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9. Access to Public Participation: Unveiling the Mismatch between what Law Prescribes and what the Public Wants

Lorenzo Squintani and Goda Perlaviciute

1. INTRODUCTION

This chapter looks at the relationship between public participation and acceptability of policies, plans and projects affecting the environment. Non-inclusiveness in public environmental procedures can fuel public resistance, especially in fields in which human activities are realised close to living areas, as in the case of the building of renewable sources¹ or infrastructural projects.² 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.³ Moreover, public participation is regarded as a pillar of environmental democracy under the Rio Convention.⁴ Besides, the Aarhus Convention establishes rights and obligations for its signatory parties in order to spur *participatory* democracy (Articles 6–8 of the Convention).⁵

Both the EU and all of its Member States are party to the Convention, and indeed have adopted legislation to implement it, further discussed below. Discrepancy between the

¹ On renewables e.g., G Perlaviciute, ‘Public participation in decision making on energy projects: When does it lead to better and more acceptable energy projects?’ in L Squintani and others (eds), *Managing Facts and Feelings in Environmental Governance* (EE 2019) ch 2; B Terwel and others, ‘Voice in political decision-making: The effect of group voice on perceived trustworthiness of decision makers and subsequent acceptance of decisions’ (2010) 16 2 *J of Experimental Psychology: Applied* 173; M Wolsink, ‘Dutch wind power policy: stagnating implementation of renewables’ (1996) 24 12 *Energy Policy* 1079; R Hindmarsh, ‘Wind farms and community engagement in Australia: A critical analysis for policy learning’ (2010) 4 4 *East Asian Science, Technology and Society: An International Journal* 541; M Wolsink, ‘Planning of renewables schemes: Deliberative and fair decision-making on landscape issues instead of reproachful accusations of non-cooperation’ (2007) 35 5 *Energy Policy* 2692; J Habermas, *The Theory of Communicative Action I: Reason and the rationalization of society* (Beacon Press 1984); J S Fishkin, *Democracy and Deliberation* (Yale University Press 1991); D Bidwell, ‘Thinking through participation in renewable energy decisions’ (2016) 1 *Nature Energy* 16051.

² E.g., E E A Wolf, and W van Dooren, ‘How policies become contested: a spiral of imagination and evidence in a large infrastructure project’, (2017) 50, *Policy Science* 449.

³ J Ebbesson, ‘The notion of public participation in international environmental law’ (1997) *YB of Intl Environmental L* 51; Bidwell (2016) o.c.

⁴ United Nations, Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

⁵ United Nations, ‘Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters’ (Aarhus, Denmark, 25 June 1998, UN Treaty Series 2161), 447.

requirements of the Convention and the legal frameworks of certain Convention Parties have already been discussed in literature.⁶ Yet, empirical evidence suggests that the main problem with the implementation of the Convention does not regard the legal framework as such, but the manner in which it is applied in *practice*,⁷ even when procedural requirements are applied in an allegedly correct manner. 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.⁸ A multitude of studies has found that educational level, gender, ethnicity and age determine who participates in politics.⁹ Accordingly, Lee and Abbot warn about the risk that a small (even if larger than before) number of participants will wrap up important decisions.¹⁰ 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.¹¹ Squintani speaks openly of an Aarhus Paradox, under which the more participation takes place, the less democratic the decision-making process becomes.¹² Transparency of governmental action is surely enhanced by public participation procedures, but the very foundation of democracy, i.e., that the government (*kratos*) is of the common people (*demos*), does not seem to be always enhanced. More generally, public participation procedures can in practice be little more than a ‘ticking the box’ exercise,¹³ meaning that procedural requirements

⁶ As regards the EU itself, L Krämer, ‘The EU and public participation in environmental decision-making’ in J Jendróska and M Bar (eds), *Procedural Environmental Rights: Principle X in Theory and Practice* (Intersentia 2017) 121–41; For Spain, J Ignatio Cubero Marcos and U Aberasturi Gorriño, ‘Controversies about projects or plans passed by law in Spain’ in B Vanheusden and L Squintani (eds), *EU Environmental and Planning Law Aspects of Large-Scale Projects* (Intersentia 2016) 119–42; For Italy, V Molaschi, ‘The implementation of the second pillar of the Aarhus Convention in Italy: the need for reform and for introduction of the so-called “deliberative arenas”’, in B Vanheusden and L Squintani (eds), 143–65.

⁷ For an example from Belgium related to air quality, Wolf and van Dooren (2017) o.c.; for another example about renewable energy sources, S Akerboom, ‘Between public participation and energy transition: the case of wind farms’ (PhD thesis, Amsterdam 2018).

⁸ This in turn entails different participatory levels between neighbourhoods, I Docherty and others, ‘Civic culture, community and citizen participation in contrasting neighbourhoods’ (2001) 38 12 *Sage Urban Studies* 2225; E Tonkens and I Verhoeven, ‘The civic support paradox: Fighting unequal participation in deprived neighbourhoods’ (2018) *Sage Urban Studies*; Cf, T Maloutas and K Fujita (eds), *Residential Segregation in Comparative Perspective: Making Sense of Contextual Diversity* (Ashgate 2012); Cf, L Squintani and H Schoukens, ‘Towards equal opportunities in public participation in environmental matters in the European Union’ in L Squintani and others (eds), o. c. ch 3.

⁹ C Pattie, D Seyd and P Whiteley, *Citizenship in Britain: Values, Participation and Democracy* (CUP 2004).

¹⁰ M Lee and C Abbot, ‘The usual suspects? Public participation under the Aarhus Convention’ (2003) 66 1 *The Modern Law Rev* 80; Cf, Squintani and Schoukens (2019) o.c. ch 3 with further references.

