

Recent developments of EU environmental law

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Access to justice at EU level:
discussion of appeal of
Vereniging Milieu Defensie
case (1)



Intermezzo – the Access
to Justice Directive:
recent developments (2)



Access to justice at
national level: discussion
of *Gruber* case (3)

Article 9(3) Aarhus Convention

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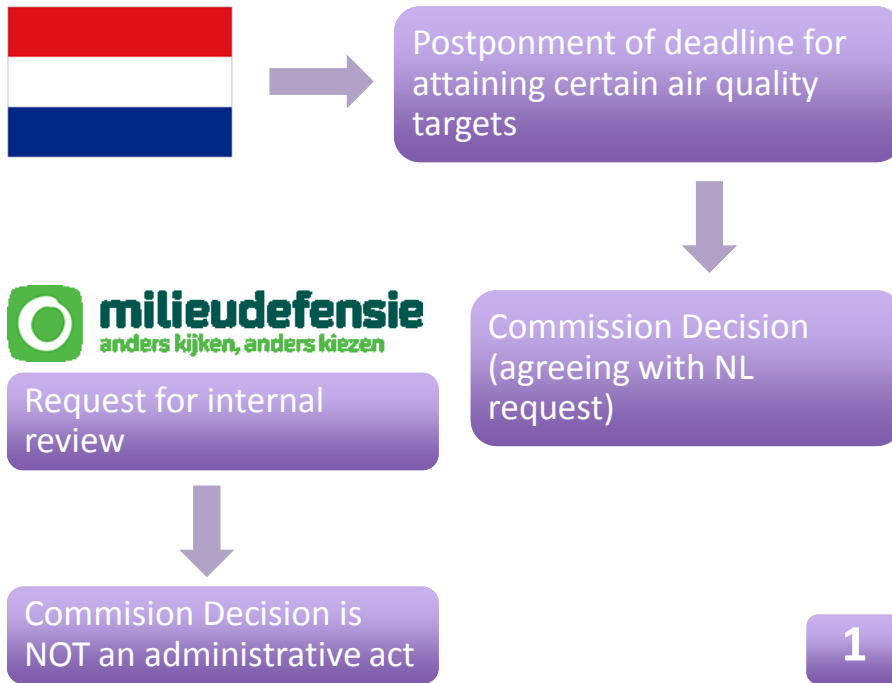
... each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment

1

Articles 10(1) & 2(1)(g) Aarhus Regulation

The non-governmental organisations which [fulfill certain requirements provided by in the Regulation] to make a request for internal review to the EU institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.

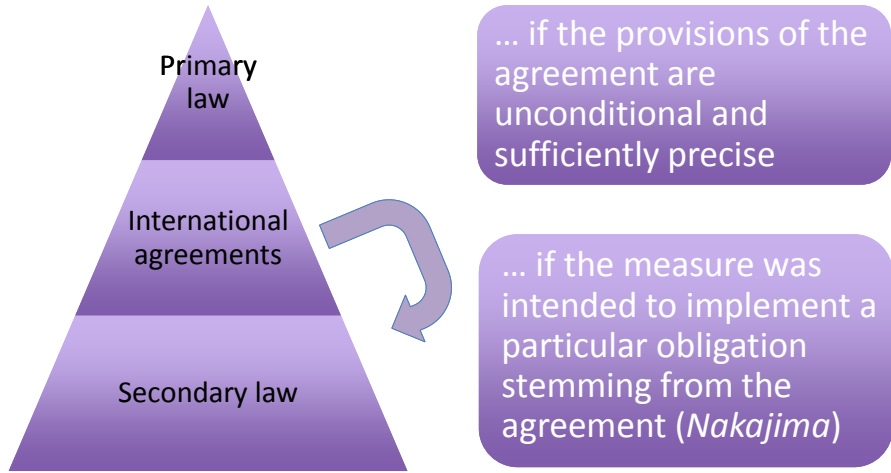
Administrative act is a measure of individual scope taken by an EU institution.



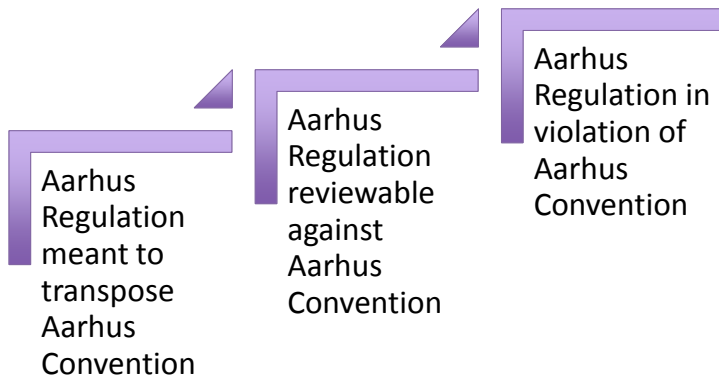
Ruling of the General Court 1

Commission Decision is a decision of general scope...

