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

Task Force on Access to Justice

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The Implementation of the Third Pillar of the Aarhus Convention

The case of Albania

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The Aarhus Convention has become part of the Albanian national law after ratification by Law no. 8672, dated 26.10.2000. To implement it, Albania approved the National Strategy and Action Plan for the Implementation of the Aarhus Convention[1], which is the governmental policy platform for enhancing the role of civil society, the public, NGOs, business organizations and individuals in the field of environmental protection. As for the institutional aspect, some positive features towards the implementation of the Convention, were the provision of an Albanian public environmental network by the Law on the protection of the environment; and the creation of a separate Ministry for the Environment, which leads this network, consisting of regional environmental agencies, the environmental inspectorate, environmental organizations composed of central and local authorities and inter-ministerial bodies, the National Environmental Information Centre, etc.

Some of the concrete measures for the implementation of the Convention relate to public awareness activities to ensure information and implementation of the requirements of the Convention, including publications, organising awareness activities with young people, pupils and students, conducting research, testing and investigations, exchange of opinions and experiences, awareness of public officials, as well as organization of scientific activities, such as symposiums and local, national and international conferences for the most acute problems of the Convention.

In addition to these measures of a general nature, the strategy and action plan provide for the fulfilment of the rules and procedures that facilitate the practical implementation of the requirements of the Convention. Regarding the Albanian environmental legislation, it has been consistently added with legal acts and regulations intended to implement in practice the three pillars of the Convention. Thus, with regard to the right to information, the Constitution provides in Article 23 that the right to information is guaranteed and that everyone has the

[1] National Strategy and Action Plan for the Implementation of the Aarhus Convention is available at: http://www.mjedisi.gov.al/files/userfiles/Sherbime/Strategjia_dhe_Plani_i_Veprimit-aarhus.pdf

right, in accordance with law, to get information about the activity of state bodies, as well as persons who exercise state functions, while Article 48 provides that everyone, himself or together with others, may direct requests, complaints or comments to the public organs, which are obliged to answer in the terms and conditions set by law. Therefore, the Constitution refers to specific laws, which include the Administrative Procedure Code and Law no. 119/2014, dated 09.18.2014, "On the Right to Information". While in connection with the right to information on access to environmental information, Article 56 provides that everyone has the right to be informed about the state of the environment and its protection. So, the right of environmental information is guaranteed to everyone, without him or her having to prove a particular interest in connection with such information. Similar wording can be found in Article 3 of Law no. 119/2014, dated 09.18.2014, "For the right to information", according to which every person has the right to public information, without being obliged to explain the motives and every person has the right to access public information, through the original document or by taking a copy of it in the form or format that allows full access to the content of the document. In reference to the discussion above about getting 'passive' information, Article 4 provides that the public authority implements an institutional program of transparency, specifying categories of information to be made public without request and ways of making this information public.

Law no. 10,431, dated 22.06.2011, "On Environmental Protection", provides in Article 11 international environmental cooperation for the exchange of environmental information, and then in Article 13 states that every person has the right to timely information on the state of environmental pollution, and the measures taken in accordance with the legislation to which it refers. The same article, foresees public participation in environmental decision making, determining that while solving problems of environmental protection, the relevant public authorities shall ensure that the public and interested parties have a real opportunity to participate in procedures for identifying the state of the environment, the development and adoption of strategies, plans and programs related to environmental protection and environmental elements, as well as in the elaboration and adoption of the regulations of a general nature, dealing with the protection of environment and decision making for appropriate environmental permits.

