THE PRACTICE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION REGARDING THE EFFECTIVENESS OF PUBLIC PARTICIPATION AND JUDICIAL PROTECTION IN ENVIRONMENTAL MATTERS

Legal Analysis

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CONTENTS

Introduction

> "Without some form of public participation, the government runs a real risk that its decisions about environmental quality or natural resource use will be substantively problematic, viewed as an **illegitimate exercise of governmental power** or both."[1]

In the 20 years since 2001 when the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters – the Aarhus Convention – entered into force, its implementation and appreciation in Europe has solidified. The legal practice of its basic definitions, principles and procedures of public participation in environmental decision-making has settled down, the Convention has proven itself a basic tool of environmental democracy all over the countries of Europe, including the European Union. A sure sign of organic fitting of the Aarhus Convention into the European legal system is that the Court of Justice of the European Union has had more than two hundred cases in connection with the implementation of the Convention, as well as with its counterparts on the EU and on national level.

Taking all this into consideration, it seems a reasonable next step now that we focus on the fine-tuning of the practice of European environmental democracy, especially paying attention to the effectiveness of public participation which includes its timeliness and affordability too.

Legal literature is rich in mapping out the possible success/effectiveness factors in public participation in environmental matters. Some of them simply start from the general definitions of efficiency and effectiveness, which are worth consulting, indeed. Webster's Third (1971, page 725) defines **efficiency** as the "capacity to produce results with the minimum expenditure of energy, time, money, or materials" and **effectiveness** as "productive of results" (1971, page 724). To achieve efficiency, managers of all walks of life focus on doing things well. They attend to the organization and centre their energies on routinizing, refining, formalizing, and elaborating existing knowledge, and on making short-run improvements. "Efficiency thrives on focus, precision, repetition, analysis, sanity, discipline, and control." On the other hand, to achieve effectiveness, managers must be concerned with doing the right things.[2] We can

[1] Akerboom, S., & Craig, R. K.: How law structures public participation in environmental decision making: A comparative law approach. (2022) Environmental Policy and Governance, 32(3), 232-246.
[2] Nancy Roberts: Public Deliberation - An Alternative Approach to Crafting Policy and Setting Direction; in: The Age of Direct Citizen Participation, Routledge, 2018

conclude from this very basic, general approach that while efficiency is easy to operationalise, effectiveness needs continuous adaptation to new situations that are never identical with previous ones.

Others borrow refined mathematical statistical tools to distil the most important effectiveness factors in public participation from practical environmental cases. "This research reviewed existing studies and identified 22 factors that may affect the effectiveness of public participation in the renewable energy field. Based on the collected empirical data, data analysis methods such as exploratory factor analysis (EFA) and confirmatory factor analysis (CFA) were adopted. Seven critical factors, which are *participation skills, environmental effect, justice, economic effect, power distribution, halo effect, and local culture,* were identified as driving forces for effective public participation in sustainable energy projects (SEPs)."[3] The cited empirical research summarized and analysed the experiences from several practical cases and found an interesting mixture of economic, social, cultural, political, legal and even sociological-psychological factors that all influence the satisfaction of participants with the decision-making procedure and the quality of the outcome of cases.

While appreciating these approaches, in our research we turn our attention to an even more specific and refined set of knowledge about effective public participation in environmental matters. The basic terms for research we borrowed from the **Maastricht Recommendations** on Promoting Effective Public Participation in Decision-making in Environmental Matters.[4] We had several reasons to select these recommendations as a framework for our research of the CJEU practice. The Maastricht Recommendations were prepared by the Task Force on Public Participation in Decision-making, an official body of the Convention in response to the request of the Meeting of the Parties to the Convention.[5] The authors of the Recommendations consulted a wide range of experts, including environmental NGO lawyers and researched the very rich and detailed case law of the Aarhus Convention Compliance Committee. The 'Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters' was approved by the Meeting of the Parties to the Aarhus Convention at its fifth session (Maastricht, the Netherlands, 30 June to 1 July 2014). Although it has no binding effect, it reflects the desire of the Parties to develop the practice of the Convention in

[3] Bingsheng Liu; Yang Hu; Anmin Wang; Zhonglian Yu; Jun Yu and Xiaolin Wu: Critical Factors of Effective Public Participation in Sustainable Energy Projects, 2018 American Society of Civil Engineers.
[4] https://unece.org/DAM/env/pp/Publications/2015/1514364_E_web.pdf
[5] ECE/MP.PP/2010/2/Add.1, paragraph 2 (c); see also ECE/MP.PP/2011/2/Add.1, decision IV/6, annex I, activity V.

the directions that make environmental democracy in Europe more effective. This responsible attitude of the Recommendations is well reflected in its introductory part:

> "The Recommendations on Public Participation developed under these treaties aim to **assist** policymakers, legislators and public authorities in their daily work of engaging the public in decision-making processes."

This sentence, in general, encourages environmental authorities to undertake an active, initiating role in ensuring and organising public participation. At the same time, the paragraph we quoted here underlines the basic importance of capacity building.

The broader socio-political intention of the Recommendations is also clarified in its introductory part:

> "(…) the Recommendations will contribute to Government efforts to tackle poverty and inequality by ensuring that all persons, including the poorest segments of society and rural communities, are given the opportunity to participate in decisions that affect them and, as a result, to benefit from the income generated from economic activities."

In other words, effective public participation serves both the interest of the environment (and of the future generations that can enjoy it) and those local communities who invest their energy and knowledge into taking part in a decision-making procedure.

Another merit of the Recommendations is that besides the provisions of the Aarhus Convention it takes into consideration the public participation provisions of several other UN ECE Conventions, such as the Convention on Environmental Impact Assessment in a Transboundary Context, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (see Annex I).

Substantially, the Maastricht Recommendations represents a very good survey of the whole structure of major problems and solutions in the practical implementation of the Convention. Therefore, in the following research we collected the most important legal structures from the Recommendations and used them as a conceptual basis for the analysis of the CJEU court practice concerning effectiveness issues in the interpretation and implementation of the Aarhus Convention.

The key concepts we concluded from the systematic summary of the effectiveness factors in public participation in environmental decision-making procedures are the following ones:

- The width and depth of the group members and organisations of the public participating in environmental decision-making
- Capacity building
- Time aspects
- Multi-level decision-making procedures
- Injunctive relief
- Data and information
- Alternatives
- Main effects of public participation
- Balancing the interests of authorities and applicants in public participation matters

We scanned the environmental decisions of the CJEU for these concepts and a couple of related fields (see also Annex I) and analysed the results found. In some matters, we considered the opinion of scholars who published relevant articles or books, but our leading interpretation tool remained the Maastricht Recommendations and the coherence of relevant decisions of the court with the system of the Recommendations (see Annex II).

WHO CAN PARTICIPATE IN WHAT KIND OF CASES?

The scope of participation is a starting point in the examination of effectiveness of public participation: naturally, a basic condition for its effectiveness is that the members and organisations are allowed to have a say in all kinds of decisions relevant for sustainability, and the width and depth of their participation has as few barriers as possible. Right after the entering into force of the Aarhus Convention, the authorities and other “old”, established stakeholders seemed to be reluctant to receive new participants into the environmental administrative cases and other decisions. However, these doubts were put aside within a couple of years in the majority of the European countries owing to the activity of the European NGO networks, the Compliance Committee and the CJEU. Furthermore, positive experiences with more and more effective public participation exerted positive feedback to this process. These initial results were summarized by the Maastricht Recommendations that captures this idea with the term of comprehensiveness.

> "*Comprehensiveness*: the broad scope of public participation in *various types of decisions* and for *the public of different characteristics"* (General Recommendations);[6]
>
> "The scope of the participants, therefore, is a key concept of comprehensiveness. Without environmental democracy there is a large gap between those with rich opportunities to have a say and those who have almost none. Strong lobby groups or those with a special relationship to the decision makers might have disproportional influence on the procedure and the decision, while some members of the public may be willing but unable to participate (e.g. vulnerable and/or marginalized groups such as children, older people, women in some societies, migrants, people with disabilities, those with low literacy or language barriers, ethnic or religious minorities, economically disadvantaged groups, those without access to the Internet, television or radio etc.). Others may be able to participate but unwilling to do so (e.g., people with prior bad experiences of participation procedures, those with a lack of time, or who see no benefits in participating etc.)." (Point 20)

The environmental legal literature echoes these views and even carries it further: too narrow participation endangers the success of the planned socio-economic projects. "Non-inclusiveness in public environmental procedures can fuel public resistance, especially in fields in which human activities are realised closed to living areas, as in the case of the building of renewable sources or infrastructural projects."[7] The practice of CJEU underpins both the Recommendations and this scholarly opinion.

Types of cases where public participation shall be allowed

LEGISLATIVE ACTS REFERRING TO INDIVIDUAL PROJECTS

With respect to the types of cases where public participation should take place, there is a typical strive from developers to lobby for legislative level permits for their individual projects, based on the argument that certain projects have a primary social importance. **Case C-182/10**, for instance, is about and individual project that was shifted to the legislative level. The Court was of the opinion that while there is a certain amount of discretion of the Member States to do so, legislative decisions should not exclude effective public participation.

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[6] All indented emphases in the Recommendations and in the CJEU decisions are from us.
[7] Access to Public Participation: Unveiling the Mismatch between What Law Prescribes and What the Public Wants by Lorenzo Squintani & Goda Perlaviciute June 2019, University of Groningen Faculty of Law Research Paper Series No. 24/2019, p.1.

