Access to Public Participation: Unveiling the Mismatch Between What Law Prescribes and What the Public Wants

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Access to public participation: Unveiling the mismatch between what law prescribes and what the public wants

By Lorenzo Squintani and Goda Perlaviciute*

Abstract
This chapter investigates the manner in which public participation in environmental matters is organised under EU law throughout the decision-making chain and shows the infant stadium of development of the case law of the Court of Justice of the European Union in this area. Based on legal analysis and literature review, this chapter highlights the different requirements existing at the various levels of the chain and their interaction. It then unveils the potential mismatch that emerges when the legal requirements are looked at from the perspective of what people want, based on social sciences insights.

1. Introduction
This chapter looks at the relationship between public participation and acceptability of policies, plans and projects affecting the environment. Non-inclusiveness in public environmental procedures can fuel public resistance, especially in fields in which human activities are realised closed to living areas, as in the case of the building of renewable sources or infrastructural projects.

Public participation, defined as collaborative participation where policymakers invite citizens to discuss and decide together upon policies and projects affecting the environment, can offer a solution to improve the quality of decisions and their ability to generate consensus, and,

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thus, acceptability. Moreover, public participation is regarded as a pillar of environmental democracy under the Rio Convention. Besides, the Aarhus Convention establishes rights and obligations for its signatory parties in order to spur participatory democracy (Articles 6-8 of the Convention).

Both the EU and all of its Member States are party to the Convention, and indeed have adopted legislation to implement it, further discussed below. Discrepancy between the requirements of the Convention and the legal frameworks of certain Convention Parties have already been discussed in literature. Yet, empirical evidence suggests that the main problem with the implementation of the Convention does not regard the legal framework as such, but the manner in which it is applied in practice, even when procedural requirements are applied in an allegedly correct manner. A specific problem in this regard consists in the finding that, generally, only a small group of people can effectively participate in public environmental procedures. A multitude of studies has found that educational level, gender, ethnicity and age determine who participates in politics. Accordingly, Lee and Abbot warn about the risk that a small (even if larger than before) number of participants will wrap up important decisions. In this regard, McGuire warns about the risk that collaborative management could reinforce the so-called ‘democratic deficit’ by giving even more opportunities to influence and affect the outcome of decision-making procedures to those that have

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7 For an example from Belgium related to air quality, Wolf and van Dooren (2017) o.c.; for another example about renewable energy sources, S Akerboom, Between Public Participation and Energy Transition: The Case of Wind Farms (PhD thesis, Amsterdam 2018).
9 C Pattie, D Seyd and P Whiteley, Citizenship in Britain: Values, Participation and Democracy (CUP 2004).
already sufficient access and expertise in these fields. Squintani speaks openly of an Aarhus Paradox, under which the more participation takes place, the less democratic the decision-making process becomes. Transparency of governmental action is surely enhanced by public participation procedures, but the very foundation of democracy, ie that the government (kratos) is of the common people (demos), does not seem to be always enhanced. More generally, public participation procedures can in practice be little more than a ‘ticking the box’ exercise, meaning that procedural requirements are fulfilled but this does not lead to qualitatively better, more legitimate, and socially acceptable decisions.

This contribution highlights that also the legal framework as such can constrain the effectiveness of public participation procedures to reach acceptability. It shows that legal effectiveness, ie whether the EU legal framework is implemented, is not a guarantee for reaching acceptability of decision-making. In this regard, perceived procedural fairness is an important factor in reaching acceptability. To achieve perceived procedural fairness, public participation procedures must allow ‘early engagement’ of people in decision-making processes, and to give people a ‘real voice’, rather than merely informing or consulting the public, while failing to incorporate their input in the final decisions. This latter phenomenon is known as pseudo- or fake participation. Accordingly, this chapter analyses whether the legal framework contains features that could constrain perceived procedural fairness in public participation procedures.