Council of Ministers Decision (CMD) dated 07.02.2008, "On the withdrawal of public opinion in environmental decision-making", as amended by Decision no. 247, dated 04.30.2014 was approved in order to draft the rules, requirements and procedures for informing and involving the public in environmental decision-making. The Decision provides that public participation in policy formulation, regional and national strategies, general or sectorial, and action plans for their implementation, relating to the environment, constitutes a legal requirement in the process of preparing these documents that improves the content and facilitates their implementation. In addition, the Decision requires public authorities to achieve the participation of the relevant public by providing the information necessary to determine the rules and procedures as simply as possible, and providing the conditions and practical solutions, suitable for attracting its opinion. It defines in detail the procedures to be followed by public authorities to ensure public participation and its contributions and charges the Ministry of Environment to publish a matrix of acts to be drafted and approved during the calendar year in all periodic publications in both print and electronic version; as well as for any bills, which will be introduced in the review procedures of approval, to notify the affected public, environmental NGOs and other interest groups, in electronic or paper form. In order to get the opinion of the public in the environmental controls of the environmental inspectorate, it is required the disclosure of information for annual programs control of the

environmental inspectorate, the annual program of environmental monitoring of its components, as well as monthly plans of regional environmental agencies. Also, it provides the process of informing and involving the public during the preliminary procedure of the Environmental Impact Assessment (EIA), the public information and its involvement during the in-depth procedure of the EIA, as well as during the monitoring of the environmental impacts of the project, except the obligations of the developer, National Environmental Agency (NEA), Regional Environmental Agency (REA) and local government units.

For the implementation of the third pillar of the Aarhus Convention, Article 48 of Law no. 10,431, dated 06.22.2011, "On Environmental Protection", concerns the right to legal proceedings and notes that in case of a threat to the environment, its pollution and damage, the public has the right to ask the relevant public authorities taking appropriate measures within the time and in accordance with the authority granted by the law and sue in court, in accordance with the conditions provided for by the Code of Civil Procedure, against the public authority or the natural person or legal entity that has caused environmental damage or that risks to damage it. The reference to the Code of Civil Procedure, except for general provisions for filing a lawsuit in court, relates to Chapter II of the Code, especially Articles 324 to 333, regulating administrative disputes. The latter are regulated in detail by Law no. 49/2012, "On the organization and functioning of administrative courts and administrative disputes". Concerning the right of access to courts, Articles 42 and 44 of the Constitution provide that everyone, to protect his constitutional and legal rights, freedoms, and interests, or in the case of charges against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court established by law; and has the right to be rehabilitated and/or indemnified in compliance with law if he has been damaged because of an unlawful act, action or failure to act of the state organs. On the other hand, Article 137§3 of the Code of Administrative Procedure, provides that, in principle, interested parties may address the court only after having exhausted the administrative recourse, which means that it applies even to claims relating to the protection of environmental rights. While the Civil Code, Article 624 provides for responsibility for the environment, in accordance with the principle 'the polluter pays', sanctioning that the person liable for having affected the environment, exacerbated, changed or damaged it, in whole or in part, is obliged to compensate the damage caused.

Regarding the role of criminal law to protect the environment, the Criminal Code provides in Chapter IV (Articles 201-207), offenses against the environment. These include air pollution through the emission of smoke, gases and other toxic or radioactive materials exceeding the normal limit allowed; the transit transportation or storage in Albanian territory of toxic and radioactive waste; pollution of the seas, rivers, lakes or the springs of the water supply system with toxic, radioactive or other substances that break the ecological balance; breach of rules of quarantine for plants or animals, when it has led to serious consequences which are either material or which bring serious danger to the life and health of people; cutting or damaging forests without authorization or when it is undertaken at a prohibited time or place; cutting decoration trees and damaging gardens and parks in the cities; intentionally destroying or damaging, causing serious material consequence, to the forest stock, nursery – plot, forest reserve or any other unit similar to them, through fire.

The Aarhus Convention Compliance Committee has considered the case "Petrolifera" (Communication ACCC/C/2005/12), initiated by environmental NGO "Civic Alliance for the Protection of Vlora Bay". That case alleged violation of Article 3§2, Article 6§2 and Article 7 of the Convention, since the Albanian authorities did not inform nor consult with the