¹¹ M McGuire, ‘Collaborative public management: assessing what we know and how we know it’ (2006) 66 *Public Administration Rev* 33.

¹² L Squintani, ‘The Aarhus Paradox: time to speak about equal opportunities in environmental governance’ (2017) 14 1 *J for Eur Environmental & Planning L* 3.

¹³ Akerboom (2018) o.c. 128 and 189.

are fulfilled but this does not lead to qualitatively better, more legitimate, and socially acceptable decisions.

This chapter highlights that the legal framework as such can also constrain the effectiveness of public participation procedures to reach acceptability. It shows that legal effectiveness,¹⁴ i.e., whether the EU legal framework is implemented, is not a guarantee for reaching acceptability of decision-making. In this regard, perceived procedural fairness is an important factor in reaching acceptability.¹⁵ To achieve perceived procedural fairness, public participation procedures must allow ‘early engagement’ of people in decision-making processes, and to give people a ‘real voice’, rather than merely informing or consulting the public, while failing to incorporate their input in the final decisions.¹⁶ This latter phenomenon is known as pseudo- or fake participation.¹⁷ Accordingly, this chapter analyses whether the legal framework contains features that could constrain perceived procedural fairness in public participation procedures.

To answer this question, the chapter first presents the legal framework, as developed by the EU on implementation of the Aarhus Convention (section 2) and as interpreted by the Court of Justice of the European Union (CJEU) (section 3). Then, this is compared with findings of empirical researches, mostly from social sciences, on the preferences of the public on how public participation in decision-making should look like (section 4). This analysis reveals that a mismatch may exist between what law prescribes and what the public wants, contributing to explaining low perceived procedural fairness and public resistance even when public participation procedures are in place.

It should be noted that in this chapter, despite the fact that public participation under the Aarhus Convention and the EU legal framework implementing it also covers the participation of environmental non-governmental organisations (ENGOS), we focus on the public participation of the general public and not on that specifically of ENGOS. ENGOS surely play an important role in environmental protection. Involving ENGOS in decision-making could enhance representation of certain public values and interests, in particular concerning the protection of nature and the environment; thereby increasing perceived

¹⁴ S Maljean-Dubois, ‘The effectiveness of environmental law: a key topic’ in S Maljean-Dubois (ed), *The Effectiveness of Environmental Law* (Intersentia 2017) 1–12 with further references.

¹⁵ C Gross, ‘Community perspectives of wind energy in Australia: The application of a justice and community fairness framework to increase social acceptance’ (2007) 35 5 *Energy Policy* 2727; S C Klain and others, ‘Will communities “open-up” to offshore wind? Lessons learned from New England islands in the United States’ (2017) 34 *Energy Research & Social Science* 13; B W Terwel and others, ‘Voice in political decision-making: The effect of group voice on perceived trustworthiness of decision makers and subsequent acceptance of decisions’ (2010) 16 2 *J of Experimental Psychology: Applied* 173; G Perlaviciute and L Steg, ‘Contextual and psychological factors shaping evaluations and acceptability of energy alternatives: integrated review and research agenda’ (2014) 35 *Renewable and Sustainable Energy Reviews*, 361–81.

¹⁶ S R Arnstein, ‘A ladder of citizen participation’ (1969) 35 4 *J of the American Planning Association* 216; E Lind, R Kanfer and P C Earley, ‘Voice, Control, and procedural justice: instrumental and noninstrumental concerns in fairness judgments’ (1990) 59 *J of Personality and Social Psychology* 952; Gross (2007) o.c.; K van den Bos, ‘What are we talking about when we talk about no-voice procedures? On the psychology of the fair outcome effect’ (1999) 35 *J of Experimental Social Psychology* 560; A Fung, ‘Varieties of participation in complex governance’ (2006) 66 *s1 Public Administration Rev* 66.

¹⁷ C Pateman, *Participation and Democratic Theory* (CUP 1970).

procedural fairness and public acceptability of decisions.¹⁸ At the same time, there are other public values and interests besides those related to the protection of nature and the environment;¹⁹ inclusion of ENGOs in the decision-making is not enough to represent such multiple values and interests. Focusing only on ENGOs' participation in public participation procedures is therefore not enough to understand how truly inclusive public participation can prevent public resistance. For the study of the effects of representative groups on public acceptance, we therefore refer to the earlier studies mentioned at note 18.

2. THE EU LEGAL FRAMEWORK FOR PUBLIC PARTICIPATION IN ENVIRONMENTAL MATTERS

2.1 General Issues: A Not Insignificant but Lacunose Legal Framework

In general, public participation is explicitly envisaged under the democratic principles in the Treaty on European Union (TEU). Especially, Article 11(1) TEU states that the EU institutions shall give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action, including the environmental one. Further, section 3 of the same Article states that the Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent. A dedicated website indicates the ongoing internet *consultation* procedures about all EU initiatives.²⁰ As regards environmental law in particular, the EU framework is further elaborated in light of Aarhus Convention, containing specific provisions regulating public participation in Article 6, regarding specific activities significantly affecting the environment, Article 7, on plans, programmes and policies, and Article 8, dealing with executive regulations and other generally applicable and legally binding rules.

The Aarhus Convention is a so-called 'mixed agreement',²¹ since both EU Member States as well as the EU itself are parties to the Convention. Under the EU hierarchy of norms, the provisions of the Convention rank higher than secondary law, but lower than the Treaties.²² For the Member States this means that the provisions of the Convention

¹⁸ E.g., Terwel and others o.c. 173; T Bernauer and others, 'Could more civil society involvement increase public support for climate policy-making? Evidence from a survey experiment in China' (2016) 40 *Global Environmental Change*, 1–12; and T Bernauer, and R Gampfer, 'Effects of civil society involvement on popular legitimacy of global environmental governance' (2013) 23 *Global Environmental Change*, 439–49.