... but Article 10(1) of the Aarhus Regulation is in violation of Article 9(3) of the Aarhus Convention

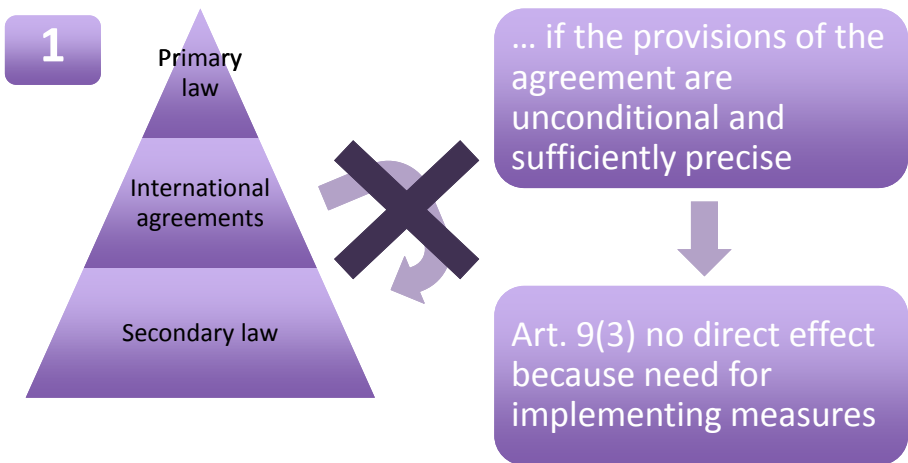
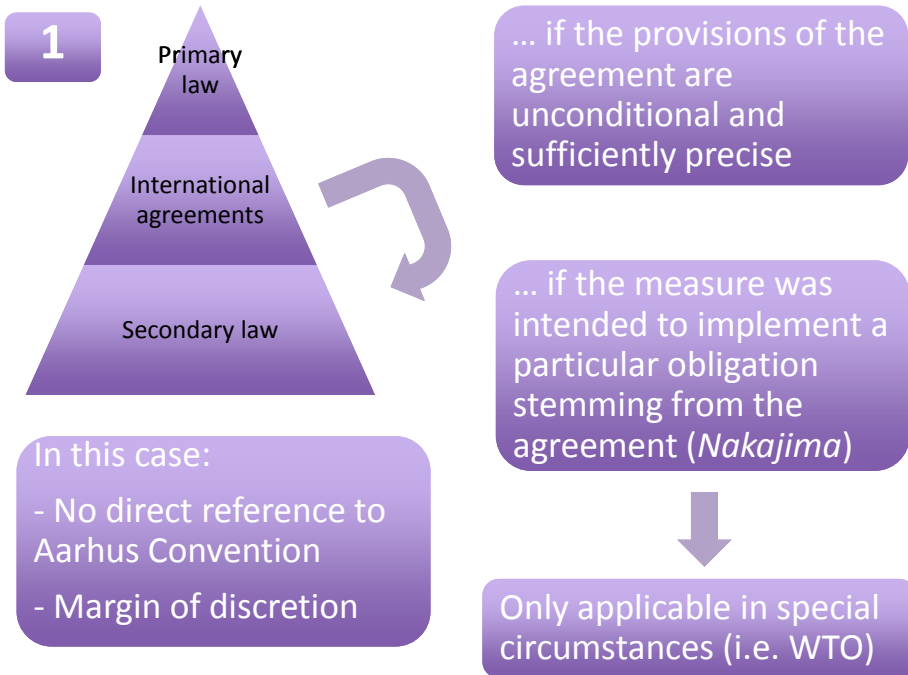


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ECJ =





The compatibility of Aarhus Regulation cannot be checked by the Court of Justice

Art. 9(3) does not have direct effect

- ...already known since *Brown Bear*
- *Nakajima* exception interpreted very narrowly
- EU transposition of Aarhus Convention cannot be checked by European Courts
- What about indirect effect? (cf. *Brown Bear*)
 - Why did the Court not talk about it?
 - It is even possible?

Violation of Art. 9(3) by the EU is evident

- Cf. Art. 3(5) TEU: aim of the EU is to contribute 'to the strict observance and the development of international law'
- Art. 9(3) 'all acts and omissions relating to the environment' vs. Aarhus Regulation 'measure of individual scope'

Remaining possibilities?

