

SCELG

STRATHCLYDE CENTRE FOR
ENVIRONMENTAL
LAW & GOVERNANCE

POLICY BRIEF

No. 6, November 2016

Rights protected under EU law concerning the environment

Elisa Morgera
Antonio Cardesa-Salzmann
Aileen McHarg
Miranda Geelhoed
Maria Ntona

The integrated and inter-disciplinary research conducted by the **Strathclyde Centre for Environmental Law and Governance (SCELG)** seeks to address real-world knowledge gaps in partnership with government institutions, NGOs, private institutions and local communities. Our researchers hold considerable expertise in the fields of national, EU and international environmental law, with regard to, among others, biodiversity, land, food and agriculture climate change and energy, corporate accountability, environmental justice, water and oceans, human rights and sustainable development.

For more information, visit:
<https://www.strath.ac.uk/scelg/>

Rights protected under EU law concerning the environment

Elisa Morgera, Antonio Cardesa-Salzmann, Aileen McHarg, Miranda Geelhoed and Maria Ntona

Strathclyde Centre for Environmental Law and Governance (SCELG)

With contributions from

Mark Poustie (SCELG), Apolline Roger (University of Sheffield), Malcolm M. Combe (University of Aberdeen) and Annalisa Savaresi (University of Sterling)

The key rights protected under EU law in the area of environment, energy and sustainability are the so-called “**procedural environmental rights**”: access to environmental information, public participation in environmental decision-making, and access to justice in environmental matters.

EU law on procedural environmental rights is heavily interlinked with two international treaties to which the UK is a party: the *Aarhus Convention on the Access to Information, Public Participation and Access to Justice in Environmental Matters*¹ and the *European Convention on Human Rights* (ECHR). The following sections identify the **risks** arising from Brexit in light of the interplay between EU law and these two treaties (1-2), and the **benefits** of procedural environmental rights as protected under EU law (3).

1 Risks with regard to EU law vis-à-vis the Aarhus Convention

To a great extent, EU law on procedural environmental rights aims to implement the Aarhus Convention with regard to:

- Access to environmental information (with provisions on access to justice);²
- Public participation in environmental impact assessments of public and private projects and in permitting processes relation to industrial installations (with provisions on access to justice);³ and
- Public participation in strategic environmental assessment of plans and programmes.⁴

The EU legislator, however, has been unable to contribute more significantly to the implementation of the Aarhus obligations related to access to justice (notably, in relation to judicial and administrative review proceedings to challenge acts and omissions by public authorities that contravene environmental law). This is due to lack of progress on the Commission’s proposal for a directive implementing the relevant provisions of the Aarhus Convention at the Member State level.⁵ Nevertheless, the EU judiciary has indicated that national regulations on access to justice in environmental matters need to be interpreted so as to give full effect to the standards of the Convention and avoid making the exercise of the right impossible, or excessively difficult, in practice.⁶ In addition, the EU legislator has inserted provisions on public participation in environmental decision-making in certain pieces of sectoral EU environmental

² Directive 2003/4/EC; see also Regulation (EC) No 1049/2001 and EU Charter Art. 42.

³ Directive 2011/92/EU (codification) and Directive 2010/75/EU.

⁴ Directive 2001/42/EC. Note that this Directive was not amended in light of the Aarhus Convention, but already contained provisions on public participation.

⁵ COM (2003) 624 final.

⁶ Case C-240/09 – *Lesoochránárske zoskupenie*, paras 46-51.

¹ Out of 49 State parties to the Aarhus Convention, 29 are EU Member States, and the EU itself is also a party.

law, albeit in an uneven manner.⁷ A much more detailed analysis will be required to determine if and to what extent different pieces of sectoral EU environmental law add to the implementation of the Aarhus Convention.