¹⁹ On the legal constraints coming from the principle of legality to including these other values in decision-making procedures, see L Squintani and others, Conclusions: facts and feelings as catalysts for environmental administration 3.0, in L Squintani and others (eds), o. c. ch 10, 203 and 204.

²⁰ Commission, 'Consultations' <https://ec.europa.eu/info/consultations_en> (accessed January 2019).

²¹ On mixed agreement see e.g., J H Jans and H H B Vedder, *European Environmental Law: After Lisbon* (Europa Law Publishing 2012), 71–4.

²² Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2009] C 306/1 art 216(2); Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A. (Kupferberg)* ECLI:EU:C:1982:362; Case C-344/04 *International Air Transport Association and*

create effects in the legal orders of the Member States via the medium of EU law.²³ Hence, the provisions of the Convention have primacy over conflicting national rules.²⁴ Primacy does not only apply to those provisions of the Convention which have been translated into EU provisions embedded into EU secondary law. It also applies to those provisions which have not yet been implemented by the EU legislator.²⁵

This finding is relevant, as despite a not insignificant body of EU measures to implement the Convention, lacunas are still present. First, the so-called Aarhus Regulation includes a provision, Article 9, to pursue compliance with the Convention as regards acts of EU institutions.²⁶ However, neither the Regulation, nor other pieces of EU law, regulate public participation as regards specific decisions taken at EU level such as those on pesticides and biocidal products.²⁷ Second, as regards EU law regulating public participation at national level,²⁸ the main instrument to implement the Convention is provided for in the so-called Aarhus Directive.²⁹ Also in this case, the implementation is not complete as in the case of certain plans and programmes that fall outside the scope of the Aarhus Directive and the Strategic Environmental Assessment (SEA) Directive,³⁰ whereas they are covered by the Convention.³¹ For example, national plans for the developments of renewable energies covered by the Renewable Energy Directive³² are not covered by the SEA Directive or the Aarhus Directive, but are covered by the Convention.³³ As regards the regulation on public participation at national level, also Articles 7(4) and 12 of the

European Low Fares Airline Association v Department for Transport (IATA and ELFAA) ECLI:EU:C:2006:10, paras 35–36.

²³ J M I J Zijlmans, *De doorwerking van natuurbeschermingsverdragen in de Europese en Nederlandse rechtsorde* (Sdu 2011), 45.

²⁴ *Ibid.*, 49.

²⁵ Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Zoskupenie)* ECLI:EU:C:2011:125.

²⁶ Council Regulation (EC) 1367/2006 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 [2006] OJ L264/13.

²⁷ Krämer (2017) o.c. 126–7.

²⁸ For an overview of the national legislation in this field see the national reports elaborated for the European Commission by the IEEP, Commission, ‘CIRCABC’ <<https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>> accessed December 2018.

²⁹ Council Directive 2003/35/EC 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 [2003] OJ L156/17.

³⁰ Council Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30.

³¹ It should be noted that the scope of application of the provisions of the Convention is broader than those in the SEA Directive, Commission, ‘Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment’ (Implementation Guide), 174–5.

³² Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16.

³³ See explicitly on this point Aarhus Convention Compliance Committee (ACCC), Report concerning the European Union (2 October 2012), ECE/MP.PP/C.1/2012/12.

Environmental Liability Directive³⁴ and Article 14 of the Water Framework Directive³⁵ contain specific provisions on public participation. Yet, these provisions are less developed than those indicated under the Aarhus Convention.³⁶

This does not mean that the EU and its Member States do not have to comply with the Convention on these aspects. Decision 2005/370/EC has made the Convention part of the EU *acquis communautaire*.³⁷ As mentioned above, this means that the Convention is, *in its entirety*, binding upon the EU and its Member States, as recognised by the Court of Justice.³⁸ It also means that the EU can be considered to be in breach of the Convention if its Member States breach the Convention and the EU has not established a regulatory framework ensuring compliance on the side of the Member States, as occurred when Ireland failed to organise effective public participation procedure in the context of the establishment of their national plans on renewable energy sources.³⁹

In the rest of this chapter, given the broader and more elaborated scope of the provisions of the Convention and the great overlap between the wording of its provisions and the pieces of EU legislation most directly aimed at implementing them,⁴⁰ the Convention is used as a basis to explain public participation in EU environmental law. Of course, the Aarhus Convention only pursues minimum harmonisation,⁴¹ which means that the EU and its Member States can decide to go beyond such a minimum, a practice called green-plating,⁴² an issue that is outside the scope of this chapter.

³⁴ Council Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56.

³⁵ Council Directive 2000/60/EC establishing a framework for Community action in the field of water policy [2000] OJ L327/1.

³⁶ E.g., the Environmental Liability Directive speaks only about the existence of a right to submit observations and of a duty to take them into account, without further specifications. The Water Framework Directive uses the concept of ‘consultation’ rather than that of ‘participation’, despite the former not necessarily meaning the same as the latter, e.g., Krämer (2017) o.c. 126–7.

³⁷ Council Decision 2005/370/EC on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/1.

³⁸ About art 9(3) of the Convention, which has not been transposed in EU secondary law, *Zoskupenie* (2011) o.c.

³⁹ Report concerning the European Union (2012) o.c. 79–85.

⁴⁰ Council Regulation (EC) 1367/2006 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 [2006] OJ L264/13; Council Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L41/26; Council Directive 2003/35/EC 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 [2003] OJ L156/17; Council Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56.

