

EU climate law through the lens of the Aarhus Convention

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Summary

It is now scientifically proven that humans' activities interfere with the climate system.¹ One of the consequences of the increase of greenhouse gas emissions in the Earth's atmosphere is climate change. The fact that humans contribute to climate change raises the question how the public engages in the decision making on measures to tackle climate change. Based on this premise, this thesis investigated to what extent rights of access to environmental information and participation in governmental environmental decision making have to be provided for individuals and ENGOs at the EU level in the field of EU climate change law in the light of international treaty law, more particularly the UNFCCC and the Aarhus Convention. In order to answer this question, the thesis was divided into four main chapters, which break down the main research question into sub-questions.

Chapter II examined the legal framework established by the UNFCCC for access to information and public participation in climate change decision making and explored the obligations they entail for the Parties. Article 6 of the UNFCCC provides an obligation for the Parties to the UNFCCC to promote and facilitate access to information and public participation in climate change decision making. A textual and systematic interpretation revealed that these obligations require the Parties to make an effort towards promoting and facilitating public access to information and public participation, without including any targets or clear and specific commitments. Therefore, the obligations contained in Article 6 are obligations of effort. In addition to examining Article 6 itself, the decisions establishing the work programmes on Article 6 of the UNFCCC adopted by the Conference of the Parties (CoP) were examined to investigate whether the content of these decisions gives more body to Article 6 of the UNFCCC. This thesis identified that the obligations contained in Article 6 of the UNFCCC do not have clear and specific commitments, which renders the provision lacking a precise result to be achieved. Furthermore, the agreements adopted under the umbrella of the UNFCCC were examined, since they potentially could provide for further commitments. This thesis concluded that neither Article 10(e) of the Kyoto Protocol nor Article 12 of the Paris Agreement provide elements that make the general obligations of Article 6 of the UNFCCC more concrete. In sum, all the relevant international provisions analysed in Chapter II were thus regarded as obligations of effort and there are no clearly identifiable results that need to be achieved by the Parties.

¹ The IPCC stated: "It is *extremely likely* that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in GHG concentrations and other anthropogenic forcings together." Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report. Summary for Policymakers*, 2014b, https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf, p. 5.

Chapter II demonstrated that there are no precise legal commitments under the UNFCCC. However, the EU is also a Party to a regional agreement on procedural rights: the Aarhus Convention (AC). In this vein, Chapter III studied the legal framework established by the Aarhus Convention and its relationship with climate change, followed by the implementation of the Aarhus Convention at the EU level. Although there is no mention of the term *climate change* in the text of the Aarhus Convention, the interpretation of the definition of environmental information demonstrates that the term *environmental* encompasses the climate change phenomenon.

The framework for access to environmental information of the Aarhus Convention provides for explicit commitments as to what has to be done by public authorities. Therefore, the commitments contained in these provisions can be characterised as obligations of result. This means that the Parties have to achieve a specific result, ensuring that their public authorities provide upon request (Article 4) and disseminate environmental information (Article 5). At the EU level, the implementation of the provisions has taken place via the Aarhus Regulation, which should be read in combination with Regulation 1049/2001 regarding requests for environmental information. Concerning access to environmental information, it was concluded that the provisions of the Aarhus Regulation are mostly in compliance with the Aarhus Convention. However, regarding the implementation of the exceptions to the obligations to provide access to environmental information upon request, the analysis revealed that the EU requirements impose more limitations than those allowed by the Aarhus Convention.

The obligations contained in Article 6 of the Aarhus Convention establishing public participation in decisions on specific activities can be generally characterised as an obligation of result. Nevertheless, the explanatory memorandum to the Aarhus Regulation's proposal clarifies that there are no measures related to specific activities which are taken at the EU level. As a consequence, the provision was not transposed. It was shown that this approach is controversial, since some EU decisions may amount to decisions on specific activities within the scope of application of Article 6 of the Aarhus Convention. Article 7 of the Aarhus Convention on public participation concerning plans, programmes and policies relating to the environment establishes two separate regimes for public participation. First, parts of the requirements contained in Article 6 of the Aarhus Convention apply to ensure participation during the development of plans and programmes. This first part of Article 7 of the Aarhus Convention is characterised by an obligation of result. The second part, for policies, Parties are only required, to the extent appropriate, to endeavour to provide opportunities for public participation. This weak and imprecise formulation, which fails to explain the exact result to be achieved, makes the second part of Article 7 of the Aarhus Convention an obligation of effort. The Aarhus Regulation only provides for public participation concerning plans and programmes. Article 8 of the Aarhus Convention concerning public participation during the preparation of executive regulations and/or generally applicable legally binding normative

instruments does not require parties to achieve effective public participation and it is also characterised as an obligation of effort. There is no implementation of Article 8 of the Aarhus Convention at the EU level, since the European Commission understood that Article 8 does not provide any legally binding requirement. However, Article 8 creates an obligation to make efforts to achieve effective public participation, and this obligation applies to the EU institutions and bodies.

