

WORKSHOP ON EU LEGISLATION

**ENVIRONMENTAL IMPACT ASSESSMENT**



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**Access to Justice –  
Aarhus Convention and EIA directive**



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**Aarhus Convention**

- ❖ Convention adopted by the UNECE (UN Economic Commission for Europe) in 1998.
- ❖ Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice.
- ❖ Convention entered into force on 30 October 2001
- ❖ Ratified by the European Community (in 2005) and all MS except Ireland
- ❖ Convention has three pillars:
  - Pillar I: Access to Environmental Information
  - Pillar II: Public Participation
  - Pillar III: Access to Justice



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**Access to Justice in the Aarhus Convention**

- Article 9(1): Access to Justice related to refusal or inadequate provision of environmental information
- Article 9(2): Access to Justice related to cases of public participation
- Article 9(3): Access to Justice “to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment” (actio popularis, in addition to paragraph 1 and 2)
- Article 9 (4): Procedures shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.
- Article 9(5): Establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.



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### Transposition of Aarhus Convention into EU law

- Access to Information:** Directive 2003/4/EC on Access to Information includes provision on judicial appeal
- Public Participation:** Directive 2003/35/EC on public participation – incorporating access to justice rules in EIA-Directive (Article 10a)
- Access to Justice:** **only Proposal for Directive (COM(2003)624)** plus
- Regulation 1367/2006** on all three pillars, laying down rules to apply the provisions of the Aarhus Convention to Community institutions and bodies



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### Article 10 a EIA Directive

Member States (MS) shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

- (a) having a sufficient interest, or alternatively,
- (b) maintaining the impairment of a right, where administrative procedural law of a MS requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

MS shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the MS, consistently with the objective of giving the public concerned wide access to justice. [...]



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### Questions:

*(C-263/08 preliminary ruling, case Djurgården)*

- Does Article 10a imply that members of the public concerned have **access to a review procedure** to challenge a decision by which a **body attached to a court of law** of a Member State has given a ruling on a request for development consent **even where they had the opportunity to participate in the court's examination** of the question of development consent and to express their views?
- Are Articles 1(2), 6(4) and 10a EIA Directive to be interpreted as meaning that **different national requirements can be laid down** with regard to the public concerned, with the result that **small, locally established environmental protection associations do not have a right of appeal** (here: **at least 2000 members** such as is referred to in Article 10a EIA Directive)?



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(C-115/09, preliminary ruling, case Luenen)

**Questions:**

1. The referring court asks whether Article 10a of the EIA Directive obliges Member States to permit environmental NGOs to seek judicial review on the ground that an environmental provision relevant to the approval of a project – including a provision which is intended to serve the interests of the general public alone, rather than which protects the legal interests of individuals – has been infringed by the German legislation.
2. If the rules of national procedural law do not enable an environmental NGO (such as BUND) to establish *locus standi* to bring an action for judicial review, is the NGO entitled to rely directly on the provisions of Article 10a?



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(C-115/09, preliminary ruling, case Luenen)

**Position of Attorney General:**

The German Government argues that Article 10a of the EIA Directive does not require Member States to modify their national systems so as to allow an *actio popularis* whereby any party enjoys unlimited access to challenge administrative decisions on environmental grounds. That is correct.

**However, the central issue of the present proceedings is whether it is compatible with the EIA Directive for a Member State to maintain procedural rules on *locus standi* whose effect is that no party at all may bring an action alleging infringement of legislation aimed only at protecting the environment.**

for discussion.....



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(C-115/09, preliminary ruling, case Luenen)

**From AG opinion re question1:**

With regard to **critterion (a)** in Article 10a, all **environmental NGOs** are considered to have sufficient interest to have access to a review procedure before a court of law or other independent and impartial body. They need do **nothing to prove that they have such an interest**, but are treated as though in fact they had proved it. They therefore have standing to challenge the substantive or procedural legality of all decisions, acts or omissions that fall within the scope of the EIA Directive. (para 65)

The **same must surely be the case where criterion (b) is concerned**. If that were not so, MS applying criterion (b) would have more leeway to refuse *locus standi* to environmental NGOs, implying profound differences in access to justice between MS. (para 66)

The objective of providing **'wide access' to justice** gives the parameters **within which MS' legislative discretion may be exercised**. (para 70)



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(C-115/09, preliminary ruling, case Luenen)

**From AG opinion re question 2:**

Article 10a of the EIA Directive is certainly sufficiently clear and precise to give it direct effect. **Is it, however, sufficiently unconditional?**

The ECJ has stated that a provision in a directive is sufficiently 'unconditional' where 'it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effect, to the taking of any measure either by the [institutions of the EU] or by the MS'.  
(Case C-194/08 *Gassmayr*, para 45)...

**Final opinion of AG re question 2:**

In the absence of full implementation into national law, an environmental NGO is entitled to rely directly on the provisions of Article 10a of the EIA Directive.



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