- Direct challenge against Commission Regulation
 - Regulatory act so no need to prove individual concern
 - ... but lack of individual concern

Practice what you preach?

- The Court of Justice is very vigorous when it comes to access to justice at national law (*Trianel, Edwards...*)
- Intervention of Compliance Committee is necessary (previous Findings had not addressed this)

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New proposal for a Directive on
Article 9(3)?

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Proposal for a directive of the European Parliament and
of the Council on access to justice in environmental
matters, 24 October 2003.



Discussion within European
Commission:

- Same directive?
- Soft law instruments?
- Infringement proceedings enough?
- New directive?

11/2013 = roadmap where legislative option is clearly favoured

- To ensure a level playing field as between different actors in similar dispute situations across the EU
- To avoid distortion of competition and the functioning of the internal market by helping to discourage the phenomenon of "pollution havens"
- To help avoid the costs of non-implementation and legal uncertainty
- To help avoid the costs of infringement proceedings by the Commission against Member States
- To help avoid the costs of national court cases, assuming that there would be further national and EU level litigation to establish the implications of the CJEU's case law

21/5/2014 = old proposal withdrawn

Currently work on a new proposal

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Background

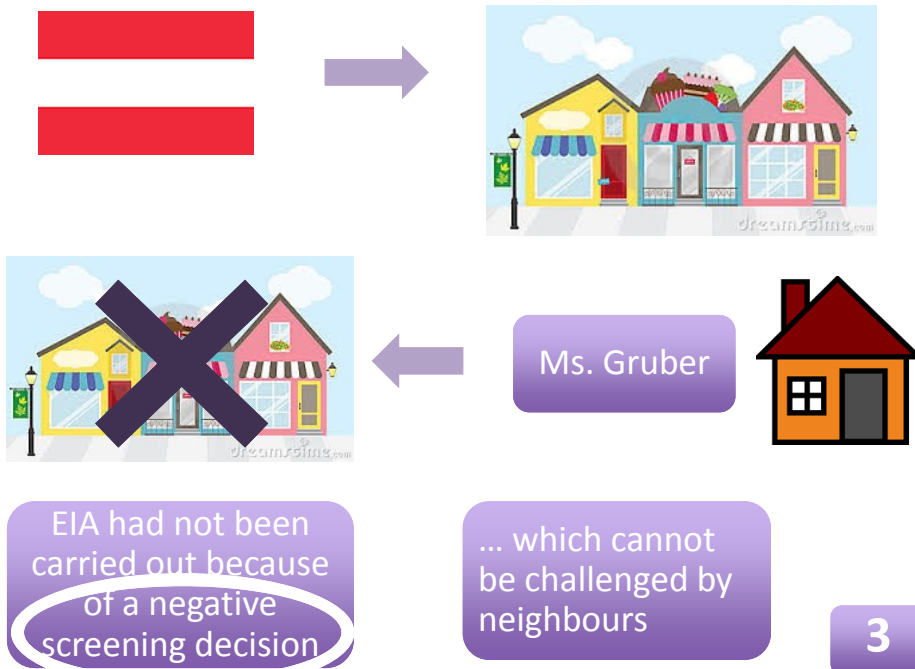
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Art. 11 EIA Directive (cf. Art. 9(2) Aarhus Convention)

Member States shall ensure that [...] members of the **public concerned**:

- (a) having a **sufficient interest**, or alternatively,
- (b) maintaining the **impairment of a right**, where administrative procedural law of a Member State requires this as a precondition, have access to a review procedure to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the Directive.

What constitutes a sufficient interest and impairment of a right shall be **determined by the Member States**, consistently with the objective of giving the public concerned **wide access to justice**.



Ruling of the Court of Justice

- Member States are free to choose for an interest model or a right model...
- ... but the rules have to be compatible with 'wide access to justice'



Ms. Gruber



By not allowing neighbours to challenge a negative EIA screening decision, 'wide access to justice' for 'public concerned' is not ensured

Ruling of the Court of Justice

... and this lack is not compensated by the possibility for neighbours to raise objections during the consent procedure (→ EIA has a different purpose)



Ms. Gruber



By not allowing neighbours to challenge a negative EIA screening decision, 'wide access to justice' for 'public concerned' is not ensured

Access to justice in EIA Directive still an issue

- *Gruber* in line with *Trianel* and *Djurgarden*
- ... but first time about neighbours
- EIA can be integrated into consent procedures but its aim must be respected

Practice what you preach?

- The Court of Justice is very vigorous when it comes to access to justice at national law (*Trianel, Edwards...*)
- Intervention of Compliance Committee is necessary for EU level

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Thank you for your attention!

Comments, questions, remarks and suggestions are welcome at m.eliantonio@maastrichtuniversity.nl

