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Áine Ryall

**Access to Justice in Environmental Matters  
in the Member States of the EU:  
the Impact of the Aarhus Convention**

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# **Access to Justice in Environmental Matters in the Member States of the EU: the Impact of the Aarhus Convention**

Áine Ryall\*

## **Abstract**

Across the Member States of the European Union (EU), there is a renewed emphasis on environmental law enforcement as the right of access to justice guaranteed by the Aarhus Convention takes effect. This paper focuses specifically on the contemporary role of the Court of Justice of the EU in promoting access to justice in environmental matters at national level. In a series of decisions over the seven year period 2009 to 2016, the Court has drawn on the Aarhus Convention and the EU legislative measures giving effect to the Convention to justify a more interventionist approach to national procedural rules and remedies and to underpin the proactive enforcement of environmental law. By engaging in close analysis of this particular line of jurisprudence, the paper demonstrates how the Aarhus Convention has led the Court to develop a new and highly dynamic phase in the evolution of environmental law enforcement. In effect, the access to justice obligations articulated in the Convention have emboldened the Court to flesh out specific elements of the principle of effective judicial protection as it applies to environmental law enforcement in the Member States.

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## Introduction

The implementation and enforcement of European Union (EU) environmental law in the Member States has always been challenging.<sup>1</sup> Environmental law infringements make up a significant proportion of the cases where the Court of Justice of the EU has imposed financial sanctions on Member States for breach of EU law obligations.<sup>2</sup> This confirms not only the traditional national resistance to (often onerous) environmental obligations, but also the fraught nature of implementation in this particular policy area, especially when significant investment in environmental infrastructure is needed to meet EU requirements.<sup>3</sup> Beyond the centralised enforcement mechanism at EU level, the Court of Justice has long promoted the integration of EU (environmental) law at national level by way of local enforcement action by concerned individuals and non-governmental organisations (NGOs).<sup>4</sup> It crafted a range of mechanisms to support such action, including the doctrines of direct effect, consistent interpretation and state liability, as well as insisting on the availability of judicial review to determine whether a Member State exceeded the scope of its discretion when implementing environmental directives.<sup>5</sup> Working to ensure that national procedures and remedies deliver effective protection for rights conferred by EU (environmental) law has proven to be a particularly difficult and long-running task. The Court made significant progress over the years by using the

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<sup>1</sup> European Commission, *Monitoring the Application of European Union Law Annual Report 2015* COM (2016) 463 15.7.2016 states at p5:

Significant shortcomings in the implementation and enforcement of EU environmental legislation persist in some Member States. This is particularly the case in waste management, waste water treatment infrastructure and compliance with air quality limit values.

<sup>2</sup> At 31 July 2016, the Court of Justice had delivered 13 judgments imposing financial penalties on Member States pursuant to Article 260 TFEU for failure to comply with prior Article 258 TFEU judgments concerning environmental protection obligations. See generally Hedemann-Robinson, M, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2<sup>nd</sup> ed) (London: Routledge, 2015) ch4.

<sup>3</sup> See, most recently, European Commission, *Delivering the benefits of EU environmental policies through a regular Environmental Implementation Review* COM (2016) 316 final 27.5.2016.

<sup>4</sup> Consider, for example, the ground-breaking ruling in Case 41/74 *Van Duyn v Home Office* EU:C:1974:133 and, in the specific context of environmental law enforcement, Case C-72/95 *Aannemersbedrijf PK Kraaijeveld BV ea v Gedeputeerde Staten van Zuid-Holland* Environment EU:C:1996:404; Case C-201/02 *R (Wells) v Secretary of State for Transport, Local Government and the Regions* EU:C:2004:12; Case C-237/07 *Janecek v Freistaat Bayern* EU:C:2008:447; and Case C-404/13 *R (ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* EU:C:2014:2382.

<sup>5</sup> For a detailed account of how the Court developed these doctrines over time in the context of enforcement of EU environmental impact assessment law, see Ryall, Á, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland* (Oxford: Hart Publishing, 2009) pp153-191.

principles of equivalence and effectiveness to test potentially restrictive national procedures and requiring Member State courts to do likewise. Traditionally, the Court moved cautiously in this area, fully aware of how jealously Member States guard their procedural autonomy and of the need to maintain a relationship of mutual respect and co-operation with the national courts.<sup>6</sup> In the absence of EU legislation harmonising national procedures and remedies, the Court relied on the general principle of effective judicial protection – grounded on the constitutional traditions of the Member States and Articles 6 and 13 of the European Convention on Human Rights – to deliver more accessible, proactive and effective local enforcement.<sup>7</sup> There were, of course, obvious limitations to this approach, in particular the fact that its success depended on national courts' willingness to scrutinise local rules for compliance with EU law and to use the preliminary ruling procedure in appropriate cases.

The principle of effective judicial protection is now enshrined explicitly in Article 19 of the Treaty on European Union (TEU)<sup>8</sup> and Article 47 of the Charter of Fundamental Rights of the European Union (the EU Charter) guarantees the right to an effective remedy for breach of EU law rights, including the right to legal aid where necessary to ensure effective access to justice. As regards environmental protection, Article 37 of the EU Charter commits the EU to integrating a high level of environmental protection and the improvement of the quality of the environment into policy development in accordance with the principle of sustainable development. It is the Aarhus Convention,<sup>9</sup> however, that has proven to be the driving force in improving access to justice in environmental matters in the Member States. The Convention not only guarantees access to justice but goes further and sets down minimum standards for administrative and judicial review mechanisms. Its provisions are more explicit than the general principle of effective judicial protection

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<sup>6</sup> *ibid.* pp76-82 and Lenaerts, K, "National Remedies for Private Parties in the Light of the EU Principles of Equivalence and Effectiveness" (2011) 46 *Irish Jurist* 13.

<sup>7</sup> Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206 paras 18-19. On the evolution of this principle in the post-*Johnston* case law, see Ryall, Á, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland* (Oxford: Hart Publishing, 2009) pp82-91 and Arnull, A, "The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?" (2011) 36 *European Law Review* 51.

<sup>8</sup> Article 19(1) TEU provides *inter alia* that: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

<sup>9</sup> United Nations Economic Commission for Europe (UN ECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, Denmark, 28 June 1998) 2161 UNTS 447, entered into force 30 October 2001.

crafted by the Court of Justice. And it demands “wide access to justice” for “the public concerned”, which includes environmental NGOs.<sup>10</sup> The Convention therefore provides the Court with a set of benchmarks to test the adequacy of measures the Member States have put in place to deliver access to justice in environmental matters at local level.

### **Structure of the paper**

This paper explores how the Court of Justice has used the right of access to justice guaranteed in the Aarhus Convention to determine what is required of the Member States’ legal systems in order to deliver effective judicial protection for environmental rights. Drawing on the Convention and the related EU legislation, the Court has determined that a number of Member States must revisit and revise their rules on environmental law enforcement, including provisions governing standing, the grounds for judicial review, the availability of interim relief and the level of costs involved in bringing proceedings before the national courts. These are matters that lie at the very heart of national legal systems and over which Member States are most reluctant to cede any element of control. The Court has also insisted that Member States inform the public adequately regarding the right of access to justice.

Part I opens by introducing the Aarhus Convention and its status in EU law, together with an account of the legislative measures the EU has adopted in response to obligations arising under the Convention. This is followed in Part II by an analysis of the cases where the Court of Justice has been called on to consider the impact of the Convention on the Member States’ legal systems. The analysis is arranged around a number of selected topics that reflect the main issues and points of contestation that have surfaced in the jurisprudence to date. The strong public interest in environmental protection is one of the key themes to emerge in this line of jurisprudence. The Court has drawn on this fundamental public interest to support an interventionist approach to environmental law enforcement and has not hesitated to rule that national procedures that pose barriers to access to the courts are incompatible with EU law. Part III takes stock of the current state of play and considers what lies ahead, including the implications of the Court’s jurisprudence for

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<sup>10</sup> The “public concerned” is defined in Article 2(5) of the Convention to mean: “the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, [NGOs] promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”



environmental law enforcement in the Member States into the future. The paper concludes that the Aarhus Convention has led to a new and highly dynamic phase in the evolution of EU environmental law enforcement. The access to justice obligations guaranteed by the Convention have enabled the Court to flesh out specific elements of the principle of effective judicial protection as it applies to environmental law enforcement in the Member States.

## **Part I        The Aarhus Convention: A new dawn for environmental law enforcement**

The Aarhus Convention is an international treaty under the auspices of the United Nations Economic Commission for Europe (UN ECE) which was opened for signature in June 1998 and entered into force on 30 October 2001. The Convention is built around three procedural rights: access to information (Articles 4 and 5), participation in decision-making (Articles 6, 7 and 8) and access to justice to enforce environmental law (Article 9). It opens by acknowledging that, in order to contribute to the right of every person of present and future generations to live in an environment adequate to their health and well-being, each Party must guarantee the three procedural rights in accordance with the Convention's provisions.<sup>11</sup> An essential feature of the Convention is that it places particular emphasis on the special supervisory role played by NGOs in environmental law enforcement. As Advocate General Sharpston put it in *Trianel*, NGOs are placed "in a uniquely privileged position".<sup>12</sup> As will become clear in Part II, this theme features prominently in the Court of Justice jurisprudence. At 31 July 2016, there were 47 Parties to the Convention, including the EU and the 28 Member States.<sup>13</sup> The EU has been a Party

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<sup>11</sup> Aarhus Convention, Art 1.

<sup>12</sup> Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG* EU:C:2010:773 para 54 of the Opinion.

<sup>13</sup> Notwithstanding the outcome of the referendum on EU membership held in the United Kingdom on 23 June 2016, where a majority voted to leave the EU ("Brexit"), the United Kingdom remains a Member State of the EU until the formal withdrawal process is completed in accordance with the Treaties.

to the Convention since May 2005<sup>14</sup> and the Court of Justice has confirmed that the Convention's provisions are "an integral part" of the EU legal order.<sup>15</sup>

An innovative compliance mechanism, in the form of the Aarhus Convention Compliance Committee, together with the Meeting of the Parties, oversees how Parties implement their Convention obligations as a matter of international law. The Compliance Committee, which comprises nine members made up of a mix of practising lawyers and academics with expertise in environmental law, operates on a "non-confrontational, non-judicial and consultative" basis and makes findings and recommendations to the Meeting of the Parties, or in certain circumstances, directly to the individual Party concerned.<sup>16</sup> The public, including NGOs, is entitled to make "communications" to the Compliance Committee regarding alleged non-compliance.<sup>17</sup> The Compliance Committee's role, and its general approach to its mandate, is geared towards assisting Parties to comply with their Convention obligations. It does not provide a formal legal remedy in a particular case. The compliance mechanism under the Aarhus Convention "is a forward-looking mechanism, not a redress mechanism".<sup>18</sup> Ebbesson has observed that although the Compliance Committee "is not given the explicit mandate to provide authoritative interpretations of the Convention", in order to carry out its role of examining compliance the Committee "has to justify its findings by a correct understanding of the Convention and of what is required of the parties".<sup>19</sup> The Compliance Committee

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<sup>14</sup> Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L 124/1.

<sup>15</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125 para 30.

<sup>16</sup> Aarhus Convention, Art 15 and Decision I/7 on review of compliance adopted at the first Meeting of the Parties held in Lucca, Italy, 21-23 October 2002. See further, *Guidance Document on the Aarhus Convention Compliance Mechanism* (UN ECE, 2010) (a new edition of this Guidance Document is currently in preparation); Koester, V, "The Aarhus Convention Compliance Mechanism and Proceedings before its Compliance Committee" in Banner, C, *The Aarhus Convention: A Guide for UK Lawyers* (Oxford: Hart/Bloomsbury, 2015) and Jendroska, J, "Aarhus Convention Compliance Committee: Origins, Status and Activities" (2011) 8 *Journal for European Environmental and Planning Law* 301.

<sup>17</sup> Decision I/7 on review of compliance adopted at the first Meeting of the Parties held in Lucca, Italy, 21-23 October 2002, para 18. The compliance mechanism may also be triggered in a number of other ways: a Party may make a submission about another Party's compliance; a Party may make a submission about its own compliance; and the secretariat may make a referral to the Committee. See Decision I/7 paras 15-17.

<sup>18</sup> Koester, V, "The Aarhus Convention Compliance Mechanism and Proceedings before its Compliance Committee" in Banner, C, *The Aarhus Convention: A Guide for UK Lawyers* (Oxford: Hart/Bloomsbury, 2015) p204.

<sup>19</sup> Ebbesson, J, "Access to Justice at the National Level: Impact of the Aarhus Convention and European Union Law" p251 in Pallemmaerts, M, *The Aarhus Convention at Ten: Interactions and*

plays a vital role in clarifying what is required of the Parties in order to comply with the Convention, including the access to justice obligations. The consistent view presented in the academic literature is that when the findings of the Compliance Committee are endorsed fully by the Meeting of the Parties, the normative value of its interpretations increases in accordance with Article 31(3) of the Vienna Convention of the Law of Treaties.<sup>20</sup>

Since its establishment in 2002, the Compliance Committee has received 139 communications from the public<sup>21</sup> and has delivered significant findings and recommendations concerning implementation of Convention obligations. These cases include findings of non-compliance regarding access to justice in environmental matters in a number of the EU Member States.<sup>22</sup> The EU itself is the subject of a number of communications on a range of issues, including the long-running saga of access to the EU courts for members of the public.<sup>23</sup> The findings and recommendations of the Compliance Committee continue to shape developments in environmental governance in the EU, the Member States and beyond. Due to the fact that the Compliance Committee, the Court of Justice and the national courts are all involved in reviewing compliance with the Convention within their particular jurisdictional remits, there is a risk of conflicting approaches

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*Tensions between Conventional International Law and EU Environmental Law* (Groningen: Europa Law Publishing, 2011).