To answer this question, this chapter first presents the legal framework, as developed by the EU on implementation of the Aarhus Convention (section 2) and as interpreted by the Court of Justice of

13 Akerboom (2018) o.c. 128 and 189.
17 C Pateman, Participation and democratic theory (CUP 1970).
the European Union (CJEU) (section 3). Then, this is compared with findings of empirical researches, mostly from social sciences, on the preferences of the public on how public participation in decision-making should look like (section 4). This analysis reveals that a mismatch may exist between what law prescribes and what the public wants, contributing to explaining low perceived procedural fairness and public resistance even when public participation procedures are in place.

It should be noted that in this contribution, despite the fact that public participation under the Aarhus Convention and the EU legal framework implementing it also covers the participation of environmental non-governmental organisations (ENGOs), we focus on the public participation of the general public and not on that specifically of ENGOs. ENGOs surely play an important role in environmental protection. Involving ENGOs in decision-making could enhance representation of certain public values and interests, in particular concerning the protection of nature and the environment; thereby increasing perceived procedural fairness and public acceptability of decisions. At the same time, there are other public values and interests besides those related to the protection of nature and the environment; inclusion of ENGOs in the decision-making is not enough to represent such multiple values and interests. Focusing only on ENGO’s participation to public participation procedures is therefore not enough to understand how truly inclusive public participation can prevent public resistance. For the study of the effects of representative groups on public acceptance, we therefore refer to the earlier studies mentioned at note 18.

2. The EU legal framework for public participation in environmental matters

2.1. General issues: A non-insignificant but lacunose legal framework

In general, public participation is explicitly envisaged under the democratic principles in the Treaty on European Union (TEU). Especially, Article 11(1) TEU states that the EU institutions shall give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action, including the environmental one. Further, section 3 of the same Article states that the Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent. A dedicated website indicates the ongoing internet consultation procedures about all EU initiatives. As regards environmental law in particular, the EU framework is further elaborated in light of Aarhus Convention, containing

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19 On the legal constraints coming from the principle of legality to including these other values in decision-making procedures, see L Squintani and others, ‘Conclusions: facts and feelings as catalysts for environmental administration 3.0’, in L Squintani and others (eds.), ch 10, pp. 203 and 204.

specific provisions regulating public participation in Article 6, regarding specific activities significantly affecting the environment, Article 7, on plans, programmes and policies, and Article 8, dealing with executive regulations and other generally applicable and legally binding rules.

The Aarhus Convention is a so-called ‘mixed agreement’, since both EU Member States as well as the EU itself are parties to the Convention. Under the EU hierarchy of norms, the provisions of the Convention rank higher than secondary law, but lower than the Treaties. For the Member States this means that the provisions of the Convention create effects in the legal orders of the Member States via the medium of EU law. Hence, the provisions of the Convention have primacy over conflicting national rules. Primacy does not only apply to those provisions of the Convention which have been translated into EU provisions embedded into EU secondary law. It also applies to those provisions which have not yet been implemented by the EU legislator.

This finding is relevant, as despite a non-insignificant body of EU measures to implement the Convention, lacunas are still present. First, the so-called Aarhus Regulation includes a provision, Article 9, to pursue compliance with the Convention as regards acts of EU institutions. However, nor the Regulation, nor other pieces of EU law, regulate public participation as regards specific decisions taken at EU level such as those on pesticides and biocidal products. Second, as regards EU law regulating public participation at national level, the main instrument to implement the Convention is provided for in the so-called Aarhus Directive. Also in this case, the implementation is not complete as in the case of certain plans and programmes that fall outside the

