

Who is not to have an interest
– on participatory rights and access
to justice for individuals



HELLE TEGNER ANKER
UNIVERSITY OF COPENHAGEN

A2J and participatory rights



- **Who** has access/standing?
 - Individuals v ENGOs
 - Sufficient interest or impairment of a right
- **What** can be reviewed (and how)?
 - Legality (substantive and procedural) v merits
- **Why** A2J regarding participatory rights?
 - Is (further) "judicialisation" of participatory rights the right way forward?



Participatory v substantive rights



- **Participatory rights**
 - Linked to the process of decision-making, e.g. notification, examination, participation, reasoning etc.
 - Aarhus Convention
 - ✦ art. 6 (projects)
 - ✦ art. 7 (plans)
 - ✦ art . 8 (executive regulations)
 - EU law, e.g.
 - ✦ EIA + IE Directives (projects)
 - ✦ SEA Dir. + Dir. 2003/35 (plans and programmes)
- **Substantive rights**
 - Linked to the outcome of decisions, e.g. emission limits

A2J and participatory rights - regarding projects

- Aarhus Convention Art. 6 and 9(2)
- EIA Directive/IE Directive
- Who:
 - Members of **the public concerned** having
 - ✦ A sufficient interest..
 - ✦ Impairment of a right..
 - ✦ National criteria
 - But "wide access" and privileged status of ENGO's
- What:
 - Access to a review procedure before a court or another independent and impartial body established by law, **to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6..**

A2J and participatory rights - regarding plans

- Aarhus Convention Art. 7 + 9(3)
- No specific EU legislation on A2J
- Who:
 - Members of the public
 - ✦ National criteria
- What:
 - Access to administrative or judicial procedures to challenge acts and omissions....

Standing criteria for individuals

– art 9(2)

- National criteria:
 - Sufficient interest
 - ✦ Broad or narrow definition of "interest"
 - ✦ Dependent upon the subject matter
 - Impairment of a right
 - ✦ Broad or narrow definition of "rights"
 - ✦ Individual or subjective public-law rights (Schutznormtheorie)
 - Substantive rights, e.g. emissions hazardous to human health
 - Participatory (a.o. procedural) rights?
 - G.A. Kokott in C-570/13 Gruber
- A false dichotomy in relation to participatory rights?
- NB: the privileged status of ENGO's!
 - Deemed to have rights that are capable of being impaired (e.g. ACCC/C/2010/50 Czech Republic)

AAC Compliance Committee



- On participatory rights:
 - ..While narrower than the definition of “the public”, the definition of “the public concerned” .. is still very broad..(66); ... “(tenants..) should generally be considered to be within the definition of the public concerned.. (67)
 -environmental decision-making is not limited to the conduct of an EIA procedure, but extends to any subsequent phases of decision-making, such as land use and building permitting procedures... (ACCC/C/2010/50 Czech Republic)
- On art. 9(2) and individuals:
 - (criteria for standing..) cannot interpreted in a way that significantly narrows standing and runs counter to their general obligations.. (ACCC/C/2010/50 Czech Republic)
- On art. 9(3):
 - ”exercise self-restraint not to set too strict criteria... access should be the presumption not the exception” – primarily aimed at ENGOs or also at individuals? (C/2011/58 Bulgaria)

Standing criteria for individuals

– EU law

- National criteria on standing for individuals (re. projects)
 - C-115/09 Trianel:
 - ✦ “.. although the national legislature is entitled to confine to individual public-law rights the rights whose infringement may be relied on by an individual in legal proceedings ..., such a limitation cannot be applied as such to environmental protection organisations” (para. 45)
 - C-72/12 Gemeinde Altrip a.o.:
 - ✦ ” Article 10a of (the EIA Dir.) leaves the Member States significant discretion to determine what constitutes impairment of a right” (para. 50)
 - ✦ ..”may not make it in practice impossible or excessively difficult to exercise the rights conferred by that directive in order to give the public concerned wide access to justice..” (para. 46)
 - C-570/13 Karoline Gruber
- The principle of effectiveness of EU law (re. Art. 9(3))
 - ENGO’s v individuals?