interested public in the decision making on planning of an industrial park, which would contain pipes oil and natural gas, oil storage tankers, three power plants and a refinery near the lagoon of Narta, declared as a protected area, near the city of Vlora. Despite the massive protests of residents of Vlora in favour of the preservation of an area declared as protected by law, state authorities decided to continue allowing the construction of the industrial park, which resulted in the clearing of an area of 500 ha and cutting of thousands of pine trees. As a result of action taken by environmental NGOs "Civic Alliance for the Protection of Vlora Bay" before the Compliance Committee of the Aarhus Convention, the Committee recommended that Albania should "... take the necessary legislative, regulatory, administrative and other measures to ensure that: a) to establish a clear, transparent and consistent framework to implement the provisions of the Convention in Albanian, including a clearer and more effective scheme of responsibility within the governmental administration ... ". However, the Industrial Park continues its operation and the inevitable pollution of the Bay of Vlora has already begun. As expected, on July 12, 2011, about a ton of fuel was spilled into the sea in Zvërneci beach, bringing all the pollution of the Adriatic coast close to Zvërneci. Besides the ecological catastrophe, this is also in violation of the government strategy for the development of the coast, where tourism is considered as a priority. It is illogical to think that tourism and an industrial park can be developed side by side.

Within the EU level, with the view of implementation of the III Pillar, it has been presented the Proposal COM(2003)624 dated 24.10.2003, of the European Commission before to the Parliament and to the Council in order to approve a directive on access to justice in environmental matters. Such a proposal has not been approved, due to the Members States' claims questioning its respect for the principle of subsidiary. In other words, claiming the conservation of the autonomy of their legal systems. But the said autonomy of the Members States is connected with the obligation to fulfil two conditions: a) the respect of the principle of equivalence, which means that the procedural rules intended to guarantee the enforcement of EU law, should not be less favourable than those intended to guarantee the enforcement of domestic law; b) the respect of the principle of effectiveness, which means that the enforcement of procedural rules should not hamper the protection of rights deriving from Community legislation. The Proposal recognizes the right of members of the public to initiate administrative or judicial proceedings to challenge the acts or omissions in breach of environment law. Therefore, articles 3 and 4 oblige Member States to provide to the members of the public the right, when they meet the criteria under domestic legislation, to have access to procedures in order to challenge acts of public and private entities in breach of environmental norms, including the right to seek interim relief measures. While Article 5, obliges Member States to provide to the environmental NGOs, the right to have access to procedures, including the right to seek interim relief measures, without having a sufficient interest or maintaining the impairment of a right, if the matter of review in respect of which an action is brought is covered specifically by the statutory activities of the qualified entity and the review falls within the specific geographical area of activities of that entity. Another attempt was made by the Commission through Communication COM(2012)95, dated 03.07.2012, addressed to the Parliament, to the Council, to the European Economic and Social Committee and to the Committee of the Regions, but there has been no development in this direction.

Despite the fact that there has not been issued yet a directive on the right to access to justice in environmental matters, in the context of the *acquis communautaire*, there is a consolidated jurisprudence of the ECJ, which has ruled that the Aarhus Convention forms an integral part of the legal order of the European Union. Under the condition when, alongside

the adhesion of the Members States, even the EU has became a Member Party to the Aarhus Convention, the right to have access to justice in environmental matters has become one of the main issues which the Commission controls the rigorous implementation, as it has been re-emphasized at the Seventh Environment Action Programme of the UE Action plan for environment. Where as a Priority objective no. 4, the EU has envisaged the maximisation of the benefits of Union environment legislation by improving its implementation. For the period until 2020, during which it will be implemented, this program provides for the improvement of the implementation of environmental legislation in four main areas: the acquisition and dissemination of knowledge on how to make implementation of environmental legislation, the ambit of extension of the claims related to inspections and supervision of all environmental community legislation, the improving of the manners how are handled the complaints about the implementation of environmental community legislation at the national level and ultimately , the enjoyment of EU citizens of the right to effective access to justice environmental issues and to effective legal protection, in accordance with the Aarhus Convention and the jurisprudence of the ECJ . In addition, it should be encouraged also the use of other methods of resolving environmental disputes, as alternatives to judicial resolution.

Apart from the harmonization of national legislation in EU member states concerning the right to environmental information and participation in environmental decision making, which was made through the adoption of special legislation harmonization at Community level, this was not achieved for the right to justice on environmental issues, due to resistance of the member states, which have considered access to court as their internal matter and thus not a matter for the EU. The argument was that such EU provisions would violate the principle of subsidiary.

