



# **Access to Justice in Environmental Matters**

**The Communication from the  
European Commission of 28 April 2017**

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Justice under the Aarhus Convention, Geneva,  
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# Introduction

*Meaning and scope of the notions of:*

- *Access to justice: a fundamental right;*
- *EU environmental law;*
- *Communication/Notice - 2017/C275/01*

*(published in the EU Official Journal C275 of 18.08.2017):*

*Why in 2017 ? Inter alia, large jurisprudence of the EU Court of Justice (38 cases cited in the Notice)*

*Its scope*

EU Law influencing the Aarhus Convention or EU Law influenced by the Aarhus Convention?

***MAIN SECTIONS OF THE NOTICE :***

- 1 - Public interests, obligations and rights relevant to judicial protection;*
- 2 - Legal standing;*
- 3 - Scope of judicial review;*
- 4, 5, 6 & 7 - Procedural safeguards: effective remedies/costs/time limits (topics not treated in this presentation).*

# 1 - Public interests, obligations and rights relevant to judicial protection

*EU environmental law aims to secure general public interests.*

*They give rise to:*

*Procedural and substantive rights for individuals (natural and legal persons) and NGOs, rights to be protected by national courts **and***

*Obligations imposed on national public authorities.*

*According to the CJEU case-law, access to justice is ensured through an approach based on the rights of the public **and** an approach based on the obligations on Member States.*

# 1 - Public interests, obligations and rights relevant to judicial protection

***Procedural rights***, in particular on public participation  
(examples EIA/SEA/IED Directives)

*Judgment of the CJEU of 24.10.1996, Case C-72/95, Kraaijeveld, point 56.*

## ***Substantive rights***

*Human health* -Judgment of the CJEU of 25.07.2008, cases C-165 to 167/09, Janecek, point 38 and  
*Case-law on property rights and other rights.*

## 2 - Legal standing: generalities

*(i) In a few cases, EU legislation gives legal standing and identifies some possible claims (EIA Directive 2011/92/EU; IE Directive 2010/75/EU; Seveso Directive 2012/18/UE; Environmental Information Directive 2003/4/EC; Environmental Liability Directive 2004/35/EC);*

**(ii) For public participation Article 9(2) of the Aarhus Convention (AC)** – follow-up of the 1996 Kraaijeveld judgment -

- Public concerned;

- Challenge procedural and substantive legality of the contested decision in its entirety (CJ judgment 15.10.15, C-137/14, point 80);

- Against any decision, act or omission subject to the provision of Article 6 AC and, where so provided for under national law, of other relevant provisions AC.

## 2 - Legal standing: Article 9(2) AC Public concerned

(i) **Individuals and any other legal entity**

*having a sufficient interest*

or

*maintaining impairment of a right, where the procedural law of a Party so requires.*

(ii) *Legal standing ex lege for **Environmental NGOs** meeting the conditions fixed by national law (Article 2(5)AC).*

## 2- Legal standing: Article 9(2) AC - Public concerned (Environmental NGOs)

*For Env. NGOs the concept of 'impairment of a right' cannot depend on conditions which **only** physical or legal persons can fulfil, such as the condition of being a more or less close neighbour of an installation or of suffering in one way or another the effects on the installation's operation (CJEU judgment 12.05.2011 Case C-115/09 , point 47).*

*The criteria that, according to a national law, Env. NGOs have to fulfil to qualify for legal standing ex lege must **not be excessively difficult to meet** and should take into account the interests of local and small NGOs (CJEU judgment 15.10.2009 Case C-263/08 , points 47 and 51).*

## 2 - Legal standing: Article 9(2) AC - Public concerned (Environmental NGOs)/ Challenges to legality of the contested decision in its entirety

*The fact that national rules offer extensive opportunities to participate at an early stage in the procedure in drawing up the decision relating to a project is no justification for the fact that judicial remedies against the final decision are available only under restrictive conditions (CJEU judgment 15.10.2009 case C-263/08, point 49).*

*- The judicial review is **not** subject to **whatsoever restriction** on **the pleas** which may be relied on **in support of the review**, inter alia restrict the pleas to the objections already submitted in the administrative procedure. However, possible procedural rules for arguments submitted abusively or in bad faith (CJEU judgment 15.10.2015 case C-137/14, points 75 to 81).*

## 2 - Legal standing: Article 9(2) AC - Challenge to legality of the contested decision in its entirety

*Participation in an environmental decision-making procedure is separate and has a different purpose from a legal review, since the latter may be directed at the decision adopted at the end of that procedure. Therefore, **participation in the decision-making process has no effect on the conditions for access to the review procedure** (CJEU judgment 15.10.2009 Case C-263/08 , point 38).*

## **2- Legal standing: Article 9(2) AC - Against any decision, act or omission subject to the provision of Article 6 AC**

The Brown Bears cases (LZ I and LZ II)

*LZ I- CJEU judgment of 08.03.2011 case C-240/09  
Article 9(3) AC does not have direct effect in EU law.*