⁴¹ United Nations, *The Aarhus Convention an Implementation Guide (Implementation Guide)* (United Nations Economic Commission for Europe E 13 II E 3) 2014, 42, 50, 67; ACCC, Report concerning Hungary (31 January 2004), ACCC/C/2004/4, para 18.

⁴² L Squintani, *Beyond Minimum Harmonisation – Green-plating and Gold-plating of European Environmental Law* (CUP 2019), ch 1.

2.2 Specific Issues: Public Participation in the Decision-making Chain

As written in the previous section, Article 6 of the Convention regards public participation about specific activities significantly affecting the environment, Article 7 about plans, programmes and policies, and Article 8 about executive regulations and other generally applicable and legally binding rules. This latter provision, however, only establishes ‘soft obligations’, i.e., best efforts obligations,⁴³ inspired by those included in parts of Article 6 of the Convention. Moreover, it allows organising public participation of the general public via the medium of representative consultative bodies. It thus deviates from the focus on the concept of public participation discussed in this chapter. Accordingly, this provision is not further analysed. Moreover, Articles 6 and 7 of the Convention have been extensively discussed in the literature,⁴⁴ as well as in the Implementation Guide to the Convention itself.⁴⁵ Accordingly, there is no need to provide a general analysis.

In this section we therefore focus on the intrinsic tension between the policy objective to empower the public and that of maintaining a status quo in which public authorities retain the ‘final word’ in the decision-making. In doing so, reference is made to the Implementation Guide to the Convention and the findings of the Aarhus Convention Compliance Committee (ACCC).⁴⁶ Indeed, although neither source has binding force, the Court of Justice recognises the authoritative nature of the Implementation Guide and uses it as a source of interpretation.⁴⁷ The Implementation Guide builds upon the findings of the ACCC, which means that also the latter is an authoritative source for interpretation of the EU legal framework on public participation.

Article 6 is the starting point for this analysis. This provision establishes a legal framework that applies to any activity regulated under the Environmental Impact Assessment Directive⁴⁸ and the Integrated Prevention Pollution and Control (IPPC)

⁴³ Implementation Guide (2014) o.c. 181, which immediately clarifies that these obligations are still enforceable under art 9(3) of the Convention.

⁴⁴ E.g., J Wates, ‘The Aarhus Convention: a driving force for environmental democracy’ (2005) 21 1 *J for Eur Environmental and Planning L* 3, 3–11; J Jendroska, ‘Aarhus Convention and Community law: the interplay’ (2005) 2 1 *J for Eur Environmental & Planning L* 12; H Unnerstall, ‘Public participation in the establishment and management of the Natura 2000 Network. Legal framework and administrative practices in selected Member States’ (2008) 1 *UFZ-Diskussionspapiere*; R Macrory, ‘Public consultation and GMO policy. A very British experiment’ (2008) 5 1 *J for Eur Environmental & Planning L* 97; J Jendroska, ‘Public participation in the preparation of plans and programs: some reflections on the scope of obligations under Article 7 of the Aarhus Convention’ (2009) *J for Eur Environmental & Planning L* 495; J Jendroska, ‘Citizen’s rights in European environmental law: stock-taking of key challenges and current developments in relation to public access to information, participation and access to justice’ (2012) *J for Eur Environmental & Planning L* 71.

⁴⁵ Implementation Guide (2014) o.c.

⁴⁶ On the nature of the ACCC, e.g., J Jendroska, ‘Aarhus Convention Compliance Committee: origins, status and activities’ (2011) 8 *J for Eur Environmental & Planning L* 301.

⁴⁷ Case C-60/15 P *Saint-Gobain Glass Deutschland GmbH v European Commission* ECLI:EU:C:2017:540, para 44. The Court can also deviate from it as occurred in Case C-442/14 *Bayer CropScience SA-NV and Stichting De Bijenstichting* ECLI:EU:C:2016:890.

⁴⁸ Council Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L124/1.

Directive,⁴⁹ now Industrial Emissions Directive,⁵⁰ as well as any other activity which could significantly affect the environment, such as activities falling under Article 4(1) of the Water Framework Directive⁵¹ or Article 6(3) of the Habitats Directive.⁵² The scope of application of Article 6 of the Convention is, accordingly, very broad. It covers decisions concerning specific activities, such as, most notably, authorisations of concrete environmental projects. Although the amount of detail in decisions about specific activities may change on a case-to-case basis, their key characteristic is that these decisions have at least specific and concrete implications for a specific product or area and therefore affects or is likely to affect specific peoples, so-called the public concerned under Article 2(5) of the Convention.

The legal framework set out therein is the most detailed one in comparison to those for plans and programmes and for policies. It is composed of eight categories of obligations. First, it establishes a *notification* duty. Properly informing the public concerned⁵³ – either by a public notice, such as a newspaper announcement, or an individual notice, such as a letter – is essential for effective participation in the decision-making procedure.⁵⁴ To this extent, the notification must include all relevant information about the project and the public participation procedure. Second, the responsible party, which could also be a private party, should set *reasonable time-frames* to inform the public concerned and to allow for a response. The concept of ‘reasonable time-frames’ is undefined under the Convention and could vary in accordance with the kind of activity under scrutiny.⁵⁵ Third, the procedure should take place *when all options are possible* and participation can be *effective*. Under this provision, the concepts of ‘early engagement’ and ‘effective participation’ are linked to the moment in the decision-making in which public participation is organised. What matters is that ‘events on the ground’, such as the availability of certain technological choices,⁵⁶ have not effectively eliminated alternative options.⁵⁷ This does not mean that during the establishment of specific activities, the public concerned must be able to

⁴⁹ Council Directive 96/61/EC concerning integrated pollution prevention and control [1996] OJ L257/26.