Nevertheless, once again, the irreplaceable role of the ECJ has emerged, which through its jurisprudence has aimed to cover this lack of harmonization of legislation at EU level. Consequently, in the case C-240/09, dated 08.03.2011, *Lesoochranárske zoskupenie VLK* against Slovakia (known by the name "the Slovak brown bear case"), concerning the lack of provisions in the Aarhus Convention that would have made possible its direct implementation, the Grand Chamber has held that despite its Article 9§3 it is formulated in general terms, it aims to protect the environment effectively, so it is for the national legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive. It may be considered now a consolidated jurisprudence, which establishes that the rules of procedure to secure these rights cannot be less favourable than those that secure the rights guaranteed under domestic law (principle of equivalence) and cannot make it impossible or extremely difficult in practice the exercise of these rights guaranteed by EU law (principle of effectiveness). This means that the national courts of the Member States must interpret to the greatest extent possible the procedural rules dealing with the conditions that must be met in order to be able to initiate administrative or judicial proceedings under Article 9§3 of the Convention and to ensure protection of the rights provided by EU legislation, so as to enable environmental NGOs appeal to the court of administrative decisions that may conflict with European environmental legislation. From this statement, it is clear that national courts have an obligation to ensure through their decisions the right to justice on environmental matters when this is not expressly provided for by the domestic legislation.

Besides of guaranteeing the right of the individual to complain before a court about a decision of a public authority, the ECJ went even further, recognizing even the individual

right to request the issuance of a decision concerning the environment, in the case when the public authority has not acted. Thus, in the case C-237/07, dated 25.07.2008, Dieter Janecek against Freistaat Bayern, as mentioned above, the ECJ has stated that Article 7(3) of Directive 96/62 must be interpreted as meaning that, where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution.

In fulfilling the right to an effective remedy, the ECJ has also examined the individual's right to seek interim measures in order to avoid environmental pollution. In the case C- 416/10, dated 15.01.2013, Križan against Slovakia, the ECJ has stated that in order to guarantee the effective remedy of appeal, provided for in Article 15a of the Directive 96/61 on integrated prevention and control of pollution, requires that the interested members of the public must be able to have the right to address the court or an independent and impartial authority to adopt interim measures of a nature temporarily, such that can prevent pollution, including, if necessary , the temporary suspension of granted permit, which is subject of the pending trial.

The ECJ has stated that toward the public authorities, individuals are entitled to rely on the provisions of directives which are un-conditional and sufficiently well-defined. In this connection, in case Ratti, no. 148/78, of 5 April 1979, the ECJ addressed two main questions: a) Does Council Directive 73/173/EEC, of 4 June 1973, in particular Article 8 thereof, constitute directly applicable legislation conferring upon individuals personal rights which the national courts must protect? b) Is it lawful ... to be determined by the domestic legislation provisions which prescribe obligations and limitations which are more precised and more detailed than those set out in the directive itself ...?

The ECJ has state that whilst under article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of acts covered by that article can never produce similar effects. It would be incompatible with the binding effect which Article 189 ascribes to directives, to exclude in principle the possibility of individuals to rely on the obligations imposed by them. Especially in cases where the community authorities, through directives have obliged member states to take a certain course of action, the effectiveness of such an act would be weakened if persons were prevented from relying on it in legal proceedings and national courts prevented from taking it into consideration as an element of community law.

The same nature have, also the directives dealing with the so-called “Frankovich responsibility”. In case of Andrea Francovich, Danila Bonifaci and Others v. Italy, the ECJ has established that an EU member state which has not taken measures to implement a directive within prescribe period provided by it, cannot be released from liability against individuals because of this failure. Thus wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the State. The ECJ had held the same position in the case Finanzamt Münster-Innenstadt Becker in 1982.

The paragraph 5 of Article 9 of the Aarhus Convention provides that in order to increase the effectiveness of this article, each Party shall ensure that to the public has to be provided information about its right to access administrative procedures and judicial review and to take into consideration the establishment of appropriate assistance mechanisms in order to remove or reduce financial barriers or other obstacles to the exercise of the right to justice.