## **2- Legal standing: Article 9(2) AC - Against any decision, act or omission subject to the provision of Article 6 AC**

*LZ II - CJEU (Grand Chamber) judgment of 08.11.2016 Case C-243/15*

*Is Article 47 Charter, in conjunction with Art. 9 AC, compatible with a national procedural law according to which the review of a decision refusing to grant to NGO the status of party to the procedure and relating to the EU law (Habitat Directive) can not be examining during this procedure? Moreover, when this procedure is over, the review is automatically rejected. The NGO is, therefore, obliged to lodge, within 3 years, an appeal against its having been wrongly excluded from the administrative procedure.*

## 2- Legal standing: Against any decision, act or omission subject to the provision of Article 6 AC

*Reasoning of the CJEU:*

- *Binding effects on public authorities of a directive ( Kraaijeveld, point 56): legal standing approach based on MS obligations;*
- *Art. 6(1) b) AC applies to the procedure pursuant to Art. 6(3) Habitat Directive; therefore, where a MS lays down procedural rules applicable to actions concerning Art. 6(3), that MS is implementing obligations stemming from the EU law;*
- *Art. 9(2) AC is applicable to activities not listed in Annex I which may have a significant effect on the environment; it limits the discretion of MS when determining detailed rules: wide access to justice and standing ex lege for Env. NGOs meeting Art. 2(5)AC.*

## **2- Legal standing: Article 9(2) AC - Against any decision, act or omission subject to the provision of Article 6 AC**

### ***Conclusions:***

***Art. 9(2) AC has to be available to NGOs for the cases covered by Art. 6(3) Habitat Directive. In such actions it can challenge not only the decision not to carry out an assessment but also the assessment carried out inasmuch as it alleged to be vitiated by defects (points 60-61);***

***- If the status of 'party to the procedure' had been granted to LZ, it would have enabled LZ to participate more actively to the decision-making process by setting out in greater detail its arguments relating to the risks of adverse effects; without the participation in the procedure of an ENV NGO as 'party to the procedure' , arguments supporting protection of the environment will be neither put forward nor taken into account against the objectives of the procedure of Art, 6(3) Habitat Directive (points 69-70).***

## 2- Legal standing: Article 9(2) AC - Against any decision, act or omission subject to the provision of Article 6 AC/ Article 9(3) of the Aarhus Convention

*What can it be deduced from this judgment?*

*The same arguments can be applied to other sectors of the EU environmental law.*

**Article 9(3)AC:** *Substantial differences between par. 2 and 3 Public concerned v Public; Judicial review v Administrative or judicial review; sufficient interest or impairment of a right v no requirement; Env. NGOs legal standing Art. 2(5)AC v no standing ex lege.*

*Limited CJEU case-laws (LZ I), see in particular point 52. See also on Water Framework Directive (WFD), CJEU judgment of 20 December 2017, case C-664/15 where the legal standing was recognised to a NGO on water permitting – non deterioration principle, Art. 4 of WFD.*

### 3 – Scope of judicial review

**Art. 9(2) AC cases in conjunction with Art. 6(1) AC** : specific activities with public participation

- **Individuals**: Where legal standing for impairment of a right, the annulment of an administrative decision by the court requires the infringement of an individual public-law right of the applicant (judgment CJEU of 15.10.2015, Case C-137/14, point 32);
- **Environmental NGOs**: No restrictions of the legal standing (judgment CJEU 12.05.2011, Case C-115/09 Trianel, point 45).

## 3 – Scope of judicial review

*EU law does not provide specific rules for the intensity of review by national courts.*

*'In the absence of further detail in EU law, it is for the legal systems of the MS to determine that extent, subject to observance of the principles of equivalence and effectiveness' (Judgment CJEU of 06.10.2015, Case C-71/14, point 53).*

*The level of scrutiny is determined by the objectives of the substantive EU law (same judgment, point 58).*

*The judgment of the CJEU (Grand Chamber) 16.05.17, case C-682/15 in administrative co-operation between Ms in fiscal matters: a confirmation of this approach as well as indirectly in the judgment 20.12.17, case C-664/15.*

## 3- Scope of judicial review

***Both procedural and substantive legality need to be scrutinized by national courts.***

- Procedural legality (example: public participation requirements)
- Substantive legality :

Facts of the case;

Assessment of the merits of a decision, act or omission (examples: significant effect on a Natura 2000 site, significant effect in an EIA context, appropriateness of measure in an air quality plan).

## 3 – Scope of judicial review

*Specific situations:*

- Scrutinizing **national legislation and regulatory acts**;
- Examining the **validity of acts adopted by EU institutions and bodies**;
- Scrutinizing regularisation decisions (such as in EIA).

*The scope of judicial review, as presented, has to be applied **also for actions based on Article 9(3) AC**, as indicated by the Implementation Guide of the Aarhus Convention, 2<sup>nd</sup> edition.*