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22 Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2009] C 306/1 art 216(2); Case 104/81 Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.a. (Kupferberg) ECLI:EU:C:1982:362; Case C-344/04 International Air Transport Association and European Low Fares Airline Association v Department for Transport (IATA and ELFAA) ECLI:EU:C:2006:10, paras 35-6.
23 JMJ Zijlmans, De doorwerking van natuurbeschermingsverdragen in de Europese en Nederlandse rechtsorde (Sdu 2011), 45.
24 Idem 49.
25 Case C-240/09 Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Zoskupenie) ECLI:EU:C:2011:125.
scope of the Aarhus Directive and the Strategic Environmental Assessment (SEA) Directive,\(^{30}\) whereas they are covered by the Convention.\(^{31}\) For example, national plans for the developments of renewable energies covered by the Renewable Energy Directive\(^{32}\) are not covered by the SEA Directive or the Aarhus Directive, but are covered by the Convention.\(^{33}\) As regards the regulation on public participation at national level, also Articles 7(4) and 12 of the Environmental Liability Directive\(^{34}\) and Article 14 of the Water Framework Directive\(^{35}\) contain specific provisions on public participation. Yet, these provisions are less developed than those indicated under the Aarhus Convention.\(^{36}\)

This does not mean that the EU and its Member States do not have to comply with the Convention on these aspects. Decision 2005/370/EC has made the Convention part of the EU *acquis communautaire*.\(^{37}\) As mentioned above, this means that the Convention is, *in its entirety*, binding upon the EU and its Member States, as recognized by the Court of Justice.\(^{38}\) It also means that the European Union can be considered to be in breach of the Convention if its Member States breach the Convention and the EU has not established a regulatory framework ensuring compliance on the side of the Member States, as occurred when Ireland failed to organize effective public participation.


\(^{33}\) See explicitly on this point Aarhus Convention Compliance Committee (ACCC), Report concerning the European Union (2 October 2012), ECE/MP.PP.C.1/2012/12.


\(^{36}\) Eg, the Environmental Liability Directive speaks only about the existence of a right to submit observations and of a duty to take them into account, without further specifications. The Water Framework Directive uses the concept of ‘consultation’ rather than that of ‘participation’, despite the former not necessarily meaning the same as the latter, eg. Krämer (2017) o.c. 126-7.


\(^{38}\) About art 9(3) of the Convention, which has not been transposed in EU secondary law, Zoskupenie (2011) o.c. It goes beyond the scope of this contribution to discuss whether these provisions can be invoked before national courts; on this topic we refer to also J Darpô, ‘Pulling the trigger: ENGO standing rights and the enforcement of environmental obligations in EU law’ in S Bogojević and R Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018) 253; see also L Squintani and HHB Vedder, ‘Towards Inverse Direct Effect?: A Silent Development of a Core European Law Doctrine’ (2014) 23 *Review of European Community and International Environmental Law* 144.
participation procedure in the context of the establishment of their national plans on renewable energy sources. 39

In the rest of this contribution, given the broader and more elaborated scope of the provisions of the Convention and the great overlap between the wording of its provisions and the pieces of EU legislation most directly aimed at implementing them, 40 the Convention is used as basis to explain public participation in EU environmental law. Of course, the Aarhus Convention only pursues minimum harmonization, 41 which means that the EU and its Member States can decide to go beyond such a minimum, a practice called green-plating, 42 an issue that is outside the scope of this contribution.

2.2. Specific issues: Public participation in the decision-making chain

As written in the previous section, Article 6 of the Convention regards public participation about specific activities significantly affecting the environment, Article 7 about plans, programmes and policies, and Article 8 about executive regulations and other generally applicable and legally binding rules. This latter provision, however, only establishes ‘soft obligations’, ie best efforts obligations, 43 inspired by those included in parts of Article 6 of the Convention. Moreover, it allows to organize public participation of the general public via the medium of representative consultative bodies. It thus allows to deviate from the focus on the concept of public participation discussed in this contribution. Accordingly, this provision is not further analyzed. Moreover, Articles 6 and 7 of the Convention have been extensively discussed in the literature, 44 as well as in

43 Implementation Guide (2014) o.c. 181, which immediately clarifies that these obligations are still enforceable under Article 9(3) of the Convention.
the Implementation Guide to the Convention itself. Accordingly, there is no need to provide a general analysis.