⁵⁰ Council Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17.

⁵¹ Council Directive 2000/60/EC establishing a framework for Community action in the field of water policy [2000] OJ L327/1.

⁵² Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/23; Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* ECLI:EU:C:2017:987, paras 36–41.

⁵³ On what constitutes an appropriate notification method, see ACCC, Report concerning Belarus (12 May 2011), ECE/MP.PP/2011/11/Add.2, para 86; ACCC, Report concerning Armenia (12 May 2011), ECE/MP.PP/2011/11/Add.1, para 70; ACCC, Report concerning Lithuania (12 May 2011), ECE/MP.PP/2008/5/Add.6, para 67; ACCC, Report concerning France (8 February 2011), ECE/MP.PP/C.1/2009/4/Add.1, para 41.

⁵⁴ This obligation requires also informing the public in other countries if the activity under scrutiny can significantly affect the environment in that country, e.g., in the context of nuclear energy, ACCC, Report concerning Czech Republic (29 December 2016), ECE/MP.PP/C.1/2017/3, paras 71–72.

⁵⁵ Implementation Guide (2014) o.c. 143.

⁵⁶ Report concerning Lithuania (2011) o.c. 74.

⁵⁷ Implementation Guide (2014) o.c. 145.

comment upon options that were subjected to a public participation procedure earlier in time.⁵⁸ For example, options that have been subjected to public participation in the context of establishing a plan or programme do not need to be subjected to public participation during the adoption of specific activities implementing such a plan or programme.⁵⁹ Fourth, *private initiators* should be encouraged to engage in public participation prior to a permit application. Public authorities, however, should retain control and responsibility for the procedure.⁶⁰ Fifth, the public concerned must be able to *access all relevant information*, in accordance with the provisions on access to information under the Convention.⁶¹ Sixth, the public must be allowed to *submit views*. This provision represents the embodiment of public participation, i.e., the ability to express a view, or arguably even a feeling,⁶² in writing or orally, to the discretion of the public.⁶³ Seventh, the responsible authority should *take the views* expressed by the public *in due account*, therefore ensuring a ‘real voice’ to the public. However, this does not mean that it has to align the decision to such views.⁶⁴ According to the European Commission, this duty ‘means that the Commission will duly consider the comments submitted by the public and weigh them in the light of the various public interests in issue’.⁶⁵ Basically, this duty means, in legal terms, that a decision-maker must show why a particular comment was rejected on substantive grounds.⁶⁶ Still, it does not amount to a right of the public to veto the decision, according to the ACCC.⁶⁷ The eighth, and final, obligation is that the decision-maker should *inform the public* about the final decision and how the views have been taken into account.⁶⁸

Importantly, the content of decisions about specific activities depends on the higher-level instruments in the decision-making chain, namely plans and programmes, and policies. The legal framework for public participation procedures as regards plans and programmes builds on the framework for decisions on specific activities, but is less extensive and specific. The concepts of ‘plans’ and ‘programme’s’ concerning the environment are left undefined under the Convention. These instruments can take a variety of forms.⁶⁹ In the majority of the cases, plans and programmes are meant to provide a framework for adopting

⁵⁸ Report concerning Lithuania (2011) o.c. 71.

⁵⁹ Ibid.

⁶⁰ Report concerning Lithuania (2011) o.c. 82.

⁶¹ On this topic, e.g., M von Unger, ‘Access to EU documents: an end at last to the authorship rule?’ (2007) 6 *J for Eur Environmental & Planning L* 440; and Jendroška (2012) o.c.

⁶² A Aragão, ‘Valuating cultural services and taking them into account in public decisions making’ in L Squintani and others (eds), ch 3.

⁶³ Implementation Guide (2014) o.c. 153.

⁶⁴ ACCC, Report of the Compliance Committee on its Twenty-fourth meeting (8 February 2011), ECE/MP.PP/C.1/2009/4, para 29.

⁶⁵ European Commission, ‘Access to information, public participation and access to justice in environmental matters at Community level – A Practical Guide’ <<http://ec.europa.eu/environment/aarhus/pdf/guide/AR%20Practical%20Guide%20EN.pdf>> accessed January 2019.

⁶⁶ Implementation Guide (2014) o.c. 155.

⁶⁷ ACCC, Report concerning European Union and the United Kingdom of Great Britain and Northern Ireland (13 January 2014), ECE/MP.PP/C.1/2014/5, para 93.

⁶⁸ ACCC, Report concerning Spain (8 February 2011), ECE/MP.PP/C.1/2009/8/Add.1, para 100.

⁶⁹ Krämer (2017) o.c.; see also L Squintani and M van Rijswijk, ‘Improving legal certainty and adaptability in the programmatic approach’ (2016) 28 *Journal of Environmental Law* 443.

decisions about specific activities. Under the Aarhus Convention, as well as under the EU and national legal frameworks implementing it, obligations regarding public participation procedures about plans and programmes refer explicitly to the second (reasonable time-frames), third (early engagement) and seventh (real voice) obligations listed above. They refer also to the need of ensuring *transparency*, *fairness* and *access to information*. Although the first, fifth, sixth and eighth obligations indicated above can easily be read into the concepts of fairness, transparency and access to information, the different formulation of such obligations denotes the presence of more discretionary power for public authorities about how to fulfil them, than in the context of decisions concerning specific activities.

