28 different systems



The Aarhus Convention – national level

Access to information:

- generally wide and non problematic (Aarhus + EU + CJEU case law + national law)
- one comprehensive system or 1 general and 1 specific for environmental information
- role of national courts

„Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment...“



The Aarhus Convention – national level

Participation in proceedings

EU: only EIA, IPPC (IED) – not all activities listed in AC

Schutznormtheorie x interest theory

National law: specific conditions (*in accordance with national legislation or practice*)

Participation fees

- not regulated by AC or EU law
- **C-216/05 (Ireland)**



The Aarhus Convention – national level

Access to justice – national systems

- ***Standing for the members of the public*** (definition of “the members of the public”, standing for individuals, standing for ENGOs and groups, participation as a prerequisite for standing)
- ***The intensity or scope of the review***
- ***Costs in the environmental procedure*** (“not prohibitively expensive”, loser pays principle, experts’ costs, Alternative Dispute Resolution)
- ***Effectiveness of the procedure*** (Criteria for injunctive relief, Bonds or cross-undertakings in damages, timeliness, malicious or capricious actions)



The Aarhus Convention – national level

Various restrictions:

C-263/08 (Djurgården-Lilla Värtans)

- only NGOs with environmental objectives
- active for 3 years
- 2.000 members



To be continued...

Thank you for your attention 😊