<sup>20</sup> Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, entered into force 27 January 1980. See further on this point: Koester, V, "The Aarhus Convention Compliance Mechanism and Proceedings before its Compliance Committee" in Banner, C, *The Aarhus Convention: A Guide for UK Lawyers* (Oxford: Hart/Bloomsbury, 2015) p205; Ebbesson, J, "Access to Justice at the National Level: Impact of the Aarhus Convention and European Union Law" p251 and Tanzi, A and Pieta, C, "The Interplay between EU Law and International Law Procedures in Controlling Compliance with the Aarhus Convention by the EU Member States" p380, both contributions in Pallemmaerts, M, *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Groningen: Europa Law Publishing, 2011).

<sup>21</sup> This is the position at 31 July 2016. Source: Aarhus Convention Compliance Committee website: <http://www.unece.org/env/pp/cc/com.html> (accessed 31 July 2016).

<sup>22</sup> Eight Member States (Austria, Bulgaria, Croatia, Czech Republic, Germany, Romania, Spain and the United Kingdom) were reported non-compliant by the Committee to the 5<sup>th</sup> Meeting of the Parties in 2014 which endorsed all of the Committee's findings on non-compliance. Access to justice matters, including standing for NGOs and effective and accessible review procedures, featured prominently in a number of these cases. See further Ebbesson, J, *The EU and the Aarhus Convention: Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, Briefing to the European Parliament Petitions Committee, June 2016, PE 571.357, pp7-8.

<sup>23</sup> For example, ACCC/C/2010/54 (European Union) concerning public participation in the adoption of National Renewable Energy Action Plans in the Member States and, on the question of access to the EU courts for members of the public, the *draft* findings and recommendations in ACCC/C/2008/32 (European Union) (Part II) issued on 27 June 2016.

developing.<sup>24</sup> While an analysis of this aspect lies beyond the scope of this particular paper, in examining the Court of Justice jurisprudence, the paper considers how the Court has treated the findings that have emerged from the Compliance Committee to date and the extent to which these findings have influenced the Court's reasoning on access to justice in the Member States.

### **The Aarhus Convention access to justice provisions**

It is the access to justice provisions found in Article 9 of the Convention that are of greatest relevance to the themes explored in this paper. At the outset, it is important to note recital 18 in the preamble to the Convention which states that effective judicial mechanisms should be accessible to the public, including NGOs, so that the public's legitimate interests are protected and the law is enforced. This confirms that wide access to justice is one of the core objectives of the Aarhus Convention. Recitals 7 and 8, together with Article 1 of the Convention, confirm that the public is granted access to justice to enable them to exercise their right to a healthy environment and to fulfil their duty to protect and improve the environment for the benefit of present and future generations.<sup>25</sup>

With regard to the specific obligations set down in Article 9: Article 9(1) governs the remedies that must be available where it is alleged that a public authority has failed to deal with a request for access to environmental information in accordance with Article 4 of the Convention. Essentially, Parties must provide access to a review procedure before a court of law or another independent and impartial body established by law. Where a Party opts to provide for a review before a court, it must ensure that there is also access to an expeditious, non-judicial review procedure that is either free of charge or inexpensive.<sup>26</sup>

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<sup>24</sup> See generally, Tanzi, A and Pieta, C, "The Interplay between EU Law and International Law Procedures in Controlling Compliance with the Aarhus Convention by the EU Member States" in Pallemaerts, M, *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Groningen: Europa Law Publishing, 2011) and Jans JH, "Judicial Dialogue, Judicial Competition and Global Environmental Law: A case study of the UN ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" in Jans, JH, Macrory, R and Moreno Molina A-M (eds) *National Courts and EU Environmental Law* (Groningen: Europa Law Publishing, 2013).

<sup>25</sup> Advocate General Cruz Villalón in Case C-72/12 *Gemeinde Altrip (Municipality of Altrip), Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate* EU:C:2013:422 paras 95-96 of the Opinion.

<sup>26</sup> Aarhus Convention, Art 9(1).

Article 9(2) concerns the remedies that must be available to enforce the right to participate in environmental decision-making guaranteed under Article 6 of the Convention. It demands that Parties provide access to a review procedure before a court of law and / or another independent and impartial body established by law, to challenge “the substantive and procedural legality” of any decision, act or omission that is subject to the participation obligations in Article 6.<sup>27</sup> Article 9(2) limits Parties’ discretion to impose standing requirements. It provides that members of “the public concerned” with a “sufficient interest”, or who maintain the impairment of a right (where this is a precondition in a Party’s system of administrative law), must have access to the review procedure. Significantly, local standing rules must ensure that the public concerned has “wide access to justice”, although the Convention text does not elaborate on what exactly is envisaged by the reference to “wide” access in this context. Reflecting the privileged position the Convention assigns to environmental NGOs in the law enforcement context, Article 9(2) insists that NGOs meeting certain conditions set by national law are *automatically* deemed to have standing to invoke the review procedure.<sup>28</sup>

Article 9(3) (which is stated expressly to be without prejudice to the review procedures in Article 9(1) and (2)), requires Parties to ensure that members of the public, who meet any criteria set down in national law, have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene national environmental law. In other words, Article 9(3) provides for a general right of access to justice to enforce environmental law at local level.

Article 9(4) is a key provision which sets down minimum standards for the review mechanisms required under Article 9(1), (2) and (3). The review procedures must provide “adequate and effective remedies”, including injunctive relief as appropriate, and must be “fair, equitable, timely and not prohibitively expensive.” The explicit reference to “adequate and effective remedies” resonates with the well-established

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<sup>27</sup> Aarhus Convention, Art 9(2) permits Parties to make provision for a preliminary review procedure before an administrative authority and also allows for a national requirement to exhaust administrative review procedures before recourse to judicial review procedures.

<sup>28</sup> The conditions referred to here are those set down in Article 2(5) of the Convention. Specifically, an NGO must promote environmental protection and meet any requirements set under national law.

Court of Justice jurisprudence on the principle of effective judicial protection.<sup>29</sup> Similarly, the requirement that review procedures must not be “prohibitively expensive” calls to mind the principle of effectiveness which insists that national provisions must not make it “practically impossible or excessively difficult” to exercise EU law rights.<sup>30</sup> But just how expensive is “prohibitively expensive”? No definition is provided in the Convention text as to what is contemplated by the reference to “prohibitively expensive” in this context. Nor is there any firm indication as to how this issue is to be determined in a specific case. Article 3(8) of the Convention clarifies that national courts may still award “reasonable” costs in judicial proceedings, but, again, no definition of what qualifies as “reasonable” costs is provided. The best that can be said here is that what is “reasonable” will depend heavily on the facts of a particular case. It is also likely to vary considerably between Parties, depending on the particular legal, social and cultural context at national level. For example, legal costs tend to be much higher in the common law jurisdictions operating adversarial legal systems when compared with inquisitorial civil law systems.

Article 9(5) complicates matters further by providing that, in order to ensure the effectiveness of the provisions of Article 9, Parties to the Convention “shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.” This obligation acknowledges that mechanisms such as, for example, civil legal aid and / or protective (pre-emptive) costs orders,<sup>31</sup> may be required to facilitate access to the courts. However, according to the Convention text, Parties are only required to “consider” establishing such mechanisms; there is no express obligation to actually put them in place. Article 9(5) also requires Parties to provide information to the public on access to administrative

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<sup>29</sup> Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206 paras 17-19.

<sup>30</sup> See, for example, Case C-268/06 *Impact v Minister for Agriculture and Food* EU:C:2008:223 para 46 and Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* EU:C:2007:163 para 43.

<sup>31</sup> By way of loose definition, a protective costs order is essentially an order made at the outset of court proceedings which provides that the party seeking the order will not be liable for their opponent’s costs or will be liable only for a set proportion of those costs.

and judicial review procedures. Decisions taken under Article 9 must be given or recorded in writing and court decisions must be publicly accessible.<sup>32</sup>

Taken as a whole, Article 9 is an elaborate provision that addresses a range of practical issues vital to effective access to justice including: standing; timely and effective review procedures; appropriate and effective remedies, including injunctive relief; and a maximum threshold on the costs involved in engaging and participating in the review mechanism. However, the rather vague nature of the language used in the text creates problems for implementation and, ultimately, enforcement. Aspects of Article 9, and indeed other provisions of the Convention, lack detail and require authoritative interpretation in order to distil their meaning and eventual impact in practice. This unenviable task falls to the Compliance Committee at the international level, to the Court of Justice in cases involving the Aarhus Convention that fall within its particular jurisdiction, and to the national courts when called on to enforce the Aarhus obligations at local level. This rich body of case law continues to evolve as new issues and problems come to light in practice.

### **EU measures designed to implement the Aarhus Convention access to justice obligations in the Member States**

This section outlines the legislative measures adopted by the EU to deliver access to environmental justice in the Member States in response to Aarhus Convention obligations. This is followed by an analysis of the jurisprudence where the Court of Justice has been called on to interpret the Aarhus access to justice provisions and to clarify and explain their implications for the Member States' legal systems. It is important to recall at the outset that the Aarhus Convention is a mixed agreement to which the EU itself and the 28 Member States are Parties. Prior to ratifying the Convention in February 2005, the European Community (as it was then) adopted secondary legislation aimed at aligning its existing legal framework with Convention requirements. Directive 2003/4/EC<sup>33</sup> on public access to environmental information was designed to give effect to the Aarhus information rights in the Member States and it included a specific access to justice provision modelled on Article 9(1) of the

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<sup>32</sup> Aarhus Convention, Art 9(4) provides that "whenever possible", decisions of bodies other than courts must also be publicly accessible.

<sup>33</sup> Directive 2003/4/EC on public access to environmental information [2003] OJ L 41/26. Member States were required to implement Directive 2003/4/EC by 14 February 2005.

Convention.<sup>34</sup> As regards the participation obligations arising under Article 6 of the Convention, Directive 2003/35/EC<sup>35</sup> (known as “the public participation directive”) provided for public participation in relation to the drawing up of certain plans and programmes and also introduced significant amendments to the Environmental Impact Assessment (EIA) directive<sup>36</sup> and the Integrated Pollution Prevention and Control (IPPC) directive.<sup>37</sup> The amendments to the EIA and IPPC directives added specific access to justice provisions, modelled closely on Article 9(2) and (4) of the Convention, to the text of each directive. Prior to these amendments, the EIA and IPPC directives were silent on the matter of enforcement.

Beyond the two directives adopted to implement Aarhus obligations in the Member States, Regulation 1367/2006/EC<sup>38</sup> (the Aarhus Regulation) aims to give effect to these obligations in the context of the EU institutions and bodies. An analysis of the provisions of the Aarhus Regulation lies beyond the scope of this paper, which focuses sharply on the situation in the Member States. For the sake of completeness, it is notable that the Aarhus Regulation has long been criticised by academic commentators and NGOs as falling short of Aarhus requirements, particularly in the context of access to justice.<sup>39</sup>

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<sup>34</sup> Directive 2003/4/EC, Art 6 which is headed “Access to Justice”.

<sup>35</sup> Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/17. Member States were required to implement Directive 2003/35/EC by 25 June 2005.

<sup>36</sup> Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175/40 as amended by Directive 97/11/EC [1997] OJ L73/5.

<sup>37</sup> Directive 96/61/EC concerning integrated pollution prevention and control [1996] OJ L 257/26.

<sup>38</sup> Regulation 1367/2006/EC on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264/13.

<sup>39</sup> See generally Pallemmaerts, M, “Access to Environmental Justice at the EU Level: Has the ‘Aarhus Regulation’ improved the situation?” in Pallemmaerts, M, *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Groningen: Europa Law Publishing, 2011); Hedemann-Robinson, M, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2<sup>nd</sup> ed) (London: Routledge, 2015) ch9 and Krämer, L, “The Aarhus Convention and the European Union” in Banner, C, *The Aarhus Convention: A Guide for UK Lawyers* (Oxford: Hart/Bloomsbury, 2015). In *draft* findings issued on 27 June 2016, concerning a communication brought by ClientEarth, the Compliance Committee expressed the initial view that the EU fails to comply with Article 9(3) and (4) with regard to access to justice by members of the public “because neither the Aarhus Regulation nor the jurisprudence of the ECJ implements or complies with the obligations arising under those paragraphs.” (See *Draft Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32* (European Union) (Part II) concerning Compliance by the European Union, agreed at the fifty-third meeting of the Compliance Committee, Geneva, 22-24 June, 2016, para 115. <http://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html> accessed 31 July 2016). As per the Compliance Committee’s operating procedure, the *draft* findings were forwarded to



When it ratified the Convention in 2005, the European Community had not, as yet, adopted legislation applying the obligations set down in Article 9(3) of the Aarhus Convention to the national legal orders.<sup>40</sup> Implementing Article 9(3) in the Member States has proven challenging for the EU legislature. A proposal for a directive on access to justice in environmental matters published in 2003<sup>41</sup> failed to generate sufficient support among the Member States. It was ultimately withdrawn in 2014, with an expectation that fresh proposals would emerge from the newly appointed Commission.<sup>42</sup> Eventually, in July 2016, the Commission published a long awaited indicative “roadmap” on access to justice at national level related to measures implementing EU environmental law.<sup>43</sup> The “roadmap” set out four possible options for a potential way forward: (1) “business as usual”, essentially relying on further clarification from the Court of Justice over time as new cases come before it; (2) an “interpretative Communication” providing guidance on the existing EU rules on

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the Party and the communicant on 27 June 2016 for their consideration. The Committee is expected to finalise and adopt its findings in due course, after having considered comments received from the EU and the communicant on the *draft* findings.

