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Case Summary posted by the Task Force on Access to Justice

European Union: C-664/15 *Protect Natur-. Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd.*

1. Key issues	Standing – Environmental NGOs must be able to challenge decisions made within the framework of water law permit procedures. Where participation as a party to the administrative procedure is required for judicial review, such participatory rights must be accorded to environmental NGOs. Effective remedies – National procedural rules which would result in the loss of party status (and therefore concomitant rights to judicial review) for failure to timely intervene are not allowed where they appear to be unfair or impossible standards.
2. Country/Region	European Union
3. Court/body	Court of Justice of the European Union, Second Chamber
4. Date of judgment /decision	2017-12-20
5. Internal reference	C-664/15 (Celex 62015CJ0664; ECLI:EU:C:2017:987)
6. Articles of the Aarhus Convention	Art. 2 para. 4 and 5; Art. 6, para. 1 (b); Art. 9, paras. 2, 3, and 4
7. Key words	Reference for a preliminary ruling, EU Directive 2000/60/EC, Permit for extraction for ski area, Water law, Deterioration of status per article 4(1)(a)(i) and rights under article 14 of Directive 2000/60/EC, article 9, paras. 2, 3, and 4, of the Aarhus Convention, Standing, Environmental NGO, Party to the administrative procedure, Participation, Prior Participation as requirement for access to justice and Effective remedies

8. Case summary

This case was a referral to the Court of Justice of the European Union (CJEU) for a preliminary ruling. Environmental non-governmental organisation Protect Natur-, Arten-, und Landschaftsschutz ("Protect") requested party status in a permit procedure under the Austrian *Wasserrechtsgesetz*, which implements the Water Framework Directive (Directive 2000/60). The project at issue concerned the abstraction of water from the river Einsiedlbach for the purposes of producing snow for a ski resort, a project which fell outside of the scope of the Environmental Impact Assessment (EIA) Directive (Directive 2011/92). This latter fact was of key importance, as Austria follows a strict impairment of rights doctrine, and environmental non-governmental organizations (ENGOs) lack party standing in administrative procedures outside of the EIA context (and selected Industrial Emissions Directive (EID) cases). This in turn means that participation rights for ENGOs are considerably limited and they have no right to legally challenge decisions made in the framework of such procedures. Accordingly, the permitting authority rejected both Protect's application for party status, as well as its submission that the project would lead to significant negative impacts, and subsequently granted the permit.

On appeal to the Lower Austrian Regional Administrative Court, Protect argued that the decision was contrary to both Directive 2000/60 and article 9, para. 3, of the Aarhus Convention. This appeal was rejected, however, on the grounds that (a) Protect lost its party standing per national administrative procedural rules by virtue of its failure to bring its submissions prior to the hearing at the administrative stage, and (b) the Convention is not directly applicable according to national law. Protect sought judicial review of this decision to the Supreme Administrative Court (Verwaltungsgerichtshof; VwGH), arguing that it should have party standing according to article 2, paras. 4 and 5, and article 9, para. 3, of the Convention. Protect furthermore argued that its legal interests in the observance of EU environmental laws – particularly Directive 2000/60 – had been violated.

This court subsequently referred the case to the CJEU, posing three questions: (1) whether article 9, para. 3, of the Convention means that article 4 of Directive 2000/60 or the Directive as a whole must be interpreted as requiring that ENGOs be able to challenge in court water law permits for projects for which an assessment under Directive 2011/92 is not foreseen; (2) whether in such a case it suffices under the Convention that an ENGO be given the ability to appeal the relevant administrative decision, or whether an ENGO must be granted rights in the administrative procedure itself; and (3) whether Articles 9(3) and 9(4) preclude a national procedural rule such as in the case at issue, according to which an ENGO loses its party standing and therefore the right to bring an appeal where it failed to "timely" make its submissions, by the time of the hearing at the latest.

