

The jurisdiction of the EU Court of Justice in matters related to the Aarhus Convention

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The EU Court of Justice

See Article 19 TEU, Articles 251ss TFEU

- „Court“ includes the Court of Justice, the General Court and specialised courts.
- Court of Justice: One judge from each of the 28 Member States
- General Court: At least one judge per Member State
- The Court of Justice shall „ensure that in the interpretation and application of the treaties the law is observed“ (Art.18 TEU).
- Cases brought by individuals or NGOs go to the General Court. Appeal possible
- Cases before the General Court have a T-number, before the ECJ a C-number

Aarhus Convention, EU and national law

1. The EU has ratified the Aarhus Convention (Decision 2005/370). The provisions of the Convention are thus part of EU law (Art.216(2) TFEU).
2. As international agreements which were concluded by the EU, bind EU institutions and Member States, they have a higher rank than EU regulations and directives (Court, case C-344/04).
3. EU law has thus to be interpreted in the light of the Aarhus Convention.
4. In case of conflict with national law, EU law prevails.
5. In the case of conflict between EU law and the Aarhus Convention, the Aarhus Convention prevails insofar as it has direct effect or EU law can be interpreted according to it.

The three pillars of the Aarhus Convention

Most decisions in our society which affect the environment, are taken by the administration, no longer by Parliaments: permits, planning, infrastructure, data collection, studies, monitoring application of the law

However, the administration is not the owner of the environment. As the environment has no voice, the administrative decisions should be taken with the participation of the people concerned.

In order to be able to participate in decision-making, citizens must have the same information as the administration has. „Public authorities hold environmental information in the public interest“ (Recital 17, AC)

In case of dispute, courts are there as arbiters. Therefore, access to courts

Access to environmental information

Articles 4 to 5 Aarhus Convention

National law: Directive 2003/4

EU law: Regulation 1367/2006 and Regulation 1049/2001

Right is granted to everyone

No interest has to be stated

Restrictions explicitly enumerated; must be interpreted narrowly

Releases into the environment: under EU law irrebuttable presumption of overriding public interest (except infringement procedures)

Schröder-letter, Germany

General Court, case T-362/08, IFAW v. Commission, judgment of 13-1-2011

Germany wanted to authorise the construction of a private airport (Airbus) in a protected bird habitat. The Commission considered this to be in conflict with EU law. The German Chancellor wrote, in 2000 a letter to the Commission's President. The Commission then gave green light; the airport was built. The applicant wanted to see the letter.

The Court: the letter concerned Germany's economic policy. Its divulgation could significantly undermine Germany's economic policy. Under Reg.1049/2001, the Commission could therefore refuse disclosure.

Comment: The undermining of the economic policy of a Member State is not a reason, under the Convention, to refuse disclosure.

C-135/11P: General Court did not look at the letter itself

Private test results

Court of Justice, C-266/09 Stichting Natuur en Milieu

Bayer applied for the permit to use a pesticide in salad agriculture. The competent Dutch authority fixes, in such cases, the maximum permitted residues of pesticide in and on salad. In its application for the permit, Bayer attached the results of field tests on that pesticide.

The Court: the test results are environmental information to which access must be granted. There is an authorisation procedure, and the results form part of it. Therefore, they cannot be kept confidential.

Comment: This reasoning also applies to environment impact studies, other studies, soil tests, opinions and positions of other administrations, and all documents on facts.

Composition of a product

T-545/11 Greenpeace a.o. v. Commission, judgment of 8-10-2013

Facts: Greenpeace wanted to know the composition of a pesticide and its impurities. The producer invoked intellectual property and confidentiality

Court: Sooner or later, the pesticide goes into the environment. Thus, it is environmental information on releases. On this Article 6 of Regulation 1367/2006 contains an irrebuttable presumption that there is an overriding public interest in disclosure. This prevails over provisions in Directive 91/414 on pesticides (confidentiality) and the international Trips-Agreement

Implementation studies

Case T-111/11 ClientEarth v. Commission, judgment of 13-9-2013

Facts: The EU Commission concludes contracts with private bodies, in order to have examined, how Member States transpose EU environmental directives into their national legal order. In 2009, 63 such studies were made. ClientEarth wanted to see these studies. The Commission refused, invoking investigation purposes.

Court (T-111/11): Studies are part of the infringement procedure under Article 258 TFEU. Commission may refuse disclosure. The Aarhus Convention may be unilaterally modified by the EU, as its provisions were drafted with States in view .

Partial access, EU

Court of Justice, C-353/01 Mattila v. Council-Commission, judgment of 22-1-2004

The applicant wanted to have access to a number of documents on relations with Russia, Ukraine, and other countries. This was refused as impairing international relations.

The Court: It has not been examined, whether partial access to documents is possible. This is an absolute failure which makes the decisions illegal.

[See also, with regard to international relations and partial access, case T-211.00 Kuijer v. Council, 7-2-2002]

Delay in answering applications, EU Commission

The Commission frequently answers within the time-period requested for access to information that it was not possible to give an answer in time and that the answer would be given as quickly as possible.

General Court (T-120/10 and others): The administration should answer in time. However, a delayed answer is not forbidden and therefore legal.

