

## National Judges and the Aarhus Convention – How the Judiciary can further the Implementation of the Third Pillar

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### Knowledge is needed

- Aarhus Convention should be well known amongst judges, other judicial officers and legal stakeholders
- Cases must be brought to Court
- Aarhus Convention well known amongst larger ENGO's
- Growing knowledge amongst specialized lawyers
- Argumentation
  - Domestic Law
  - EU law – CJEU
  - International Law – Far from my bed show ?

## Importance of Aarhus Convention

- In some respects larger protection than domestic and EU law
- Relative strong compliance mechanism
- Open to the public
- Aarhus Convention is part of the EU Acquis
- Growing case law of the CJEU
  - Preliminary rulings
  - Infringement cases
- Training and information is crucial

## Application by national judges

- Different ways in which judges can be confronted with the Convention
- Constitutional courts are of great importance
  - Combining national constitutional provisions with relevant international treaties
  - Check compliance of national law
  - Belgian Constitutional Court referred to Aarhus Convention in 21 cases
    - Slovenia, Czech Republic, Latvia...

## Application by national judges

- CJEU, 18 October 2011, *Boxus and Others*
  - Art 9 (2)
  - Adopting project by specific legislative act
  - Must be possible to question if legislative act satisfies conditions art (2) 2 - access to court or independent and impartial body established by law
  - Any national court has the task of carrying out review
  - Dis-apply legislative act as the case may be
- Belgian Constitutional Court annulled an act of parliament
  - UK Supreme Court refused to follow that case law in the Hybrid Bill Case (2HS)

## Application by national judges

- Most of countries dual structure
  - Ordinary courts: civil and criminal cases
  - Administrative courts: judicial review of activity of administrative authorities
- Administrative courts most confronted with Aarhus cases
- Standing requirements – most of the time vague formula that can be interpreted in conformity with art. 9 of the Convention

## *Belgian Supreme Court (Court of Cassation), 11 June 2013*

**Case of PP and PSLV**

**v. Gewestelijk Stedenbouwkundig Inspecteur and M vzw**

- *Radical change case law on Standing*
- *Based on relevant provisions of the Aarhus Convention*
- *Can ENGOs act as civil parties in criminal proceedings ?*
- *Past: only when their property rights and alike were violated*

## **Civil Party in Criminal Proceedings**

- **It follows from these provisions that Belgium has engaged itself to secure access to justice for environmental NGOs when they like to challenge acts or omissions of private persons and public authorities which contravene domestic environmental law, provided they meet the criteria laid down in national law. Those criteria may not be construed or interpreted in such a way that they deny such organizations in such a case access to justice. Judges should interpret the criteria laid down in national law in conformity with the objectives of art. 9 (3) of the Aarhus Convention.**



## Civil Party in Criminal Proceedings

- According the Criminal Procedure Code, **the legal action to repair damages belong to the victims**. They shall demonstrate a direct and personal interest. **When such an action is introduced by an environmental NGO and aims to challenge acts and omissions that contravene environmental law, such an environmental NGO has a sufficient interest to do so.**
- The Supreme Court upholds judgment of Court of Appeal of Brussels
  - Accepted the action in reparation of an environmental NGO in a criminal case dealing with violations of the Code on Town and Country Planning (the illegal construction of horse stables and an outdoor arena in a protected landscape)

## Civil Party in Criminal Proceedings

- Victim can act as “civil party” in criminal proceedings
- Rights in
  - Pre-trial procedure (criminal investigation)
  - Trial procedure (before the criminal courts)
- Pre-trial procedure
  - Introducing a complaint and register as plaintiff with investigating judge (a bond can be asked)
  - Investigating judge has to start criminal investigation,
  - He will lead the police officers doing the investigation

## Civil Party in Pre-Trial Proceedings

- He can order investigating measures that infringe on rights and liberties of the suspects and are considered to be necessary for the investigation
  - Search at domicile, telephone tap, observance of financial transactions, interrogations while arrested, confrontations, arresting, seizure of proof and objects used in crime...
- Supervision by the investigation tribunal ("*chambre de conseil*") – trial judge
  - Monthly hearing if persons have been arrested
  - Will formulate at the end of the criminal investigation the charges referred to the trial judge on the basis of the investigation of the investigating judge and the demand of the public prosecutor

## Civil Party in Pre-Trial Proceedings

- Civil Party
  - Can trigger a criminal investigation
  - Has access to the criminal files at various moments
  - Can ask for additional investigation actions
  - Is invited to the hearings of the investigation tribunal in the course of the investigation and at the end of it



WATCHDOG FUNCTION TO KEEP THE INVESTIGATION PROGRESSING

## Civil Party in the Trial Procedure

- Can be represented before the Criminal Court, alongside
  - Public Prosecutor
  - Defense
  - Accused
- May claim damages and measures to restore the harm done by the criminal acts

## Conclusion

- Similar approach is possible in most countries
- Consistent interpretation is an EU law obligation - CJEU, *Slovak Brown Bear* + *Trianel*
- Other issues – art. 9 (4) – more difficult to address - judicial interpretation not sufficient
  - Backlog
  - Strict interim relief conditions
  - Costs (CJEU, Irish Costs + Edwards/UK Costs)