<sup>40</sup> On ratification of the Convention in 2005, the EC, in accordance with Article 19 of the Convention, submitted a declaration of competences concerning the matters governed by the Convention. As regards the implementation of Article 9(3) in the Member States, the EC declared that:

[T]he legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, [the] Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.

For the full text of the Declaration, see Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L 124/1 p3.

<sup>41</sup> Proposal for a directive on access to justice in environmental matters COM (2003) 624 final 24.10.2003 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003PC0624&qid=1469454120394&from=EN> (accessed 31 July 2016).

<sup>42</sup> The *Commission Work Programme 2016: No time for business as usual* COM (2015) 610 final 27.10.2015 states at p10 that the Commission will “take forward work to clarify access to justice in environmental matters”. For the background to this ongoing work see Brakeland, J-F, “Access to Justice in Environmental Matters: Developments at EU Level” paper delivered at International Symposium “Towards an Effective Guarantee of the Green Access: Japan’s Achievements and Critical Points from a Global Perspective”, Osaka University, 30-31 March 2013, pp17-24 <http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2014/05/arten-brakelandup.pdf> (accessed 31 July 2016).

<sup>43</sup> *Communication on access to justice at national level related to measures implementing EU environmental law*, 21 July 2016 [http://ec.europa.eu/smart-regulation/roadmaps/docs/2013\\_env\\_013\\_access\\_to\\_justice\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2013_env_013_access_to_justice_en.pdf) (accessed 31 July 2016).

access to environmental justice; (3) a legislative proposal (subsidiarity concerns were noted specifically here); and (4) a sector by sector approach, which would involve including access to justice obligations in new and existing secondary EU environmental legislation where problems have surfaced in practice (in particular, nature, water, air and waste). The Commission's indicative "roadmap" concluded that an "interpretative Communication", based on existing provisions of EU secondary legislation, international obligations under the Aarhus Convention and the case law of the Court of Justice, "would be less burdensome and intrusive for Member States" when compared with a new legislative instrument. The thinking behind the preferred option is to provide clear guidance, in a relatively short timeframe, on what the Commission expects as regards arrangements for access to justice at national level. According to the "roadmap", guidance of this nature is intended to assist those Member States not in compliance at present to make the necessary changes in their national legislation and to provide a "strong basis for further co-operation between Member States and the Commission".<sup>44</sup> Whether what is ultimately adopted officially by the Commission will take the form of a new proposal for a directive or, alternatively, a "soft" law approach still remains to be seen. However, the initial strong preference for an "interpretative Communication" or a "soft" law solution, as set out in the "roadmap" will certainly disappoint NGOs who continue to push for a specific legislative instrument to implement Article 9(3) of the Aarhus Convention in the Member States.

In the absence of EU legislative action in this particular space, it has fallen to the Court of Justice to consider the impact of Article 9(3) at national level. This particular issue is one important strand of the Court's evolving jurisprudence which is examined in Part II below. The Commission's apparent reluctance to pursue a legislative instrument to implement Article 9(3) in the Member States serves to bring the importance and influence of the Court's jurisprudence on access to environmental justice in the national legal orders into even sharper focus.

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<sup>44</sup> It is envisaged that any such guidance would operate in tandem with the Environmental Implementation Review adopted recently by the Commission. See further European Commission, *Delivering the benefits of EU environmental policies through a regular Environmental Implementation Review* COM (2016) 316 final 27.5.2016.

## **Part II      Jurisprudence of the Court of Justice on the Impact of the Aarhus Convention Access to Justice Obligations in the Member States**

The Court of Justice has delivered thirteen judgments to date involving Aarhus-related measures governing arrangements for access to justice in the Member States.<sup>45</sup> Details of these judgments, presented in chronological order, are included in the Appendix to this paper for ease of reference. There are three judgments from infringement proceedings brought by the Commission alleging breach of the (Aarhus-inspired) access to justice provisions in the EIA directive<sup>46</sup> and the industrial emissions (ex IPPC) directive.<sup>47</sup> Two of these infringement proceedings concerned the ban on “prohibitively expensive” costs and involved two common law jurisdictions, Ireland and the United Kingdom respectively.<sup>48</sup> The third set of infringement proceedings was taken against Germany and concerned a number of points including: restrictive national standing rules; the criteria governing admissibility of an action; as well as limitations on the grounds for judicial review.<sup>49</sup> So far, there have been ten preliminary rulings interpreting the access to justice obligations in the EIA directive, the industrial emissions (ex IPPC) directive, the directive on public access to environmental information (Directive 2003/4/EC) and Article 9(3) of the Aarhus Convention.<sup>50</sup> Two further references are pending at the time of writing.<sup>51</sup> The origins of the references for preliminary rulings to date are as

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<sup>45</sup> This is the position at 31 July 2016.

<sup>46</sup> Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175/40 as amended by Directive 97/11/EC [1997] OJ L73/5. The EIA directive has now been consolidated in Directive 2011/92/EU [2011] OJ L 26/1 which was amended recently by Directive 2014/52/EU [2014] OJ L 124/1. Member States are required to implement Directive 2014/52/EC by 16 May 2017.

<sup>47</sup> Directive 2010/75/EU on industrial emissions [2010] OJ L 334/17. The original IPPC directive has now been replaced twice. First by Directive 2008/1/EC [2008] OJ L 24/8 and most recently by Directive 2010/75/EU.

<sup>48</sup> Case C-427/07 *Commission v Ireland* EU:C:2009:457 and Case C-530/11 *Commission v United Kingdom* EU:C:2014:67.

<sup>49</sup> Case C-137/14 *Commission v Germany* EU:C:2015:683.

<sup>50</sup> Art 9(3) of the Aarhus Convention guarantees a general right of access to justice to enforce environmental law.

<sup>51</sup> On 30 June 2016, Advocate General Kokott delivered her Opinion in Case C-243/15 *Lesoochránárske zoskupenie VLK v Obvodný úrad Trenčín (LZ II)* EU:C:2016:491 and judgment is expected in autumn 2016. On 29 July 2016, in *North East Pylon Pressure Campaign Limited An Bord Pleanála* [2016] IEHC 490, the High Court of Ireland decided to make a reference to the Court of Justice on a range of questions concerning the ban on prohibitive costs and the impact of Article 9(3) of the Aarhus Convention at national level (Case C-470/16).

follows: Slovakia (3);<sup>52</sup> Belgium (2); Germany (2); United Kingdom (2); Sweden (1); Austria (1) and Ireland (1).<sup>53</sup> It is clear from the number of references to the Court of Justice that national courts require guidance on the correct interpretation of the access to justice obligations on a fairly regular basis. This is not surprising given the general manner in which aspects of these obligations are drafted both in the Convention text itself and the related EU legislative measures. The references made by national courts to date have provided the Court with the opportunity to interpret the access to justice obligations in a way that promotes effective judicial protection at local level and to underscore the importance of a high level of environmental protection across the EU. As will become clear from the analysis of the jurisprudence presented here, the Court has adopted its characteristic purposive approach in interpreting the discretion left to Member States when implementing the access to justice obligations with a view to delivering the objective of “wide access to justice” envisaged by the Convention. At the same time, the Court is alert to the fact that its preliminary rulings must be applied across the highly diverse legal systems operating in the (for now, at least) 28 Member States.<sup>54</sup> This practical reality leads to a situation where the rulings delivered by the Court are not always as sharply focussed or as specific as the referring national court would like. Rulings cast in general terms may well leave scope for further genuine disagreement at national level around grey areas which are not settled fully. As will be seen below, this is especially the case as regards the implications of the obligation that costs must not be “prohibitively expensive”. Given the diverse approaches to access to justice in environmental matters across the Member States, and the fact that contentious points of interpretation will only reach the Court where a national court makes a reference and / or the Commission brings infringement proceedings, settling authoritatively what is required by the access to justice obligations is inevitably going to take time. The Court’s jurisprudence to date is best regarded therefore as a work in progress which continues to evolve and mature as new issues arise for its consideration.

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<sup>52</sup> Note: Judgment is pending in Case C-243/15 *Lesoochránárske zoskupenie VLK v Obvodný úrad Trenčín (LZ II)* EU:C:2016:491 at the time of writing.

<sup>53</sup> Note: The reference in Case C-470/16 *North East Pylon Pressure Campaign Limited v An Bord Pleanála* [2016] IEHC 490 is pending at the time of writing.

<sup>54</sup> Case C-260/11 R (*Edwards*) v *Environment Agency* EU:C:2012:645 para 33 of the Opinion per Advocate General Kokott.

Before turning to the analysis of the jurisprudence, it is necessary to note briefly important changes in the numbering of the access to justice clauses in the EIA directive and the industrial emissions (ex IPPC) directive which have occurred over time. The access to justice provision was originally found in Article 10a of the EIA directive (Directive 85/337/EEC<sup>55</sup> as amended by Directive 97/11/EC<sup>56</sup> and Directive 2003/35/EC<sup>57</sup>). Following codification of the EIA directive in 2011, which led to a renumbering of its provisions, the access to justice clause is now found in Article 11 of Directive 2011/92/EU.<sup>58</sup> As regards the IPPC directive, the access to justice provision was originally set out in Article 15a of that directive. The IPPC directive has now been replaced twice, first by Directive 2008/1/EC<sup>59</sup> and, most recently, by the industrial emissions directive (Directive 2010/75/EU<sup>60</sup>) adopted in 2010. The result is that the access to justice provision is now found in Article 25 of the industrial emissions directive. These changes relate solely to renumbering; the substantive text of the access to justice provisions in both directives has not been amended since they were first introduced in 2003.

### **Framework of analysis of the Court of Justice jurisprudence**

When implementing Article 9 of the Aarhus Convention, and the access to justice provisions in the EU directives, the Member States enjoy a measure of discretion under the principle of national procedural autonomy, but subject to compliance with the principles of equivalence and effectiveness.<sup>61</sup> In particular, it is for the Member States to determine which court of law or which independent and impartial body established by law has jurisdiction in respect of the review procedure and what

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<sup>55</sup> Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175/40.

<sup>56</sup> [1997] OJ L 73/5.

<sup>57</sup> [2003] OJ L 156/17.

<sup>58</sup> [2011] OJ L 26/1. Amendments to the codified EIA directive in 2014 pursuant to Directive 2014/52/EC [2014] OJ L 124/1 did not impact on the content of the access to justice provision.

<sup>59</sup> [2008] OJ L 24/8.

<sup>60</sup> [2010] OJ L 334/17.

<sup>61</sup> Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125 paras 47-48; Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG* EU:C:2010:773 para 43; Joined Cases C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and C-135/09 and *Roua et al v Région wallonne* EU:C:2011:667 para 52; Case C-416/10 *Križan and Others v Slovenská inšpekcia životného prostredia* EU:C:2013:8 para 106; Case C-72/12 *Gemeinde Altrip (Municipality of Altrip), Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate* EU:C:2013:712 para 45; Case C-570/13 *Gruber v Unabhängiger Verwaltungssenat für Kärnten* EU:C:2015:231 para 37; and Case C-71/14 *East Sussex County Council v Information Commissioner, Property Search Group and Local Government Association* EU:C:2015:656 para 52.

procedural rules apply. The analysis of the jurisprudence set out below demonstrates clearly that the Court will not permit Member States to side step the obligation to provide judicial review to ensure that environmental law is observed in practice. Beyond the fundamental right to judicial review, the Court has been called on to examine the effectiveness of Member States' arrangements governing access to judicial review (including the costs involved), the scope of the review process itself and the remedies available at local level. For the purposes of this paper, the analysis of the jurisprudence of the Court of Justice is arranged around a series of topics reflecting the key issues that have surfaced to date. This approach aims to draw out particular flashpoints that have arisen in the course of Member States' efforts to implement the access to justice obligations set down in the Aarhus Convention and the related EU legislative measures. The following themes are used to arrange and analyse the jurisprudence:

1. The right to judicial review to ensure compliance with EIA obligations;
2. The temporal application of the right to judicial review under the EIA directive;
3. Standing to invoke the right to judicial review to enforce environmental obligations;
4. The scope of Member State discretion to set conditions governing admissibility of judicial review proceedings;
5. The scope of the right to challenge decisions concerning projects subject to EIA;
6. The scope of administrative and judicial review that must be provided at national level;
7. Interim measures to ensure effective judicial protection;
8. Deciphering the meaning of the ban on prohibitive costs;
9. The duty to inform the public of the right of access to justice;

10. Whether a court decision enforcing the IPPC directive could amount to an unjustified interference with the developer's right to property under Article 17 of the EU Charter?
11. Court of Justice engagement with Aarhus Convention Compliance Committee findings on access to justice in the Member States.