While international obligations on environmental procedural rights are binding upon the UK as a party to the Aarhus Convention independently of EU law, the main risk arising from Brexit in this connection is losing the “**hard, enforceable edge**” that EU law provides to the Aarhus Convention’s provisions, including through the **clarification of the sometimes equivocal language used in it**.⁸ It is worth noting that compliance with the obligations foreseen by the Aarhus Convention is ensured by the Aarhus Convention Compliance Committee (ACCC), which is a quasi-judicial body that issues non-binding recommendations. However – especially once they are endorsed by the Meeting of Parties to the Convention – the ACCC recommendations are considered authoritative interpretations of the treaty provisions, which must be taken into account by domestic authorities and courts in the interpretation and implementation of the Convention,⁹ as confirmed also by the UK Supreme Court.¹⁰

The UK has been involved in the highest number of non-compliance cases considered by the ACCC,¹¹ which has identified persistent problems with regard to the prohibitive expense of access to justice in environmental matters. The ACCC found different aspects of the costs regime in England and Wales to be either

“prohibitively expensive”¹² or “unfair and inequitable,”¹³ noting that “in determining the allocation of costs in a given case, the public interest nature of the environmental claims under consideration [was] not in and of itself given sufficient consideration.”¹⁴ The role of the EU judiciary in this connection has thus been very significant. It has, *first*, clarified the obligations of the Convention. Upon a preliminary reference from the UK Supreme Court, the Court of Justice of the EU clarified how to evaluate the prohibitive effect of litigation costs, by stating that “the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.”¹⁵ In making such an assessment, national courts must take into account a number of factors, including the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, and the existence of a national legal aid scheme or a costs protection regime. *Second*, the European Commission brought infringement proceedings against the UK,¹⁶ which together with the ACCC recommendations and two seminal reports prepared by members of the senior judiciary (the Sullivan¹⁷ and Jackson¹⁸ reports) led to a broad-ranging reform of the England and Wales costs regime in 2013. The resulting ‘Jackson reforms’, however, have still been criticised for failing to fully address the issue of costs in cases relating to the Aarhus Convention.¹⁹

The procedural rules governing judicial review in England and Wales are different from those

⁷ Compare public participation under Directive 2000/60/EC (“Water Framework Directive”) to narrow participation under licensing scheme managed by EU bodies, e.g. GMO authorisation. M. Lee, ‘Experts and Publics in EU Environmental Law’ in A. Arnulf and D. Chalmers (eds), *The Oxford Handbook of European Union Law* (2015) 991, pp. 1008-9.

⁸ M. Lee, *EU Environmental Law, Governance and Decision-Making* (2014), p. 160.

⁹ Decision I/7 Annex XII-37 (UN Doc ECE/MP.PP/2/Add.8).

¹⁰ *Walton v. Scottish Ministers* [2012] UKSC 44 per Lord Carnwath, para. 100: “Although the Convention is not part of domestic law as such (except where incorporated through European directives), ...the decisions of the Committee deserve respect on issues relating to standards of public participation.”

¹¹ 17 admissible communications have thus far been considered by the ACCC concerning the UK, while the party with the second highest number of cases has 5: <http://www.unece.org/index.php?id=35289>.

¹² ACCC/C/2008/27, paras 42-45; ACCC/C/2008/33, paras 128-136; ACCC/C/2008/77, paras 72-77 of the Committee’s draft findings; ACCC/C/2013/85 and ACCC/C/2013/86, paras 113-122 of the Committee’s draft findings.

¹³ *Ibid*; ACCC/C/2008/23, paras 48-52.

¹⁴ ACCC/C/2008/33, para 129.

¹⁵ Case C-260/11 – *Edwards and Pallikaropoulos*, para 40.

¹⁶ Case C-530/11 – *Commission v United Kingdom*. It should, however, be mentioned that the case was decided after the introduction of the Jackson reforms.

¹⁷ Ensuring access to environmental justice in England and Wales, Report of the Working Group on Access to Environmental Justice (May 2008).

¹⁸ Lord Justice Jackson, Review of Civil Litigation Costs: Preliminary Report (May 2009).