> "The general principles of equivalence and effectiveness allow the Member States, by virtue of their procedural autonomy to have a discretion in implementing Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and impartial body established by law is to have jurisdiction in respect of the review procedures referred to in those provisions and what procedural rules are applicable. However, these mentioned provisions would lose their all **effectiveness**, if the mere fact that a project is adopted by a legislative act were to make it immune to any review procedure for challenging its substantive or procedural lawfulness within the meaning of those provisions (see Boxus and Others, paragraph 53)." (Point 48)

> "In addition, in order to ensure effective judicial protection in the fields covered by EU environmental law, it is for the national court to interpret its national law in a way which, to the fullest extent possible, is consistent both with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention and with the objective of **effective judicial protection of the rights conferred by EU law** (see, to that effect, judgment of 8 March 2011, Lesoochranárske zoskupenie, C-240/09, EU:C:2011:125, paragraphs 50 and 51)." (Point 39)

PLANNING DECISIONS

As concerns another type of cases, in some countries there were doubts about the possibility of participation for the members and organisations of the public in certain planning procedures of the state administration on central or local level. While public participation in spatial planning decisions is widely acknowledged, there are not yet clarified legal situations in connection with other planning decisions, such as Air Quality Planning (AQP). The European civil organisation Client Earth started a campaign in the last decade in this matter (see for example **C-404/13**, ClientEarth), while an earlier case, Janecek (**C-237/07**) is also frequently quoted in this respect. Recently, the question was positively addressed by the Court in Case **C-752/18**, Deutsche Umwelthilfe eV v Freistaat Bayern. The central case was the stubborn objection of the Bavarian Regional Government to allowing the environmental NGOs into the planning procedure. The principle of effectiveness became relevant here, interpreted as the *bona fide* implementation of EU laws:

> "By its question, the referring court seeks, in essence, to ascertain whether EU law, in particular the first paragraph of Article 47 of the Charter, must be interpreted as meaning that, in circumstances in which a national authority persistently refuses to comply with a

> judicial decision enjoining it to perform a clear, precise and unconditional obligation flowing from EU law, in particular from Directive 2008/50, EU law empowers or even obliges the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority." (Point 29)

In that regard, it should be noted, in the first place, that, in the absence of harmonisation of national enforcement mechanisms, the details of their implementation are governed by the internal legal order of the Member States by virtue of the principle of procedural autonomy of those States. Nevertheless, the means of implementation must meet two conditions, namely that they are no less favourable than those governing similar domestic actions (principle of equivalence) and that they do not make it impossible or excessively difficult to exercise the rights conferred by EU law (**principle of effectiveness**) (judgment of 26 June 2019, Kuhar, C-407/18, EU:C:2019:537, paragraph 46 and the case-law cited)" (Point 33).

NON-ENVIRONMENTAL ADMINISTRATIVE DECISIONS THAT EXERT SIGNIFICANT EFFECT ON THE ENVIRONMENT

Looking at the question from another angle, even if the decision was made on administrative level, the environmental features of certain cases may be disputable. In the Slovakian brown bear case (**Case C-240/09**, Lesoochranárske zoskupenie VLK) the CJEU offers the most frequently cited solution to this. In this case it was questionable for the national court if a nature conservation NGO has the right to step up in a nature conservation / hunting case where the issue was the permitting of agricultural and other not strictly environmental activities that, however, might exert serious effects on protected wildlife. The authorities were reluctant to grant standing to the NGO in such cases, referring to the vague formulation of Article 9(3) of the Aarhus Convention. The Court of Justice of the European Union disagreed, saying that

> "(…) if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law. It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure **effective judicial protection in the fields covered by EU environmental law**, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention. (the court should) 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."

In addition to that, the Lesoochranárske case highlights efficiency as a major implementation tool of international environmental law. Even if these treaties – in order to gain the most possible support from the potential Parties – are usually vague in their language, their goal is clear and the Parties should act in *bona fide* when implementing those domestically. As the CJEU states

> "It must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals. (…) However, it must be observed that those provisions, although drafted in broad terms, are intended to ensure **effective environmental protection**. On that basis, as is apparent from well-established case law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law (…) must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (**principle of effectiveness**)." (Point 48)

We note here that the principle of effectiveness is indeed a much broader term than the effectiveness of public participation and is used in different fields of law. In short, the principle of effectiveness means the way of implementation of EU law in general, which ensures the attainment of the goal of the given legal act that can be deducted from its entire text and from its contextual information. In some legal systems this concept is labelled as "*the intent of the legislator*", a notion that may be slightly misleading, because the goal of a piece of legislation is usually not a matter of subjective approach and desire by those natural persons who exercise legislative power.

Lastly, effectiveness in its narrower sense, used in our interpretation is also mentioned in the Lesoochranárske decision. Notably, Article 9(3) of the Aarhus Convention is a standalone provision, which is not directly stemming from the context of the Convention, contrary to Article 9(1) and 9(2) that are closely connected to Article 4 and 6 respectively. Correspondingly, the language of Article 9(3) is vaguer than the one of the rest of the Convention, but that must not mean that its content is *null and void*. We can see here, therefore, that Article 9(3) is being progressively interpreted by the CJEU.

Case C-873/19, Deutsche Umwelthilfe eV v Bundesrepublik Deutschland is another example , this time from clean air protection – a field of environmental law where almost everyone has an interest but oftentimes nobody has direct links with the consequences. Furthermore, this field of environmental law is strongly related to other branches of administrative law, such as traffic law and certain aspects of industrial laws. As such, clean air protection cases cannot usually apply the traditional, direct interest-based standing criteria. However, Aarhus Convention Article 9(3) sheds a different light on this issue:

> "In that respect, as regards the argument that such a limitation of the standing of environmental associations to bring proceedings to certain decisions, in particular those having a serious environmental impact, could be justified on account of the large number of administrative decisions linked to the environment, it must be held that, as the Advocate General observed, in essence, in point 71 of his Opinion, first, it is not apparent from Article 9(3) of the Aarhus Convention that the right to bring an action provided for therein could be limited solely to decisions with significant consequences for the environment. Secondly, decisions granting or amending an EC type-approval are likely to concern many vehicles and cannot therefore, in any event, be regarded as being of only minor importance for the environment. In that regard, as is apparent from recital 6 of Regulation No 715/2007, in particular, a considerable reduction in NO_x emissions from diesel vehicles is necessary to improve air quality and comply with limit values for pollution. However, decisions granting or amending EC type-approval in breach of the prohibition on the use of defeat devices which reduce **the effectiveness of emission control systems**, laid down in Article 5(2) of that regulation, are liable to frustrate the attainment of those environmental protection objectives." (Point 73)

WHO CAN TAKE PART IN ADMINISTRATIVE DECISION-MAKING PROCESSES?

Limiting public participation to only a part of an administrative case because of the lack of direct interest on the side of certain parties is still an existing problem in European practice. Besides simple participatory options (e.g., commenting) and full standing, there is a third concept that can create the procedural opportunity to take part in an environmental administrative case – or can exclude some persons from the merit of the case. It is called *locus standi* (right of action) and means in the practice of several EU countries (e.g., Germany and Hungary) that certain participants have to prove their direct link and interest in each and every question at hand in a court case. Even if they have participatory rights or full standing in general in the administrative phase of the case, they may be excluded from certain key issues in the judicial phase. In **Case C-197/18**, Wasserleitungsverband Nördliches Burgenland, the CJEU established that such limitations decrease the effectiveness of public participation in an unacceptable way.

> "According to settled case-law of the Court, it would be incompatible with the **-binding effect** conferred by Article 288 TFEU on a directive to exclude, in principle, the possibility that the obligations which it imposes may be relied on by the persons concerned (judgments of 19 January 1982, Becker, 8/81, EU:C:1982:7, paragraph 22; of 7 September 2004, Waddenvereniging and Vogelbeschermingsvereniging, C-127/02,

> EU:C:2004:482, paragraph 66; and of 20 December 2017, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation, C-664/15, EU:C:2017:987, paragraph 34).

In particular, where the EU legislature has, by directive, imposed on Member States the obligation to pursue a particular course of action, **the effectiveness of such action would be weakened** if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of EU law in deciding whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out therein (judgments of 24 October 1996, Kraaijeveld and Others, C-72/95, EU:C:1996:404, paragraph 56, and of 26 June 2019, Craeynest and Others, C-723/17, EU:C:2019:533, paragraph 34). (…)

In addition, 'where they meet the criteria, if any, laid down in [the] national law, members of the public' have the rights provided for in Article 9(3) of the Aarhus Convention. That provision, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, imposes on Member States an obligation to ensure **effective judicial protection of the rights conferred by EU law**, in particular the provisions of environmental law (see, to that effect, judgment of 20 December 2017, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation, C-664/15, EU:C:2017:987, paragraph 45)." (Points 30-31 and 33)."

In **Case T-245/11**, ClientEarth the Court went further and concluded that once one of the participants have full access to the case beyond doubt, there is no point in a further examination of the legal position of other participants who are jointly bringing the case.

> "(…) as regards the *locus standi* of ClientEarth, it must be observed that the applicants have submitted one and the same action. According to case-law which is now well established, where one and the same action is involved, as soon as one of the applicants has locus standi, there is no need to consider whether or not other applicants are entitled to bring proceedings except where considerations of procedural economy exist (see, to that effect, judgments in Case C-313/90 CIRFS and Others v Commission [1993] ECR I-1125, paragraph 31; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P Comitato 'Venezia vuole vivere' and Others v Commission [2011] ECR I-4727, paragraphs 36 to 38; and Case T-79/12 Cisco Systems and Messagenet v Commission [2013] ECR, paragraph 40).

In this case, even if a separate examination of the admissibility of ClientEarth's action were to reveal that ClientEarth does not have locus standi, the Court would none the less have to examine the *action in its entirety*. There are therefore no grounds of **procedural economy** that would justify the Court departing from the abovementioned case-law (see, to that effect,

judgment in Cisco Systems and Messagenet v Commission, cited in paragraph 97 above, paragraph 40)." (Points 97-98).

Capacity building

DEFINITION OF CAPACITY BUILDING

In the definition of comprehensiveness, the Recommendations establishes that the main barrier to the basic concept of public participation is the unequal position (financial, professional, of knowledge and in motivation etc.) of the potential participants. It is the responsibility (and also vested interest, at the end of the day) of the public bodies to ensure genuinely comprehensive participation through the tools of capacity building as they are determined in Article 3 of the Aarhus Convention. Capacity building is defined in the Maastricht Recommendations as follows.

> "*Capacity building*: The responsible authority shall ensure that the public knows the aims, procedure and expected outcomes of the decision-making process, in other words, the whole context of the plan or individual decision; facilitation and assistance should be provided; explaining planning and SEA processes in a non-technical manner; clarifying the relevance of the plan; non-technical summaries. In order to establish and maintain *a clear, transparent and consistent framework* to implement the provisions of the Convention, the public participation procedure for a decision subject to the Convention should be designed in such a way that both the public authorities and *the public know precisely*: the rules of the procedure, including the stages, time frames, costs and the possible decisions and the legal remedies thereof. Due consideration of the needs and abilities (e.g., with regard to language, literacy, access to the Internet, geographic location (rural/urban), mobility) of the public concerned so that they can **participate effectively** in the procedure." (Point 14)

The Recommendations follows the basic structure of capacity building in the Convention: supporting the public with information and technical means, where the information served can be of professional (scientific, environmental etc.) and of procedural character. The only component of Article 3 missing is the prohibition of co-called negative capacity building (capacity destroying?), i.e., instances where criticized developers and/or authorities harass members of the public or discriminate against them.

TOOLS FOR ENHANCING CAPACITY BUILDING

The detailed text of the Maastricht Recommendations offers further technical details. It underlines the importance of the mitigation of expenses of participation, as well as the key role of municipalities in organising effective participation. We note that the role of the environmental NGOs, especially the local, grassroots ones is similarly important.

