

BASICS OF THE 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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Last lecture summary - Harmonization of environmental requirements

- 1) Principles of subsidiarity and proportionality,**
- 2) Obligation to refrain from any measure which could jeopardise the attainment of the Union's objectives**
- 3) Implementation and the enforcement: member states, problems of EU control: remote, burden of proof**
- 4) 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**

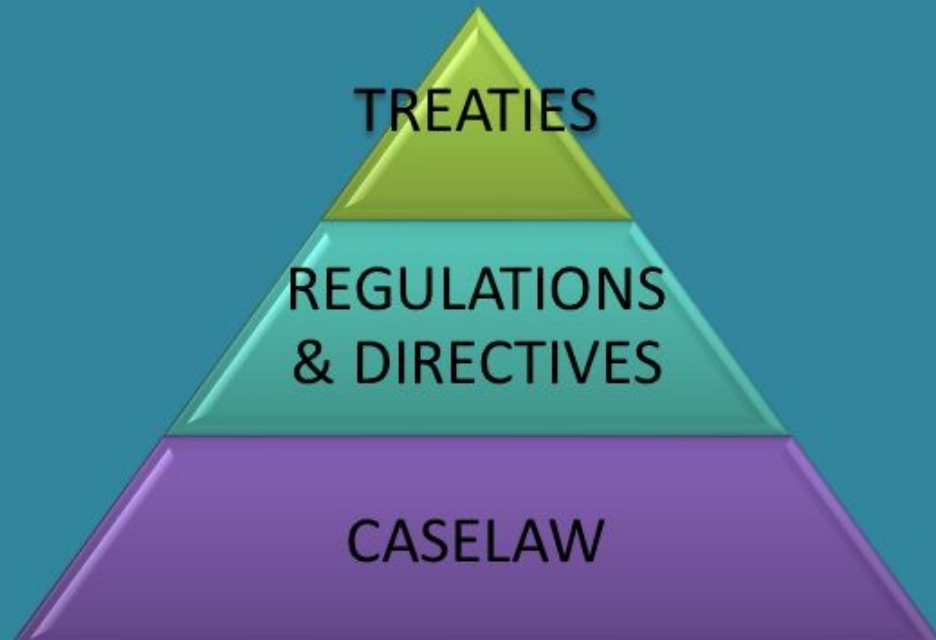
Today

- **Public participation in general**
- **The Aarhus Convention**
- **Three pillars at the EU level**
- **Three pillars at the national level**



The Sources of EU Law

There is a **hierarchy** of law in the EU, when making a case you always want to cite the strongest sources of law. Here is an overview of the hierarchy:



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

Public participation? **How?**

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



Effective public 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.

Public participation? **Balancing the system**

C-115/09 Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV/Bezirksregierung Arnsberg 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.



Public participation? **Balancing the system**

Marina Isla de Valdecañas



Public participation? **Balancing the system**

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.**

Public participation? **Balancing the system**

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



= 28 different systems

Sources of legal regulation: **International level**

- Principle 1 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
- Customary international law?

- Human Right treaties
- **The Aarhus Convention**

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



AARHUS CONVENTION
for our environment

<https://www.youtube.com/watch?v=uyhE9v2UnEQ>

<https://www.youtube.com/watch?v=2UvwbKCjmjA>

The Aarhus Convention

- *the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations* (Kofi Annan)
- *the world's foremost international instrument that links environmental and human rights*
- *a unique international treaty regime, combining notions from environmental as well as human rights law*

*Almost mature, yet not always respected**

*** by Austria, Bulgaria, Czechia, Romania, Slovakia, Spain, United Kingdom, Croatia, Germany, Lithuania and the European Union**

Development

Before the 1990's international law did not pay much attention to domestic procedures - domestic law- and policy-making only

- Principle I of the Stockholm Declaration on the Human Environment (1972) – *Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.*
- 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
- Customary international law?
- Human Right treaties – access to justice and effective remedies

The EU:

- **The EIA Directive (85/337/EEC), Directive on the freedom of access to information on the environment (90/313/EEC), The Habitats Directive (92/43/EEC),**
- **CJEU: elements of individual rights to rely on environmental laws before courts, e.g. with respect to environmental quality standards (C-59/89, Commission v Germany; C-361/88, Commission v Germany; and C-64/90, Commission v France).**

United Nations Framework Convention on Climate Change (1992, 197 Parties):

- *Art. 6 (a) Promote and facilitate at the national and, as appropriate, subregional and regional levels, and **in accordance with national laws and regulations**, and **within their respective capacities**:*
- *(ii) public access to information on climate change and its effects;*
- *(iii) public participation in addressing climate change and its effects and developing adequate responses;*

Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention, 1991, 45 Parties):

Art. 2(2): Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including (...) the establishment of an environmental impact assessment procedure that permits public participation.

*Art. 2(6): The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the **opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin**.*

Art. 3(8): 8. The concerned Parties shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.

Art. 4 (2): ... The concerned Parties shall arrange for distribution of the documentation to the authorities and the public of the affected Party in the areas likely to be affected...

Declaration of France: *The Convention implies that it is the responsibility of each Party to ensure the public distribution within its territory of the environmental impact assessment documentation, inform the public and collect its comments, except where different bilateral arrangements apply*

The Aarhus Convention: Development

Principle 10 of the 1992 **Rio Declaration on Environment and Development** (UN Doc. A/Conf.151/26):

*Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate **access to information** concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to **participate in decision-making processes**. States shall facilitate and encourage public awareness and participation by making information widely available. Effective **access to judicial and administrative proceedings, including redress and remedy**, shall be provided.”*

Agenda 21: “*One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making*”

Political changes in Europe in the beginning of the 1990's influenced the perception of what are international and national legal issues. New matters, such as civic society, democratisation, environmental human rights and globalisation, transcended state borders, entered the international arena, and expanded into international discourse, law, and policy-making in a way that had previously not been possible.

The Aarhus Convention: Negotiations

1995: The Third “Environment for Europe” Ministerial Conference **endorsed the UNECE Guidelines** on Access to Environmental Information and Public Participation in Environmental Decision-making, which drew on and developed Principle 10. The Ministerial Conference also decided to consider the drafting of a convention.

1996: The UNECE Committee on Environmental Policy **established the** mandate for an *ad hoc* working group to conduct the negotiations for a new instrument.

June 1996 - March 1998: Over ten sessions of the working group. The NGOs engaged (*‘friends of the secretariat’*). **The EU** (EC) did not have a negotiating mandate, but increasing EU coordination and presentation of a single EU position. **The US and Canada** opted out of the negotiations at an early stage. **Russia and Turkey** played an active role, with many of their textual proposals being accommodated by the other negotiating parties, but did not sign or accede to the Convention.

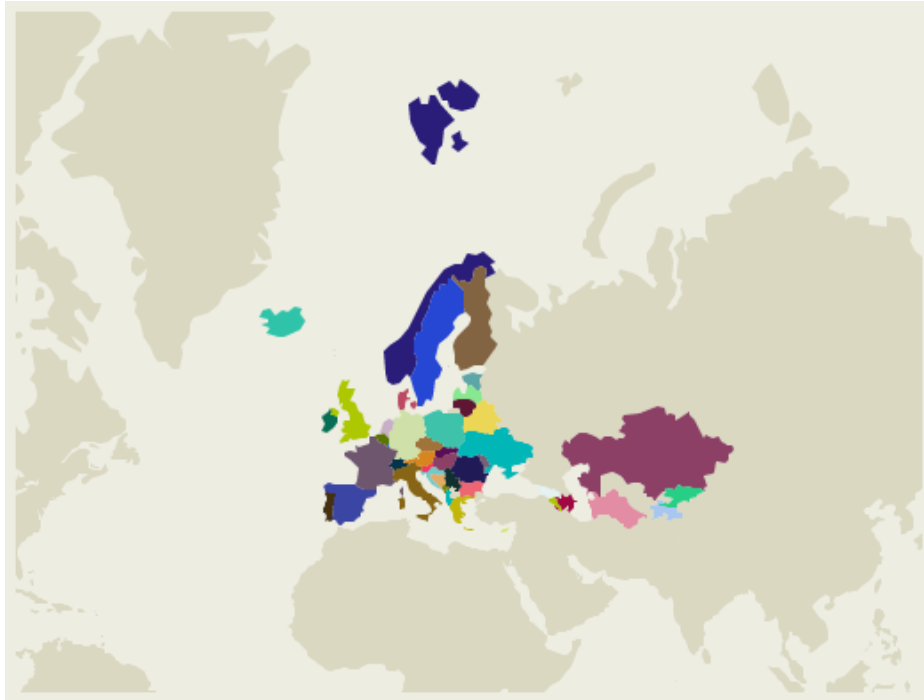
25 June 1998 (Aarhus, Denmark): The Convention was adopted within the framework of the Fourth Ministerial ‘Environment for Europe’ conference.