Interpretation of the Aarhus Convention and the related EU legislative measures is a challenging task. The UN ECE publication, *The Aarhus Convention: An Implementation Guide*, now in its second edition (2014), is widely regarded as a useful reference point when interpreting the Convention.<sup>62</sup> In *Solvay*,<sup>63</sup> a reference from the *Cour constitutionnelle* in Belgium, the national court enquired whether Convention provisions must be interpreted in accordance with the commentary provided in the implementation guide. The Court of Justice clarified that the guide may be regarded as “an explanatory document”, which could indeed be taken into consideration, where appropriate, and together with other relevant material, for the purpose of interpreting the Convention.<sup>64</sup> However, the observations in the guide “have no binding force and do not have the normative effect of the provisions of the Aarhus Convention.”<sup>65</sup> As will be seen below, the Court and its Advocates General have referred to the Implementation Guide as an aid to interpretation on a number of occasions.

### **1. The right to judicial review to ensure compliance with EIA obligations**

Members of the public concerned must be able to invoke judicial review to ensure that the requirements of the EIA directive have been met.<sup>66</sup> Under Article 1(5) of the EIA directive, projects approved by way of a specific legislative act are excluded from the scope of the directive, but only where the directive's objectives, including that of

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<sup>62</sup> UN ECE, *The Aarhus Convention: An Implementation Guide* (2<sup>nd</sup> ed) (2014) [http://www.unece.org/env/pp/implementation\\_guide.html](http://www.unece.org/env/pp/implementation_guide.html) (accessed 31 July 2016). The original version of the implementation guide was published in December 2000: UN ECE, *The Aarhus Convention: An Implementation Guide* (2000)

<http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf> (accessed 31 July 2016).

<sup>63</sup> Case C-182/10 *Solvay v Région wallonne* EU:C:2012:82.

<sup>64</sup> *ibid*, paras 26-27.

<sup>65</sup> *ibid*, para 27.

<sup>66</sup> Case C-201/02 *Wells v Secretary of State for Transport, Local Government and the Regions* EU:C:2004:12 paras 54-61.

supplying information to the public, are achieved through the legislative process.<sup>67</sup> In *Boxus*,<sup>68</sup> a reference from the *Conseil d'État* in Belgium, the Court of Justice, sitting in Grand Chamber formation, ruled that whether a particular legislative act satisfies the conditions set down in Article 1(5) must be subject to review by a court of law or an independent and impartial body established by law. Otherwise, Article 9 of the Convention and Article 10a of the EIA directive “would lose all effectiveness”.<sup>69</sup> Where no such review procedure is available under national law, then any national court before which an action is brought must carry out a review and, in the case of non-compliance with Article 1(5), must disapply the legislative act in question.<sup>70</sup> The Court subsequently confirmed this approach in *Solvay*.<sup>71</sup> These decisions confirm that domestic constitutional arrangements as to the jurisdiction of specific national courts cannot operate to preclude the right to judicial review.

In *Solvay*, the national court also sought clarification on the scope of the competent (national) authority's duty, under Article 9(1) of the EIA directive, to provide reasons for a negative screening decision (i.e. a decision that an EIA is not required in a particular case). The Court confirmed its earlier *Mellor*<sup>72</sup> ruling and concluded that the effective judicial protection of EU law rights requires that a competent authority must inform interested parties of the reasons for a negative screening decision.<sup>73</sup> The reasons could be provided either in the decision itself, or in a subsequent communication following a request for a statement of reasons.<sup>74</sup> The Court confirmed that this interpretation may also be applied in the case of Article 6(9) of the Aarhus Convention, the text of which is substantially the same as that found in Article 9(1) of the EIA directive.<sup>75</sup> The basis for the *Solvay* and *Mellor* rulings is the fundamental point that interested parties cannot engage judicial review effectively without being provided with the reasons behind a competent authority's negative screening decision. They must be in a position to verify whether the competent

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<sup>67</sup> EIA directive, Art 1(5) and Case C-435/97 *World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen* EU:C:1999:418. A similar exclusion is found in Art 2(2) of the Aarhus Convention where any “bodies or institutions acting in a judicial or legislative capacity” are excluded from the scope of the definition of “public authority”.

<sup>68</sup> Joined Cases C-128/09, C-129/09, C-130/09, C-131/09; C-134/09 and C-135/09 *Boxus and Roua et al v Région wallonne* EU:C:2011:667 paras 53-54.

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*

<sup>71</sup> Case C-182/10 *Solvay v Région wallonne* EU:C:2012:82 paras 41-42 and 48-50.

<sup>72</sup> Case C-75/08 *Mellor v Secretary of State for Communities and Local Government* EU:C:2009:279.

<sup>73</sup> Case C-182/10 *Solvay v Région wallonne* EU:C:2012:82 paras 54-62.

<sup>74</sup> *ibid* paras 59-62.

<sup>75</sup> *ibid* para 63.



authority acted in accordance with the EIA directive. Both rulings provide clear examples of the importance that the Court attaches to the duty to give reasons in order to ensure that interested parties can decide, on an informed basis, whether to engage in judicial review proceedings to enforce EIA obligations.

## **2. The temporal application of the right to judicial review under the EIA directive**

*Altrip*,<sup>76</sup> a reference from the *Bundesverwaltungsgericht* (Federal Administrative Court) in Germany, addressed an important practical issue concerning the temporal application of the right of access to justice under Article 10a of the EIA directive. The national court enquired whether the right guaranteed under Article 10a also applied to development consent procedures initiated *before* 25 June 2005 (the deadline for implementation of Directive 2003/35/EC) where they resulted in development consent being granted *after* that date. The Court of Justice began by observing that Directive 2003/35/EC did not contain any particular provisions governing the temporal application of Article 10a; it was simply one of a number of measures required to be implemented by the 25 June 2005 deadline.<sup>77</sup> The Court recalled its well-established case law to the effect that the obligation to undertake an EIA does not apply where the application for development consent for a particular project was lodged formally *before* the expiry of the deadline for implementation.<sup>78</sup> The basis for this approach is that it would not be appropriate for the relevant EIA procedures, which are already complex at national level, to be made even more cumbersome and time-consuming by applying the directive to pre-existing situations.<sup>79</sup> In *Altrip*, however, the Court considered that neither the new access to justice obligations arising under Article 10a, nor the existing requirement that certain projects must be subject to EIA, rendered administrative procedures more cumbersome and time-consuming.<sup>80</sup> As Advocate General Cruz Villalón observed, Article 10a is designed to improve access to a legal remedy to ensure compliance with obligations which are already binding.<sup>81</sup> If extending the right of access to justice is likely to increase the

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<sup>76</sup> Case C-72/12 *Gemeinde Altrip (Municipality of Altrip), Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate* EU:C:2013:712.

<sup>77</sup> *ibid*, paras 23-24.

<sup>78</sup> *ibid*, para 25.

<sup>79</sup> *ibid*, para 26.

<sup>80</sup> *ibid*, para 27.

<sup>81</sup> Case C-72/12 *Gemeinde Altrip (Municipality of Altrip), Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate* EU:C:2013:422 para 59 of the Opinion.

risk of a legal challenge to a particular project, that increase of a “pre-existing” risk could not be regarded as affecting a situation already established.<sup>82</sup> The Court acknowledged that extending the applicability of Article 10a in this way could have the practical effect of delaying the completion of projects due to legal challenges, but “a disadvantage of that kind is inherent in the review of the legality of decisions, acts or omissions” that fall within the scope of the EIA directive.<sup>83</sup> In the words of the Advocate General, it is “an inevitable consequence of the judicial review of already binding provisions”.<sup>84</sup> In reaching its conclusion on this point the Court referred explicitly to the fact that the review procedure required by virtue of the Aarhus Convention has the objective of contributing “to preserving, protecting and improving the quality of the environment and protecting human health.”<sup>85</sup> Given those objectives, the potential disadvantage of delay to projects due to litigation could not justify making Article 10a “redundant” in situations existing at the deadline for transposition which result in development consent being granted after that date.<sup>86</sup> Adopting a purposive approach, the Court therefore concluded that even though Member States enjoy discretion in implementing Article 10a (subject to the principles of equivalence and effectiveness), they may not restrict the application of that provision exclusively to development consent procedures initiated after 25 June 2005.<sup>87</sup> This firm ruling signals, yet again, the fundamental importance of the availability of judicial review to ensure compliance with the law. The Court was not prepared to let concerns about potential delay to the completion of projects undermine the public’s right of access to a legal remedy to enforce EIA obligations. It is implicit in the Court’s reasoning that Article 10a codified the right to judicial review which was established in the EIA jurisprudence before the access to justice obligation was inserted into the text of EIA directive in 2003.<sup>88</sup>

### **3. Standing to invoke the right to judicial review to enforce environmental obligations**

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<sup>82</sup> Case C-72/12 *Gemeinde Altrip (Municipality of Altrip)*, *Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate* EU:C:2013:712 para 27.

<sup>83</sup> *ibid*, para 28.

<sup>84</sup> Case C-72/12 *Gemeinde Altrip (Municipality of Altrip)*, *Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate* EU:C:2013:422 para 59 of the Opinion.

<sup>85</sup> Case C-72/12 *Gemeinde Altrip (Municipality of Altrip)*, *Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate* EU:C:2013:712 para 28.

<sup>86</sup> *ibid*, para 29.

<sup>87</sup> *ibid*, para 30.

<sup>88</sup> *ibid*, paras 27-28.

In *Djurgården*,<sup>89</sup> a reference from the *Högsta Domstolen* (Supreme Court) in Sweden, the Court of Justice determined that a national rule providing that only NGOs with at least 2,000 members could bring an appeal against an environmental decision was not compatible with the access to justice obligation in Article 10a of the EIA directive. The net impact of such a restrictive provision was to deprive small, locally based environmental associations of any judicial remedy.<sup>90</sup> The Court acknowledged that Article 10a, read in conjunction with Article 1(2) of the EIA directive, provides national legislatures with discretion to determine the conditions to be met in order for an NGO to be eligible to invoke the review procedure.<sup>91</sup> The Court insisted, however, that any such conditions must deliver “wide access to justice” and ensure that the judicial remedies mandated in the EIA directive are effective.<sup>92</sup> As Advocate General Sharpston explained in her Opinion, the Aarhus Convention gives NGOs “a special supervisory role” to enforce environmental law.<sup>93</sup> She referred to the (non-binding) Aarhus Convention implementation guide (original edition) and noted that the guide commented on the specific rule at issue in this case, suggesting that it might be considered “overly strict under the Convention”.<sup>94</sup> The Court took the view that it was permissible for national law to insist that an NGO has the protection of nature and the environment as its objective.<sup>95</sup> It was also prepared to accept that a Member State could require that NGOs have a minimum number of members (in order to ensure that a particular NGO exists and is active), but this number cannot be fixed at such a level that it runs counter to the objectives of the

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<sup>89</sup> Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* EU:C:2009:631.

<sup>90</sup> *ibid.*, para 50.

<sup>91</sup> *ibid.*, para 45.

<sup>92</sup> *ibid.*

<sup>93</sup> Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* EU:C:2009:421 para 50 of the Opinion. See further the Advocate General’s detailed analysis of the role of NGOs in promoting environmental protection and the importance of judicial review in environmental matters in paras 59-64 of the Opinion. The Advocate General observed that the Aarhus Convention and the EIA directive, as amended by Directive 2003/35/EC:

[H]ave deliberately chosen to reinforce the role of [NGOs] promoting environmental protection. They have done so in the belief that such organisations’ involvement in both the administrative and the judicial stages [of the decision-making process] not only strengthens the decisions taken by the authorities but also makes procedures designed to prevent environmental damage work better [para 64].

<sup>94</sup> Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* EU:C:2009:421 at para 78 of the Opinion.

<sup>95</sup> Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* EU:C:2009:631 para 46.

EIA directive and, in particular, the objective of facilitating judicial review.<sup>96</sup> The Court concluded its judgment by insisting that the right to participate in the environmental decision-making process under Article 6(4) of the EIA directive is separate to, and has a different purpose from, the right of access to judicial review under Article 10a. It followed that it was not permissible for Member States to limit access to the review procedure on the basis that the persons concerned had the opportunity to express their views during the participatory stage of the decision-making procedure.<sup>97</sup>

The *Djurgården* case is of particular interest because Advocate General Sharpston explained in her Opinion that, even in the absence of the explicit access to justice obligations set out in Article 9 of the Aarhus Convention and Article 10a of the EIA directive, she would still have concluded that the restrictive procedural rule in this case breached the principle of effectiveness of EU law.<sup>98</sup> The EIA directive “which introduces a system of environmental assessment and confers rights, would be stripped of its effectiveness if the domestic procedural system failed to ensure access to the courts.”<sup>99</sup> On the facts of the instant case, the impact of the contested rule was to make access to justice impossible for virtually all NGOs in Sweden. The Advocate General’s analysis provides further confirmation that the access to justice obligation, which was added to the text of the EIA directive in 2003, codified the pre-existing right to effective judicial protection articulated in the case law of the Court of Justice.

In *Lesoochránárske zoskupenie (LZ)*,<sup>100</sup> a reference from the *Najvyšší súd Slovenskej republiky* (the Supreme Court) in Slovakia, in the Court of Justice was required to interpret Article 9(3) of the Aarhus Convention in the context of NGO standing.<sup>101</sup> It will be recalled that Article 9(3) provides for a general right of access to justice to enforce environmental law at local level. The Court, sitting in Grand Chamber formation, confirmed that the provisions of Article 9(3) “do not contain any clear and precise obligation capable of directly regulating the legal position of

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<sup>96</sup> *ibid.*, para 47.

<sup>97</sup> *ibid.*, para 48. See also para 38.

<sup>98</sup> Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* EU:C:2009:421 para 80 of the Opinion.

<sup>99</sup> *ibid.*

<sup>100</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125.