> "Practical arrangements to facilitate effective public participation may be put in place where appropriate:
>
> a. facilitation of the public's access to information for the least possible cost, such as by making copies of requested documents available electronically free of charge;
>
> b. local public authorities and/or public institutions (e.g., schools or public libraries) may be requested to assist the participants, with due compensation where appropriate;
>
> c. schemes may be established to support, financially or otherwise, the public to participate (e.g., to assist with travel costs or legal advice or the assistance of technical experts)." (Point 37)

ACADEMIC LITERATURE VIEWS ON THE NEED FOR CAPACITY BUILDING

Scholars are less politically cautious; that way environmental legal literature is full of warnings about the dangers when proper capacity building is omitted from procedures of decision-making. Indeed, in these instances public participation might be captured by a small, influential, but not necessarily representative group of the public. Even more, in some instances the developers and the authorities might manipulate the whole process through cherry-picking friendly groups and neglecting or restricting the participation of others.

> "A specific problem in this regard consists in the finding that, generally, only a small group of people can **effectively participate** in public environmental procedures. A multitude of studies has found that educational level, gender, ethnicity and age determine who participates in politics. Accordingly, Lee and Abbot warn about the risk that a small (even if larger than before) number of participants will wrap up important decisions. In this regard, McGuire warns about the risk that collaborative management could reinforce the so-called 'democratic deficit' by giving even more opportunities to influence and affect the outcome of decision-making procedures to those that have already sufficient access and expertise in these fields."[8]

[8] Squintani, 2019, p.2.

Similarly

> "The majority of choices regarding what is constructed where – what planners call land use – as well as where public money is spent are made by local governments (Beshi and Kaur, 2020). Despite this, few citizens participate in the many forms of community decision-making, and participation is unequal by colour, age, and wealth. As a result, rather than reflecting the values and requirements of the whole community, local institutions frequently make decisions that reflect the values and needs of older, richer, and largely white inhabitants (Andrews et al., 2020). Technology may be used to widen public involvement, embrace participatory budgeting, change the public planning process, and provide all long-term residents the opportunity to vote in order to promote more participation in local government. These measures, taken together, will result in local choices that better represent the needs and ambitions of the community."[9]

We have found no EU Court decisions that deal directly, systematically with the issue of capacity building. However, some important aspects of the measures to be taken by the authorities in order to enable the members and organisations of the public to take part in their decision-making procedures more effectively were found.

SERVING THE PUBLIC WITH PROPER INFORMATION AS A CAPACITY BUILDING TOOL

In **Case C-673/13** (European Commission appeal) the Court highlights the capacity building effects of genuine information (all data, professional conclusions and legal consequences deducted from it – i.e., information as a collective term) on public environmental (and social) awareness as well as on good governance, in the meaning of transparency and accountability. Moreover, the Court positioned this issue in the context of the effectiveness of public participation.

> "It is also necessary to include in the concept of 'information [which] relates to emissions into the environment' information enabling the public to check whether the assessment of actual or foreseeable emissions, on the basis of which the competent authority authorised the product or substance in question, is correct, and the data relating to the effects of those emissions on the environment. It is apparent, in essence, from recital 2 of Regulation No 1367/2006 that *the purpose of access to environmental information provided by that regulation is, inter alia, to promote* ***more effective public participation*** **in**

[9] Azlan Abas, Kadir Arifin, Mohd Azhar Mohamed Ali, Muhammad Khairil: A systematic literature review on public participation in decision-making for local authority planning: A decade of progress and challenges; Environmental Development, Elsevier, 2023.; Volume 46, June 2023, 100853

> **the decision-making process**, thereby increasing, on the part of the competent bodies, the *accountability* of decision-making and contributing to public *awareness* and support for the decisions taken. In order to be able to ensure that the decisions taken by the competent authorities in environmental matters are justified and to **participate effectively in decision-making in environmental matters**, the public must have access to information enabling it to ascertain whether the emissions were correctly assessed and must be given the opportunity reasonably to understand how the environment could be affected by those emissions." (Point 80)

THE SPECIFIC ROLE OF REASONING A DECISION IN MAKING THE PARTICIPANTS TO UNDERSTAND THE LAWFULNESS OR FAULTS IN THE DECISION

Case T-245/11, ClientEarth is a good example of a systemic approach in environmental law, whereas it refers to the rights of the public, the principle of transparency, moreover the principle of democracy and legitimacy within the framework of capacity building, emphasizing the importance of a proper and sufficiently specific reasoning of a decision. This decision invokes effectiveness of public participation, too.

> "Further, first, to the extent that the applicants appear to suggest that the reasons stated for the extension decision (see paragraph 133 above) did not permit them to determine whether that decision was vitiated by error, suffice it to state that that *statement of reasons* is sufficiently detailed to enable them to understand why ECHA had decided to extend the time-limit and, therefore, to form an opinion on the lawfulness of that decision. (Point 139) (…)

The *public's right to receive that information constitutes the expression of the principle of transparency*, to which the provisions of Regulation No 1049/2001, as a body, give effect, as is apparent from recital 2 in the preamble to that regulation, according to which *openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is* ***more effective*** *and more accountable* to them, and contributes to strengthening *the principle of democracy* (judgment in Case T-36/04 API v Commission [2007] ECR II-3201, paragraph 96)." (Point 192)

Also, **Case T-9/19**, ClientEarth adds some further elements to this, such as the right to good administration and a warning that even a perfect reasoning of a decision can cover all facts when a decision itself is faulty, not fitting to the context (circumstances of the case, interests of the parties and other concerned persons and communities, environmental and intergenerational considerations, the spirit of the laws, meaning all the legal provisions that have relevance in the case etc.).

"First of all, it should be recalled that the *right to good administration* laid down in Article 41 of the Charter of Fundamental Rights of the European Union, by virtue of paragraph 2(c) of that provision, includes, inter alia, *the obligation of the administration to give reasons for its decisions*. In accordance with Article 296 TFEU, acts adopted by the institutions, bodies, offices and agencies of the European Union must state reasons. Article 10(2) of the Aarhus Regulation also provides that the written position taken by the EU institution or body to which a request for internal review of one of its acts has been submitted is to state the reasons on which it is based. The reasons given should *enable the applicant to understand the reasoning* of the competent institution or body (Opinion of Advocate General Szpunar in TestBioTech and Others v Commission, C-82/17 P, EU:C:2018:837, point 49)." (Point 87)

(…)

It is settled case-law that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose *in a clear and unequivocal fashion* the reasoning followed by the institution, body or office which adopted the measures in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard *not only to its wording but also to its context* and to ECLI:EU:T:2021:42 13 JUDGMENT OF 27. 1. 2021 – CASE T-9/19 CLIENTEARTH V EIB all the legal rules governing the matter in question (see judgment of 5 March 2009, France v Council, C-479/07, not published, EU:C:2009:131, paragraph 49 and the case-law cited). In particular, the reasons given for a measure adversely affecting persons are sufficient if that measure was adopted in a context which was known to them (see judgment of 14 April 2015, Council v Commission, C-409/13, EU:C:2015:217, paragraph 79 and the case-law cited)." (Point 99)

THE SPECIFIC ROLE OF REASONING IN HIGHLY TECHNICAL, SCIENTIFIC ISSUES

Case T-545/11 (Stichting Greenpeace Nederland, established in Amsterdam (Netherlands), Pesticide Action Network Europe) highlights an important feature of many environmental cases, namely their heavy dependency on sophisticated scientific knowledge. Such issues pose an especially difficult task for the authorities when they are supposed to support effective public participation. This case, similarly, to earlier ones, refers to the basic requirements of effectiveness of public participation.

> "The applicants, supported by the Kingdom of Sweden, submit that the Commission infringed the presumption arising from Article 6(1) of Regulation No 1367/2006, the information requested being environmental information relating to emissions into the environment. They argue that the information concerns all the substances released into the environment when the authorised substance 'glyphosate' is used and applied in pesticides. The information in the draft report would, moreover, enable the public to verify whether the tests conducted give an insight into the emissions and effects of the substance authorised on the basis of those tests, namely the active substance 'glyphosate'." (Point 50)
>
> (…)
>
> It is also necessary to include in the concept of 'information [which] relates to emissions into the environment' information *enabling the public to check whether the assessment of actual or foreseeable emissions, on the basis of which the competent authority authorised the product or substance in question, is correct*, and the data relating to the effects of those emissions on the environment. It is apparent, in essence, from recital 2 of Regulation No 1367/2006 that the purpose of access to environmental information provided by that regulation is, inter alia, *to* ***promote more effective public participation*** **in the decision-making process**, thereby increasing, on the part of the competent bodies, the *accountability* of decision-making and contributing to *public awareness* and support for the decisions taken. In order to be able to ensure that the decisions taken by the competent authorities in environmental matters are justified and to participate effectively in decision-making in environmental matters, the public must have access to information enabling it to ascertain whether the emissions were correctly assessed and *must be given the opportunity reasonably to understand how the environment could be affected by those emissions* (judgment on appeal, paragraph 80)." (Point 57)

STANDING AS A CAPACITY ENHANCEMENT MEASURE IN ENVIRONMENTAL DECISION-MAKING PROCEDURES

Public participation as ensured in Articles 6-8 of the Aarhus Convention is, in a legal sense, a subset of entitlements we usually call standing. Standing is a core element of historical administrative procedural laws, which ensures a decisive role for those who are closely interested in a case, including the initiation and closure of the case itself, raising suggestions, attaching evidence, having full access to all files, using legal remedies and so on. Those members and associations of the public that use public participation, use only some of these procedural rights. However, as the frequently cited **Case C-243/15**, Lesoochranárske

zoskupenie VLK states, in certain cases a full-fledged standing would ensure the most effective public participation. Standing can be understood here as a strong procedural institute that reinforces the capacity of a key participant in an environmental administrative case.

> "It is apparent from the documents before the Court that the status of 'party to the procedure', had it been granted to LZ, *would have enabled LZ to participate more actively in the decision-making process by setting out in greater detail and more appositely its arguments* relating to the risks of adverse effects of the project envisaged on the integrity of the protected site, arguments which would *indeed have had to be taken into account by the competent authorities* before that project was authorised and executed." (Point 69)

As **Case T-569/20**, Stichting Comité N 65 Ondergronds Helvoirt points out, however, in many cases less rights ensured to environmental NGOs could be enough in order to achieve effective participation. We note, however, that the vagueness of the term "status of addressee" reflects a legal uncertainty in the scope of entitlements in such cases.