30 October 2001: The Convention entered into force.

Since 2012, all EU Member States and the EU itself are parties to the Aarhus Convention.

4 March 2018: Escazú (Costa Rica) - Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters **in Latin America and the Caribbean**

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



UNECE welcomes adoption of regional agreement to protect right of access to information in environmental matters in Latin American and the Caribbean

Published: 06 March 2018

UNECE congratulates the Economic Commission for Latin America and the Caribbean (ECLAC) and Governments and civil society in Latin America and the Caribbean on the adoption of a regional legally binding instrument to promote Principle 10 of the Rio Declaration on Environment and Development. This Aarhus-inspired agreement grants the public the right to access information, participate effectively in decision-making and to seek access to justice regarding important decisions that affect people and the environment.



Representatives of 24 Latin American and Caribbean countries adopted the Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin American and the Caribbean at the ninth Meeting of the Negotiation Committee, held in San Jose, Costa Rica, from 28 February to 4 March 2018. The text had been under negotiation since 2014. Throughout the negotiations, the Aarhus Convention secretariat provided advisory support to ECLAC, upon request, and facilitated participation of relevant experts in negotiations. Several Aarhus Parties and partner organizations also supported the process. The Aarhus Convention secretariat stands ready to continue its close collaboration with ECLAC also during the next steps of bringing the Regional Agreement to life.

According to ECLAC, the agreement will be open to the signature by all countries in Latin America and the Caribbean (33 nations) at the United Nations Headquarters in New York, from 27 September 2018 to 26 September 2020. Unlike the Aarhus Convention, which is open for accession by any United Nations Member State, this agreement is only open to membership by States of the ECLAC region.

For further information on the Aarhus Convention, please visit www.unece.org/env/pp/welcome.html

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

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

- **Rights-based approach**
- **A 'floor', not a 'ceiling',**
- **Non-discrimination**
- **Definition of public authorities**
- **Non-compliance mechanism**
 - Meeting of the Parties*
 - Bureau*
 - Working Group of the Parties*
 - Compliance Committee*
- **GMO amendment**

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

“**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 three-pillar structure

I. Access to information (Art. 4 – 5)

- a) a “passive” obligation - the environmental information possessed by **public authorities** should be provided **to members of the public** on request “as soon as possible” and at the **latest within a month**. Requests for information can only be refused if any of the listed grounds for refusal apply. Even when they do, **the grounds for refusal shall be interpreted “in a restrictive way**, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment. Any **refusal must be reasoned and in writing**.
- b) an “active” obligation - the Parties must **actively ensure** that public authorities possess and update relevant environmental information, and that **mandatory systems are established, providing for an adequate flow of information**. Electronic databases shall be publicly accessible and the Parties are to set up **nationwide systems of pollution inventories and registers**. This part has been further developed through the 2003 Kiev Protocol on Pollution Release and Transfer Registers.