From a legal perspective, also plans and programmes are not adopted in a vacuum but should fit within the existing policy framework. Under the Aarhus Convention, environmental policies can be defined as ‘a course or principle of action adopted or proposed by an organization or individual’.⁷⁰ Yet, this concept remains officially undefined. From the perspective of public participation, Article 7, last sentence, of the Convention adopts a different approach about the legal obligation in the context of policies. There are indeed no specific legal requirements in this regard. Most significantly, the duty to organise public participation procedures at a moment in time in which all options are still open does not apply to policies. This consideration holds true also for the duty to take due account of the views and feelings of the public.⁷¹ As these two obligations aim at ensuring ‘early engagement’ and ‘real voice’ during public participation procedures, their absence underlines that, under the Convention, there are no explicit legal requirements aiming at ensuring that public participation as regards policies is *effective*.

When we compare the legal obligations existing as regards public participation at each step in the decision-making chain, an interesting phenomenon becomes clear: the legal obligations on public participation vary in accordance to the level of the decision-making chain in which public participation takes place. More specifically, the intensity of the legal obligations is inversely proportional to the level of specificity of the act as regards to which public participation takes place. Otherwise stated, the legal framework on public participation under the Convention contains more specific legal obligations about the setting up of public participation procedures for decisions on specific activities, than for plans and programmes and, most notably, policies.

This finding is of particular importance when we consider that options discussed during the adoption of a policy, a plan or a programme do not need to be made subject to public participation during the adoption of a specific activity implementing that policy, plan or programme, as indicated above. At the same time, what has been decided at an earlier level of the chain of decision-making influences the content of decisions about specific activities. Policy choices expressed in policy documents can determine that in practice certain options are no longer available at the level of decisions about specific actions.

The above shows that at the starting point of the decision-making chain, the legal framework for public participation procedures in the context of the establishment of

⁷⁰ Implementation Guide (2014) o.c. 180.

⁷¹ Art 10.7 of the Dutch Environment and Planning Order (*Omgevingsbesluit*) will go beyond this standard, by requiring public authorities to give account of how they involved the public in drafting environmental strategies and what the outcome of the procedure has been.

policies does not contain obligations ensuring ‘early engagement’ and a ‘real voice’. It also shows that options decided at this level do not need to be subject to public participation in a later stage of the chain. In section 4, we discuss how this could open a gap between what the public expects and what the public gets from public participation procedures. First, however, the next section shows that the case law of the Court of Justice does not change the present findings.

3. PUBLIC PARTICIPATION AND THE COURT

Despite the elapsing of 20 years from the signature of the Convention, and about three lustra from its implementation in the EU, case law of the Court of Justice on public participation is scarce, in striking contrast with what is noticeable about access to information and, even more, access to justice. On Curia, we could retrieve only four cases dealing with public participation in environmental matters,⁷² after the implementation of the Aarhus Convention in the EU.⁷³ Clearly, in this area, the case law of the Court is at an infant stage of development, which makes it premature to make any statement about the *modus operandi* of the Court in this field. Yet, two initial patterns can be recognised so far, none of which affect the findings indicated in the previous section.

First, the Court of Justice recognises the importance of the Aarhus Convention and its underlying rationale as a ground to interpret EU law provisions aimed at its implementation. This approach was clearly recognizable in the *Krizan* case,⁷⁴ in which the Court of Justice stated that the provisions of the IPPC Directive on public participation must be aligned with those in Article 6 of the Convention.⁷⁵ This case concerns access to information relevant for a public participation procedure concerning the authorisation of a landfill site; hence, it concerns Article 6(6) of the Convention. Access to information can be limited to protect, inter alia, confidential commercial and industrial information, but such a possibility is only an exception. The Court therefore interpreted it restrictively. Similarly, in the *VKL II* case,⁷⁶ to establish the rules on public participation under the Habitats Directive the Court of Justice ruled that, although Article 6 of the Convention states that its application is governed by the domestic law of the concerned contracting party, that statement must be understood as relating solely to the manner in which the public participation specified by Article 6 is carried out.⁷⁷ It does not call into question the

⁷² Search criteria in the database of the Court: Text: participation; Subject-matter: ‘Euratom matters’ and ‘Environment’; Documents: Documents published in the ECR: Judgments and Orders; Court: ‘Court of Justice and General Court’; Case status: ‘Cases closed’ (search last performed January 2019). This search forms leads to 93 results which were then further filtered manually. Search on EUR-LEX based on the relevant legal provisions confirmed this finding.

⁷³ Case C-216/05 is not included as it regards the EIA Directive prior to the implementation of the Aarhus Convention, thus concerns a legal framework no longer in force, Case C-216/05 *Commission of the European Communities v Ireland* ECLI:EU:C:2006:706.

⁷⁴ Case C-416/10 *Jozef Krizan and Others v Slovenská inšpekcia životného prostredia (Krizan)* ECLI:EU:C:2013:8.

⁷⁵ *Krizan* (2013) o.c. 77.

⁷⁶ Case C-243/15 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín* ECLI:EU:C:2016:838.

⁷⁷ *Ibid.*, para 48.

right to participate which an environmental organisation, as derived from that article.⁷⁸ Moreover, in this case the Court decided that access to public participation must be granted to NGOs fulfilling the conditions for being considered part of the (concerned) public. Enjoyment of this right entails in particular the right to participate ‘effectively during the environmental decision-making’ by submitting, ‘in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity’ at a moment in the decision-making procedure ‘when all options are open and effective public participation can take place’.⁷⁹ Any participatory status that does not allow enjoying such a right is not in compliance with Article 6 of the Convention.⁸⁰