In this section we therefore focus on the intrinsic tension between the policy objective to empower the public and that of maintaining a status quo in which public authorities retain the ‘final word’ in the decision-making. In doing so, reference is made to the Implementation Guide to the Convention and the findings of the Aarhus Convention Compliance Committee (ACCC). Indeed, although neither source has binding force, the Court of Justice recognizes the authoritative nature of the Implementation Guide and uses it as a source of interpretation. The Implementation Guide builds upon the findings of the ACCC, which means that also the latter is an authoritative source for interpretation of the EU legal framework on public participation.

Article 6 is the starting point for this analysis. This provision establishes a legal framework that applies to any activity regulated under the Environmental Impact Assessment Directive and the Integrated Prevention Pollution and Control (IPPC) Directive, now Industrial Emissions Directive, as well as any other activity which could significantly affect the environment, such as activities falling under Article 4(1) of the Water Framework Directive or Article 6(3) of the Habitats Directive. The scope of application of Article 6 of the Convention is, accordingly, very broad. It covers decisions concerning specific activities, such as, most notably, authorizations of concrete environmental projects. Although the amount of detail in decisions about specific

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47 Case C-60/15 P Saint-Gobain Glass Deutschland GmbH v European Commission ECLI:EU:C:2017:540, para 44. The Court can also deviate from it as occurred in Case C-442/14 Bayer CropScience SA-NV and Stichting De Bijnstichting ECLI:EU:C:2016:890.


activities may change on case-to-case basis, their key characteristic is that these decisions have at least specific and concrete implications for a specific product or area and therefore affects or is likely to affect specific peoples, so-called the public concerned under Article 2(5) of the Convention.

The legal framework set out therein is the most detailed one in comparison to those for plans and programmes and for policies. It is composed of eight categories of obligations. First, it establishes a notification duty. Properly informing the public concerned\(^{53}\) —either by a public notice, such as a newspaper announcement, or an individual notice, such as a letter— is essential for effective participation in the decision-making procedure.\(^{54}\) To this extent, the notification must include all relevant information about the project and the public participation procedure. Second, the responsible party, which could also be a private party, should set reasonable time-frames to inform the public concerned and to allow for a response. The concept of ‘reasonable time-frames’ is undefined under the Convention and could vary in accordance with the kind of activity under scrutiny.\(^{55}\) Third, the procedure should take place when all options are possible and participation can be effective. Under this provision, the concepts of ‘early engagement’ and ‘effective participation’ are linked to the moment in the decision-making in which public participation is organized. What matters is that ‘events on the ground’, such as the availability of certain technological choices,\(^{56}\) have not effectively eliminated alternative options.\(^{57}\) This does not mean that during the establishment of specific activities, the public concerned must be able to comment upon options that were subjected to a public participation procedure earlier in time.\(^{58}\) For example, options that have been subjected to public participation during the adoption of specific activities implementing such a plan or programme.\(^{59}\) Fourth, private initiators should be encouraged to engage in public participation prior to a permit application. Public authorities, however, should retain control and responsibility for the procedure.\(^{60}\) Fifth, the public concerned must be able to access all relevant information, in accordance with the provisions on access to


\(^{54}\) This obligation requires also informing the public in other countries if the activity under scrutiny can significantly affect the environment in that country, eg in the context of nuclear energy, ACCC, Report concerning Czech Republic (29 December 2016), ECE/MP.PP/C.1/2017/3), paras 71-2.

\(^{55}\) Implementation Guide (2014) o.c. 143.

\(^{56}\) Report concerning Lithuania (2011) o.c. 74.

\(^{57}\) Implementation Guide (2014) o.c. 145.

\(^{58}\) Report concerning Lithuania (2011) o.c. 71.