The three-pillar structure

II. Public participation - three categories of decision-making (Art. 6 – 8)

- a) **Decision-making concerning** specific activities listed in Annex I **and** other activities which may have a *significant effect* on the environment.

Annex I:

1. Energy sector
2. Production and processing of metals
3. Mineral industry
4. Chemical industry
5. Waste management:
6. Waste-water treatment plants
7. Industrial plants
8. Construction of railways, motorways, express roads, roads
9. Inland waterways, trading ports, piers
10. Groundwater abstraction or artificial groundwater recharge schemes
- ...
20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

The three-pillar structure

II. Public participation - three categories of decision-making

- a) **Decision-making concerning** specific activities listed in Annex I **and** other activities which may have a *significant effect* on the environment.

The Parties must ensure:

- Early information and notification about the decision-making procedure, in an effective, adequate and timely manner;
- Reasonable time-frames to prepare and participate effectively;
- Early and effective public participation when all options are open;
- All relevant information is made available at the time of the public participation procedure;
- The public is allowed to submit comments, information, analyses or opinions in writing or at public hearings;
- Due account is taken of the outcome of public participation;
- Publicly accessible decisions with reasons and consideration.

The three-pillar structure

II. Public participation - three categories of decision-making

b) Decision-making concerning plans and programmes.

- Practical or other provisions shall be made for public **participation during preparations of plans and programmes relating to the environment**;
- This should be provided in a **transparent and fair framework with necessary information**;
- **Reasonable time-frames** must be ensured to prepare and participate effectively;
- **Early and effective public participation must be provided when all options are open**; and
- Due account shall be taken of the outcome of public participation

The Parties must endeavour to provide for public participation when preparing policies relating to the environment (Art 7).

The three-pillar structure

II. Public participation - three categories of decision-making

c) Executive regulations and generally applicable legal instruments

- The Parties are obliged to strive to promote effective public participation, at an appropriate stage. To this end, certain requirements are set out (Art 8):
 - Time-frames sufficient for effective participation should be fixed;
 - Draft rules should be published or otherwise made publicly available; and
 - The public should be given the opportunity to comment, directly or through representative consultative bodies.The result of the public participation shall be taken into account as far as possible.
- In addition, the 2nd Meeting of Parties (MoP) decided to amend the Convention in order to provide for **public participation with respect to deliberate release into the environment and the placing on the market of genetically modified organisms.**

The three-pillar structure

III. Access to justice (Art. 9)

a) Denied information

- Anyone who is denied access to environmental information shall have access to a **review procedure before a court of law or another independent and impartial body** established by law.
- Standing should be granted to anyone whose request has been ignored, wrongfully refused or otherwise not dealt with in accordance with the Convention. In certain cases, the Parties should also provide for expeditious procedures for reconsideration by a public authority.

b) Decision-making concerning specific activities

- access to court or another independent and impartial body of law should also be granted with respect to decision-making concerning specific activities for members of the public concerned who either have a sufficient interest or, where so required in national law, maintain impairment of a right.
- These criteria should be determined in accordance with national law and consistently with the objective of giving the public concerned wide access to justice. To this effect, environmental NGOs are deemed to have a sufficient interest to be granted standing.
- This right to access to justice pertains to challenging the substantive as well as procedural legality of any decision, act or omission concerning specific activities