<sup>101</sup> On the Court’s jurisdiction to interpret the provisions of Art 9(3) of the Aarhus Convention (a mixed agreement), and to give a ruling as to whether or not they have direct effect, see paras 29-43 of the LZ judgment.

individuals”.<sup>102</sup> Only members of the public who meet the criteria (if any) set down in national law have standing to invoke the review procedure. It followed that implementation of Article 9(3) depends on the adoption of a subsequent (national) measure.<sup>103</sup> Therefore Article 9(3) does not have direct effect in EU law.<sup>104</sup> However, that stark conclusion was not the end of the matter. The Court went on to emphasise that Article 9(3), although drafted in broad terms, is intended to ensure effective environmental protection.<sup>105</sup> In the absence of EU rules, it fell to the Member States to set down the detailed procedural requirements governing actions for safeguarding the rights that individuals derive from EU law, subject to the principles of equivalence and effectiveness.<sup>106</sup> It is the Member States’ responsibility to ensure that those rights (in this particular case the rights arising under the habitats directive)<sup>107</sup> are protected effectively.<sup>108</sup> The Court insisted that if the “effective protection” of EU environmental law is to be delivered, Article 9(3) could not be interpreted in such a way as to make it impossible in practice or excessively difficult to exercise rights conferred by EU law.<sup>109</sup> Where, as in this case, a species protected under the habitats directive was at issue, effective judicial protection demanded that the national court interpret domestic law, “to the fullest extent possible”, consistently with the objectives in Article 9(3) of the Aarhus Convention.<sup>110</sup>

Recalling its earlier rulings in *Unibet*<sup>111</sup> and *Impact*,<sup>112</sup> the Court concluded that the referring court must interpret its national procedural rules in accordance with Article 9(3) of the Convention and the objective of delivering effective judicial protection, to enable an NGO to challenge a decision likely to be contrary to EU environmental

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<sup>102</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125 para 45.

<sup>103</sup> *ibid.*

<sup>104</sup> *ibid.*

<sup>105</sup> *ibid.*, para 46.

<sup>106</sup> *ibid.*, para 47, citing Case C-268/06 *Impact v Minister for Agriculture and Food* EU:C:2008:223 para 46.

<sup>107</sup> Directive 92/43/EEC on the conservations of natural habitats and wild fauna and flora [1992] OJ L 206/7.

<sup>108</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125 paras 47-48.

<sup>109</sup> *ibid.*, paras 48-49.

<sup>110</sup> *ibid.*, para 50.

<sup>111</sup> Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiiekanslern* EU:C:2007:163 para 44.

<sup>112</sup> Case C-268/06 *Impact v Minister for Agriculture and Food* EU:C:2008:223 para 54.

law.<sup>113</sup> This is a particularly powerful and far-reaching ruling. It confirms the right to effective judicial protection and the vital role of NGOs in environmental law enforcement under the regime established in the Aarhus Convention. It also underlines the significance of the doctrine of consistent interpretation in enabling national courts to deliver the rights conferred by the Aarhus Convention by interpreting national law, “to the fullest extent possible”, in light of the obligations set down in the Convention. The *LZ* ruling further demonstrates that, notwithstanding the EU’s inability to legislate to implement Article 9(3) in the Member States to date, the Court of Justice has responded forcefully to address this gap by insisting that national courts give effect to the access to justice obligation created in Article 9(3) of the Convention.

The question of standing to enforce environmental law surfaced again in *Trianel*,<sup>114</sup> a reference from the *Oberverwaltungsgericht für das Land Nordrhein-Westfalen*, (Higher Administrative Court for the Nordrhein-Westfalen Land) in Germany. The Court of Justice confirmed that the access to justice obligation in the EIA directive (Article 10a) must be interpreted in light of the objectives of the Aarhus Convention.<sup>115</sup> It determined that a Member State could not deprive an NGO that fulfils the conditions in Article 1(2) of the EIA directive of its right to bring judicial review proceedings to enforce environmental law.<sup>116</sup> It would be contrary to the objective of giving the public concerned “wide access to justice” and “at odds with the principle of effectiveness” if NGOs were prevented from bringing judicial review proceedings to verify compliance with the law in cases involving the public interest as opposed to the protection of individual public law rights.<sup>117</sup> It followed that the NGO

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<sup>113</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125 para 51.

<sup>114</sup> Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG* EU:C:2011:289.

<sup>115</sup> *ibid*, para 41.

<sup>116</sup> *ibid*, para 44. Art 1(2) of the EIA directive define “the public concerned” as meaning “the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2) [of the directive] ... ; for the purpose of this definition, [NGOs] promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”

<sup>117</sup> *ibid*, para 46.

in this case must be permitted to challenge the alleged infringement of the habitats directive, even though such an action was not available under German law.<sup>118</sup>

In a very significant passage, the Court confirmed that, where it was not possible for a national court to interpret domestic procedural law in a manner consistent with EU law, then certain elements of the access to justice provision in the EIA directive could be relied on directly against the State.<sup>119</sup> It acknowledged that, taken as a whole, Article 10a leaves Member States “a significant discretion” as regards the conditions governing access to justice.<sup>120</sup> However, Article 10a contains a specific rule that any NGO meeting the requirements referred to in Article 1(2) of the EIA directive automatically has standing to invoke the review procedure.<sup>121</sup> This rule is precise and is not subject to other conditions. The Court explained that the rights that NGOs may rely on in judicial review proceedings under Article 10a include the rules of EU environmental law, and, in particular, the rules of national law flowing from Article 6 of the habitats directive.<sup>122</sup> The Court concluded by confirming that NGOs can rely on Article 10a to insist on their right to enforce EU environmental law before the national courts, notwithstanding national procedural law to the contrary effect.<sup>123</sup>

*Trianel* confirms the vital role of NGOs in environmental law enforcement guaranteed by the Aarhus Convention. Drawing inter alia on the Aarhus Convention implementation guide (original edition), Advocate General Sharpston highlighted the importance of involving NGOs in both the administrative and judicial stages of the decision-making process in the following purposive analysis:

[Involving NGOs] strengthens the quality and the legitimacy of decisions taken by the public authorities, and improves the effectiveness of the procedures aimed at preventing environmental damage.<sup>124</sup>

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<sup>118</sup> *ibid*, para 49. The Court accepted, however, that the national legislature is entitled to limit an individual’s (as opposed to an NGO’s) entitlement to bring a challenge to situations where the administrative measure in question affects the individual’s public law rights (para 45 of the judgment). See also Case C-137/14 *Commission v Germany* EU:C:2015:683 paras 32-33.

<sup>119</sup> Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG* EU:C:2011:289 paras 52-54.

<sup>120</sup> *ibid*, para 55.

<sup>121</sup> *ibid*, paras 56-57.

<sup>122</sup> *ibid*, para 58.

<sup>123</sup> *ibid*, para 59.

<sup>124</sup> Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG*

In case the Court was not convinced that the wording and objective of Article 10a provided for automatic standing for environmental NGOs, Advocate General Sharpston also examined the issue from the perspective of the principle of effectiveness. She began by recalling that the amendments to the EIA directive introduced pursuant to Directive 2003/35/EC were intended to create “wide access to justice” and that the Court had already interpreted the EIA directive extensively.<sup>125</sup> It followed, in her view, that excluding all actions based on environmental provisions, other than those which also grant substantive rights to individuals, clearly did not amount to effective implementation of the EIA directive.<sup>126</sup> The German Government argued that its system of judicial review involved careful and detailed scrutiny of administrative decisions and provided a high level of protection of individual rights. Advocate General Sharpston was unimpressed by this argument and responded both pithily and appropriately that “like a Ferrari with its doors locked shut, an intensive system of review is of little practical help if the system itself is totally inaccessible for certain categories of action”.<sup>127</sup> The Advocate General also took the opportunity to highlight that “allowing environmental NGOs to bring actions may in fact result in a more efficient and cost-effective use of limited judicial resources”.<sup>128</sup>

In *Gruber*,<sup>129</sup> a reference from the *Verwaltungsgerichtshof* (Administrative Court) in Austria, the Court was again required to consider matters relating to standing. Under the relevant national law, only the person seeking the development consent, the competent authorities, the relevant municipality and the *Umweltanwalt* (Ombudsman for the Environment) had the right to bring an action to challenge a screening decision.<sup>130</sup> It will be recalled that under Article 11 (formerly Article 10a) of the EIA directive, members of the public concerned having a “sufficient interest” or maintaining impairment of a right (as the case may be), must have access to a

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EU:C:2010:773 para 52 of the Opinion. On this particular theme, the Advocate General cited an earlier contribution of the author of this paper in Ryall, Á, “EIA and Public Participation: Determining the Limits of Member State Discretion” (2007) 19 *Journal of Environmental Law* 247 which criticised the Court’s judgment in Case C-216/05 *Commission v Ireland* EU:C:2006:706 for failing to take account of the potential cumulative effect of imposing participation fees on environmental NGOs seeking to participate in the EIA process.

<sup>125</sup> *ibid*, paras 74 and 76 of the Opinion.

<sup>126</sup> *ibid*, para 76 of the Opinion.

<sup>127</sup> *ibid*, para 77 of the Opinion.

<sup>128</sup> *ibid*, para 79 of the Opinion.

<sup>129</sup> Case C-570/13 *Gruber v Unabhängiger Verwaltungssenat für Kärnten* EU:C:2015:231.

<sup>130</sup> *ibid*, para 42.



review procedure to challenge decisions, acts or omissions falling within the scope of the EIA directive. Article 1(2) of the directive defines “the public concerned” as meaning the public affected or likely to be affected by, or having an interest, in the EIA decision-making procedures. According to the Court, it follows, therefore, that not all natural persons, legal persons or NGOs falling within the concept of “the public concerned” must be entitled to invoke the review procedure.<sup>131</sup> This right is limited to those individuals who can demonstrate “a sufficient interest” or impairment of a right under the relevant national legislation.<sup>132</sup>

Article 11 of the EIA directive, which is designed to implement Article 9(2) of the Aarhus Convention, must be interpreted in light of the objectives of that Convention.<sup>133</sup> The Court referred to the Aarhus Convention implementation guide (original edition) to assist it in interpreting this provision. It noted that the guide clarified that the two standing options referred to in the first paragraph of Article 9(2) constitute “two equivalent mechanisms” aiming to achieve the same result by having regard to the differences between the legal systems of the Parties to the Convention.<sup>134</sup> Although the Member States have “a significant discretion” to determine what constitutes “a sufficient interest” or the impairment of a right, it is clear from Article 11(3) of the EIA directive and Article 9(2) of the Convention that this discretion “is limited by the need to respect the objective of ensuring wide access to justice for the public concerned”.<sup>135</sup> It follows that the right of members of “the public concerned” to challenge decisions, acts or omissions that fall within the scope of the EIA directive cannot be interpreted restrictively.<sup>136</sup> The Court concluded that, by depriving a large number of individuals from exercising the right to bring an action, including in particular “neighbours” such as Ms Gruber who may meet the conditions set down in Article 11(1) of the EIA directive, the national provision at issue in this case was incompatible with the directive.<sup>137</sup> Although national law enabled neighbours to raise objections during the development consent procedure,

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<sup>131</sup> *ibid*, para 32. This conclusion seems questionable as regards the position of NGOs that meet the requirements set down in Article 1(2) of the EIA directive. NGOs that meet these requirements *automatically* have standing to invoke the review procedure.

<sup>132</sup> *ibid*, paras 32-33.

<sup>133</sup> *ibid*, para 34.

<sup>134</sup> *ibid*, para 35.

<sup>135</sup> *ibid*, para 39.

<sup>136</sup> *ibid*, para 40.

<sup>137</sup> *ibid*, paras 42-43. In this case, Ms Gruber was a “neighbour” under the relevant provision of national law because the proposed project was to be built on land bordering her property (see paras 41-42 of the judgment).

the Court took the view that “the primary purpose of such a procedure is to protect the private interests of individuals and it has no specific environmental aims in the interests of society”.<sup>138</sup> Although the EIA directive provides at Article 2(2) that it is permissible for Member States to integrate the EIA procedure into other administrative procedures, all the requirements set down in Articles 5 to 10 of the directive must be met in that procedure.<sup>139</sup> It falls to the national court to determine whether this has been achieved in a particular case.<sup>140</sup> In *Gruber*, we see another example of the Court’s determination to ensure that qualified individuals can invoke the right to judicial review to challenge alleged non-compliance with EIA obligations in the interests of promoting environmental protection.

#### **4. The scope of Member State discretion to set conditions governing admissibility of judicial review proceedings**

In *Altrip*,<sup>141</sup> considered earlier above, the Court of Justice also examined whether certain criteria governing admissibility of judicial review proceedings were compatible with Article 10a of the EIA directive. First, German law required a causal link (“the condition of causality”) between the alleged defect in the environmental assessment process and the ultimate content of the contested administrative decision. A second requirement was that the substantive legal position of the person bringing the challenge should be affected as a result of the contested decision. On the first point, the Court recalled that national law may not make it impossible in practice or excessively difficult to exercise the right to “wide access to justice” that the EIA directive confers on the public concerned.<sup>142</sup> The Court highlighted the objective of this right to contribute “to preserving, protecting and improving the quality of the environment and protecting human health.”<sup>143</sup> It was not the EU legislature’s intention to make the possibility of invoking a procedural defect conditional on that defect impacting on the contested administrative decision.<sup>144</sup> The Court stressed, yet again, the particular importance of ascertaining whether EIA

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<sup>138</sup> *ibid*, para 49.

