



**Fourth Joint Aarhus Convention /
Convention on Biological Diversity
Round Table on
Public Awareness, Access to Information and
Public Participation regarding
Living Modified Organisms/Genetically Modified Organisms**

Training on access to justice in the context of LMOs/GMOs

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The purpose of this training

- To raise awareness of the importance of access to justice for LMOs/GMOs – related matters
- To explain procedures on access to justice and how they work in practice
- Aimed mainly at the National Focal Points of the two treaties (the Aarhus Convention and Convention on Biological Diversity)

How this training is structured

- Based on (mostly) hypothetical scenarios
- Please feel free to ask any clarifying questions
- And please actively take part in the discussions as we try to figure out the answers together
- (For most part) not asking to evaluate other parts of the Convention
- Tip: Remember the WHO, WHAT...HOW under article 9 of the Aarhus Convention
 - WHO is entitled to bring a case like the scenario in question?
 - WHAT sort of challenges may be brought?
 - HOW can the procedures be carried out? Using what modalities?

Scenario A

A group of citizens come together as a group to form a so-called citizen's initiative named "Aarhus Rights Now" because they are concerned about GMO releases in their community in Burbank. Aarhus Rights Now requests of the municipality "Burbank", in the country "Caledonia" information relating to:

- A cost-benefit analysis that Burbank undertook as part of its decision-making process to permit the release of the GMOs in trial fields;
- Any fines Burbank imposed on permittees for unlawful releases of GMOs

Assume Burbank is a public authority. Assume also that Caledonia is a Party to the Aarhus Convention and that citizen's initiatives are recognized under Caledonian law and practice.

Burbank rejects Aarhus Rights Now's requests on the basis that Aarhus Rights Now has no legal character, as it is not an ENGO (or an individual person), and demands that it resubmit its requests in the name of an individual member of the citizen's initiative. Aarhus Rights Now appeals to the Ombudsman for Environmental Information, which is responsible for appeals concerning access to environmental information requests. Aarhus Rights Now argues that it should be entitled to the information, even though it is a group of individuals without legal character.

Q1: How should the Ombudsman decide?

Scenario A

Assume that the Ombudsman decides that Aarhus Rights Now cannot be denied the information on the basis that it is just a group of individuals with no legal character for the group itself. However, Burbank then argues that the cost-benefit analysis Burbank undertook and any fines imposed on permittees for unlawful releases of GMOs are not environmental information and again refuses disclosure. Aarhus Rights Now appeals to the Ombudsman again.

Q2: How should the Ombudsman decide?

Assume that the Ombudsman can issue binding decisions on Burbank, compelling it to release the requested information. Aarhus Rights Now however complains that the Ombudsman is only an administrative review body, and this does not fulfill the requirements of the Aarhus Convention, which requires judicial review.

Q3: Is Aarhus Rights Now correct? Is there a problem with having administrative review for complaints concerning access to information requests?

Scenario A

Assume now that the Ombudsman decides that Aarhus Rights Now is entitled to the requested information. But the Ombudsman only has the power to recommend to Burbank that it release the information; according to the law in Caledonia the Ombudsman cannot compel it to do so. To get a binding judgment Aarhus Rights Now needs to go to a court following the Ombudsman's decision, and this will cost 80,000€ and take approximately 8 years.

Q4: Are there any issues with the legal framework and practice in Caledonia as regards requests for information (concerning LMOs/GMOs)?

Scenario B

ENGO “Do Right by Us” is based in the country “Ether”. ENGO “Free from GMOs” is based in a neighboring country, “Gaya”. A public authority in Ether granted licenses to plant GMO enhanced corn in the environment in an area directly bordering Gaya, into which the wind routinely brings pollen and small plant residues from Ether.

Assume the license Ether granted concerning GMOs is for a project that falls under article 6 of the Convention. Assume also that Ether and Gaya are Parties to the Aarhus Convention. Do Right by Us challenges the licenses to plant GMO enhanced corn in court, arguing that:

- It was given no chance to receive information concerning the proposed license to plant GMO enhanced corn; nor the opportunity to comment on this proposed activity;
- Ether’s decision failed to reduce any risks associated with the license to the effective “zero level”

In court, the lawyers for Ether argue firstly that, as an ENGO, Do Right by Us is not entitled to challenge the licenses to plant GMO enhanced corn, as it could not allege these licenses resulted in an impairment of its rights.

