ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS
DEVELOPMENTS AT EU LEVEL

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1. BACKGROUND
2. THE EVOLUTION OF THE CASE LAW AT EU LEVEL
3. THE EVOLUTION AT POLITICAL LEVEL IN THE EU

1. BACKGROUND

The Aarhus convention is a "mixed" agreement

- The EU is a party in its own right (since 2005), with a declaration of competence on access to justice
- The 27 Members States are individual parties as well
- The 27 Member States are also bound by the Aarhus Convention as part of EU law : Article 216(2) TFEU

1. BACKGROUND

General constitutional provisions

- Article 19 (1) TEU
  "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law"
- Charter of Fundamental Rights
  - Article 37 : high level of environmental protection
  - Article 47 : right to an effective remedy before a tribunal for the rights guaranteed by the law of the Union

1. BACKGROUND

EU instruments to implement the Aarhus Convention

- For the EU level: Regulation 1367/2006
- For the Member States level:
  - Pillar I + Art. 9(1): Directive 2003/4
    http://ec.europa.eu/environment/aarhus/pdf/COM_2012_774_en.pdf
  - Pillar II + Art. 9(2), 9 (4): Directive 2003/35, SEVESO III, oil rigs

1. BACKGROUND

EU instruments to implement the Aarhus Convention

- For the Member States level:
  - Pillar III – Art. 9(3) & 9(4): proposal COM(2003)624
    1st reading by EP, blocked in Council

=> Vacuum at EU level ??

2. THE EVOLUTION OF THE CASE LAW AT EU LEVEL

An impressive body of CJEU case law:

- C-237/07 Janecek: air
- C-427/07 Commission vs. Ireland: clarity
- C-263/08 DLV: access for NGOs
- C-115/09 Trianel: access for NGOs
- C-128/09 Boxus
- C-182/10 Solvay } effective remedy in planning
- C-240/09 "Slovak Bears": nature protection
- C-416/10 Krizan: interim relief and landfills

2. THE EVOLUTION OF THE CASE LAW AT EU LEVEL

An impressive body of CJEU case law:

- C-237/07 Janecek (25/07/2008)

42. The answer to the first question must therefore be 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.

2. THE EVOLUTION OF THE CASE LAW AT EU LEVEL

An impressive body of CJEU case law:

- C-263/08 DLV Miljöskyddsförening (15/10/2009)

47. Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope.

2. THE EVOLUTION OF THE CASE LAW AT EU LEVEL

An impressive body of CJEU case law:

- C-115/09 Trianel (12/05/2011)

48. It follows more generally that the last sentence of the third paragraph of Article 10a of Directive 85/337 must be read as meaning that the 'rights capable of being impaired' which the environmental protection organisations are supposed to enjoy must necessarily include the rules of national law implementing EU environment law and the rules of EU environment law having direct effect.

2. THE EVOLUTION OF THE CASE LAW AT EU LEVEL

An impressive body of CJEU case law:

- C-115/09 Trianel (AG's opinion)

77. The German Government has explained that its system of judicial review involves a careful and detailed scrutiny of administrative decisions and results in a high level of protection of individual rights. (24) However, like a Ferrari with its doors locked shut, an intensive system of review is of little practical help if the system itself is totally inaccessible for certain categories of action.

2. THE EVOLUTION OF THE CASE LAW AT EU LEVEL

An impressive body of CJEU case law:

- C-240/09 Slovak Bears (8/03/2011)

52. In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention **does not have direct effect** in EU law. It is, however, for the referring court to interpret, **to the fullest extent possible**, the procedural rules relating to the conditions to be met **in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3)** of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.

2. THE EVOLUTION OF THE CASE LAW AT EU LEVEL

An impressive body of CJEU case law:

- C-128/09 Boxus (18/10/2011)

56. In the present instance, if the referring court finds that the Decree of the Walloon Parliament of 17 July 2008 does not satisfy the conditions laid down in Article 1(5) of Directive 85/337 [..], and if it turns out that, under the applicable national rules, no court of law or independent and impartial body established by law has jurisdiction to review the substantive or procedural validity of that decree, the decree must then be regarded as incompatible with the requirements flowing from Article 9 of the Aarhus Convention and Article 10a of Directive 85/337. The referring court must then disapply it.

2. THE EVOLUTION OF THE CASE LAW AT EU LEVEL

An impressive body of CJEU case law:

- C-416/10 Križan (15/1/2013)

109. However, exercise of the right to bring an action provided for by Article 15a of Directive 96/61 would not make possible effective prevention of that pollution if it were impossible to prevent an installation which may have benefited from a permit awarded in infringement of that directive from continuing to function pending a definitive decision on the lawfulness of that permit. It follows that the guarantee of effectiveness of the right to bring an action provided for in that Article 15a requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent that pollution, including, where necessary, by the temporary suspension of the disputed permit.