¹⁹ UK fails Aarhus compliance test (New Law Journal, 17 February 2014). Available online at: <http://bit.ly/2dAmjcx>; DEFRA, Decision V/9n concerning compliance by the United Kingdom with its obligations under the Aarhus Convention, Second Progress Report (13 November 2015), paras 3-12.

in Scotland, therefore the ruling of the Court of Justice of the EU (CJEU) did not extend to Scotland, yet similarities are evident.²⁰ The Courts Reform Scotland Act 2014, following the Lord Gill's Scottish Civil Courts Review,²¹ addresses some issues in the Scottish court system, which are similar to those in the other British nations. The reform establishes a permission stage;²² a statutory confirmation of the 'sufficient interest test' for standing developed under common law,²³ which allows for actions to be raised in the public (rather than individual) interest. Furthermore, it seeks to enhance legal certainty by setting a clear three-month time limits for supervisory jurisdiction, albeit a longer period may apply "as the Court considers equitable having regard to all the circumstances".²⁴ Additionally, rules on Protective Expense Orders (PEOs) in environmental matters entered into force in March 2013,²⁵ with specific references to the Aarhus Convention included in January 2016.²⁶ Yet, there is still scope for improvement. NGOs have raised concerns regarding the fact that "Scottish courts have not been quick to apply [the new standing test]," and that the time limit may be too stringent.²⁷ In addition, legal aid

²⁰ In 2014, the Meeting of the Parties to the Aarhus Convention adopted Decision V/9n on compliance by the UK, which referred to two non-compliance cases relating to Scotland: ACCC/C/2010/53 and ACCC/C/2012/68. Accordingly, the progress reports that are submitted to the ACCC by DEFRA include updates on any amendments made to the Scottish regime with a view to ensuring compliance with the Convention. See also Steve Peers, 'Europe to the Rescue? EU Law, the ECHR and Legal Aid' in Palmer et al, *Access to Justice: Beyond the Policies and Politics of Austerity* (2016).

²¹ Scottish Civil Courts Review (*Crown Copyright* 2009) <<http://tinyurl.com/hv43d6h>>.

²² Article 27B Court of Session Act 1988 (following section 89 of the Courts Reform Scotland Act 2014).

²³ E.g. *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46.

²⁴ Article 27A Court of Session Act 1988 (following section 89 of the Courts Reform Scotland Act 2014).

²⁵ Act of Sederunt (Rules of the Court of Session (Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013, SSI 2013/81. About which T Mullen, 'Protective Expenses Orders and public interest litigation' (2015) 19(1) *Edinburgh Law Review* 36.

²⁶ Rules of the Court of Session 1994 Amendment (No. 4) (Protective Expenses Orders) 2015, with specific reference to Article 6 of the Aarhus Convention. M Wright, 'Access to Justice in Scotland and the Aarhus Convention. Is Scotland fulfilling its obligation to provide access to justice in environmental matters under Article 9 of the Aarhus Convention?' (University of Edinburgh Dissertation 2016).

²⁷ Evidence to the Scottish Parliament Justice Committee on the Courts Reform (Scotland) Bill' (*Friends of the Earth*, 13 March 2014).

remains largely unavailable for most environmental cases. Furthermore, the general rule that the losing party in court proceedings must bear the costs of the successful party also applies to public interest litigation and amendments for broader and more inclusive rules on PEOs are still considered necessary.²⁸ Overall, these procedural hurdles still create some uncertainty and unaffordability that hinders recourse for many individuals, NGOs and communities, although Scotland has made steps forward.²⁹

In conclusion, the main risks arising from Brexit for Scotland are:

- **The potential lowering of standards in the domestic implementation of the Aarhus Convention if changes are made to existing legislation implementing EU law on procedural environmental rights, particularly with regard to access to environmental information and (to a certain extent) public participation in environmental decision-making and access to justice; and**
- **the loss of the EU's "hard enforcement" infrastructure to ensure compliance with relevant EU law, as well as the obligations under the Aarhus Convention.**

²⁸ G. Parihar, UK Compliance with Decision V/9n of the Meeting of the Parties, Statement made to the Aarhus Convention Compliance Committee on behalf of the 'Royal Society for the Protection of Birds' and 'Friends of the Earth' groups in England and Wales, Northern Ireland and Scotland (9 March 2016).