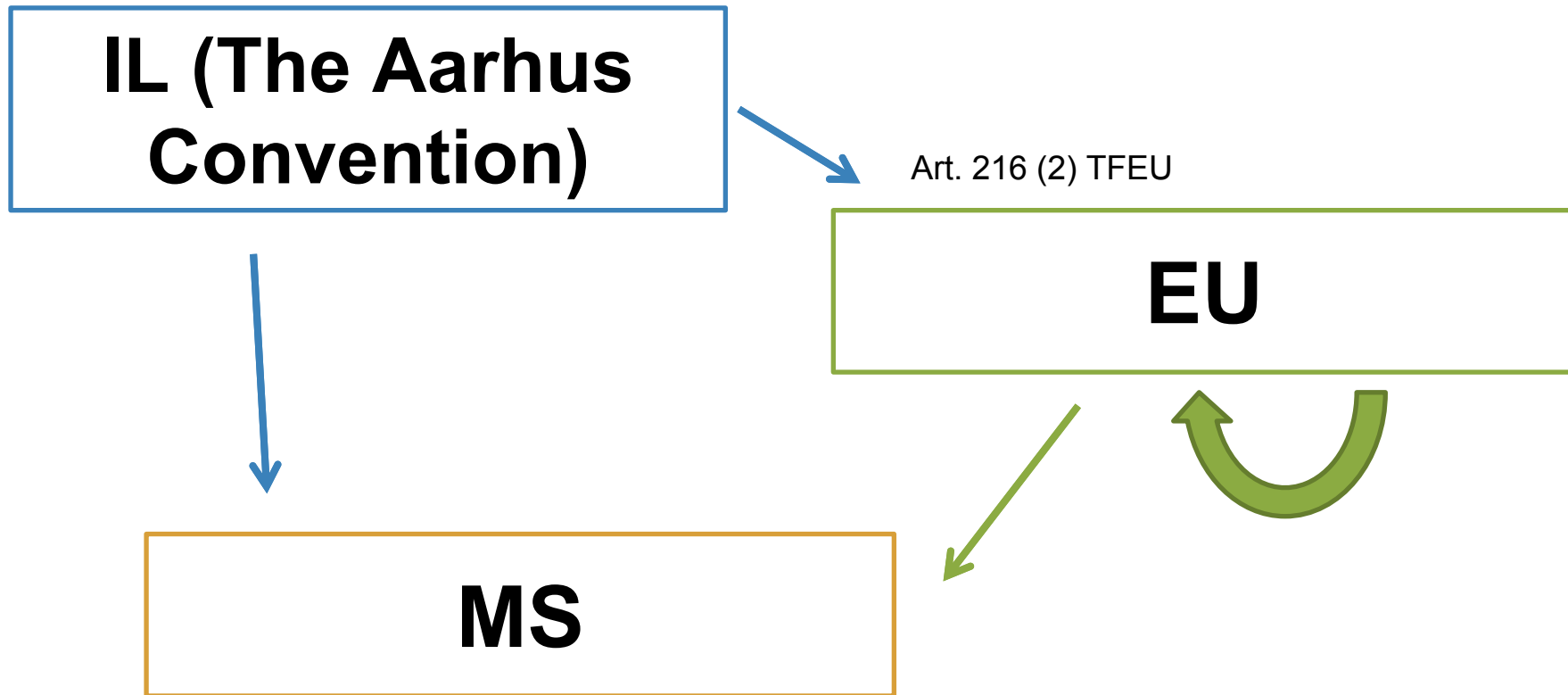
The three-pillar structure

III. Access to justice (Art. 9)

c) Violation of provisions of the national law relating to the environment

- Access to administrative or judicial procedures to members of the public, meeting the criteria in national law, “if any”, **to challenge other acts and omissions by private persons and public authorities “which contravene provisions of its national law relating to the environment”** (Art 9(3)).
- EU law relating to the environment should also be considered to be part of the domestic, “national law”.
- Contrary to the first and the second categories, **it may suffice to ensure access to administrative review procedures** to challenge acts and omissions in the third category.
- Access to justice must not be *pro forma* only. Therefore, all procedures referred to above under the three categories, including any administrative procedure, ***must provide “adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive”***

The Aarhus Convention



The Aarhus Convention implemented by 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