> "Next, it is important to bear in mind that the internal review procedure under Article 10 of the Aarhus Regulation is intended to facilitate access to justice for non-governmental organisations – since such organisations do not have to have a sufficient interest or to maintain the impairment of a right in order to exercise that right in accordance with the fourth paragraph of Article 263 TFEU – and that that regulation therefore **effectively** affords such groups the *status of addressees* (see, to that effect, Opinion of Advocate General Jääskinen in Joined Cases Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht, C-401/12 P to C-403/12 P, EU:C:2014:310, point 124, and Opinion of Advocate General Szpunar in TestBioTech and Others v Commission, C-82/17 P, EU:C:2018:837, point 36)." (Point 59)

FAIRNESS AND EQUITY IN THE ENVIRONMENTAL ADMINISTRATIVE PROCEDURES

Fairness and equity are basic requirements of administrative procedural laws in Europe and under the Aarhus Convention, too. Fairness refers to even-handedness, a fair procedure handles all parties in the case equally, ensuring the same procedural rights and possibilities for all. **Case C-664/15**, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation and **Case C-470/16**, North East Pylon Pressure Campaign Ltd. are examples of fairness in both ways: fairness to the developer and fairness to the members and organisations of the public. In the first case the Court said:

> "In that context, it must, however, be noted that, when they set out detailed procedural rules for legal actions intended to ensure the protection of rights conferred by Directive 2000/60, the Member States must ensure compliance with the ***right to an effective remedy*** *and to a fair hearing*, enshrined in Article 47 of the Charter, which constitutes a reaffirmation of the principle of **effective judicial protection** (see, to that effect, inter alia, judgment of 27 September 2017, Puškár, C-73/16, EU:C:2017:725, paragraph 59 and the case-law cited).

In principle, Article 9(3) of the Aarhus Convention does not preclude a rule imposing a time limit, such as the one set out in Paragraph 42 of the AVG, obliging the **effective exercise**, from the administrative procedure stage, **of the right of a party to the procedure** to submit objections regarding compliance with the relevant rules of environmental law, since such a rule may allow areas for dispute to be identified as quickly as possible and, where possible, resolved during the administrative procedure so that judicial proceedings are no longer necessary." (Points 87-88)

The second **Case C-470/16**, North East Pylon Pressure Campaign Ltd. states:

> "It is apparent from the file submitted to the Court that 16 reliefs were sought on approximately 40 grounds, alleging, inter alia, that EirGrid had amended the information initially included in the environmental impact assessment report it was required to issue under Directive 2011/92, that the environmental impact statements and the Natura 2000 impact statements were defective, that parts of the development consent process were unlawful, that EirGrid's application for approval did not comply with national law, that the *requirements of a fair trial were infringed* in the organisation of the hearing by An Bord Pleanála, and objective bias on the latter's part because of its designation by the Minister." (Point 20)

In connection with the joint concepts of fairness and equity, we have to note that we did not find CJEU cases focusing on the second basic procedural element. Equity would dictate a more favourable procedural position to those parties who otherwise would have much less chance to influence the process and the outcome effectively. Therefore, use of equity in environmental administrative procedures would be a key tool to support the participation of poor, disenfranchised, socially or otherwise vulnerable groups by reinforcing their procedural position – as an important part of a systematic capacity building.

TIME ASPECTS

Quick and effective procedure – these two requirements are strongly interrelated. Time relations in public participation in environmental decision-making procedures have several appearances in CJEU practice. The Maastricht Recommendations defines its basic concept in a concise way:

> "*Timeliness*: early and well-informed participation, as well as participation when changes in the project or other factors make the revision and reconsideration of the past conclusions necessary." (General Recommendations)

This very concise sentence first reflects on the basic time dichotomy in public participation: if it is too early, little information is available, while if it is too late, all alternatives have already been discussed and decided. It is obvious that this dichotomy can be easily solved by ensuring continuous or multiple possibilities for the members and associations of the public to participate throughout the whole procedure, even after the decision was made and the project is in operation. In the following paragraphs we are going to ascertain that these important factors of timeliness are reflected in the practice of the Court of Justice of the EU.

EARLY PARTICIPATION

The most famous appearance of the issue of early participation can be found in **Case C-416/10**, Jozef Križan and others.

> "In that regard, it is important to note that Article 15 of Directive 96/61 requires the Member States to ensure that the public concerned are given ***early and effective*** **opportunities to participate** in the procedure for issuing a permit. That provision must be interpreted in the light of recital 23 in the preamble to that directive, according to which the public must have access, before any decision is taken, to information relating to applications for permits for new installations, and of Article 6 of the Aarhus Convention, which provides, first, for early public participation, that is to say, **when all options are open and effective public participation can take place**, and, second, for access to relevant information to be provided as soon as it becomes available. It follows that the public concerned must have all of the relevant information from the stage of the administrative procedure at first instance, before a first decision has been adopted, to the extent that that information is available on the date of that stage of the procedure." (Point 88)

EARLY INFORMATION ABOUT THE COSTS

In the British court practice and procedural law (visited at in **Case C-530/11**, European Commission) there is a legal institution called *protective costs order*, which might make the litigation (also in environmental administrative cases) for the plaintiffs safer. Even if the British legal disputes seem to be amongst the most expensive ones, this instrument can mean a relative safety to the civil litigants in environmental cases once they know in advance the maximum potential expenses in the case. Naturally, this early knowledge could only partly balance the fact that the procedural costs are too high in a country.

> "According both to the documents submitted to the Court and to the discussion at the hearing, in England and Wales section 51 of the Senior Courts Act 1981 provides that the court concerned is to determine by whom and to what extent the costs are to be paid. This power is stated to be exercised in accordance with the detailed provisions laid down in Rule 44.3 of the Civil Procedure Rules. The decision on costs is accordingly generally made by the court concerned at the conclusion of the proceedings, but the claimant may also apply for a '*protective costs order*', which enables him to obtain, at an early stage of the proceedings, a cap on the amount of costs that may be payable.
>
> As to the costs regime and, more specifically, the possibility for the national courts to grant 'protective costs orders' enabling the amount of the costs that may be payable to be limited at an early stage of the proceedings, the Commission considers that in England and Wales, despite the criteria laid down by the judgment of the Court of Appeal in R (on the application of Corner House Research) v Secretary of State for Trade & Industry [2005] 1 WLR 2600, the case-law remains contradictory and gives rise to legal uncertainty. Furthermore, the courts grant such orders only rarely. The Commission considers that the Court of Appeal's judgment of 29 July 2010 in R (on the application of Garner) v Elmbridge Borough Council and Others [2010] EWCA Civ 1006, which was, however, delivered after expiry of the period laid down in the reasoned opinion mentioned in paragraph 9 of the present judgment, is a favourable but still insufficient development. Any cost caps obtained are in practice set at very high amounts and they generate satellite litigation that increases the overall cost of the dispute. (…)
>
> According both to the documents submitted to the Court and to the discussion at the hearing, in England and Wales section 51 of the Senior Courts Act 1981 provides that the court concerned is to determine by whom and to what extent the costs are to be paid. This power is stated to be exercised in accordance with the detailed provisions laid down in Rule 44.3 of the Civil Procedure Rules. The decision on costs is accordingly generally

made by the court concerned at the conclusion of the proceedings, but the claimant may also apply for *a 'protective costs order', which enables him to obtain, at an early stage of the proceedings, a cap on the amount of costs that may be payable*." (Points 15-16, 52)

TOO EARLY REQUEST

In our view, the joined **Cases T-424/14 and T-425/14**, ClientEarth are very controversial. Early and well-informed public participation is a key to its effectiveness. Since we all acknowledge the importance of environmental democracy, we find it a false presumption that public participation would exert a harmful effect on the procedure and/or on the content of the decision itself.

> "Having regard to those factors, the Commission concluded in the contested decisions that access to the documents requested had to be refused on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001, given that the decision-making processes were at a very early and delicate stage. (Point 14)
>
> (…)
>
> It is apparent from the contested decisions that the Commission held that the disclosure of the documents requested might seriously undermine the ongoing decision-making processes, which were at a very early and delicate stage. That finding is based on a number of grounds. First, the Commission considered that such disclosure would restrict its *room for manoeuvre* and reduce its ability to help to *seek a compromise*. Second, the Commission stated that there was a need to preserve an *atmosphere of trust* during discussion and negotiation processes concerning the development of policy proposals. According to the Commission, the disclosure of the documents requested would give rise to a risk of *external pressures* liable to affect those delicate ongoing processes. In that regard, the Commission also emphasised the fact that it was required, under Article 17(1) and (3) TEU, to promote the *general interest* and to carry out its responsibilities in a *completely independent* manner. Third, in the decision of 1 April 2014 (Case T-425/14) the Commission focused on the fact that inspections and surveillance in respect of environmental matters were a key element in the implementation of public policy, that no external factors should influence the discussion as such influence would affect the quality of control over the Member States, and that the institutions had been making their views on that issue known since 2001. In the decision of 3 April 2014 (Case T-424/14) the Commission emphasised the *political sensitivity* of the issue of access to justice in

environmental matters, the possible differences of opinion between Member States, and the fact that 10 years had elapsed since the 2003 proposal for a directive. (Point 51)

(…)

First, the arguments summarised in paragraph 46 above, concerning the *general and hypothetical* nature of the grounds of the contested decisions, the Commission's reduced room for manoeuvre, the lack of evidence of a real risk of public pressure, the non-sensitive nature of the documents requested, and the irrelevance of the fact that the decision-making processes are at a very early stage, are in no way capable of rebutting the general presumption pursuant to which the Commission was entitled, in the present cases, to refuse to grant access to the documents requested without having to carry out a specific and individual examination of those documents. Thus, on the one hand, to the extent that those arguments seek, in essence, to criticise the general nature of the grounds relied on in the contested decisions, it should be observed that the reliance on grounds for refusal of a general nature is justified by the application of a general presumption which specifically enables the Commission to dispense with a specific and individual examination of the documents requested. On the other hand, although the applicant questions the reality of external pressures affecting the Commission's room for manoeuvre, it must be stated that the applicant has failed to adduce specific evidence permitting the rebuttal of that general presumption in the present cases." (Point 120)

We note here, for the sake of a weak balance, that even without a detailed citing we can establish that **Case C-411/17** (29 July 2019) at least clarifies a basic question: a decision should not be brought earlier than the end of the public participation procedure! The case was about a question for preliminary ruling in connection with postponing the date of deactivation and of the end of industrial production of electricity by the Doel 1 and Doel 2 nuclear power plants. The CJEU has specifically referred to the Maastricht Recommendations in the reasoning of its decision, as a non-binding, however, prestigious source of legal concepts.