²⁹ B. Christman, Scotland needs a wider debate over environmental justice (Holyrood, 14 September 2016). Available online at: <http://bit.ly/2cIGdlv>. See also B. Christman (2014) *The Poor Have No Lawyers: Scotland's Non-Compliance with the Access to Environmental Justice 'Pillar' of the Aarhus Convention*, *King's Inns Student Law Review* 4, pp. 105-132; G. Parihar, UK Compliance with Decision V/9n of the Meeting of the Parties, Statement made to the Aarhus Convention Compliance Committee on behalf of the 'Royal Society for the Protection of Birds' and 'Friends of the Earth' groups in England and Wales, Northern Ireland and Scotland (9 March 2016).

2 Risks with regard to EU law vis-à-vis the European Convention on Human Rights

The EU Charter of Fundamental Rights has an environmental provision,³⁰ which enshrines a principle for public authorities to integrate a high level of environmental protection into other (non-environmental) policies. This principle, however, does not amount to an individually justiciable substantive right to environmental protection.³¹

Nevertheless, other provisions in the EU Charter³² must be read as incorporating the **procedural environmental rights** that have been recognised under the ECHR³³ by the European Court of Human Rights (ECtHR), namely:

- A right to effective and accessible procedures to enable individuals to seek all relevant and appropriate environmental information, and to participate in environmental decision-making, when their right to life, or/and their right to respect for private and family life, are threatened;³⁴
- A right to access to justice and an effective remedy in environmental matters.³⁵

There is therefore significant overlap in terms of procedural environmental rights among the EU Charter, the ECHR and the Aarhus Convention.³⁶ In addition, the EU Charter must be read as incorporating obligations concerning **certain substantive standards of environmental protection** that have been recognised by the ECtHR in relation to the protection of:

- the right to life, which has been interpreted as placing a positive obligation on States to protect individuals' life from dangerous activities, such as nuclear tests, the operation of chemical factories with toxic emissions or waste-collection sites, whether carried out by public authorities or by private companies;³⁷
- the right to respect for private and family life, which has been interpreted as giving rise to a positive duty for States, under certain circumstances, to protect individuals from environmental factors that directly and seriously affect their private and family life, or their home,³⁸ and
- the right to property, which has been interpreted as imposing a positive obligation on States to put in place environmental standards necessary to protect individuals' peaceful enjoyment of their possessions.³⁹

These rights are already the object of international obligations binding upon the UK as a party to the ECHR, and in the case of procedural environmental rights, also under the Aarhus Convention. But their recognition under the EU Charter, which has now the same legal strength as the highest instruments of EU law⁴⁰ and takes precedence over all other sources of domestic law, results in a stronger **remedy** against incompatible acts of UK public authorities within the domestic legal system: if a case can be brought under the EU Charter, rather than the Human Rights Act - which incorporates most ECHR rights⁴¹ - the offending law can (effectively) be struck down (rather than merely declared incompatible).⁴² This implication does not have extensive relevance for Scotland, in that the Scottish Parliament and the Scottish Government are absolutely prohibited from acting in breach of the ECHR

³⁰ EU Charter Art. 37.

³¹ G.M. Duran and E. Morgera, 'Commentary to Article 37 – Environmental Protection' in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *Commentary on the EU Charter of Fundamental Rights* (2014) 983.

³² EU Charter, Arts 2, 7, 11, 17, 42 and 47.

³³ EU Charter, Art. 52(3).

³⁴ ECHR Art. 10, 2 and 8: Council of Europe, *Manual on Human Rights and the Environment – Principles derived from the Case law of the European Court of Human Rights* (2012, 2nd edition), pp. 76-85.

³⁵ ECHR Arts. 6(1) and 13: Council of Europe (n 34 above), pp. 94-109.

³⁶ A significant overlap in the membership of the Aarhus Convention and that of ECHR has deeply influenced the ECtHR's interpretation of key provisions in the ECHR in order to provide consistency and mutual supportiveness with the Aarhus Convention, even for those parties that have not ratified the latter.

³⁷ ECHR Art. 2: Council of Europe (n 34 above), pp. 35-41.