The linkage between the status of a party in the decision-making procedure and the right to access to justice discussed in the *VKL II* case is the second pattern in the case law of the Court Justice that can be recognised, albeit in its very initial form. This linkage was first discussed in the *Djurgården* case,⁸¹ concerning the requirements that non-governmental organisations must fulfil in order to enjoy the right to access to justice. One of the questions the Court had to answer concerned whether access to justice had to be granted, even where a party had the opportunity to participate in the decision-making procedure. The Court stated that participation in the decision-making procedure has no effect on the conditions for access to the review procedure.⁸² This is so because participation in an environmental decision-making procedure is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure.⁸³ In *VKL II*, the Court of Justice was not called to rule on this same question, but the linkage between public participation and access to justice was discussed when the Court stated that access to public participation in Slovakia is important as it is a pre-condition to access to justice.⁸⁴ The same *modus operandi* is recognisable in the *Protect* case.⁸⁵ This case is, once again, mainly focusing on access to justice, but it touches upon the relationship between public participation and access to justice, since under Austrian law, only natural and legal persons who are parties to the administrative procedure can bring an action before a court in order to claim that their rights have been infringed.⁸⁶ The Court approached this relationship by imposing a duty upon the national court to interpret national law so as to grant the status of party to the procedure to the non-governmental organisation at stake in this case,⁸⁷ or to set aside national law that requires having such status to access a court, if a consistent interpretation was not

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, para 46.

⁸⁰ This is an implicit conclusion as the Court’s answer concerned the linkage between public participation and judicial protection and not public participation as such, *ibid.*, paras 67–70.

⁸¹ Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* ECLI:EU:C:2009:631.

⁸² *Ibid.*, para 38.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, para 71.

⁸⁵ Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* ECLI:EU:C:2017:987.

⁸⁶ *Ibid.*, para 50.

⁸⁷ *Ibid.*, paras 53–54.

possible.⁸⁸ A conjunctive reading of these cases suggests that the Court of Justice would not accept limits to acquiring the status of party to a public participation procedure if this status is a condition for access to justice. It is less clear whether a party which could have acquired such status, but failed to do so due to its own omission, might be deprived of the right to access to justice. The case law at our disposal is inconclusive on this matter, as in all cases the concerned party did activate itself during the decision-making procedure.

4. FROM LEGAL REQUIREMENTS TO PEOPLE'S PERCEPTIONS: UNVEILING THE POTENTIAL MISMATCH

Section 2 indicated that public participation under the Aarhus Convention and the EU legal framework implementing it requires 'early engagement' and a 'real voice' only about public participation procedures in the context of projects, and, less so, plans and programmes. It does not have similar obligations about policies. Still, policies have an impact on the options that can be discussed in the context of the establishment of plans and programmes and, in turn, decisions about specific activities. At the same time, options which have been subjected to a public participation procedure at an early level of the decision-making chain do not need to be re-discussed during public participation procedures in later stages of the chain.

Under the legal framework envisaged by the Aarhus Convention 'real voice' and 'early participation' may therefore be circumscribed to the level of concrete projects and activities, where the influence that the public can have in decision-making is limited by macro-level decisions taken earlier in the decision-making chain. This may open a gap between what people expect from public participation procedures and what they actually get from these procedures. Specifically, social sciences show that when people consider that public participation procedures are taking place too late, after the important decisions about projects had already been made, this can reduce perceived procedural fairness and fuel resistance against the final decisions.⁸⁹ Furthermore, even if people can participate in decision-making but only have influence over minor decisions, this results in lower public acceptability of concrete projects than when they can have influence over major decisions.⁹⁰ Therefore, while people may be particularly willing to participate in decision-making on concrete actions, such as energy projects in their vicinity,⁹¹ having limited influence at this level of the decision-making chain may result in low perceived procedural fairness and public resistance.

⁸⁸ Ibid., para 55.

⁸⁹ C Gross, 'Community perspectives of wind energy in Australia: The application of a justice and community fairness framework to increase social acceptance' (2007) 35 *Energy Policy*, 2727–36, and R M Colvin, G B Witt, and J Lacey, 'How wind became a four-letter word: Lessons for community engagement from a wind energy conflict in King Island, Australia' (2016) 98 *Energy Policy*, 483–94.

⁹⁰ L Liu, and others, 'Effects of trust and public participation on acceptability of renewable energy projects in the Netherlands and China' (2019) 53 *Energy Research & Social Science*, 137–44.

⁹¹ G Perlaviciute and L Squintani, 'De mening van inwoners van de provincie Groningen over de energietransitie, Rijksuniversiteit Groningen' (2019), available at: <https://www.rug.nl/about-us/collaboration/research-collaboration/onderzoekenergietransitie/> accessed January 2019.

Thus, there is a potential mismatch between what law says and what the public wants about public participation procedures in environmental matters. This mismatch is capable of jeopardising the effectiveness of such procedures to achieve acceptability, as shown by the following example.

During the public participation procedures for the authorisation of a wind-energy park in Oost Groningen (the Netherlands),⁹² the policy choice to reach a production target of 855.5 MW by means of wind parks at three locations in the province of Groningen (the Netherlands),⁹³ along with the designation of these locations and the rules that the wind parks should respect noise levels,⁹⁴ could not be re-discussed.⁹⁵ This could partly explain why the project has faced strong public resistance which has also materialised in a legal challenge before the Dutch Council of State.⁹⁶

Clearly, such a situation does not spur on the chance of achieving perceived procedural fairness and, hence, acceptability of projects. In these situations, people may consider that there is either no participation or that there is *fake* participation, namely, they can voice their opinions but this has little or even no impact on important decisions. From a legal perspective, the existence of barriers to discuss certain (policy) aspects related to the realisation of an activity such as a wind energy park is perfectly understandable and justified by legal principles, in particular that of legal certainty. This justification, however, does not change the perceived lack of procedural fairness, as also noticed by Akerboom in the context of the chain of decision-making that led to the building of a large wind park before the coast of the province of North Holland (the Netherlands).⁹⁷

5. CONCLUDING REMARKS

This chapter has explained that the legal framework for public participation in environmental matters in the EU changes as regards the type of acts in respect of which public participation is organised. The Aarhus Convention and EU law implementing it contain more specific legal obligations about the setting up of public participation procedures for decisions on specific activities, than for plans and programmes and, most notably,

⁹² For the input of the public and the reply of the public authority, see documents, Rijksdienst voor Ondernemend Nederland, 'Windpark N33 – Fase 1' <<https://www.rvo.nl/subsidies-regelingen/bureau-energieprojecten/lopende-projecten/windparken/windpark-n33/fase-1>> accessed January 2019.