\(^{59}\) Idem.

\(^{60}\) Report concerning Lithuania (2011) o.c. 82.
information under the Convention. Six, the public must be allowed to submit views. This provision represents the embodiment of public participation, ie the ability to express a view, or arguably even a feeling, in writing or orally, to the discretion of the public. Seventh, the responsible authority should take the views expressed by the public in due account, therefore ensuring a ‘real voice’ to the public. However, this does not mean that it has to align the decision to such views. According to the European Commission, this duty ‘means that the Commission will duly consider the comments submitted by the public and weigh them in the light of the various public interests in issue’. Basically, this duty means, in legal terms, that a decision-maker must show why a particular comment was rejected on substantive grounds. Still, it does not amount to a right of the public to veto the decision, according to the ACCC. The eighth, and final, obligation is that the decision-maker should inform the public about the final decision and how the views have been taken into account.

Importantly, the content of decisions about specific activities depends on the higher-level instruments in the decision-making chain, namely plans and programmes, and policies. The legal framework for public participation procedures as regards plans and programmes builds on the framework for decisions on specific activities, but is less extensive and specific. The concepts of ‘plans’ and ‘programme’s’ concerning the environment are left undefined under the Convention. These instruments can take a variety of forms. In the majority of the cases, plans and programmes are meant to provide a framework for adopting decisions about specific activities. Under the Aarhus

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62 A Aragão, ‘Valuating cultural services and taking them into account in public decisions making’ in L Squintani and others (eds), ch 3.
Convention, as well as under the EU and national legal frameworks implementing it, obligations regarding public participation procedures about plans and programmes refer explicitly to the second (reasonable time-frames), third (early engagement) and seventh (real voice) obligations listed above. They refer also to the need of ensuring transparency, fairness and access to information. Although the first, fifth, sixth and eighth obligations indicated above can easily be read into the concepts of fairness, transparency and access to information, the different formulation of such obligations denotes the presence of more discretionary power for public authorities about how to fulfill them, than in the context of decisions concerning specific activities.

From a legal perspective, also plans and programmes are not adopted in a vacuum, but should fit within the existing policy framework. Under the Aarhus Convention, environmental policies can be defined as “a course or principle of action adopted or proposed by an organization or individual”. Yet, this concept remains officially undefined. From the perspective of public participation, Article 7, last sentence, of the Convention adopts a different approach about the legal obligation in the context of policies. There are indeed no specific legal requirements in this regard. Most significantly, the duty to organize public participation procedures at a moment in time in which all options are still open does not apply to policies. This consideration holds true also for the duty to take due account of the views and feelings of the public. As these two obligations aim at ensuring 'early engagement' and 'real voice' during public participation procedures, their absence underlines that, under the Convention, there are no explicit legal requirements aiming at ensuring that public participation as regards policies are effective.

When we compare the legal obligations existing as regards public participation at each step in the decision-making chain, an interesting phenomenon becomes clear: the legal obligations on public participation vary in accordance to the level of the decision-making chain in which public participation takes place. More specifically, the intensity of the legal obligations is inversely proportional to the level of specificity of the act as regards to which public participation takes place. Otherwise stated, the legal framework on public participation under the Convention contains more specific legal obligations about the setting up of public participation procedures for decision on specific activities, than for plans and programmes and, most notably, policies.

This finding is of particular importance when we consider that options discussed during the adoption of a policy, a plan or a programme do not need to be made subject to public participation during the adoption of a specific activity implementing that policy, plan or programme, as indicated above. At the same time, what has been decided at an earlier level of the chain of decision-making influences the content of decisions about specific activities. Policy choices expressed in policy

71 Article 10.7 of the Dutch Environment and Planning Order (Omgevingsbesluit) will go beyond this standard, by requiring public authorities to give account of how they involved the public in drafting environmental strategies and what the outcome of the procedure has been.
documents can determine that in practice certain options are no-longer available at the level of decisions about specific actions.