³⁸ ECHR Art. 8: Council of Europe (n 34 above), pp. 44-60.

³⁹ Protocol No. 1 to the ECHR, Art. 1: Council of Europe (n 34 above), pp. 62-73.

⁴⁰ TEU Art. 6(1).

⁴¹ But not all: for instance, ECHR Art. 13, mentioned above as one of the ECHR rights used to recognise access to justice in environmental matters, is not.

⁴² *Benkharbouche & Anor v Embassy of the Republic of Sudan* [2015] EWCA Civ 33, 5th February 2015. Note Protocol on the Application of the Charter of Fundamental Rights of the EU to Poland and the UK, Article 1(2).

under the Scotland Act 1998,⁴³ so their incompatible acts would be declared invalid without the need to bring a case under the EU Charter. Nonetheless, the implication for the UK are relevant for Scotland to the extent that reliance on the EU Charter can serve to declare invalid acts that are incompatible with relevant ECHR rights in environmental matters that are reserved (several powers related to energy, for instance) or are still governed by UK legislation (that is, issues may be devolved, but the Scottish Parliament has not yet legislated on them).

Overall, the main risks arising from Brexit for Scotland are:

- **the loss within the domestic legal system of a stronger remedy (disapplication) against acts violating EU Charter/ECHR rights in environmental matters that are reserved or are still governed by UK legislation;**
- **the loss of the EU's "hard enforcement" infrastructure to ensure compliance with the EU Charter/ECHR environment-related rights. While, post-Brexit, the European Court of Human Rights would still provide a harder enforcement system than the Aarhus Convention for procedural environmental rights, the ECtHR entails additional complexities (exhaustion of domestic judicial remedies, standing of NGOs, etc.).⁴⁴**

It should be noted, in concluding, that EU law has not contributed significantly to implementing international obligations related to *substantive* standards of environmental protection as a *matter of* human rights, and that the role of EU enforcement in connection with the substantive dimensions of the EU Charter/ECHR rights is speculative at present, if not to be excluded for the UK.⁴⁵ Note in this connection also the UK Declaration to the Aarhus Convention:

⁴³ Section 29(2)(d).

⁴⁴ Note that the ACCC procedure may also be triggered by the public, i.e. any 'natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups.'

⁴⁵ Protocol on the Application of the Charter of Fundamental Rights of the EU to Poland and the UK, Article 1(1).

The United Kingdom understands the references in article 1 ... to the 'right' of every person 'to live in an environment adequate to his or her health and well-being' to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.⁴⁶

3 Benefits of environmental procedural rights

Procedural environmental rights provide several benefits to the public. They serve to:

1. raise awareness of the state of the environment and possibly motivate behavioural change;
2. facilitate gathering of information for sounder environmental decision-making, which in turn likely increases legitimacy of, and buy-in into, resulting decisions;
3. facilitate accountability of government and others (including private entities, to some extent) as regards environmental protection throughout the policy process, with increased scrutiny likely to lead decision-makers to give greater weight to environmental considerations and adhere more closely to environmental policy and law); and
4. enable improved implementation and enforcement of environmental law (in a climate of limited State resources and given the widespread nature of environmental harm), by empowering the public to control public authorities' environmental decisions and protect their rights dependent on a healthy environment which may be/have been affected by the proposed decision.⁴⁷

Accordingly, procedural environmental rights are key to **empower the public and environmental NGOs to hold the State**

⁴⁶

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en.

⁴⁷ C. Kimber, 'Understanding Access to Environmental Information: The European Experience,' in T. Jewell and J. Steele (eds), *Law in Environmental Decision-Making: National, European and International Perspectives* (1998) 139, pp 142-143.

accountable for inadequate levels of environmental protection, and to enforce compliance with existing environmental standards. Such “private enforcement” of environmental law will become even more important post-Brexit, due to the loss of the EU’s strong enforcement powers, which have been a significant factor in the raising of environmental standards in the UK. But, equally, Brexit will put to an end the use of EU enforcement powers to ensure compliance with the UK’s international obligations regarding procedural environmental rights.