C-570/13 Gruber

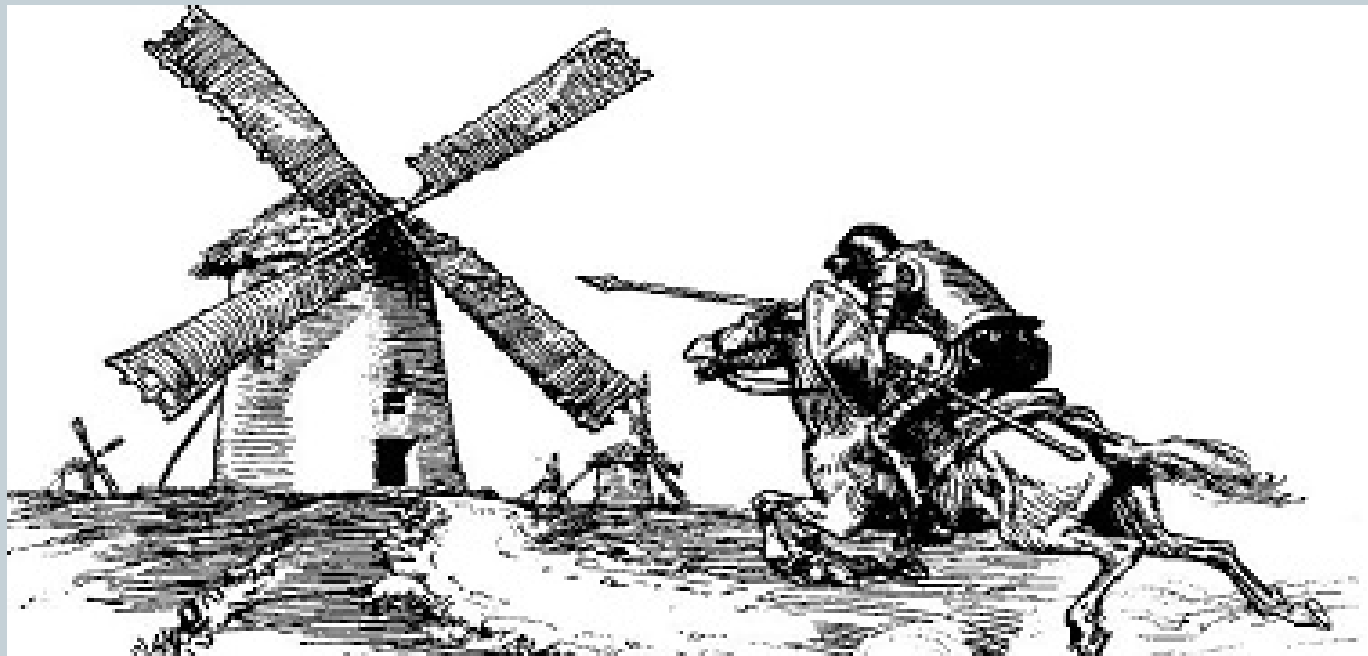


- Karoline Gruber was a neighbour who brought an action for annulment of a development consent for a retail park – in particular claiming the unlawfulness of an earlier decision that an EIA was not required. Gruber had not had access to challenge the EIA screening decision and the Austrian authorities claimed that it was now binding.
- CJEU:
 - MS have "a significant discretion to determine what constitutes sufficient interest or impairment of a right" (para. 38)
 - The rights of the members of the public concerned to bring action "cannot be interpreted restrictively" (para. 40)
 - .. (the Austrian legislation) "deprives a large number of individuals from exercising that right to bring an action, including, in particular, neighbours who may meet the conditions in Art. 11(1) of Directive 2011/92" (para. 42)... (such national legislation) cannot prevent an individual, who is part of the "public concerned".. and satisfies criteria laid down in national law re. "sufficient interest" or "impairment of a right", from contesting that administrative decision in an action brought against either that decision, or against a subsequent development consent decision."
 - ... does not limit the right of the Member State to determine what constitutes... a sufficient interest or impairment of a right...(para. 45)!

Implications re. A2J and participatory rights

- **The "public concerned"**
 - Neighbours (bordering properties) are definitely included
 - Also a larger number of individuals...
 - Some delimitation of "those affected" might be possible
- **National criteria re. sufficient interest/impairment of a right**
 - Very limited room for national discretion
 - A false dichotomy between sufficient interest and impairment of a right in relation to participatory rights
- **Who is not to have an interest?**

What can be reviewed?



Substantive and procedural *legality*



- *Legality v merits!*
- Procedural *legality*
 - E.g. information, consultation and participation procedures...
- Substantive *legality*
 - E.g. material error of fact, error of law, jurisdictional error, irrelevant considerations, failure to have regard to relevant considerations, proportionality... (ACCC.C/2008/33 UK)
- Merits
 - The discretionary elements of decision-making

Is A2J an effective measure re. participatory rights?



- Legality review rarely results in the desired change on the merits!
 - A stumbling block delaying - but not preventing projects?
 - Attempts to limit *de facto* A2J
- Is merits review the next step?
 - Participatory rights are often linked to discretionary decision-making, e.g. planning
 - But who is the decision-maker – the competent authority or the judiciary?
 - Are administrative appeal bodies/tribunals more appropriate?
- Is "judicialisation" of participatory rights the way forward?

Why A2J re. participatory rights?



- Should a right to participate in decision-making automatically result in a right to appeals/review?
- Why?
 - To enforce participatory rights?
 - To improve environmental decision-making?
 - To challenge the substance of the decision?
- Could other mechanisms be more appropriate?
 - Conflicts of interest
 - ✦ E.g. ADR and mediation
 - Conflicts of facts/environmental impact
 - ✦ E.g. expert panels regarding environmental impacts

Conclusions A2J for individuals...



- Important to distinguish between participatory (and other procedural) rights as opposed to substantive rights
- A2J re. participatory rights cannot be interpreted restrictively
 - Wide access also for individuals!
 - Who is not to have an interest?
- Need to reconsider whether wide A2J is an effective measure re. participatory rights or alternative measures can also be used.

THANKS