The above shows that at the starting point of the decision-making chain, the legal framework for public participation procedures in the context of the establishment of policies does not contain obligations ensuring 'early engagement' and a 'real voice'. It also shows that options decided at this level do not need to be subject to public participation in a later stage of the chain. In section 4, we discuss that this could open a gap between what the public expects and what the public gets from public participation procedures. First, however, the next section shows that the case law of the Court of Justice does not change the present findings.

3. Public Participation and the Court
Despite the elapsing of 20 years from the signature of the Convention, and about three lustra from its implementation in the EU, case-law of the Court of Justice on public participation is scarce, in striking contrast with what noticeable about access to information and, even more, access to justice. On Curia, we could retrieve only four cases dealing with public participation in environmental matters,72 after the implementation of the Aarhus Convention in the EU.73 Clearly, in this area, the case law of the Court is at an infant stadium of development, which makes premature to make any statement about the modus operandi of the Court in this field. Yet, two initial patterns can be recognized so far, none of which affecting the findings indicated in the previous section.

First, the Court of Justice recognizes the importance of the Aarhus Convention and its underlying rationale as a ground to interpret EU law provisions aimed at its implementation. This approach was clearly recognizable in the Krizan case,74 in which the Court of Justice stated that the provisions of the IPPC Directive on public participation must be aligned with those in Article 6 of the Convention.75 This case concerns access to information relevant for a public participation procedure concerning the authorization of a landfill site; hence, it concerns Article 6(6) of the Convention. Access to information can be limited to protect, inter alia, confidential commercial and industrial information, but such a possibility is only an exception. The Court therefore interpreted it restrictively. Similarly, in the VKL II case,76 to establish the rules on public

72 Search criteria in the database of the Court: Text: participation; Subject-matter: "Euratom matters" and "Environment"; Documents: Documents published in the ECR: Judgments and Orders; Court: "Court of Justice and General Court"; Case status: "Cases closed" (search last performed January 2019). This search forms leads to 93 results which were then further filtered manually. Search on EUR-LEX based on the relevant legal provisions confirmed this finding/
73 Case C-216/05 is not included as it regards the EIA Directive prior to the implementation of the Aarhus Convention, thus concerns a legal framework no longer in force, Case C-216/05 Commission of the European Communities v Ireland ECLI:EU:C:2006:706.
74 Case C-416/10 Jozef Krížan and Others v Slovenská inšpekcia životného prostredia (Krizan) ECLI:EU:C:2013:8.
75 Krizan (2013) o.c. 77.
76 Case C-243/15 Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín ECLI:EU:C:2016:838.
participation under the Habitats Directive the Court of Justice ruled that, although Article 6 of the Convention states that its application is governed by the domestic law of the concerned contracting party, that statement must be understood as relating solely to the manner in which the public participation specified by Article 6 is carried out.\textsuperscript{77} It does not call into question the right to participate which an environmental organization, as derived from that article.\textsuperscript{78} Moreover, in this case the Court decided that access to public participation must be granted to NGOs fulfilling the conditions for being considered part of the (concerned) public. Enjoyment of this right entails in particular the right to participate ‘effectively during the environmental decision-making’ by submitting, ‘in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity’ at a moment in the decision-making procedure ‘when all options are open and effective public participation can take place’.\textsuperscript{79} Any participatory status that does not allow enjoying such a right is not in compliance with Article 6 of the Convention.\textsuperscript{80}