The CJEU ruled that:
- article 9, para. 3, of the Convention in conjunction with article 47 of the Charter of Fundamental Rights (CFR) requires that a recognized environmental NGO must be able to bring legal challenge against a decision which might violate article 4 of Directive 2000/60;
- article 9, para. 3, in conjunction with article 47 of the CFR as well as Article 14(1) of Directive 2000/60 must be interpreted such as to block any national provisions denying participation rights as a party to administrative proceedings, where such status is a prerequisite to challenge decisions which are made in the framework of these proceedings;
- articles 9, paras. 3 and 4, of the Convention – as applied to the specific circumstances of the national law(s) and case at issue – precludes a national procedural provision according to which environmental NGOs would lose their rights as a party to the administrative procedure (and therefore concomitant access to justice rights) by virtue of failing to bring its submissions in a "timely" fashion, at the hearing at the latest.

The CJEU furthermore stated that the question of whether an environmental NGO like Protect has a right under article 9, para. 3, of the Convention to challenge a permit issued per article 4 of Directive 2000/60 only arises when a court's review of the circumstances comes to the conclusion that significant negative impacts are excluded; otherwise the procedure would fall under article 6, para. 1 (b), of the Convention and by extension article 9, para. 2, would be the relevant access to justice provision (paras. 39-42 in the judgement with reference to C-243/15 (*LZ II*)).

Assuming significant negative impacts can be excluded, however, article 9, para. 3, of the Convention is indeed the applicable provision for access to justice, in the Court's view. In analysing this provision in conjunction with article 47 CFR, the CJEU went on to say that, although Member States have some discretion in establishing standing criteria" according to their national laws, these may not be so strict that it is practically impossible for ENGOs to challenge acts and omissions within the meaning of article 9, para. 3, of the Convention. National courts must interpret the national procedural rules on standing to allow such challenges or, where such an interpretation is not possible, must disapply such rules of their own motion (paras 54-58).

With respect to the issue of participation in the administrative procedures themselves (assuming the non-application of article 6, para. 1 (b), and article 9, para. 2, of the Convention), the CJEU indicated that rights thereto do not arise by virtue of article 9, para. 3, alone. Yet the Court discussed at length the benefits that full and active participatory rights for ENGOs can bring in all cases, such as ensuring that important arguments in the common interest and for the environment can be brought forth and duly considered, and pointed out that provisions of EU law (particularly Article 14(1) of Directive 2000/60) indicate a further obligation for Member States to support the active participation of all interested parties. Against this backdrop, and considering also the case before it, where national procedural law *conditions* the right to judicial review on participation in the administrative procedures, the CJEU concluded that the combined provisions of article 9, para. 3, of the Aarhus Convention, Article 47 of the Charter and Article 14(1) of Directive 2000/60 must be interpreted as precluding national procedural rules in cases such as the one before it that deprive ENGOs of the right to participate, as a party to the procedure, in a permit procedure that is intended to implement Directive 2000/60 and limit the right to bring proceedings contesting decisions resulting from such procedure solely to persons who do have that status. Finally, while stating that procedural rules which could result in the loss of party status and access to justice rights for a failure to submit an application for party status or to submit objections during the course of the administrative procedure itself would not *a priori* run afoul of articles 9, paras. 3 and 4, and could even in some cases serve legitimate interests, the CJEU found the Austrian procedure impermissible in the case before it (paras 96-99). As Protect was denied such status in the participation phase of the proceedings and therefore was not capable of submitting cognizable claims, it would be excessively restrictive to use a procedural rule to bar these claims on the basis that they had failed to bring them in a timely manner. The Court took care to indicate that this aspect of its decision is to be examined on a case-by-case basis, taking into account all relevant circumstances of the case and national law at issue. However, if the national court finds that the procedural rule in the case is impermissible according to what is said in this judgement, it is bound to disapply it (95-101).	
9. Link address	http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0664&lang1=en&type=TXT&ancre= http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/EUROPEAN_UNION/CJEU_C664_15_Protect/CJEU_C664_15_Protect_judgment.pdf