<sup>139</sup> *ibid*, para 50.

<sup>140</sup> *ibid*.

<sup>141</sup> Case C-72/12 *Gemeinde Altrip (Municipality of Altrip), Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate* EU:C:2013:712.

<sup>142</sup> *ibid*, para 46.

<sup>143</sup> *ibid*. See also Case C-137/14 *Commission v Germany* EU:C:2015:683 para 55.

<sup>144</sup> *ibid*, para 47. See also Case C-137/14 *Commission v Germany* EU:C:2015:683 para 56.

rules have been complied with in practice.<sup>145</sup> It followed from this line of reasoning that the public concerned must be able to invoke *any* procedural defect in support of an action challenging the legality of decisions that fall within the scope of the EIA directive.<sup>146</sup> The Court accepted, however, that there could be situations where a procedural defect would not have consequences for the contested decision and, in such cases, the rights of the party seeking to plead such a defect could not be said to be impaired.<sup>147</sup> Moreover, the Court recalled that Article 10a leaves Member States “significant discretion” to determine what constitutes impairment of a right.<sup>148</sup> The Court considered that “it could be permissible” for national law not to recognise impairment of a right within the meaning of Article 10a where it is established that it is “conceivable”, in the particular circumstances of the case, that the contested decision would have been the same without the procedural defect.<sup>149</sup> Under the specific national rule at issue in the present case, however, it was incumbent on a person bringing a challenge to demonstrate the required causal link. The Court found that this shifting of the burden of proof onto the person bringing the action was capable of making the exercise of the rights conferred by the EIA directive “excessively difficult”.<sup>150</sup> The Court reached this conclusion on the basis of the complexity of the procedures in question and the technical nature of environmental assessments.<sup>151</sup> It insisted that under Article 10a impairment of a right could not be excluded unless the court is in a position to take the view (by relying, where appropriate, on the evidence produced by the developer or the competent authorities and, more generally the documents submitted to the court) that the contested decision would not have been any different without the procedural defect at issue.<sup>152</sup> The national court’s assessment of the situation cannot impose the burden of proof in this regard on the person bringing the action.<sup>153</sup> In making its assessment, the

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<sup>145</sup> *ibid*, para 48.

<sup>146</sup> *ibid*. Advocate General Cruz Villalón drew on the Aarhus Convention implementation guide (2<sup>nd</sup> ed) to support his interpretation of Article 10a as leaving open the possibility of restricting access to the review procedure, but not the scope of the examination carried out under the review procedure (EU:C:2013:422 para 89 of the Opinion).

<sup>147</sup> *ibid*, para 49.

<sup>148</sup> *ibid*, para 50.

<sup>149</sup> *ibid*, para 51.

<sup>150</sup> *ibid*, para 52. In subsequent infringement proceedings concerning the same point, the Court found that German law was incompatible with the access to justice provision in the EIA directive: Case C-137/14 *Commission v Germany* EU:C:2015:683 para 62.

<sup>151</sup> *ibid*.

<sup>152</sup> *ibid*, para 53.

<sup>153</sup> *ibid*.

national court must take into account the seriousness of the defect invoked. It must ascertain, in particular, whether that defect deprived the public concerned of one of the guarantees designed to enable the public to have access to information and “to be empowered” to participate in the decision-making in line with the objectives of the EIA directive.<sup>154</sup> Given the lack of detail provided by the national court as to the requirement under German law that the substantive legal position of the person bringing the challenge must be affected by the defect, the Court did not proceed to give a ruling on this particular aspect of the reference.<sup>155</sup>

Subsequently, in *Commission v Germany*,<sup>156</sup> the Court determined that Member States could not restrict the arguments that may be pursued in judicial review proceedings to those arguments which were raised during any previous administrative review procedure. By imposing such a restriction, Germany was in breach of the access to justice provisions in the EIA directive and the industrial emissions directive. The Court observed that the text of these directives does not permit restrictions on the pleas that may be raised in legal proceedings<sup>157</sup> and recalled its earlier ruling in *Trianel*, discussed above, to this effect.<sup>158</sup> This approach meets the objective of “ensuring broad access to justice in the area of environmental protection”.<sup>159</sup> The Court concluded that the restrictions imposed by German law could not be justified by the requirements of legal certainty<sup>160</sup> or arguments concerning the efficiency of administrative procedures.<sup>161</sup> While the Court acknowledged that raising a plea in law for the first time in legal proceedings, may, in certain cases, hinder the smooth running of that procedure, the objective of the access to justice provisions in the EIA directive and the industrial emissions directive was determinative. The Court articulated this objective in the following expansive terms:

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<sup>154</sup> *ibid*, para 54.

<sup>155</sup> *ibid*, paras 55-56.

<sup>156</sup> Case C-137/14 *Commission v Germany* EU:C:2015:683.

<sup>157</sup> *ibid*, para 76.

<sup>158</sup> *ibid*, para 77.

<sup>159</sup> *ibid*.

<sup>160</sup> *ibid*, para 79.

<sup>161</sup> *ibid*, para 80.

[To ensure not only] that the litigant has the broadest possible access to review by the courts, but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety.<sup>162</sup>

At the same time, however, the Court was prepared to accept that the Member States could lay down specific procedural rules, providing, for example, for the inadmissibility of an argument submitted abusively or in bad faith, which would represent “appropriate mechanisms for ensuring the efficiency of the legal proceedings.”<sup>163</sup> This particular concession is compatible with the principle of effectiveness and strikes an appropriate balance between the right of access to judicial review and the need to ensure efficiency in legal proceedings.

##### **5. The scope of the right to challenge decisions concerning projects subject to EIA**

In *Altrip*,<sup>164</sup> considered earlier, the Court of Justice also ruled that it was not permissible for a Member State to limit the right to challenge the legality of a decision to cases where no environmental assessment was carried out, as opposed to cases where an assessment was undertaken, but was allegedly deficient. Recalling its earlier *Trianel* ruling, the Court confirmed that Article 10a of the EIA directive did not restrict the pleas that could be put forward to challenge the substantive or procedural legality of a decision.<sup>165</sup> Excluding the possibility to challenge a decision where an environmental assessment is allegedly defective “would render largely nugatory” the provisions in the EIA directive governing public participation.<sup>166</sup> Such an approach would therefore run counter to the objective of ensuring “wide access” to the courts as required under Article 10a.<sup>167</sup> The Court later confirmed its conclusion on this point in *Commission v Germany* and determined that this aspect of German law was incompatible with the access to justice provision in the EIA directive.<sup>168</sup>

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<sup>162</sup> *ibid.*

<sup>163</sup> *ibid.*, para 81.

<sup>164</sup> Case C-72/12 *Gemeinde Altrip (Municipality of Altrip), Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate* EU:C:2013:172.

<sup>165</sup> *ibid.* para 36.

<sup>166</sup> *ibid.*, para 37.

<sup>167</sup> *ibid.*

<sup>168</sup> Case C-137/14 *Commission v Germany* EU:C:2015:683 paras 47-48.

## **6. The scope of administrative and judicial review that must be provided at national level**

In *East Sussex*,<sup>169</sup> a reference for a preliminary ruling from the First-tier Tribunal (General Regulatory Chamber, Information Rights) in the United Kingdom, the Court of Justice was asked to interpret the access to justice provision in Article 6 of Directive 2003/4/EC on public access to environmental information. The national tribunal enquired whether the limited administrative and judicial review that applies under English law when assessing the reasonableness, or otherwise, of a charge levied by a public authority for supplying environmental information was sufficient to meet the requirements of Article 6? The Court began its analysis by recalling that in the absence of EU rules governing the matter, it is for the legal system in each Member State to designate the courts having jurisdiction and to set down the detailed procedural rules governing actions for safeguarding EU law rights, subject to the principles of equivalence and effectiveness.<sup>170</sup> Citing its earlier *Unibet* ruling, it observed that Article 47 of the EU Charter enshrines the right to an effective remedy before an impartial tribunal.<sup>171</sup> The Court noted that in the text of Directive 2003/4/EC, Article 6(1) uses the term “be reconsidered” and “reviewed administratively”, while Article 6(2) requires that the contested decision “be reviewed”.<sup>172</sup> However, these expressions do not determine the extent or scope of the review required under the directive.<sup>173</sup> It was therefore a matter for the Member States to determine the scope of review, subject to the principles of equivalence and effectiveness.<sup>174</sup> The principle of effectiveness requires that protection of the right of access to environmental information must not be subject to conditions that may make it impossible in practice or excessively difficult to exercise that right.<sup>175</sup> Recalling that Directive 2003/4/EC is intended to implement the right of access to environmental information enshrined in the Aarhus Convention, the Court observed that the existence of effective administrative and judicial review of the levying of a charge for the supply of such information “is intrinsically linked to the realisation of

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<sup>169</sup> Case C-71/14 *East Sussex County Council v Information Commissioner, Property Search Group and Local Government Association* EU:C:2015:656.

<sup>170</sup> *ibid*, para 52.

<sup>171</sup> *ibid*.

<sup>172</sup> *ibid*, para 53.

<sup>173</sup> *ibid*.

<sup>174</sup> *ibid*.

<sup>175</sup> *ibid*, para 55.

that objective”.<sup>176</sup> The review must examine whether the public authority levying the charge actually complied with the specific conditions governing charging for the supply of environmental information set down in Article 5(2) of the directive.

In this case, the referring tribunal had explained that the relevant English law limited the scope of administrative and judicial review to the question of whether the decision taken by the public authority was “*Wednesbury* unreasonable”<sup>177</sup> or “irrational”, illegal or unfair and provided “very limited scope for reviewing the relevant factual conclusions reached by that authority”.<sup>178</sup> Drawing on its established case law,<sup>179</sup> the Court confirmed that the exercise of EU law rights is not made impossible in practice or excessively difficult where a procedure for judicial review of administrative decisions does not allow “complete review” of those decisions.<sup>180</sup> However, any national judicial review procedure must enable the court or tribunal that is tasked with reviewing the lawfulness of a decision to apply effectively the relevant principles and rules of EU law.<sup>181</sup> The *East Sussex* ruling therefore confirms that:

[J]udicial review that is limited as regards the assessment of certain questions of fact is compatible with EU law, on condition that it enables the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision.<sup>182</sup>

The Court noted that the two conditions at issue in the present case (i.e. whether a cost factor concerns the “supplying” of the information requested and whether the total amount of the charge levied is “reasonable”) are questions of EU law. As such, they “must be amenable to administrative and judicial review carried out on the basis

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<sup>176</sup> *ibid*, para 56. See also Advocate General Sharpston’s Opinion where she emphasised that the availability of the review process “is essential in order to guarantee effective enforcement of the public’s right of access to environmental information enshrined in Directive 2003/4” (Case C-71/14 *East Sussex County Council v Information Commissioner, Property Search Group and Local Government Association* EU:C:2015:234 at para 85 of the Opinion).

<sup>177</sup> The phrase “*Wednesbury* unreasonable” derives from the judgment in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1.

<sup>178</sup> *ibid*, para 57. As Advocate General Sharpston noted at para 61 of the Opinion, the scope of judicial review “is a complex subject.”

<sup>179</sup> Case C-120/97 *Upjohn* EU:C:199:14 paras 30, 35 and 36 and Joined Cases C-211/03, C-299/03, C-316/03, C-317/03, C-318/03 *Orthica* EU:C:2005:370 paras 75-77 and para 79.

<sup>180</sup> Case C-71/14 *East Sussex County Council v Information Commissioner, Property Search Group and Local Government Association* EU:C:2015:656 paras 58-59.

<sup>181</sup> *ibid*.

<sup>182</sup> *ibid*, para 58.

of objective elements and capable of ensuring full compliance with the conditions in Article 5(2) of the directive”.<sup>183</sup> It fell to the national court to determine whether those requirements are satisfied and, if necessary, to interpret national law in line with those requirements.<sup>184</sup>

The *East Sussex* ruling provides valuable guidance on the standard of review that must be applied by the national courts when called on to enforce EU law. It confirms that “a complete review” of the contested decision, involving a full reassessment of questions of fact, is not necessarily required in order to comply with the principle of effective judicial protection. However, as Advocate General Sharpston put it with her characteristic clarity of expression:

The Member State must guarantee that the review procedure that it provides enables the reasonableness of a particular charge levied [for the supply of information] to be measured against the standard of reasonableness for such charges laid down by EU law. It is for the competent national court to interpret national law in such a way as to provide that review.<sup>185</sup>

Here again we see the importance of the doctrine of consistent interpretation where national law falls short of the standards required by EU law.

## **7. Interim measures to ensure effective judicial protection**

In *Križan*,<sup>186</sup> a reference from the *Najvyšší súd Slovenskej republiky* (the Supreme Court) in Slovakia, the national court enquired whether Articles 1 and 15a of the IPPC directive, read in conjunction with Articles 6 and 9 of the Aarhus Convention, must be interpreted as meaning that members of the public concerned must be able to ask the national court to order interim measures to suspend the application of a permit pending the final determination of the review procedure. The Court, sitting in Grand Chamber formation, recalled its earlier rulings in *Factortame*<sup>187</sup> and *Unibet*<sup>188</sup> that a national court dealing with a dispute governed by EU law must be in a position to

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<sup>183</sup> *ibid*, para 59.

<sup>184</sup> *ibid*, para 60.

<sup>185</sup> Case C-71/14 *East Sussex County Council v Information Commissioner, Property Search Group and Local Government Association* EU:C:2015:234 para 85 of the Opinion.