The linkage between the status of a party in the decision-making procedure and the right to access to justice discussed in the \textit{VKL II} case is the second pattern in the case law of the Court Justice that can be recognized, albeit in its very initial form. This linkage was first discussed in the \textit{Djurgarden} case,\textsuperscript{81} concerning the requirements that non-governmental organizations must fulfil in order to enjoy the right to access to justice. One of the questions the Court had to answer concerned whether access to justice had to be granted, even where a party had the opportunity to participate in the decision-making procedure. The Court stated that participation in the decision-making procedure has no effect on the conditions for access to the review procedure.\textsuperscript{82} This is so because participation in an environmental decision-making procedure is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure.\textsuperscript{83} In \textit{VKL II}, the Court of Justice was not called to rule on this same question, but the linkage between public participation and access to justice was discussed when the Court stated that access to public participation in Slovakia is important as it is a pre-condition to access to justice.\textsuperscript{84} The same \textit{modus operandi} is recognizable in the \textit{Protect} case.\textsuperscript{85} This case is, once again, mainly focusing on access to justice, but it touches upon the relationship between public participation and access to justice, since under Austrian law, only natural and legal persons who are parties to the

\begin{itemize}
\item Idem para 48.
\item Idem.
\item Idem para 46.
\item This is an implicit conclusion as the Court’s answer concerned the linkage between public participation and judicial protection and not public participation as such, idem paras 67-70.
\item Case C-263/08 \textit{Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd} ECLI:EU:C:2009:631.
\item Idem para 38.
\item Idem.
\item Idem para 71.
\item Case C-664/15 \textit{Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd} ECLI:EU:C:2017:987.
\end{itemize}
administrative procedure can bring an action before a court in order to claim that their rights have been infringed. The Court approached this relationship by imposing a duty upon the national court to interpret national law so as to grant the status of party to the procedure to the non-governmental organization at stake in this case, or to set aside national law that requires having such status to access a court, if consistent interpretation was not possible. A conjunctive reading of these cases suggests that the Court of Justice would not accept limits to acquiring the status of party to a public participation procedure if this status is a condition for access to justice. It is less clear whether a party which could have acquired such status, but failed to do so due to its own omission, might be deprived of the right to access to justice. The case law at our disposal is inconclusive on this matter, as in all cases the concerned party did activate itself during the decision-making procedure.

4. From legal requirements to people’s perceptions: unveiling the potential mismatch

Section 2 indicated that public participation under the Aarhus Convention and the EU legal framework implementing it requires ‘early engagement’ and a ‘real voice’ only about public participation procedures in the context of projects, and, less so, plans and programmes. It does not have similar obligations about policies. Still, policies have an impact on the options that can be discussed in the context of the establishment of plans and programmes and, in turn, decisions about specific activities. At the same time, options which have been subjected to a public participation procedure at an early level of the decision-making chain do not need to be re-discussed during public participation procedures in later stages of the chain.

Under the legal framework envisaged by the Aarhus Convention 'real voice' and 'early participation' may therefore be circumscribed to the level of concrete projects and activities, where the influence that the public can have in decision-making is limited by macro-level decisions taken earlier in the decision-making chain. This may open a gap between what people expect from public participation procedures and what they actually get from these procedures. Specifically, social sciences show that when people consider that public participation procedures are taking place too late, after the important decisions about projects had already been made, this can reduce perceived procedural fairness and fuel resistance against the final decisions. Furthermore, even if people can participate in decision-making but only have influence over minor decisions, this results in lower public acceptability of concrete projects than when they can have influence over major decisions.

86 Idem para 50.
87 Idem paras 53-4.
88 Idem para 55.
90 L Liu, and others, ‘Effects of trust and public participation on acceptability of renewable energy projects in the Netherlands and China’ (2019) 53 Energy Research & Social Science, 137-144.
Therefore, while people may be particularly willing to participate in decision-making on concrete actions, such as energy projects in their vicinity,\footnote{G Perlaviciute and L Squintani, ‘De mening van inwoners van de provincie Groningen over de energietransitie, Rijksuniversiteit Groningen’ (2019), available at: https://www.rug.nl/about-us/collaboration/research-collaboration/onderzoekenergietransitie/.} having limited influence at this level of the decision-making chain may result in low perceived procedural fairness and public resistance.

