

Notifying new risks in view of freedom of expression: in search of a legal framework

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Problem definition

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- ENGO'S and individual citizens act as **watchdogs** for environmental protection

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- Information and use of the “**court of public opinion**” are important tools

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- However, information may be hard to get
-> **access to environmental information?**

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- In cases of new risks -> speculation of potential dangers
-> **freedom of expression ?**

How to get relevant information?

- Aarhus Convention, First Pillar:
Access to Environmental Information
- Three conditions:
 1. Request by **the public**
 2. Request for **environmental** information
 3. Held by a **public authority**
 - Traditional public authorities
 - Public administrative functions
 - Public responsibilities that relate to the environment

Limits to the right

- Grounds of refusal
 - Confidentiality of commercial and industrial information
 - > Defined by EU / national law
 - Course of justice or ability to receive a fair trial
 - > To protect parties in ongoing proceedings
- Application of these grounds
 - Restrictive interpretation
 - Transparency and confidentiality (balancing act)

Court of Justice of the EU

(23 November 2016)

- Has provided important judgments regarding “emissions in the environment”: is not limited to industrial emissions, but includes influences on the environment coming from products (C-442/14)
- Still some balancing required (even in the case of emissions in the environment” regarding the protection of business secrecy (C-673/13)

Having access to information as provided by the Aarhus Convention is not enough

- The Aarhus Convention does not regulate WHAT may be done with the information
- The Aarhus Convention does also not regulate WHAT may be done in case information simply does not exist (such as in case of new risks)
- Moreover, there is no legal right provided in the Aarhus Convention for the public to request directly with the polluters information held by them

Seeking the 'court of public opinion'

- Notifying potential harm to the environment through traditional and modern media
- Faming, blaming and shaming strategies (explicitly or implicitly)
- Which may result in economic and / or reputational damage

Aarhus Convention 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”.
- -> the use of information to influence the court of public opinion is not regulated in the Convention

European Convention on Human Rights

- **Freedom of expression**, recognized also for informal groups
- Although necessity of free speech is clearly recognized, it is not unlimited
- > **legal uncertainty**
- This is particularly relevant in cases of **speculation** (new risks, no scientific evidence)

Conclusion

- Not much attention yet to the questions of *how information may be used, and to what extent gaps in information may be filled in by speculation notified then to the public.*
 - This matter is not regulated by the Aarhus Convention,
 - The ECHR gives some important protection, but not much case law;
- Does the precautionary principle imply that ENGOs have a possibility of pointing at (new) risks that cannot be proofed, and, consequently, do they have the right to influence the court of public opinion in such a way that the economic position of operators will be influenced while not having sufficient proof?
Further discussion on the legal position of this matter by the parties to the Aarhus Convention ?