<sup>186</sup> Case C-416/10 *Križan and Others v Slovenská inšpekcia životného prostredia* EU:C:2013:8.

<sup>187</sup> Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd* EU:C:1990:257.

<sup>188</sup> Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* EU:C:2007:163.



grant interim relief in order to ensure the full effectiveness of the judgment to be delivered.<sup>189</sup> The Court highlighted the purpose of the IPPC directive to prevent environmental pollution. It observed that the right to bring an action under Article 15a of the IPPC directive would not deliver effective prevention of pollution unless interim relief is available to suspend an allegedly unlawful permit pending determination of the action.<sup>190</sup> The effectiveness of the right of access to justice therefore required the availability of interim measures. Advocate General Kokott noted that the national court's obligation to provide interim relief "is an expression of the right to an effective remedy" recognised in Article 47 of the EU Charter, which the Member States must ensure under Article 19(1) TEU.<sup>191</sup> The Advocate General also referred to Article 9(4) of the Aarhus Convention, which must be taken into account when interpreting the EIA and IPPC directives, and which also requires that regard must be given to the fact that the remedies under those directives facilitate adequate interim relief.<sup>192</sup>

## **8. Deciphering the meaning of the ban on prohibitive costs**

### **- Basic principles**

In infringement proceedings against Ireland,<sup>193</sup> the Court of Justice examined whether the obligation in the EIA and IPPC directives to ensure that costs in the context of judicial review procedures were "not prohibitively expensive" had been transposed correctly.<sup>194</sup> The Court began by noting, rather cryptically and without further elaboration, that this obligation "covers only the costs arising from participation in such procedures".<sup>195</sup> It confirmed that the rule banning prohibitive costs did not prevent national courts from making an order for costs, provided the amount of costs involved complied with the "not prohibitively expensive" requirement.<sup>196</sup> The Court determined that a mere "discretionary practice", whereby

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<sup>189</sup> Case C-416/10 *Križan and Others v Slovenská inšpekcia životného prostredia* EU:C:2013:8 para 107.

<sup>190</sup> *ibid*, paras 108-109.

<sup>191</sup> Case C-416/10 *Križan and Others v Slovenská inšpekcia životného prostredia* EU:C:2012:218 para 172 of the Opinion.

<sup>192</sup> *ibid*, para 173 of the Opinion.

<sup>193</sup> Case C-427/07 *Commission v Ireland* EU:C:2009:457.

<sup>194</sup> The Commission had alleged inter alia that Ireland had failed to transpose this particular aspect of Art 10a of the EIA directive (inserted by Art 3(7) of Directive 2003/35/EC) and Art 15a of the IPPC directive (inserted by Art 4(4) of Directive 2003/35/EC).

<sup>195</sup> Case C-427/07 *Commission v Ireland* EU:C:2009:457 para 92.

<sup>196</sup> *ibid*.

the Irish courts could decline to order an unsuccessful litigant to pay the other side's costs, could not be regarded as adequate transposition.<sup>197</sup> Such a practice did not satisfy the requirement for legal certainty.<sup>198</sup> As these infringement proceedings were concerned solely with alleged failure in transposition, the Court did not engage in any analysis of the substance of the concept of "prohibitive" costs on this occasion. In her detailed Opinion, Advocate General Kokott noted that Article 9(5) of the Aarhus Convention, although it is not reflected explicitly in the text of Directive 2003/35/EC, must be taken into account when interpreting Article 9(4) and the corresponding access to justice provisions in the EIA and IPPC directives.<sup>199</sup> The Advocate General observed that Article 9(5) demonstrates that the Parties to the Convention had the need for assistance mechanisms "entirely in mind" when they determined that review procedures must not be "prohibitively expensive".<sup>200</sup> The Advocate General also referred to Article 47(3) of the EU Charter which requires legal aid to be granted in so far as such aid is necessary to ensure effective access to justice.<sup>201</sup>

In *Commission v United Kingdom*,<sup>202</sup> the Court was called on to consider whether the national costs regime that applied in the UK at the time of the infringement proceedings transposed the ban on prohibitive costs correctly. Uncertainty as to the effect of the body of national case law governing liability for costs in environmental cases led the Court to conclude that transposition was not sufficiently clear and precise.<sup>203</sup> Nor did the regime established in the case law ensure the claimant "reasonable predictability" as to whether the cost of the proceedings are payable by him and the amount of those costs.<sup>204</sup>

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<sup>197</sup> *ibid*, paras 93-94. In sharp contrast to the Court, Advocate General Kokott expressed the view that this possibility of limiting the risk of costs was indeed sufficient to prove that implementing measures existed and she concluded that the Commission's action was unfounded in relation to this point (EU:C:2009:9 paras 97-98 of the Opinion).

<sup>198</sup> Case C-427/07 *Commission v Ireland* EU:C:2009:457 para 94. In infringement proceedings in Case C-530/11 *Commission v United Kingdom* EU:C:2014:67, which also concerned implementation of the ban on prohibitive costs, the Court clarified that not every judicial practice is uncertain and inherently incapable of meeting the requirements of clarity and precision necessary in order to be regarded as valid implementation of obligations arising under a directive (para 36).

<sup>199</sup> Case C-427/07 *Commission v Ireland* EU:C:2009:9 para 91 of the Opinion.

<sup>200</sup> *ibid*.

<sup>201</sup> *ibid*, para 92 of the Opinion.

<sup>202</sup> Case C-530/11 *Commission v United Kingdom* EU:C:2014:67.

<sup>203</sup> *ibid*, para 56.

<sup>204</sup> *ibid*, para 58.

In *Edwards*,<sup>205</sup> a reference from the Supreme Court of the United Kingdom, the Court was presented with a series of questions on how a national court should approach the ban on prohibitive costs in the EIA and IPPC directives. The referring court sought clarification on the meaning of the requirement that judicial proceedings should not be “prohibitively expensive” and requested guidance on the criteria for assessing that requirement in a particular case. The Court began its analysis by recalling that the obligation to ensure that judicial proceedings are not prohibitively expensive does not prevent national courts from making an order for costs<sup>206</sup> and that the ban on prohibitive costs “concerns all the costs arising from participation in the judicial proceedings”<sup>207</sup> The potentially prohibitive nature of costs therefore fell to be assessed “as a whole”, taking into account all of the costs borne by the party concerned.<sup>208</sup> The objective of delivering “wide access to justice” for the public concerned reflected the desire of the EU legislature “to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role”.<sup>209</sup> The Court linked the ban on prohibitive costs with the observance of the right to an effective remedy guaranteed under Article 47 of the EU Charter and to the principle of effectiveness of EU law.<sup>210</sup> At this point, the Court took the opportunity to draw on what the (non-binding) Aarhus Convention implementation guide (original edition) had to say on the meaning of the ban on prohibitive costs – essentially that the cost of engaging the review procedure “must not be so expensive as to prevent the public from seeking review in appropriate cases”.<sup>211</sup> The Court concluded that the ban on prohibitive costs means that the public concerned should not be prevented from seeking a review by the courts “by reason of the financial burden that might arise as a result”.<sup>212</sup> It followed that where a national court is asked to make an order for costs against a member of the public who has been unsuccessful in judicial proceedings or, where it is required to determine, at an early stage in the proceedings, whether the costs involved should be capped at a certain level (i.e. a protective costs order), it must be satisfied that the

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<sup>205</sup> Case C-260/11 *R (Edwards) v Environment Agency* EU:C:2013:221.

<sup>206</sup> *ibid* paras 25-26.

<sup>207</sup> *ibid*, para 27.

<sup>208</sup> *ibid*, para 28.

<sup>209</sup> *ibid*, paras 31-32.

<sup>210</sup> *ibid*, para 33.

<sup>211</sup> *ibid*, para 34.

<sup>212</sup> *ibid*, para 35.

costs are not prohibitively expensive.<sup>213</sup> In determining this issue, the national court must take into account both the interest of the person wishing to defend his rights and “the public interest in environmental protection”.<sup>214</sup>

- **Criteria for assessing whether costs are prohibitive**

As to the assessment criteria to be applied in order to ensure compliance with the requirement that costs are not prohibitively expensive, the referring court in *Edwards* enquired whether this assessment was objective or subjective in nature and the extent to which national law must be taken into account. The Court recalled the well-established principle that where EU law lacks precision, it is for the Member States to ensure that it is transposed effectively, although they retain a broad discretion as to the choice of methods that may be used to implement the obligation in question.<sup>215</sup> The Court then considered the methods likely to secure the objective of ensuring effective judicial protection without excessive cost in the field of environmental law. It confirmed that all the relevant provisions of national law and, in particular, any national legal aid scheme and / or costs protection regime must be taken into consideration.<sup>216</sup> It is also necessary to take account of the “significant differences” which exist between national laws in this area.<sup>217</sup> The Court concluded that the assessment of whether costs are prohibitive or not cannot be carried out solely on the basis of the person concerned’s financial situation. It must also be based on an objective analysis of the amount of costs involved. This is because members of the public and NGOs “are naturally required to play an active role in defending the environment”.<sup>218</sup> Overall, the cost of proceedings “must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.”<sup>219</sup>

As to the analysis of the financial situation of the person concerned, the assessment undertaken by the national court cannot be based exclusively on the estimated

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<sup>213</sup> *Ibid.*

<sup>214</sup> *ibid.* See also Advocate General Kokott’s Opinion (paras 39-47) for detailed analysis of the importance of the public interest in environmental protection when examining whether costs are prohibitively expensive.

<sup>215</sup> *ibid.*, para 37.

<sup>216</sup> *ibid.*, para 38.

<sup>217</sup> *ibid.*

<sup>218</sup> *ibid.*, para 40.

<sup>219</sup> *ibid.*

financial resources of the “average” applicant.<sup>220</sup> This is because that information may have little connection with the actual situation of the person concerned. An objective analysis of the amount of the costs must be made in every case. The national court may also take the following factors into account: the situation of the person concerned; whether the claimant has a reasonable prospect of success; 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 potentially frivolous nature of the claim at its various stages.<sup>221</sup> Furthermore, the fact that a claimant has not, in practice, been deterred from bringing proceedings is not, in itself, sufficient to establish that the proceedings are not prohibitively expensive in so far as that particular claimant is concerned.<sup>222</sup>

The Court clarified that the requirement that judicial proceedings must not be prohibitively expensive cannot be assessed differently by a national court depending on whether it is adjudicating at the conclusion of first instance proceedings, an appeal or a second appeal.<sup>223</sup> No such distinction is envisaged in the access to justice provisions in the EIA and IPPC directives and such an interpretation would be unlikely to comply fully with the EU legislature’s objective to ensure wide access to justice and to contribute to the improvement of environmental protection.<sup>224</sup>

In contrast to the Court, Advocate General Kokott engaged in extensive analysis of the role of legal aid in ensuring that costs are not prohibitively expensive. She recalled the principle of effective judicial protection under Article 47 of the EU Charter and, in particular, Article 47(3) which demands that legal aid must be made available to those who lack sufficient resources where such aid is necessary to ensure effective access to justice.<sup>225</sup> Acknowledging that Article 9(5) of the Aarhus Convention “does not absolutely require” the introduction of assistance mechanisms such as legal aid, the Advocate General highlighted that “legal aid makes it possible to prevent risks in terms of prohibitive costs in certain cases.”<sup>226</sup> In a particularly strong statement, the Advocate General insisted that:

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<sup>220</sup> *ibid*, para 41.

<sup>221</sup> *ibid*, para 42.

<sup>222</sup> *ibid*, para 43.

<sup>223</sup> *ibid*, para 45.

<sup>224</sup> *ibid*, para 44.

<sup>225</sup> Case C-260/11 R (*Edwards*) v *Environment Agency* EU:C:2012:645 para 38 of the Opinion.

<sup>226</sup> *ibid*.

In so far as the enforcement of provisions of EU law is concerned, legal aid may even be absolutely necessary if the risks in terms of costs, which are acceptable in principle, constitute an insurmountable obstacle to access to justice on account of the limited capacity to pay of the person concerned.<sup>227</sup>

The Court has not, as yet, addressed this particular point.

In *Commission v United Kingdom*,<sup>228</sup> where it was alleged that the United Kingdom had failed to transpose correctly the requirement that judicial proceedings must not be prohibitively expensive, the Court followed the approach it had adopted in *Edwards*. It took the opportunity to clarify that, when assessing costs, the national court may take account, where appropriate, of any costs already incurred at earlier levels in the same dispute.<sup>229</sup> The Commission had also alleged that the system of cross undertakings in damages imposed by the national courts in respect of the grant of interim relief also infringed the requirement that proceedings must not be prohibitively expensive. The Court determined that the ban on prohibitive costs also applied to the financial costs resulting from measures which the national court might impose as a condition for the grant of interim relief.<sup>230</sup> The conditions under which the national court grants interim relief are, in principle, a matter for national law, subject to the principles of equivalence and effectiveness. The requirement that proceedings must not be prohibitively expensive is not to be interpreted as *automatically* precluding an undertaking in damages as a condition to the grant of interim relief where this is provided for under national law.<sup>231</sup> The situation is the same as regards any financial consequences which might arise under national law where an action is found to be an abuse of the process of the court.<sup>232</sup> However, the national court must ensure that the resulting financial risk for the claimant is also included among the various costs generated by the case when it assesses whether or not the proceedings are prohibitively expensive.<sup>233</sup> On the basis of the documents submitted to the Court, it was not clear that the requirement that proceedings are not

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<sup>227</sup> *ibid*, footnote omitted.