Thus, there is a potential mismatch between what law says and what the public wants about public participation procedures in environmental matters. This mismatch is capable of jeopardizing the effectiveness of such procedures to achieve acceptability, as shown by the following example.

During the public participation procedures for the authorization of a wind-energy park in Oost Groningen (the Netherlands),\footnote{For the input of the public and the reply of the public authority, see documents, Rijksdienst voor Ondernemend Nederland, ‘Windpark N33 – Fase 1’ <https://www.rvo.nl/subsidies-regelingen/bureau-energieprojecten/lopende-projecten/windparken/windpark-n33/fase-1> accessed January 2019.} the policy choice to reach a production target of 855.5 MW by means of wind parks at three locations in the province of Groningen (the Netherlands),\footnote{Environmental Strategy Province of Groningen 2016-2020, Provincie Groningen, ‘Omgevingsvisie Provincie Groningen (Provinciale Staten 1 juni 2016) 2016-2020’ <https://www.provinciegroningen.nl/fileadmin/user_upload/Documenten/Downloads/Omgevingsvisie/Omgevingsvisie_GS_PS_160714.pdf> accessed January 2019.} along with the designation of these locations and the rules that the wind parks should respect noise levels,\footnote{Idem.} could not be re-discussed.\footnote{‘Antwoordnota Windpark N33’ <https://www.rvo.nl/sites/default/files/2017/02/Nota%20van%20Antwoorden%20op%20Zienswijzen_deel%201_TM_4.pdf> accessed January 2019, section Zienswijzen, specifically Zienswijzen 1a and 1b.} This could partly explain why the project has faced strong public resistance,\footnote{See references to such protests, J de Veer, ‘Tegenstanders bedreigen windparkbouwers’ Dagblad van het Noorden (Groningen, 16 July 2018).} which has also materialized in a legal challenge before the Dutch Council of State.

Clearly, such a situation does not spur the chance of achieving perceived procedural fairness and, hence, acceptability of projects. In these situations, people may consider that there is either no participation or that there is \textit{fake} participation, namely if they can voice their opinions but this has little or even no impact on important decisions. From a legal perspective, the existence of barriers to discuss certain (policy) aspect related to the realization of an activity such as a wind energy park is perfectly understandable and justified by legal principles, in particular that of legal certainty. This justification, however, does not change the perceived lack of procedural fairness, as also noticed by Akerboom in the context of the chain of decision-making that led to the building of a large wind park before the coast of the province of North Holland (the Netherlands).\footnote{Akerboom (2018) o.c. ch 10.}
5. **Concluding Remarks**

This contribution explained that the legal framework for public participation in environmental matters in the EU changes as regards the type of acts in respect of which public participation is organised. The Aarhus Convention and EU law implementing it contain more specific legal obligations about the setting up of public participation procedures for decision on specific activities, than for plans and programmes and, most notably, policies. Moreover, it has been discussed that the lack of requirements to ensure ‘early engagement’ and ‘real voice’ in public participation procedures for the setting of policies, likewise the fact that options subjected to public participation during an early phase of the decision-making chain do not need to be re-discussed later in the chain, do not seem to align with the preferences of the public in this context. Indeed, if people are willing to participate in decision-making on concrete projects, their influence is limited by macro-level decisions, which can make public participation procedures ineffective (or even counterproductive) in increasing public acceptability.

Further research will have to show the extent of this potential mismatch. Such research is essential as the potential mismatch unveiled in this contribution can clearly affect the possibility to achieve perceived procedural fairness and thus acceptability. This would mean that, even when applied in practice, the legal framework discussed in section 2 could not necessary lead to effective public participation procedures, at least when looking at their ability to generate acceptability. It could also explain why case law on public participation in scars. Indeed, due to the mismatch, people could lack trust in the institutions and prefer the route of political, rather than judicial, protest. A profound rethinking of the legal framework might thus be necessary.