PROPER TIME FOR PROVIDING FOR PUBLIC PARTICIPATION

Case C-721/21, Eco Advocacy CLG establishes that the proper timing of public participation in an environmental decision-making procedure is not determined, it should be decided on a case-by-case basis, using the principle of effectiveness.

"In that regard, as the Advocate General observed, in essence, in points 29 and 30 of her Opinion, although EU law requires, pursuant to Article 11 of Directive 2011/92 and Article 9 of the Convention on access to information, public participation in decision-

making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1), inter alia that environmental associations be guaranteed access to ***an effective and fair review procedure***, it does not prescribe how and *at what point in time* the grounds aimed at challenging the lawfulness of relevant decisions, acts or omissions must be raised. (Point 20)

Moreover, the Court has held that national procedural rules according to which the subject matter of the dispute is determined by the pleas in law put forward at the point in time at which the action was brought are *consistent with* ***the principle of effectiveness*** in so far as they ensure proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas (judgment of 6 October 2021, Consorzio Italian Management and Catania Multiservizi, C-561/19, EU:C:2021:799, paragraph 64 and the case-law cited)." (Point 23)

NOTIFICATION OF THE PUBLIC

Notification of the potential participants by environmental authorities at or close to the onset of the procedure plays a very important role in ensuring early participation. The Maastricht Recommendations defines it and gives some details in the text.

"*Notification*: such mechanisms might include electronic mailing lists and automatic notifications connected to electronic databases; in regions where significant parts of the public lack regular access to the Internet, other effective and culturally appropriate means of individual notification should be used, e.g., by mail or even door-to-door notification.

Concerning the content, the notification should describe clearly all the opportunities for the public to participate and the time frames regarding those opportunities; the notification should include a summary of the most important information relevant to the decision-making and such technicalities as the contact details of the decision maker and the developer." (Points 53-54)

Unfortunately, no cases were found in the relevant CJEU case collections in this matter.

RES JUDICATA, NON-RETROACTIVITY

While early participation might meet with hindrances in certain cases, a too late start of being active by the members and associations of the public may result in losing cases. Participants in environmental decision-making should be aware of the complicated time relations of these

cases, in order to apply laws correctly. Decision of the Court in **Case C-167/17**, Volkmar Klohn, gives a short description of those cases where new laws apply to newly emerged features of activities permitted before the new laws, as well as those cases where the time elapsed made the possibilities for intervention to expire.

> "According to the settled case-law of the Court, new rules apply, as a matter of principle, immediately to *the future effects of a situation* which arose under the old rule (judgments of 11 December 2008, Commission v Freistaat Sachsen, C-334/07 P, EU:C:2008:709, paragraph 43 and the case-law cited; of 6 July 2010, Monsanto Technology, C-428/08, EU:C:2010:402, paragraph 66; and of 6 October 2015, Commission v Andersen, C-303/13 P, EU:C:2015:647, paragraph 49).
>
> It is otherwise – subject to the principle of the *non-retroactivity* of legal acts – only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (judgment of 16 December 2010, Stichting Natuur en Milieu and Others, C-266/09, EU:C:2010:779, paragraph 32). (Point 38-39)
>
> In that regard, the principle of res judicata is, both in the legal order of the European Union and in national legal systems, of particular importance. In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become final after all rights of appeal have been exhausted or after expiry of the time limits provided for in that regard can no longer be called into question (judgment of 11 November 2015, Klausner Holz Niedersachsen, C-505/14, EU:C:2015:742, paragraph 38 and the case-law cited)." (Point 63)

CHANGES IN THE PROJECT

Even if permitting was completed a long time ago, res judicata will not prevent the public from submitting new observations or requests to the environmental authorities in those cases where the circumstances of a permitted activity have undergone significant changes. The practice of CJEU refers to that affirmatively, especially in several environmental impact assessment cases.

The second part of the definition of timeliness from the Maastricht Recommendations deals with these cases, when – either in the project during its operation or in the environment of the project, or in the scientific knowledge concerning both of them – change happens in a significant manner. **Case C-411/17**, Inter-Environnement Wallonie (in the case of a nuclear power plant in the wake of the Fukushima accident) says

> "As regards point 24 of Annex I to the EIA Directive, it is evident from the wording and general scheme of that provision that it applies to any *change or extension* to a project,

> which by virtue of, inter alia, its nature or scale, presents risks that are similar, in terms of their effects on the environment, to those posed by the project itself." (Point 78)

An interesting cross-section of the interpretations of time and of change in a project can be found in **Case C-43/21**, FCC Česká Republika, although we think that not everyone would agree with our conclusion. At any rate, we should establish that in our opinion, enlengthening the operation time of a project might exert significant effects on its environment, amongst others by its effects that are cumulative in time.

> "By its question, the referring court asks whether Article 3(9) of Directive 2010/75 must be interpreted as meaning that the mere extension of the duration of waste disposal at a landfill, without any change in the maximum approved dimensions of the installation or its total capacity, constitutes a 'substantial change' within the meaning of that provision. ECLI:EU:C:2022:425 9 JUDGMENT OF 2. 6. 2022 – CASE C-43/21 FCC ČESKÁ REPUBLIKA
>
> It should be noted, as a preliminary point, that landfills intended to receive more than 10 tonnes of waste per day or with a capacity exceeding 25 000 tonnes are among the activities listed in Annex I to Directive 2010/75 which, falling within the scope of Chapter II of that directive pursuant to Article 10 thereof, are subject to a permit in accordance with Article 4 thereof. The same applies to any 'substantial change' to the installation pursuant to Article 20(2) of that directive. (Points 29-30)
>
> (…)
>
> In the light of the foregoing observations, the answer to the question referred is that Article 3(9) of Directive 2010/75 must be interpreted as meaning that the mere extension of the duration of waste disposal at a landfill, without any change in the maximum approved dimensions of the installation or its total capacity, does not constitute a 'substantial change' within the meaning of that provision." (Point 45)

Multi-level decision-making procedures

SEVERAL INSTANCES IN ADMINISTRATIVE PROCEDURE AND THE TIERED PROCEDURES

Multi-level decision-making procedures represent a collective term, basically including several administrative and court decisions within the framework of administrative law. It includes administrative decisions and their court review. Another kind of multi-level decision-making is

an even broader concept, where a project undergoes several policy making, development, strategic planning, physical (spatial) planning phases, thereafter environmental impact assessment, integrated pollution prevention control, construction, usage and other types of permitting up until the final examination of environmental impacts of the termination of the project. This latter procedure is what we usually denote with the term 'tiered procedure'. The Maastricht Recommendations, when using this term, actually encompasses both kinds of multi-level decision-making procedures.

> "*Tiered procedures*: when the design and implementation of a project goes through several stages, the public shall be given additional opportunities to participate, whenever new information emerges or the circumstances change in some significant way. (…) Considering the lengthy procedure, the issues of early participation where all alternatives are still open and later participation when all the relevant information has already revealed, emerges." (Point 15 and 78)

The decision in **Case C-416/10** (Križan) puts it simple: once the second or further instances have the legal possibility to substantially change a decision (facts, expert evaluations and legal parts with serious consequences to the realisation of the project), public participation can be provided for at these later stages. This decision is based not only on the Aarhus Convention but also on the participation provisions of the old IPPC Directive.

> "Where under the applicable national legislation, the administrative body at second instance has the power to amend the administrative decision at first instance, therefore, certain options and solutions remain possible for the purposes of Article 15(1) of Directive 96/61, interpreted in the light of Article 6(4) of the Aarhus Convention. As concludes, at that stage of the procedure public participations shall be ensured by making available to the public concerned relevant documents and allowing that public effectively influence the outcome of the decision-making process." (Point 89)

A related decision in **Case C-826/18**, Stichting Varkens in Nood extends the examination of the problem to the court level and allows that under certain national legal circumstances (highlighted in our next sub-chapter) the courts can dismiss the claims from the public when it is based on Article 9(2) (revision of participation issues), but not under Article 9(3) (general provision on access to justice) of the Aarhus Convention.

> "In the light of the foregoing considerations, the answer to the first to sixth questions is that Article 9(2) of the Aarhus Convention must be interpreted as precluding the admissibility of the judicial proceedings to which it refers, brought by non-governmental organisations which are part of the 'public concerned' referred to in Article 2(5) of that

> convention, from being made subject to the participation of those organisations in the procedure preparatory to the contested decision, even though that condition does not apply where such organisations cannot reasonably be criticised for not having participated in that procedure. However, Article 9(3) of that convention does not preclude the admissibility of judicial proceedings to which it refers from being made subject to the participation of the applicant in the procedure preparatory to the contested decision, unless the applicant cannot reasonably be criticised, in the light of the circumstances of the case, for not having intervened in that procedure." (Point 69)

NON-PARTICIPATION IN EARLIER PHASES OF A PROCESS SHALL NOT PRECLUDE AN NGO FROM PARTICIPATION IN A LATER STAGE

Domestic administrative procedural laws might make it difficult for the members and associations of the public to participate in review proceedings of certain environmental decisions in case they failed to raise their arguments earlier. We should observe the irrationality of this – unfortunately – widespread perception because obviously even the largest mainstream environmental associations cannot scan each and every environmental decision in their home region/country, let alone the smaller local grassroots groups and communities. Decision in Case C-664/15, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation approaches this recurring problem of tiered procedures progressively.

> "Subject to verification by the referring court of the relevant matters of fact and national law, Article 9(3) and (4) of that convention approved by Decision 2005/370, read in conjunction with Article 47 of the Charter of Fundamental Rights, must be interpreted as precluding, in a situation such as that in question in the main action, a national procedural rule that imposes a time limit on an environmental organisation, pursuant to which a person loses the status of party to the procedure and therefore cannot bring an action against the decision resulting from that procedure if it failed to submit objections in good time following the opening of the administrative procedure and, at the very latest, during the oral phase of that procedure." (Point 102/3)

LIMITATIONS OF PUBLIC PARTICIPATION IN TIERED PROCEDURES

Submitting the same request for participation at various stages of a tiered decision-making procedure, however, can be found frivolous and might have an effect on cost-bearing in the case. Case C-260/11, the Queen and Case C-530/11, European Commission (identical text in the relevant parts) examine this question in the context of other factors of cost bearing by the civil participants.

> "In the context of that assessment, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, *the potentially frivolous nature of the claim at its various stages*, and the existence of a national legal aid scheme or a costs protection regime." (Point 49)

Injunctive relief

INJUNCTIVE RELIEF AS A BASIC CONDITION FOR EFFECTIVE PARTICIPATION

The quickest, most effective public participation is useless if meanwhile the project construction goes ahead with full steam. The frequently cited decision of the CJEU in **Case C-416/10** (Križan) deals with this very issue and summarizes the relevant cases from the history of the Court. This decision underlines the need for a genuine effectiveness of public participation in this respect.