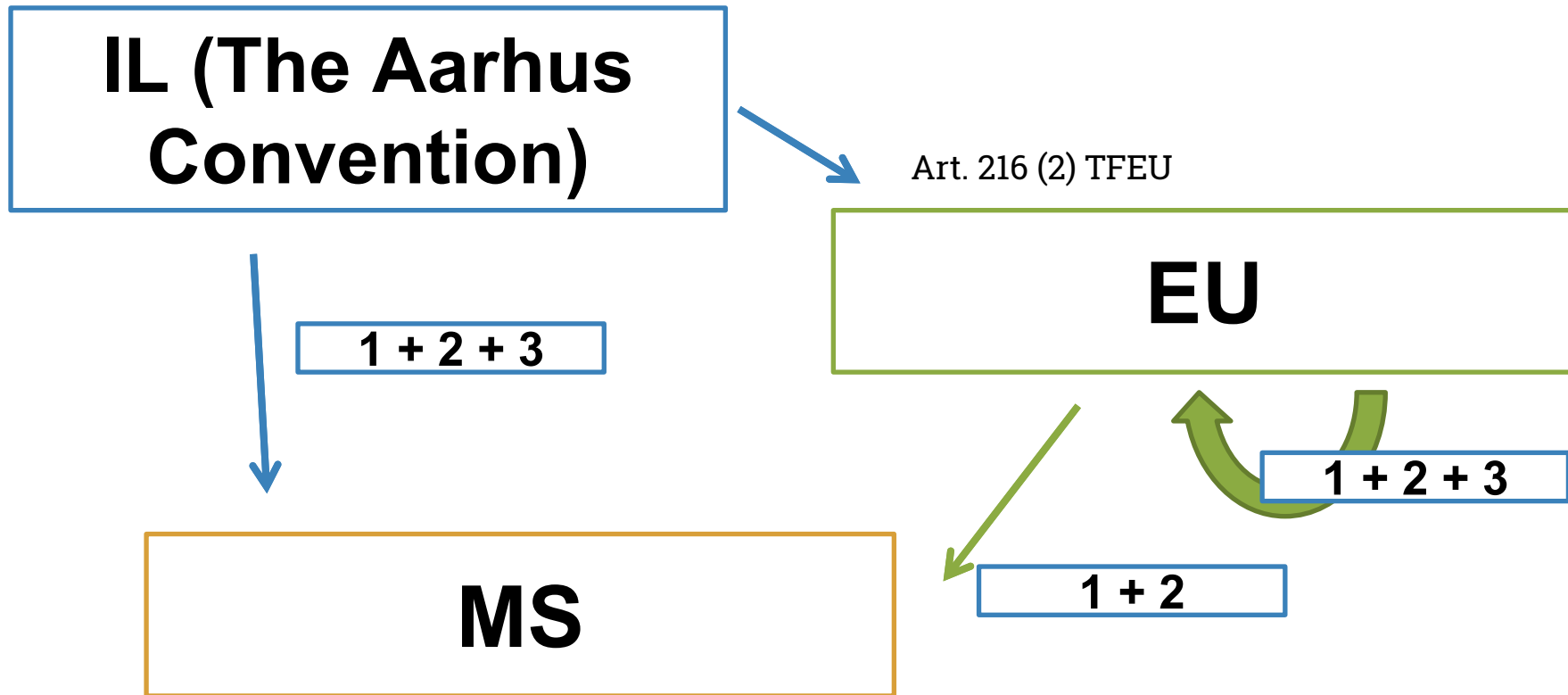
Proposal for a Directive of the European Parliament and of the Council on **access to justice**

[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



The Aarhus Convention

Binding nature? Direct application?

C-240/09 (*Slovak Brown Bears*): As far as possible



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

Access to justice – major problem: requirement of impairment of rights

C 401/12 P to C 403/12 P:

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.

Result: EU before the Aarhus Convention Compliance Committee

The Aarhus Convention – EU level

Access to justice – major problem: requirement of impairment of rights

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)

Only the Commission turns out
to be personally affected

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



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

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- generally wide and non problematic (Aarhus + EU + CJEU case law + national law)
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- 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

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

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

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**



The Aarhus Convention – NATIONAL level

Access to justice – national systems

- No harmonization, but EIA, IPPC + direct effect

- ***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

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• <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2017:275:FULL&from=EN>

Thank you for your attention