⁹³ Environmental Strategy Province of Groningen 2016–2020, Provincie Groningen, 'Omgevingsvisie Provincie Groningen (Provinciale Staten 1 juni 2016) 2016–2020' <https://www.provinciegroningen.nl/fileadmin/user_upload/Documenten/Downloads/Omgevingsvisie/Omgevingsvisie_GS_PS_160714.pdf> accessed January 2019.

⁹⁴ *Ibid.*

⁹⁵ 'Antwoordnota Windpark N33' <https://www.rvo.nl/sites/default/files/2017/02/Nota%20van%20Antwoorden%20op%20Zienswijzen_deel%201_tm_4.pdf> accessed January 2019, section Zienswijzen, specifically Zienswijzen 1a and 1b.

⁹⁶ See references to such protests, J de Veer, 'Tegenstanders bedreigen windparkbouwers' *Dagblad van het Noorden* (Groningen, 16 July 2018). For the judgment see, Council of State, judgment of 29 May 2019, ECLI:NL:RVS:2019:1781.

⁹⁷ Akerboom (2018) o.c. ch 10.

policies. Moreover, it has been discussed that the lack of requirements to ensure ‘early engagement’ and ‘real voice’ in public participation procedures for the setting of policies, likewise the fact that options subjected to public participation during an early phase of the decision-making chain do not need to be re-discussed later on in the chain, do not seem to align with the preferences of the public in this context. Indeed, if people are willing to participate in decision-making on concrete projects, their influence is limited by macro-level decisions, which can make public participation procedures ineffective (or even counterproductive) in increasing public acceptability.

Further research will have to be undertaken to show the extent of this potential mismatch. Such research is essential as the possible mismatch unveiled in this chapter can clearly affect the possibility of achieving perceived procedural fairness and thus acceptability. This would mean that, even when applied in practice, the legal framework discussed in section 2 could not necessary lead to effective public participation procedures, at least when looking at their ability to generate acceptability. It could also explain why case law on public participation is scarce. Indeed, due to the mismatch, people could lack trust in the institutions and prefer the route of political, rather than judicial, protest. A profound rethinking of the legal framework might thus be necessary.

10. Access to Justice in Environmental Matters in the EU: The EU's Difficult Road towards Non-compliance with the Aarhus Convention

Matthijs van Wolferen and Mariolina Eliantonio

1. INTRODUCTION¹

Access to justice in the (now) EU has a long and troubled history,² which is exemplified by the problems faced by those pursuing access to justice in environmental matters.³ This chapter aims to illustrate how the judicial organisation of the EU offers an additional challenge to public interest litigants, where there is already a high bar for the 'normal' natural and legal person who seeks to have her day in the golden buildings on top the Kirchberg in Luxembourg.⁴ To that end, the following path through the woods is proposed.

First, a very brief overview of the system of access to justice as it has developed from the Treaty of Rome until now is given. It will be demonstrated what is meant when the Court of Justice of the European Union (CJEU) makes use of its famous tenet that there exists within the EU 'a complete system of remedies'.

Building on that knowledge, it is possible to see the relevance of two recent developments in the European legal order. One entails the changes in the Treaty of Lisbon, mainly in the primary article governing the possibility for judicial review of acts of the EU, and secondary legislation that aims to support these changes. The second is the current line that the CJEU is taking in its case law. Both of these developments need to be placed in

¹ The authors wish to thank Helle Tegner Anker for her valuable comments.

² A by no means complete overview of commentary through the recent decades, Ami Barav, 'Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court' (1974) 11 *CMLRev* 191; Hjalte Rasmussen, 'Why Is Article 173 Interpreted against Private Plaintiffs?' (1980) 5 *ELRev* 112; Anthony Arnall, 'Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty' (1995) 32 *CMLRev* 7; Laurence Gormley, 'Judicial Review in EC and EU Law—Some Architectural Malfunctions and Design Improvements?' (2001) 4 *CYBELS* 167; Albertina Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?' (2003) 62 *CLJ* 77.

³ Ludwig Krämer, 'Public Interest Litigation in Environmental Matters before European Courts' (1996) 8 *JEL* 1; Hans Micklitz, 'The Interest In Public Interest Litigation' in Hans Micklitz and Norbert Reich (eds), *Public Interest Litigation Before European Courts*, vol 2 (Nomos 1996); Albertina Albors-Llorens, 'Locus Standi of Private Parties in Environmental Cases' (1999) 58 *CLJ* 1; Laurence Gormley, 'Public Interest Litigation in Community Law' (2001) 7 *EPL* 51; Jonas Ebbesson, *Access to Justice in Environmental Matters in the EU*, vol 3 (Kluwer Law International 2002).

⁴ The Kirchberg is the plateau in the fairy-tale kingdom of Luxembourg upon which the Court of Justice has its domicile. See, famously, Eric Stein 'Lawyers, Judges and the making of a Transnational Constitution' (1981) *AJIL* 75, 2–27.