Chapters IV and V delved into the question of how the EU legal framework provides for access to information and public participation in the context of acts adopted at the EU level under two core instruments of the EU climate policy, namely the EU ETS Directive (Chapter IV) and the recognition of voluntary schemes for assessing the sustainability of biofuels under the Renewable Energy Directive (Chapter V).

Chapter IV analysed the EU ETS Directive in view of: (i) legal requirements for access to environmental information and public participation in the decision making for acts adopted under the EU ETS Directive; and (ii) the compatibility of this framework with requirements imposed by the Aarhus Convention.

Chapter IV identified that there is a general regime for access to environmental information under the EU ETS. Despite the existence of specific provisions on access to information, their limited scope cannot cover all the possible requests for information under the EU ETS. Therefore, an investigation through the existing CJEU case law on access to environmental information was carried out, particularly in view of how the Aarhus Regulation is applied with regard to such requests. Hence, the analysis of the case law built further on the definition of environmental information and on the limits of the grounds for a refusal to disclose environmental information. These cases revealed that: (i) a great number of EU ETS-related information potentially falls within the definition of environmental information; and (ii) the grounds for refusal have to be interpreted in a restrictive way, to ensure the right of access to environmental information.

The EU ETS Directive does not have a general provision on public participation, which would apply to all decisions to be taken under this Directive. Therefore, it was investigated whether public participation requirements could be derived from specific provisions under the EU ETS Directive. This investigation revealed that public participation is not required by the EU ETS Directive for the adoption of most acts. It was also demonstrated that the Aarhus Regulation does not impose any obligation regarding public participation for the acts adopted under the EU ETS Directive. Further, it was examined whether there is nevertheless an obligation under the Aarhus Convention for the Commission to provide for public participation in the decision making process under the EU ETS. The analysis demonstrated that these acts qualify as *executive regulations and other generally applicable legally binding normative instruments*, because they are acts of general application, as their addressees are

not determined or determinable.² Furthermore, considering their size, location and potential effects on the environment, they have a *significant effect on the environment*. Therefore, they fall under the scope of application of Article 8 of the Aarhus Convention and, as a consequence, there is a legal obligation for the Commission to strive to promote public participation. According to the 2017 Better Regulation Guidelines, stakeholders can provide feedback on the draft of implementing and delegated acts, which encompasses most of the acts adopted by the Commission discussed in chapter IV. This could amount to compliance with Article 8 of the Aarhus Convention when implementing and delegated acts are adopted. However, the acts adopted by the Commission acting alone would not be covered and, therefore, no compliance with Article 8 of the Aarhus Convention could be achieved. Moreover, Article 8 of the Aarhus Convention does not provide for any exception to the rule that the drafts should be subject to public participation, and it requires that the timeframe should be sufficient for effective participation, while the Better Regulation Guidelines provides for the application of exceptions and no flexibility regarding the time-frame. Therefore, the Guidelines, *per se*, cannot guarantee that the EU fully complies with Article 8 of the Aarhus Convention. In light of the conclusions reached in Chapter IV, it can be argued that public participation under the EU ETS could be strengthened if the EU ETS Directive contained a specific provision on public participation.

Chapter V assessed the regime of access to biofuel-related information and public participation in decision making for the recognition of biofuels voluntary schemes at the EU level in view of the Aarhus Convention requirements. The European Commission is empowered by the Renewable Energy Directive to recognise voluntary schemes as capable of checking for compliance with the EU's biofuels sustainability criteria. Only the biofuels that fulfil certain sustainability criteria established in the RED count towards national renewable energy targets. It was found that biofuel-related information is environmental information and that the European Commission, the evaluator/contractor and the voluntary schemes themselves are public authorities according to the Aarhus Convention, and therefore these entities are under the obligation to disclose information. However, the case law of the CJEU revealed that the European Commission did not respect the prescribed timeframe for providing environmental information. Regarding public participation, the findings have shown that there is no legal framework for public participation in the recognition of voluntary biofuels schemes at the EU level. The examination of the participatory rights of the Aarhus Convention, which are laid down in Articles 6, 7 and 8 of the Aarhus Convention, revealed that the decisions on the recognition of voluntary schemes and the decisions on the certification of biofuels may be interpreted as decisions on proposed activities which may have a significant effect on the environment for the purposes of Article 6(1)(b) of the Aarhus

² These non-legislative acts took the form of a regulation or decision. Regulations and decisions are among the legal instruments available to the European institutions to exercise the Union's competences, according to Article 288 TFEU. How they are adopted defines whether they are a legislative act or not.

Convention, and they are therefore subject to the most precise set of requirements for public participation provided by the Aarhus Convention.

Overall, this thesis has shown that there is a need for a more consistent and clearer legal framework which should ensure access to climate change-related information and participation in climate change decision making. Climate change challenges will become ever more pressing in the coming years and the analysis of two EU measures from a procedural rights perspective provided some insight into how puzzling access to environmental information and public participation can be in the context of the new regulatory measures adopted to tackle it.