Q1: How should a court respond?

Scenario B

Secondly, the lawyers for Ether argue that, as an ENGO, Do Right by Us is only entitled to challenge the authority's decision as regards the failure to receive information and comment on the activity; it was not entitled to challenge the decision as regards the claimed need to reduce the license to the zero level as regards risks.

Q2: How should a court respond?

Assume the foreign-based ENGO Free from GMOs brought a separate lawsuit against the license Ether granted. Ether now argues that Free from GMOs has no standing in courts in Ether because it is a foreign organization.

Q3: How should a court respond?

Scenario C

ENGO “Help the good use of GMOs” is concerned about the regional zoning plans in region “Ithaca”, which banned GMO cultivation in that region solely on the basis of a report concerning the effects of GMOs on local flora and fauna, which was never shared with the public. It therefore brings a challenge of these zoning plans.

Assume Ithaca is a region within an Aarhus Party. Assume also that Help the good use of GMOs is a recognized ENGO in this Party. Help the good use of GMOs argues that

- The fact that the report concerning the effects of GMOs on local flora and fauna was never published violated its procedural rights
- The zoning plans are inconsistent with binding national law requiring that regions establish zones where GMO cultivation is allowed

Ithaca argues that Help the good use of GMOs has no standing as to either claim.

Q1: How should a court rule as to the standing of Help the good use of GMOs as to the first claim?

Scenario C

Bonus question: What, if any, facts are relevant to understanding the merits of Help the good use of GMO's claim that its procedural rights were violated by the facts that the report was not shared?

Q2: How should a court rule as to the standing to assert the second claim concerning the alleged inconsistency between the regional zoning plan and national law?

Scenario D

ENGO “Justice for the Environment” is concerned about GMOs in commonly consumed agricultural products. It learns that private cereal company “Kelfughs” uses GMO wheat in its breakfast cereal products. In the view of Justice for the Environment, Kelfughs fails to adequately label its product as containing GMO wheat. Justice for the Environment alleges this is contrary to the laws in its jurisdiction regarding product labelling for commonly consumed agricultural products, and therefore undertakes a publicity campaign to share its view that Kelfughs is marketing products containing GMOs while failing to disclose the presence of GMOs in these products, and brings a lawsuit against Kelfughs for what it considers a breach of national laws regarding the labelling of products containing GMOs.

Scenario D

Kelfughs responds that:

- As a private cereal company, Kelfughs cannot be challenged by an ENGO for any alleged violation of national laws relating to the environment
- As an ENGO, Justice for the Environment is not a competitor of Kelfughs and therefore cannot bring a challenge against Kelfughs

Q1: How should a court respond as to Kelfughs' claim that it cannot be challenged due to its status of a private company?

Q2: How should a court respond as to Kelfughs' claim that Justice for the Environment cannot bring a challenge due to the fact that it is not a competitor?

Scenario D

Moreover, in response to Justice for the Environment's lawsuit Kelfughs brings a counter-suit in which it alleges that Justice for the Environment has defamed Kelfughs and caused it reputational damage. It therefore demands that Justice for the Environment stop any negative press concerning the presence of GMO wheat in its cereal, and that it moreover pay 10 million€ in damages.

Q3: What, if any, issues are raised by Kelfughs' countersuit for defamation and reputational damage?

A few takeaways

- Generally broad but differentiated rights as to WHO has standing
- WHAT can be challenged includes
 - Rejections (full or partial) of environmental information requests;
 - Substantive legality (decision taken/plan developed unlawful)
 - Procedural legality (procedural rights like access to information, to make comments, were not respected)
 - Contraventions of laws relating to the environment
- HOW? What modalities are permitted under the Aarhus Convention? (Administrative review, etc.) and what modalities are not? (No binding decisions, costly, very lengthy procedures, etc.)
- Critical importance of transboundary element (article 3(9)) and potential for penalization, persecution and harassment (article 3(8))



**Thank you for your kind
attention and participation!**