2. THE EVOLUTION OF THE CASE LAW AT EU LEVEL

- **ECJ Case law in the pipeline:**
  - C-260/11 Edwards (+ C-530/11): prohibitive cost of justice : 11/4/2013
  - C-72/12 Altrip (aka Trianel II)
- **+ Infringement actions under Art. 258 TFEU**

Belgium, Germany, UK, Austria, Ireland, Slovenia, …

2. THE EVOLUTION OF THE CASE LAW AT EU LEVEL

- **+ The role of the ACCC "case law"**

1) Cases against BE, UK, DE, AT, BG, ES, the EU, …

2) Reception by the EU legal order : AG in Edwards

36. The Compliance Committee has already given its view on the issue of prohibitive costs on several occasions, indeed mainly in relation to the United Kingdom. In each case it conducts a comprehensive assessment of the circumstances of the individual case and of the national system. This approach is necessary because Article 9(4) of the Convention – just like the provisions of the directives – does not contain any specific criteria.

2. THE EVOLUTION OF THE CASE LAW AT EU LEVEL

+ Full reception of the ECJ case law by national courts:

- Slovak bears : SK Supreme admin court, SE admin court of appeals (wolves)
- Boxus – Solvay : BE Constitutional court
- Trianel : DE administrative courts

3. THE EVOLUTION AT POLITICAL LEVEL IN THE EU

Is the status quo sustainable ?

3. THE EVOLUTION AT POLITICAL LEVEL IN THE EU

The **Commission** Communication COM(2012)95 of 7 March 2012:
Specific provisions aimed at **ensuring reasonable access to justice** are currently restricted to a few areas of EU environment law. A 2003 Commission proposal aimed at facilitating wider access has not progressed but the wider context has changed, in particular the **Court of Justice has confirmed** recently that national courts must interpret access to justice rules in a way which is compliant with the Aarhus Convention. National courts and economic as well as environmental interests face **uncertainty** in addressing this challenge. The Commission considers it appropriate to **explore how greater certainty** could be provided for national courts and economic and environmental interests. Possibilities include:
· Defining at EU level the **conditions for efficient as well as effective access to national courts in** respect of all areas of EU environment law.

3. THE EVOLUTION AT POLITICAL LEVEL IN THE EU

The reaction from the other institutions:
1) **Council** conclusions of 11 June 2012 (document 11186/12)

II. Better implementation, enforcement, monitoring and strengthening of environment policy and legislation

6. (…)REITERATES the need for ensuring a full implementation of environmental policies and legislation at EU level, and therefore ENCOURAGES the Commission and as appropriate the Member States, while respecting the principle of subsidiarity, to further develop and implement the objectives and initiatives set out in the Communication such as:
- improving access to justice in line with the Aarhus Convention,

3. THE EVOLUTION AT POLITICAL LEVEL IN THE EU

The reaction from the other institutions:

2) **European Parliament**
Report 2012/2104(INI) adopted on 12 March 2013
29. Regrets that the procedure for adopting the proposal for a directive on public access to justice in environmental matters has been halted at first reading; calls, therefore, on the co-legislators to reconsider their positions with a view to breaking the deadlock;

3) **Committee of the Regions** : report of 30 November 2012 (document ENVE-V-024)

3. THE EVOLUTION AT POLITICAL LEVEL IN THE EU

- The proposal for a 7th Environmental Action Programme

60. Fourth, **EU citizens will gain** ~~better~~ **effective access to justice** in environmental matters and effective legal protection, **in** line with international treaties and developments brought about by the entry into force of the Lisbon Treaty and **recent case law** of the European Court of Justice. **Non-judicial conflict resolution** will also be promoted as an alternative to litigation.

63. In order to maximise the benefits of EU environment legislation, the programme shall ensure that by 2020:
(e) **The principle of effective legal protection** for citizens and their organisations is facilitated.

3. THE EVOLUTION AT POLITICAL LEVEL IN THE EU

- The Study phase

1) The "Darpö studies": updated state of play in 28 MS

2) The "Maastricht study": economic aspects of access to justice
http://ec.europa.eu/environment/aarhus/studies.htm

3. THE EVOLUTION AT POLITICAL LEVEL IN THE EU

- The discussion phase
  - Discussion in Council Working Group
  - Expert group of Supreme Court of judges
  - Academia
  - Business
  - NGOs

3. THE EVOLUTION AT POLITICAL LEVEL IN THE EU

- The discussion phase

Possible options :

Option 1: business as usual (soft law approach)

Option 2: addressing existing gaps in Member States provisions (infringement)

Option 3: drafting a new proposal in accordance with developments of the case-law

Option 4: retain COM(2003) 624

Studies pointing in the direction of a new proposal under option 3 – less legal uncertainty and less costly in the long run

3. THE EVOLUTION AT POLITICAL LEVEL IN THE EU

- The drafting phase ?