> "By its fourth question, the referring court asks, in essence, whether Articles 1 and 15a of Directive 96/61, read in conjunction with Articles 6 and 9 of the Aarhus Convention, must be interpreted as meaning that members of the public concerned must be able, in the context of an action under Article 15a of that directive, to ask the court or the competent independent and impartial body established by law to order interim measures of a nature temporarily to suspend the application of a permit within the meaning of Article 4 of that directive pending the final decision.
>
> By virtue of their procedural autonomy, the Member States have discretion in implementing Article 9 of the Aarhus Convention and Article 15a of Directive 96/61, subject to compliance with **the principles of equivalence and effectiveness**. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and impartial body established by law is to have jurisdiction in respect of the review procedure referred to in those provisions and what procedural rules are applicable (see, by analogy, Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 Boxus and Others [2011] ECR I-9711, paragraph 52).
>
> Moreover, it is apparent from settled-case law that a national court seized of a dispute governed by European Union law must be in a position to **grant interim relief in order to**

ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under European Union law (Case C-213/89 Factortame and Others [1990] ECR I-2433, paragraph 21, and Case C-432/05 Unibet [2007] ECR I-2271, paragraph 67).

It must be added that the right to bring an action provided for by Article 15a of Directive 96/61 must be interpreted in the light of the purpose of that directive. The Court has already held that that purpose, as laid down in Article 1 of the directive, is to achieve integrated prevention and control of pollution by putting in place measures designed to prevent or reduce emissions of the activities listed in Annex I into the air, water and land in order to achieve a high level of protection of the environment (Case C-473/07 Association nationale pour la protection des eaux et rivières and OABA [2009] ECR I-319, paragraph 25, and Case C-585/10 Møller [2011] ECR I-13407, paragraph 29).

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." (Points 105-109)

A BOND OR DEPOSIT AS A SECURITY MEASURE IN CASE OF AN INTERIM RELIEF

Interim relief, naturally, might cause a major risk or damage to a developer/operator. The legal practice therefore has developed a balancing measure, namely that those who ask for halting the progress of a project until the definite end of a legal dispute, should deposit a certain amount of money, in case their motions turn out to be futile or vexatious. The decision of the CJEU in **Case C-530/11**, United Kingdom analyses this situation under the heading "Cross-undertakings in respect of the grant of interim relief." Such a security bond could or could not reach the level of full compensation of the loss of the developer. Notably, the developer might not be in an easy situation even in a consecutive civil law litigation, where she has to prove the unlawfulness of the actions of the participants and/or the authorities in the administrative case. At any rate, the burden put on the shoulders of the members and associations of the public by imposing security measures should not lead to unbearable financial consequences. Moreover, it must not be allowed that the developers/operators use these financial tools as a harassment or revenge

against those who interfere with their economic interests in the name of the protection of environment and livelihoods (Article 3(8) of the Convention).

> "As regards the system of cross-undertakings imposed by the court in respect of the grant of interim relief, which, as is apparent from the documents submitted to the Court, principally involves requiring the claimant to undertake to compensate for the damage which could result from interim relief if the right which the relief was intended to protect is not finally recognised as being well founded, it is to be recalled that the prohibitive expense of proceedings, within the meaning of Articles 3(7) and 4(4) of Directive 2003/35, concerns all the financial costs resulting from participation in the judicial proceedings, so that their prohibitive character must be assessed as a whole, taking into account all the costs borne by the party concerned (see Edwards and Pallikaropoulos, paragraphs 27 and 28), subject to the abuse of rights.
>
> In addition, it is apparent from settled case-law that a national court seized of a dispute governed by European Union law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under European Union law (see, to this effect, Case C-416/00 Križan and Others [2013], paragraph 107 and the case-law cited), including in the area of environmental law (see Križan and Others, paragraph 109).
>
> Consequently, the requirement that proceedings not be prohibitively expensive applies also to the financial costs resulting from measures which the national court might impose as a condition for the grant of interim measures in the context of disputes falling within Articles 3(7) and 4(4) of Directive 2003/35.
>
> Subject to this reservation, the conditions under which the national court grants such interim relief are, in principle, a matter for national law alone, provided that **the principles of equivalence and effectiveness are observed**. The requirement that proceedings not be prohibitively expensive cannot be interpreted as immediately precluding the application of a financial guarantee such as that of the cross-undertakings where that guarantee is provided for by national law. The same is true of the financial consequences which might, as the case may be, result under national law from an action that constitutes an abuse.
>
> On the other hand, it is incumbent upon the court which rules on this issue to make sure that the resulting financial risk for the claimant is also included in the various costs generated by the case when it assesses whether or not the proceedings are prohibitively expensive.

It must, accordingly, be found that it is not clear from the documents submitted to the Court that the requirement that proceedings not be prohibitively expensive is imposed on the national courts in this area with all the requisite clarity and precision. The United Kingdom merely asserts that, in practice, cross-undertakings are not always imposed in disputes relating to environmental law and that they are not demanded from impecunious claimants.

As to the United Kingdom's argument that the limiting of cross-undertakings could result in infringement of the right to property, the Court consistently acknowledges that *the right to property is not an absolute right* but *must be viewed in relation to its social function*. Its exercise may therefore be restricted, provided that those restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, disproportionate and intolerable interference, impairing the very substance of the right guaranteed (see, to this effect, Križan and Others, paragraph 113 and the case-law cited). Protection of the environment is one of those objectives and is therefore capable of justifying a restriction on the exercise of the right to property (see, also, to this effect, Križan and Others, paragraph 114 and the case-law cited).

Consequently, it is also necessary to uphold the Commission's argument that the system of cross-undertakings in respect of the grant of interim relief constitutes an additional element of uncertainty and imprecision so far as concerns compliance with the requirement that proceedings not be prohibitively expensive." (Points 65-71)

Data and information

Data and information remotely belong to the topic of public participation, concerning access to environmental information. Providing the public with data and/or information? An old dichotomy of public participation systems. Raw data (technical data of a project or data about environmental effects, e.g., from monitoring stations) should be provided regardless of its quality and regardless of whether the public authority considers it to be accurate, comprehensive or up to date. The same applies to processed data. Comments, information submitted by other participants should also be disclosed. A non-technical summary is also indispensable that should use an appropriate language the public concerned can understand. However, providing non-technical summaries without providing access also to the full technical documentation and the professional and legal analyses is not sufficient.

The EIA related Aarhus cases mostly focus on data – no wonder, the overwhelming majority of the participants, including the professional environmental NGOs, have the necessary

background to interpret data and conclude the necessary information. This can be seen amongst others from the **Case C-411/17**, with Inter-Environnement Wallonie ASBL, Bond Beter Leefmilieu Vlaanderen ASBL. The same is true for instance in respect to the greenhouse gas emission allowance trading data (**Case C-524/09**, Ville de Lyon).

In other public participation cases, however, as a rule, the members and associations of the public need to be served with both raw data and complex, processed information.

Even if the processing procedure of the raw data might fall under the scope of one of the exemptions (official secret, internal communication etc.) of access to information, the basic raw data should be given out to the requesters, as the decision in **Case C-60/15 P**, Saint-Gobain Glass Deutschland GmbH states.

> "In the light of both Regulation No 1049/2001 and that directive, and also German case-law at national level, the ground for refusal at issue here must be construed as covering only those internal proceedings involving decision-making and not factors preceding those proceedings, such as data on which they are based." (Point 38)

Effective participation, as we have argued for already, needs both data and information. Environmental information in the light of **Case C-673/13 P**, European Commission means professional and legal analysis of the data found in the case, with the help of the context and details of the data (objectives of data collection, methodology, results etc.).

> "In the light of the objective set out in the first sentence of Article 6(1) of Regulation No 1367/2006 of ensuring a general principle of access to 'information ... [which] relates to emissions into the environment', that concept must be understood to include, inter alia, data that will allow the public to know what is actually released into the environment or what, it may be foreseen, will be released into the environment under normal or realistic conditions of use of the product or substance in question, namely those under which the authorisation to place that product or substance on the market was granted and which prevail in the area where that product or substance is intended to be used. Consequently, that concept must be interpreted as covering, inter alia, information concerning the nature, composition, quantity, date and place of the actual or foreseeable emissions, under such conditions, from that product or substance.
>
> It is also necessary to include in the concept of 'information [which] relates to emissions into the environment' information enabling the public to check whether the assessment of actual or foreseeable emissions, on the basis of which the competent authority authorised the product or substance in question, is correct, and the data relating to the

> effects of those emissions on the environment. It is apparent, in essence, from recital 2 of Regulation No 1367/2006 that the purpose of access to environmental information provided by that regulation is, inter alia, to **promote more *effective public participation* in the decision-making process**, thereby increasing, on the part of the competent bodies, the accountability of decision-making and contributing to public awareness and support for the decisions taken. In order to be able to ensure that the decisions taken by the competent authorities in environmental matters are justified and to **participate effectively in decision-making in environmental matters**, the public must have access to information enabling it to ascertain whether the emissions were correctly assessed and must be given the opportunity reasonably to understand how the environment could be affected by those emissions." (Points 79-80)

Alternatives

If there are no alternatives for a planned or operating activity there is hardly any point in participating in the environmental decision-making procedure. The text of the Recommendations adds to that, in line with Article 3(1) of the Convention, that for establishing *a clear, transparent and consistent framework* to implement the provisions of the Convention, the procedure should also be sufficiently open to consider new options identified as a result of public participation (Point 13).

Other than in those decisions that were primarily based on EIA law (also with reference to the Aarhus Convention) alternatives are rarely mentioned in CJEU cases as a precondition of substantial, effective environmental democracy. Applicants tried to refer solely to the Aarhus Convention in one case, but their arguments did not meet the approval of the Court. **Case T-245/11**, ClientEarth sounds:

> "Secondly, the applicants state that the 356 substances with respect to which a request for access to information was submitted are highly toxic chemicals. They consider that it is legitimate for the public to know that hundreds of thousands of tonnes of substances that can adversely affect human health and the environment are on the EU market, handled by workers and used in consumer products. To recognise the right of citizens to have a thorough knowledge of the number of hazardous substances on the market would make it possible to exercise greater pressure in favour of those substances being replaced by safer alternatives." (Point 190)

Quite similarly in **Case T-108/17** ClientEarth or in **Case C-458/19** ClientEarth, the applicant referred to the lack of alternatives, in both cases in relation to the REACH Regulation.