Voluminous documents, EU

General Court, EU, case T-2/03

The EU Commission instructed a case of a merger by Austrian banks. An Austrian NGO wanted to have access to the file on one Austrian bank, as it had proceedings against that bank before Austrian courts ; this file had about 47.000 pages. The Commission refused.

The Court: There has normally to be a concrete, individual examination of the documents which compose a file. An abstract examination is normally not allowed. The Commission did not examine the different options (partial access, finding a fair solution, addressing the interests of the NGO). Also the workload for the Commission is no argument per se.

Location of GMO-release, EU

Court of Justice EU, Case C-552/07 Azelvandre

A citizen wanted to know the place in a municipality, where GMO plants were released into the environment. The municipality refused, being afraid of social unrest, the destruction of the field etc.

Court: Directive 2001/18 provides in Article 25(4) that such information cannot be kept confidential.

See also Conseil d'Etat (France), decision 279817 of 16 April 2010.

In contrast, a citizen cannot require that the municipality releases this information, as France had decided that such information is to be released by the responsible minister in central government.

Information of another administration

Court of justice, C-321/96, Mecklenburg

A region wanted to build a motorway. Under existing national law, it had to obtain the opinion of the nature protection administration. Mr. Mecklenburg wanted to see that opinion; this was refused, as the final decision on the motorway and its lining had not yet been taken.

Court: the opinion constitutes environmental information, as it is capable, with regard to the environmental interests at stake, to influence the final decision on the motorway. The opinion is final, though the decision might not be final.

Legislative activity

Court of Justice, case C-515/11

An NGO wanted to see the correspondence between a German ministry and the German car industry. Disclosure was refused, with the argument, that a regulation was in preparation.

Court: The Aarhus Convention does not apply to legislative activities. However, a regulation is not a legislative, but a regulatory activity. Therefore, disclosure may not be refused.

Location of mobile phone masts, UK

Office of Communication v. The Information Commissioner, (2009)EWCA Civ.90

The applicant wanted to know the exact placement of mobile phone masts, and the name of the companies which owned them. His application was rejected, as there was some intellectual property right involved and as public security was at risk (policy and emergency service radio network was involved)

The Court accepted the two grounds of objections but was in favour of granting disclosure, as there was an overriding public interest in disclosure (electromagnetic fields).

C-71/10 Public security and privacy together may constitute a ground to refuse

Participation in planning decisions

Court of Justice, case C-416/10, Krizan, judgment of 15-1-2013

Facts: a local administration planned a new landfill. An NGO wanted to see the planning decision deciding on the localisation of that landfill. The administration invoked commercial confidentiality and refused

Court: There is a right to participate which is accompanied by the right to see the relevant documents. Therefore, the information on the localisation must be made available early in the procedure and may not be withheld.

Effects of lack of participation

Court of Justice, case C-463/11, L.v.M., judgment of 18-4-2013

Facts: A municipality made a plan for new urban building programme. It did not provide for an environmental impact assessment. Therefore, the public could not participate. The legislation in question provided that where a plan for the construction was defective, the plan would nevertheless remain valid.

Court: An EIA was required under EU and national law. Therefore, the plan was defective. In such a case, the legislation may not provide that the plan would nevertheless remain valid.

Interpretation of the Aarhus Convention

Court of Justice, case C-260/11, Edwards, judgment of 11-4-2013

Facts: An applicant to UK courts had to pay 90.000 UK pounds for court fees. The UK court then asked the EU Court of Justice, what the provision on the Aarhus Convention meant, that court costs should not be prohibitively expensive. The Court of Justice gave that interpretation.

Court action against regulations

Court of Justice, case C-177/09, Poumon vert, judgment of 17-11-11

Facts: A Belgian administration wanted to authorise a project without environment impact assessment. When the public protested, the regional government adopted a decree by which it authorized the project. Un Belgian law, decrees may not be attacked before courts

Court: The adoption of the decree was incompatible with Article 1(5) of Directive 2011/92. In order to ensure effective access to justice, there must therefore be a possibility for any Belgian judge to set aside this decree.

Restrictive national legislation

Court of Justice, case C-115/09, Trianel, judgment of 12-5-2011

Facts: German law allowed access to the courts for NGOs only in cases, where also individual persons had access to the courts

Court: This is not in compliance with the Aarhus Convention. That Convention explicitly recognizes NGOs as members of the public in their own right. Their right to go to court may thus not be subordinated to other requirements.

Obligation of national judges

Court of Justice, case C-240/09, Lesoochranárske zoskupenie

Facts: An NGO wanted to oppose a national forestry measure that threatened the brown bear. National law did not allow the NGO to go to court.

Court: The Aarhus Convention wants to give wide access to courts. Its Article 9 cannot be invoked directly by the NGO. However, the national judge must do everything possible (i.e. interpret national law as widely as possible) to ensure that the NGO has access to courts.

Local initiatives

Court of Justice, Case C-263/08 Djurgaarden

In Sweden, only groups with at least 2000 members may take action in court to review environment impact assessments.

The Court: there might be projects only of local character. The membership clause would not allow an effective judicial protection for local citizen groups. Often projects have only local importance and citizens' initiatives might be much smaller. The clause is therefore incompatible with EU law (Aarhus Convention).

Comment: This would also apply to the requirement of 3 years of existence.