

Public Participation and Access to Justice Rights in Habitats Directive Procedures

*CJEU grants NGOs extensive public participation
and access to justice rights in Habitats Directive
procedures... and possibly far beyond*

Case Study

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I. Introduction

On November 8, 2016, the Court of Justice of the EU issued a landmark ruling in case C-243/15 in which it established that authorization procedures such as the so-called appropriate assessments pursuant to the Habitats Directive fall within the scope of Article 6(1)(b) of the Aarhus Convention. Accordingly, environmental associations have participatory rights in such procedures. They also have the right to appeal any decision made in the framework of these procedures directly under Article 9(2) of the Convention. This in turn means that opportunities for review must be adequate and effective per Article 9(4) of the Convention and Article 47 of the Charter of Fundamental Rights.

II. A simplified factual and procedural history of the case

In 2008, the Slovakian NGO Lesoochránárske zoskupenie VLK (“LZ”) was afforded limited participation as an “interested person”, but was denied full legal standing in administrative proceedings for permitting a project that involved extending an enclosure in which the applicant raised deer.

The affected land belonged to a nature reserve protected under the Habitats Directive. LZ’s lack of standing meant it could not legally challenge the permitting decision as violating the Habitats Directive because only parties to administrative proceedings have the right to appeal decisions under Slovakian law. LZ brought a lawsuit to change this situation. The precise procedural history of this lawsuit is extremely complex; to simplify matters greatly, the result is that the Highest Slovakian Court asked the CJEU by way of a preliminary reference whether the Slovakian legal framework is consistent with the right to effective judicial protection under Article 47 of the Charter of Fundamental Rights and Article 9 of the Aarhus Convention. The Court answered this in the negative.

Arguably the legally most interesting aspect of this case, however, is the Court’s affirmative answer to the threshold question of whether Article 47 of the Charter is even applicable. To come in the scope of that provision, it must be established that a right guaranteed by EU law is at issue. This in turn raises the question: Did LZ have the right to bring a legal action in this case and if so, under what legal basis? Or as Attorney General Kokott of the EU Court framed the issue in her highly elucidating Opinion, what are the rights of environmental associations under EU law?

III. The rights of environmental associations under EU law

Judicial review rights based on the principle of effective judicial protection reaffirmed

The Court’s first conclusion is unsurprising: It would be incompatible with the binding effect of the Habitats Directive to exclude the possibility that concerned parties may rely on the obligations which

the directive imposes. This would seem to endorse Kokott's view that a right to judicial review flows directly from the Habitats Directive in light of the principle of effective judicial protection and the Court's case law, notably the Slovak Brown Bear Case.

Participation and review rights per Article 6(1)(b) and Article 9(2) of the Convention

But the Court does not stop there. Instead, the Court goes quite a bit farther in clarifying the rights of environmental organizations. The Court went on namely to determine in addition that Article 6 of the Habitats Directive must be read in conjunction with Article 6(1)(b) of the Convention. The latter provision states that the parties to the Convention are to apply the substantive provisions of Article 6 (such as the right to submit comments, to participate early, when options are open, etc.) "in accordance with its national law... on proposed activities not listed in Annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions."

The Court explained that the reference in this provision to national law relates solely "to the manner in which the public participation is carried out, and does not call into question the right to participate." As Kokott elaborated, this provision cannot mean that the national law must make provision for case-by-case examinations. Article 6 itself, which is directly applicable, constitutes the legal basis for such examinations as to whether public participation is necessary. The role of national law in this context, rather, is to establish whether the activity in question is even subject to an authorization procedure. Only when such an authorization procedure is provided for can the need for public participation be examined and such participation take place. Whether a national legislature provides for an authorization procedure in the first place is largely dependent on the anticipated effects of the activities in question.

In the case before it, the expansion of an enclosure in a protected area did not fall under the Convention's Annex I (which is largely the same as that of the EIA Directive). However, it was indeed subject to an authorization procedure, namely an appropriate assessment per Article 6(3) of the Habitats Directive. The activity could thus fall under Article 6(1)(b). It followed from this conclusion that decisions within the framework of the appropriate assessment procedure, including decisions on requests to participate, the need to carry out an assessment (screening), the conclusions drawn from the assessment regarding the risks of the activity for the site in question, and whether the assessment is autonomous or integrated in a decision granting authorization, are all decisions subject to review under Article 9(2), because this provision is the basis for review for violations of the Convention's Article 6.

Article 9(2) of the Convention was found, moreover, to be directly applicable, largely based on its similarity to the Article 11 of the EIA Directive. By virtue of Article 9(2)'s application in the case, Article 9(4) of the Convention, which requires that remedies be "adequate and effective", and Article 47 of the Charter are applied.

IV. Wide-ranging implications

What can be taken from this case? Clearly, public participation rights apply in the context of appropriate assessments. At a minimum this is to include the rights to submit comments, participate

early, etc. It is, however, quite possible that full standing rights are required. Notably the Court supported its ultimate conclusion that the Slovakian system was inadequate on criticisms that the status of an “interested party” had significant short-comings.

Secondly, any decisions in the framework of such assessments, including the right to participate, must be subject to review. This has not been the case in many EU member states, including Austria. This must change now and environmental associations can rely directly on Article 9(2) of the Convention in national courts to secure their rights. The Court’s decision would also seem to preclude a limitation that became apparent in the wake of the Slovak Brown Bear case. By virtue of Article 9(2)’s direct applicability, national legislatures may not exclude the possibility of judicial review. In other words, access to justice is not “merely” a matter of judicial interpretation in this context. And this context may be large indeed, as the Court’s conclusions could apply with equal force to a number of other authorization procedures.

It will be quite interesting to see how the Aarhus Convention Compliance Committee (the UNECE body of independent experts which reviews compliance with the Convention) will respond to this case, as it has previously inclined to a more restrictive interpretation of Article 6(1)(b). A recent Irish case, which involves permits to dump at sea in a protected area, might well afford the Committee such a chance to share its views.

Links:

[The CJEU Judgment in C-243/15](#)
[Opinion of AG Kokott in C-243/15](#)
[Text of the Aarhus Convention](#)

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