The public as the ruler of the case

THE POSSIBILITY TO PROVE THE CASE

At the very beginning of this study, we touched upon the issue of different scopes of participation, where we established that standing ensures the widest possible set of entitlements to take part in an environmental decision-making procedure while we also noted that in many instances the participants can only exercise significantly less rights, basically only parts of those stemming from the procedural position of full standing. Even if so, the members and associations of the public quite understandably strive to exert the largest possible effect on the decision-making procedure. Since public participation is not a political act or a mere advocacy activity where participants simply raise objections or protest, if a participant genuinely wishes to influence the outcome of an administrative legal procedure here, they have to present convincing evidence and build convincing legal arguments. The Maastricht Recommendations contains this requirement of effective participation.

> "*Proving the case by the participants*: verbally or in writing, all participants should have the possibility to issue evidence (documents, witnesses, civil expert opinion etc.) and discuss the evidence other parties put forward." (Points 118-119)

In **Case C-240/09** Lesoochranárske zoskupenie VLK, the Court established that full standing is beneficial for public participation, while it does not directly stem from the text of Article 9(3) of the Aarhus Convention.

> "In accordance with Article 15a(2) of the Code of Administrative Procedure (Správny poriadok), 'a participant' is entitled to be informed that administrative proceedings have been initiated, to have access to files submitted by the parties to the administrative proceedings, to attend hearings and on-the-spot inspections, and to produce evidence and other information on the basis of which the decision will be taken.
>
> Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 does not have direct effect in European Union 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 European Union law**, in order to enable an environmental protection organisation, such as the Lesoochranárske zoskupenie, to

challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law." (Point 17-18)

Another aspect of proving a cases and carrying out effective case management is to question the evidence provided by the adversary party as described in **Joined Cases C-212/21 P and C-223/21 P** European Investment Bank (EIB). While this point in the argument from ClientEarth was accepted by the Court, the whole case itself was dismissed on a different procedural basis.

> "Against the EIB's assertion that the risk of a review and the associated delays would unduly hinder its lending activities or perhaps even render them impossible, ClientEarth correctly contends that the EIB does not provide sufficient evidence in support of that assertion. Rather, it is already apparent from the course of the procedure between the resolution in question and the financing contract 23 that, had the resolution been published in a timely manner, there would have been approximately two months available for internal review." (Point 17)

CITIZEN SUITS IN THE U.S.

We note here that in the U.S. the so-called citizen suit provides the members and associations of the public with powerful tools to exert determining influence on designed or operating projects with significant environmental impact.

> "(…) environmental citizen suits also allow citizens to participate in agency decision making and even to develop environmental agendas by allowing citizens to sue to force government agencies to comply with their mandatory duties (e.g., Clean Water Act, 33 U.S.C. § 1365(a)(2)). These types of citizen suits, against the agencies themselves, have generated a significant portion of the court decisions interpreting environmental laws (May 2003) and have jumpstarted entire new environmental programs (Houck, 2002). Thus, again, these citizen suit provisions allow interested citizens to become actively involved in environmental decision making and agency agendas, empowering them to force environmental agencies to implement programs and environmental protections that the agencies might otherwise have ignored. Babich (1995) characterized environmental citizen suits as 'the teeth in public participation', and these provisions, in conjunction with extensive use of citizen petitions and some use of negotiating rulemaking, demonstrate that US environmental law has embraced the

IAPP's full spectrum of public participation modalities across different decision-making contexts."[10]

Balancing the interests of authorities and applicants in public participation matters

SMOOTH COLLABORATION OF ALL INTERESTED PARTIES

Environmental democracy serves the interests of authorities and the public, as well as and on the long run and with a systemic approach, it is useful for the economy, too. Effective public participation is indispensable for social peace and smooth collaboration of different social groups in decision-making procedures that concern the environment. "Public participation, defined as collaborative participation where policymakers invite citizens to discuss and decide together upon policies and projects affecting the environment, can offer a solution to improve the quality of decisions and their ability to generate consensus, and, thus, acceptability."[11]

In line with these, the Maastricht Recommendations defines the balance of interests at stake in environmental cases.

> "*Balance of interests:* public participation shall not be too resource consuming (human, financial, time) for both side and should be proportional, compared to the potential environmental, including health, effects."

From the case law of the Court of Justice of the European Union we can only mention those cases in which the Court warns Member States that there are serious reservations against those cases where the governments decide individual project development issues via legislation instead of regular administrative permitting procedures. Such manoeuvres can be interpreted as shifting the balance between political-economic interests and social-environmental interests, meanwhile seriously limiting the possibilities for public participation. One example of many such decisions was brought in **Case C-182/10** (Solvay and others) on individual case decisions shifted to legislation where at least the reasoning of the decision shall be made known fully for all the interested parties, in order to grant them at least the theoretical opportunity to challenge it.

> "The general (non-environmental) ***principles of equivalence and effectiveness*** allow the Member States, by virtue of their procedural autonomy to have a discretion in

[10] Akerboom, 2022, p. 243.
[11] Squintani, 2019, p. 2.

> implementing Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and impartial body established by law is to have jurisdiction in respect of the review procedures referred to in those provisions and what procedural rules are applicable. However, these mentioned provisions would lose their all ***effectiveness***, if the mere fact that a project is adopted by a legislative act were to make it immune to any review procedure for challenging its substantive or procedural lawfulness within the meaning of those provisions (see Boxus and Others, paragraph 53)." (Point 48)

The finding is clear that the transformation of a decision on an individual project into the realm of legislation cannot deprive the members of the public of their opportunities to seek remedies according to the requirements of the Aarhus Convention and prevailing EU environmental law.

CONCLUSIONS

Effectiveness of public participation is well addressed by the case law the Court of Justice of the European Union. Roughly one third of the cca. 200 Aarhus Convention related cases contain some reference not only to proper domestic level implementation of the Aarhus Convention and related EU law, but to the quality of implementation as well. Therefore, as it seems, the Court is interested not only in formal implementation but also in the results achieved by public participation. On the other hand, though, even if the Meeting of the Parties to the Aarhus Convention has unequivocally expressed its support to the Maastricht Recommendations, unfortunately only a very limited number (2) of Court decisions refer directly to it when talking about the effectiveness of public participation. Slightly more CJEU decisions (as many as 12) mention the decisions of the Aarhus Convention Compliance Committee in this regard.

As signalled in the introductory part to this study, we have chosen the Maastricht Recommendations to determine the structure of our research on the practice of CJEU because of its full coverage of the topic. Its title is "… on Promoting Effective Public Participation in Decision-making in Environmental Matters". Not the least, the Recommendations has attracted our interest because of the widespread consultations with relevant academic and civil society stakeholders during its preparation. Furthermore, as we also hinted in the introductory part, the Recommendations harnessed the results of the decades-long jurisprudence of the Aarhus Convention Compliance Committee that collected and analysed a very wide range of conflicts in the Pan-European region in connection with environmental democracy. As a result of this

careful preparation and solid background, the Maastricht Recommendations reflects a coherent system of public participation law and practice in Europe. A systemic approach always offers a better understanding of a phenomenon and makes possible a balanced and effective development thereof. So, we were curious, indeed, to what extent the relevant CJEU practice reflects the *system of environmental democracy* as such.

In connection with this initial hypothesis of our research, we must come to a rather negative conclusion. While we have revealed a multitude of deep analyses of problems stemming from public participation where in the majority of judgments the Court took a progressive stance, we had to realize that several key issues of the Maastricht Recommendations are almost totally non-existent in CJEU practice. Major issues in connection with capacity building, injunctive relief, data and information, alternatives, impacts of public participation and the balance of interests of all those who participate in the environmental decision-making procedures are addressed only sporadically, in fragments.

We have no reason to wonder about this finding: the courts do not determine their own agenda; it depends on the clients' claims. If we wish to fill in the gaps in the rich CJEU practice in respect of effectiveness of public participation, we have to influence the input side. NGO networks, national authorities and courts, the European Commission and other organisations whoever can directly or indirectly initiate European Union Court cases, should time to time take a look at problems of effectiveness of public participation and raise the most relevant missing questions.

Another key finding of our research is that we have to admit that there are "VIP decisions" of the CJEU dealing with the effectiveness of public participation in environmental decision-making that are cited in several dozens of instances by the European Court of Justice itself, like Krizan (29 since 2013 January) or Lesoochranárske (14 since 2011 March), many more by the Advocate Generals and the environmental law and administrative literature. The secret of them is multi fold. The first is quite obvious, they deal with important issues, occasionally with several interrelated important questions (the strength of system approach!), and so it is almost unavoidable to refer to them in the similar consecutive cases. We have to add that the overwhelming majority of these references are agreeing with, supporting or even further developing the views expressed in these decisions. Second, closely related to the first reason of popularity, the system thinking of these decisions represent a higher level of reflection of the reality in the field of social and legal issues of environmental democracy, therefore induce the feeling of genuine and valid content in the scholars, administrators and NGO experts. Third, but not least, these cases were quite precisely and painstakingly prepared by the participating

NGOs and local communities with the help of wide range of experts, including public interest environmental lawyers.

Both the courts and the experts of the NGOs and concerned local communities should be aware of the wide range of valuable statements from the environmental literature of environmental democracy, too. Let us select from this pool an important, likeminded message as a closing paragraph of our practical research study.

> "Thus, what qualifies as successful, effective, or appropriate public participation depends on the exact kind of environmental decision under consideration? Continuing governmental failure to appropriately match the form of public participation to the decision being made helps to explain why researchers continue to debate whether public participation in environmental decision making actually achieves all that it is supposed to."[12]

[12] Akerboom, 2022, p. 233.

ANNEX I

Relevant provisions on the effectiveness of public participation

While public participation laws are full of provisions that are highly relevant for the effectiveness thereof, there are a number of paragraphs in the relevant UNECE Conventions and EU laws that explicitly refer to the effectiveness of public participation.

AARHUS CONVENTION[13]

Article 3(2) Each Party shall endeavour to ensure that officials and authorities *assist and provide guidance* to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

Article 3(3) Each Party shall promote environmental *education and environmental awareness* among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.

Article 3(4) Each Party shall provide for appropriate *recognition of and support to* associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.

Article 3(8) Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be *penalized, persecuted or harassed* in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

Article 3(9) Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters *without discrimination* as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

Article 4(1) Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for *environmental information*, make such

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

information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, *copies of the actual documentation* containing or comprising such information: (…)

Article 4(5) Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, *inform the applicant* of the public authority to which it believes it is possible to apply for the information requested or *transfer the request* to that authority and inform the applicant accordingly.

Article 4(8) Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

Article 5(2) Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is *effectively* accessible, inter alia, by:

(a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;

(b) Establishing and maintaining practical arrangements, such as:

(i) Publicly accessible lists, registers or files;

(ii) Requiring officials to support the public in seeking access to information under this Convention; and

(iii) The identification of points of contact; and

(c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.

Article 6(2) The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and *effective* manner, inter alia, of: (…)

Article 6(3) The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate *effectively* during the environmental decision-making.

Article 6(4) Each Party shall provide for early public participation, when all options are open and *effective* public participation can take place.

Article 8 Each Party shall strive to promote *effective* public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

(a) Time-frames sufficient for *effective* participation should be fixed;

(b) Draft rules should be published or otherwise made publicly available; and

(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

Article 9(4) In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and *effective* remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this Article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

Article 9(5). In order to further the *effectiveness* of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

ESPOO CONVENTION[14]

Article 2(6) The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is *equivalent* to that provided to the public of the Party of origin.

[14] UNECE Convention on Environmental Impact Assessment in a Transboundary Context

SEA PROTOCOL TO THE ESPOO CONVENTION

Article 1 The objective of this Protocol is to provide for a high level of protection of the environment, including health, by: (…)

(c) Establishing clear, transparent and effective procedures for strategic environmental assessment;

Article 8(1) Each Party shall ensure early, timely and *effective* opportunities for public participation, when all options are open, in the strategic environmental assessment of plans and programmes.

WATER CONVENTION[15]

Article 16.1. The Riparian Parties shall ensure that information on the conditions of transboundary waters, measures taken or planned to be taken to prevent, control and reduce transboundary impact, and the effectiveness of those measures, is made available to the public. For this purpose, the Riparian Parties shall ensure that the following information is made available to the public:

(a) Water-quality objectives;

(b) Permits issued and the conditions required to be met;

(c) Results of water and effluent sampling carried out for the purposes of monitoring and assessment, as well as results of checking compliance with the water-quality objectives or the permit conditions.

Article 16.2. The Riparian Parties shall ensure that this information shall be available to the public at all reasonable times for inspection free of charge and shall provide members of the public with reasonable facilities for obtaining from the Riparian Parties, on payment of reasonable charges, copies of such information.

AARHUS REGULATION[16]

Recital (2) The Sixth Community Environment Action Programme stresses the importance of providing adequate environmental information and effective opportunities for public

[15] Convention on the Protection and Use of Transboundary Watercourses and International Lakes as amended, along with decision VI/3 clarifying the accession procedure

[16] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies

participation in environmental decision-making, thereby increasing accountability and transparency of decision-making and contributing to public awareness and support for the decisions taken. It furthermore encourages, as did its predecessors, more *effective* implementation and application of Community legislation on environmental protection, including the enforcement of Community rules and the taking of action against breaches of Community environmental legislation.

Recital (14) For the right of public access to environmental information to be *effective*, environmental information of good *quality* is essential. It is therefore appropriate to introduce rules that oblige Community institutions and bodies to ensure such quality.

Recital (17) The Aarhus Convention requires Parties to make provisions for the public to participate during the preparation of plans and programmes relating to the environment. Such provisions are to include reasonable timeframes for informing the public of the environmental decision-making in question. To be *effective*, public participation is to take place at an early stage when all options are open. When laying down provisions on public participation, Community institutions and bodies, should identify the public which may participate. The Aarhus Convention also requires that, to the extent appropriate, Parties shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

Recital (19) To ensure adequate and *effective* remedies, including those available before the Court of Justice of the European Communities under the relevant provisions of the Treaty, it is appropriate that the Community institution or body which issued the act to be challenged or which, in the case of an alleged administrative omission, omitted to act, be given the opportunity to reconsider its former decision, or, in the case of an omission, to act.

Article 9(1) Community institutions and bodies shall provide, through appropriate practical and/or other provisions, *early and effective* opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment when all options are still open. In particular, where the Commission prepares a proposal for such a plan or programme which is submitted to other Community institutions or bodies for decision, it shall provide for public participation at that preparatory stage.

Article 9(3). Community institutions and bodies shall ensure that the public referred to in paragraph 2 is informed, whether by public notices or other appropriate means, such as electronic media where available, of: (…) c) (…)

(iii) reasonable time-frames allowing sufficient time for the public to be informed and to prepare and participate effectively in the environmental decision-making process.

SEA DIRECTIVE[17]

Recital (3) *Effective* public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

Article 2(2) Member States shall ensure that the public is given *early and effective* opportunities to participate in the preparation and modification or review of the plans or programmes required to be drawn up under the provisions listed in Annex I.

Article 2(3) (…) The detailed arrangements for public participation under this Article shall be determined by the Member States so as to enable the public to prepare and participate *effectively*.

EIA DIRECTIVE[18]

Recital (16) *Effective* public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

Article 6(4) The public concerned shall be given *early and effective* opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions

Article 6(6) Reasonable time-frames for the different phases shall be provided, allowing *sufficient time* for informing the public and for the public concerned to prepare and participate *effectively* in environmental decision-making subject to the provisions of this Article.

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[17] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

[18] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment

Article 7(5) The detailed arrangements for implementing this Article may be determined by the Member States concerned and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.

Article 11(5) In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.

INDUSTRIAL EMISSIONS/IPPC DIRECTIVE[19]

Recital (27) In accordance with the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, *effective* public participation in decision-making is necessary to enable the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken. Members of the public concerned should have access to justice in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.

Article 24(1) Member States shall ensure that the public concerned are given *early and effective* opportunities to participate in the following procedures:

(a) the granting of a permit for new installations;

(b) the granting of a permit for any substantial *change*;

(c) the granting or updating of a permit for an installation where the application of Article 15(4) is proposed;

d) the *updating* of a permit or permit conditions for an installation in accordance with Article 21(5)(a).

Annex IV. 5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States. Reasonable time-frames for the different phases shall be provided, allowing

[19] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control)

sufficient time to inform the public and for the public concerned to prepare and participate *effectively* in environmental decision-making subject to this Annex.

ANNEX II

A summary of the basic features of effectiveness of public participation in the Recommendations

The second part of the Maastricht Recommendations has a very good summary of the main points of our research; therefore, it seems to be useful to collect and quote some excerpts from it. This serves as a starting point to collect the *basic concepts* for streamlining the research of the practice of the CJEU.

Effective participation means effective from the point of view of both:

a. The participants: participants should be involved early and throughout the planning process, be allowed to fully express their views, and have these views considered by the plan-makers respectfully, seriously and in a spirit of mutual education;

b. The plan-makers: public participation should aim to facilitate useful suggestions that help in the choice of *alternatives* and improve the plan or programme.

Effective opportunities for public participation may be:

a. Well planned and focused on negotiable issues relevant to the plan or programme. The public should know the aims, procedure and expected outcomes of the decision-making process;

b. Open to mutual gains for planners and participants. This may require being open to a broader scope than the plan objectives alone, and involve promoting cooperation and consensus rather than confrontation;

c. Supportive of participants through an adequate diffusion of information on the plan or programme and on the planning process. Capacity-building, *facilitation and assistance could be provided*, particularly for groups that would not otherwise have the capacity to participate and in regions where there is no culture of plan-making;

d. Efficient. Because SEA is resource consuming (human, financial, time) for the public, efficient SEA will ensure more willing participation;

e. Open and transparent. People who are affected by a plan or programme and are interested in participating must be given access to all necessary information and be able to participate in

meetings and hearings related to the SEA process. Information and facilitation for such participation could be provided;

f. Context-oriented. Because many communities have their own formal and informal rules for public access to resources, conflict resolution and governance, plan-making could be adapted to the cultural, social, economic and political dimensions of the affected communities;

g. Credible and rigorous, and adhering to established ethics, professional behaviour and moral obligations. Facilitation of public participation by a neutral facilitator – one chosen jointly with the public, or where the public has the right to refuse a particular facilitator – improves the impartiality of the process, reduces tensions and the risk of conflict among participants, increases the confidence of the public to express their opinions and in the final decision and reduces opportunities for corruption. A code of ethics could be adopted;

h. Proportional. The effort put into public participation in an SEA will depend on the characteristics and nature of the proposed plan or programme, and its potential environmental, including health, effects.[20]

Techniques for effective public participation in SEA may include:

a. Capacity-building: *Explaining planning and SEA processes in a non-technical manne*r, so that participants understand the main steps of the processes and how their views will contribute to them;

b*. Clarifying the relevance of the plan* **or programme and its impacts,** for instance by focusing on its impacts on people's health;

c. Publication of *non-technical summaries* of SEA information in a variety of formats;

d. Use of informal meetings, workshops, and small group discussions rather than (or in addition to) formal meetings in official government venues or convention centres;

e. Careful use of facilitators at meetings to ensure that participants are fully respected, are not rushed and have plenty of time to speak, and that silent members' opinions are elicited.[21]

A. Participation of disenfranchised people

[20] Points 10-11. of the SEA Guideline, referring to Article 8, paragraph 1 of the Protocol on SEA that requires public participation in SEA to be "effective".

[21] Points 12. of the SEA Guideline.

People who are traditionally disenfranchised from SEA may include the elderly, the young, the disabled, the poor, minorities and people living in remote locations. Individuals from these groups could face particular problems in using or accessing the Internet; reading long and technical documents; or engaging in formal or professional situations. Traditionally, their views may not have been taken seriously. As a result, they may feel unwilling or unable to express their views in standard forums.

All of the public concerned, including disenfranchised people, must be given an effective opportunity to participate in screening and scoping where appropriate, and to express their opinion on the draft plan or programme and the environmental report. The Protocol on SEA does not specify how opinions should be expressed but specifies that the opportunity must be **"effective".** In addition to the approaches discussed at paragraphs 11 and 12, **this may require the use of different techniques for public participation than those of typical plan-making and SEA.** Depending on the group, this could include:

a. Publication of non-technical summaries and relevant parts of the environmental report in a variety of formats, for instance in minority languages, Braille, and social media;

b. Holding meetings in local, remote or rural locations as well as larger, central, urban locations;

c. Actively encouraging disenfranchised groups to participate in the SEA process, for instance by

posting notices in specific communities, having stalls or giving talks at events run by specific groups, or requesting their participation via community leaders;

d. Involving pre-existing groups and representatives of disenfranchised people. These groups and representatives may already have acquired an understanding of the planning and SEA processes and be able to participate in more traditional ways; will know best how to communicate with disenfranchised people; may have ideas about who could be involved in participatory processes; and may be able to use non-traditional ways of disseminating

e. Providing financial resources where effective public participation would otherwise be hampered by lack of resources. European Union (EU) member States can use EU funding for capacity-building of NGOs for SEAs on plans or programmes where EU co-financing is involved, such as the Operational Programmes for Cohesion Policy.[22]

[22] Points 40-41. of the SEA Guideline

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