<sup>228</sup> Case C-530/11 *Commission v United Kingdom* EU:C:2014:67.

<sup>229</sup> *ibid*, para 49. Advocate General Kokott referred to the Aarhus Convention implementation guide (original edition) which includes interim relief within the categories of judicial decisions that are specified in Article 9(4) as part of the review procedures (EU:C:2012:645 para 86 of the Opinion).

<sup>230</sup> *ibid*, para 66.

<sup>231</sup> *ibid*.

<sup>232</sup> *ibid*, para 67.

<sup>233</sup> *ibid*, para 68.

prohibitively expensive was imposed on the national courts in the United Kingdom “with all the requisite clarity and precision”.<sup>234</sup> Consequently, the Court upheld the Commission’s argument that the system of cross undertakings in damages in respect of the grant of interim relief constituted an additional element of uncertainty and imprecision in the national measures aimed at ensuring compliance with the ban on prohibitive costs.<sup>235</sup> The Court rejected the argument mounted by the United Kingdom that limiting cross-undertakings in damages, in order to give effect to the ban on prohibitive costs, could result in infringement of the right to property.<sup>236</sup>

## **9. The duty to inform the public of the right of access to justice**

In *Commission v Ireland*,<sup>237</sup> the Court found that Ireland had failed to make practical information available to the public regarding access to administrative and judicial review procedures. In the absence of any specific statutory or regulatory provision on this matter, the Court was adamant that the availability of rules on access to justice in publications or on the internet, and the possibility of access to court decisions, did not ensure “in a sufficiently clear and precise manner” that the public is in a position to be aware of its rights on access to justice in environmental matters.<sup>238</sup> The Court prefaced this conclusion by recalling that one of the underlying principles of the EIA directive is to promote access to justice in environmental matters “along the lines of the [Aarhus] Convention”.<sup>239</sup> This statement confirms its purposive approach to interpretation of the Aarhus-inspired access to justice obligations and the fundamental importance of the Convention text in providing the context for interpretation of the EU measures designed to implement the Convention. In her more expansive Opinion, Advocate General Kokott insisted that Member States must disseminate practical information concerning access to justice. Publishing implementing legislation was not sufficient to meet this obligation.<sup>240</sup> The express obligation to inform the public demanded more than this.

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<sup>234</sup> *ibid*, para 69.

<sup>235</sup> *ibid*, para 71.

<sup>236</sup> *ibid*, para 70.

<sup>237</sup> Case C-427/07 *Commission v Ireland* EU:C:2009:457.

<sup>238</sup> *ibid*, para 98.

<sup>239</sup> *ibid*, para 96.

<sup>240</sup> Case C-427/07 *Commission v Ireland* EU:C:2009:9 paras 105-106 of the Opinion.

**10. Whether a court decision enforcing the IPPC directive could amount to an unjustified interference with the developer's right to property under Article 17 of the EU Charter?**

In *Križan*,<sup>241</sup> the Court of Justice was also required to consider whether a decision of a national court annulling a permit granted in breach of the requirements of the IPPC directive could constitute an unjustified interference with the developer's right to property under Article 17 of the EU Charter? The Court began by recalling Advocate General Kokott's observations<sup>242</sup> that the conditions prescribed by the IPPC directive restrict the use of the right to property on the site in question.<sup>243</sup> The Court emphasised that the right to property is not absolute and "must be viewed in relation to its social function."<sup>244</sup> It followed that the exercise of the right to property could be restricted, provided any restrictions correspond to the objectives of general interest and are not disproportionate.<sup>245</sup> Recalling its established case law, the Court confirmed that protection of the environment is one of the objectives of general interest and is therefore capable of justifying a restriction on the right to property.<sup>246</sup> As regards the proportionality of the potential interference with the right to property at issue in the instant proceedings, the Court observed that the IPPC directive "operates a balance between the requirements of that right and the requirements linked to protection of the environment".<sup>247</sup> It followed, in the Court's view, that a decision of a national court that gives effect to the right of access to justice by annulling a permit granted in breach of the IPPC directive was not capable, in itself, of constituting an unjustified interference with the right to property under Article 17 of the EU Charter.<sup>248</sup>

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<sup>241</sup> Case C-416/10 *Križan and Others v Slovenská inšpekcia životného prostredia* EU:C:2013:8.

<sup>242</sup> Case C-416/10 *Križan and Others v Slovenská inšpekcia životného prostredia* EU:C:2012:218 paras 182-184 of the Opinion.

<sup>243</sup> Case C-416/10 *Križan and Others v Slovenská inšpekcia životného prostredia* EU:C:2013:8 para 112.

<sup>244</sup> *ibid.*, para 113.

<sup>245</sup> *ibid.*

<sup>246</sup> *ibid.*, para 114. The Court cited Case 240/83 *ADBHU* EU:C:1985:59 para 13; Case 302/86 *Commission v Denmark* EU:C:1988:421 para 8; Case C-213/96 *Outokumpu* EU:C:1998:155 para 32; and Joined Cases C-379/08 and C-380/08 *ERG and Others* EU:C:2010:127 para 81.

<sup>247</sup> *ibid.*, para 115.

<sup>248</sup> *ibid.*, para 116. On a related point, an interesting question, concerning whether an order requiring an individual to dismantle work carried out in breach of Italian law protecting cultural heritage and landscape constituted an unjustified and disproportionate interference with property rights under Article 17 of the EU Charter, was referred to the Court in Case C-206/13 *Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* EU:C:2014:126. On the facts of this particular case, however, the Court determined that it did not have jurisdiction to answer the question



## **11. Court of Justice engagement with Aarhus Convention Compliance Committee findings on access to justice in the Member States**

As explained in Part I, the Compliance Committee has found a number of Member States to be non-compliant with the access to justice obligations and is currently considering whether arrangements governing access to the EU courts for members of the public meet the standards set in the Convention.<sup>249</sup> Given that both the Court of Justice and the Compliance Committee are involved in interpreting and applying the Convention within the framework of their particular jurisdictional remits, it is interesting to consider how the Court has engaged with the Compliance Committee's findings on access to justice matters in the Member States.

It is important to recall at the outset that the Compliance Committee's mandate is focussed on assisting Parties to comply with their obligations in line with the "non-confrontational, non-judicial and consultative nature" of the compliance mechanism.<sup>250</sup> It is not surprising, therefore, to find that the Court of Justice has not referred to Compliance Committee findings in any of its judgments to date. Of the thirteen Advocates General's Opinions that have been delivered in the line of cases considered in this paper, only three Opinions make reference to Compliance Committee findings. In *Edwards* (which concerned interpretation of the ban on prohibitive costs), Advocate General Kokott noted that the Compliance Committee had given its view on the issue of prohibitive costs "on several occasions" and "mainly in relation to the United Kingdom".<sup>251</sup> She cited the Compliance Committee's findings in cases involving the United Kingdom and Denmark by way of examples.<sup>252</sup> The Advocate General emphasised that the Compliance Committee "conducts a comprehensive assessment of the circumstances of the individual case and of the national system" and that this approach is necessary because Article 9(4) of the Convention, in similar vein to the access to justice provisions in the EIA directive,

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referred by the *Tribunale amministrativo regionale per la Sicilia* in Italy. The provisions of national law at issue here did not fall within the scope of EU law and did not implement rules of EU law (see paras 30, 35 and 36 of the judgment).

<sup>249</sup> See footnotes 22 and 23 in Part I and accompanying text.

<sup>250</sup> Aarhus Convention, Article 15 and Decision I/7 on review of compliance adopted at the first Meeting of the Parties held in Lucca, Italy 21-23 October 2002.

<sup>251</sup> Case C-260/11 R (*Edwards*) v *Environment Agency* EU:C:2012:645 para 36 of the Opinion.

<sup>252</sup> *ibid*, para 36 of the Opinion. The Advocate General cited the following Compliance Committee decisions in this particular context: ACCC/C/2008/23 (United Kingdom); ACCC/C/2008/27 (United Kingdom); ACCC/C/2008/33 (United Kingdom); ACCC/C/2011/57 (Denmark).

“does not contain any specific criteria”.<sup>253</sup> She noted the Compliance Committee’s findings in ACCC/C/2008/33 (United Kingdom) and ACCC/C/2009/36 (Spain) in the context of whether it was necessary, at least in certain cases, for a Member State to provide legal aid.<sup>254</sup> The Advocate General also drew on the Compliance Committee’s findings in cases involving the United Kingdom to support her conclusion that due account must be taken of the public interest in environmental protection when assessing whether costs are prohibitively expensive.<sup>255</sup> The jurisprudence of the Court of Justice (as per *Commission v Ireland*,<sup>256</sup> *Edwards*<sup>257</sup> and *Commission v United Kingdom*)<sup>258</sup> confirms a similar approach when called on to examine the obligation to ensure that costs are not prohibitive. The Advocate General also cited the findings in ACCC/C/2008/24 (Spain) when concluding that prohibitive costs must be prevented at all levels of jurisdiction. In *Altrip*, Advocate General Cruz Villalón, while noting that the Compliance Committee’s findings “are not binding on the Court”, drew on the Committee’s analysis in ACCC/C/2010/48 (Austria) to support his interpretation of Article 9(2) of the Convention in the context of standing to invoke the right to judicial review to ensure compliance with the EIA directive.<sup>259</sup> Finally, in *Commission v Germany*, Advocate General Wathelet noted the findings of the Compliance Committee in ACCC/C/2008/31 (Germany) when considering whether, for the purposes of standing, a national rule which insisted on a causal link between the alleged defect in the EIA process and the ultimate content of the contested decision was permissible.<sup>260</sup> The Compliance Committee, while not making any finding on non-compliance on this particular point, expressed the view in passing that such a rule would not be compatible with Article 9(2) of the Convention.<sup>261</sup> Overall, these Advocates General Opinions indicate a strong awareness of relevant Compliance Committee findings and of the Committee’s general approach when assessing national rules across a number of Member States, in particular as regards standing and costs.

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<sup>253</sup> *ibid.*

<sup>254</sup> *ibid.*, para 38 of the Opinion.

<sup>255</sup> *ibid.*, paras 39-49 of the Opinion, citing Compliance Committee findings in ACCC/C/2008/23 (United Kingdom); ACCC/C/2008/27 (United Kingdom).

<sup>256</sup> Case C-427/07 *Commission v Ireland* EU:C:2009:457.

<sup>257</sup> Case C-260/11 R (*Edwards*) v *Environment Agency* EU:C:2013:221.

<sup>258</sup> Case C-530/11 *Commission v United Kingdom* EU:C:2014:67.

<sup>259</sup> Case C-72/12 *Gemeinde Altrip (Municipality of Altrip), Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate* EU:C:2013:422 para 101 of the Opinion.

<sup>260</sup> Case C-137/14 *Commission v Germany* EU:C:2015:344 para 81 of the Opinion.

<sup>261</sup> ACCC/C/2008/31 (Germany) para 83.

### **Part III                    Pulling the Threads Together**

The analysis of the jurisprudence presented in this paper confirms the fundamental importance of the right to judicial review to ensure compliance with EU environmental law. The basic principles are now well established: in the absence of detailed EU rules governing a specific matter, it falls to the Member States to determine the courts and tribunals having jurisdiction and to establish the procedural arrangements governing actions to enforce EU law rights. As ever, this discretion is subject to compliance with the principles of equivalence and effectiveness. Beyond these basic principles, the Aarhus Convention access to justice obligations set additional constraints on Member State discretion to regulate access to review procedures in environmental matters. The Convention also imposes minimum standards as regards the quality of the review procedures that must be available to the public. The fact that these obligations are drafted in general terms, both in the Convention itself and the EU implementing measures, results in genuine disputes over their correct interpretation and implementation. The jurisprudence of the Court of Justice to date has provided important guidance on what is expected of the Member States in this context.

First, in line with the special supervisory role that the Aarhus Convention assigns to NGOs, environmental organisations that meet any conditions set at national level are *automatically* entitled to invoke judicial review procedures. *Djurgården*<sup>262</sup> confirms that Member States' discretion to set such conditions is very narrow. Moreover, any national conditions must still ensure "wide access to justice". Second, *LZ*<sup>263</sup> is clear authority that the principle of effective judicial protection demands that individuals and NGOs must have access to the courts to enforce rights arising under the habitats directive. To this end, a national court must, where necessary, interpret domestic procedural rules "to the fullest extent possible" consistently with the objective of ensuring effective environmental protection as per Article 9(3) of the Convention.<sup>264</sup> Third, *Altrip*<sup>265</sup> confirms that it is not generally permissible for a national rule to

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<sup>262</sup> Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* EU:C:2009:631.

<sup>263</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125.

<sup>264</sup> *ibid*, para 50.

<sup>265</sup> Case C-72/12 *Gemeinde (Municipality of Altrip), Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate* EU:C:2013:712.

insist on a causal link between an alleged defect in the EIA process and the ultimate content of the contested administrative decision as a condition for admissibility of judicial review proceedings. The public must be able to invoke *any* procedural defect in support of a challenge to the legality of decisions that fall within the scope of the EIA directive. Fourth, national rules cannot restrict the arguments that may be pursued in judicial review proceedings to those arguments which were raised during any previous administrative review procedure (except, perhaps, where an argument is submitted abusively or in bad faith).<sup>266</sup> Neither can a Member State limit the right to challenge the legality of a decision to cases where no EIA was carried out, as opposed to cases where there was an EIA but it was allegedly deficient.<sup>267</sup> Fifth, the scope of administrative and judicial review provided at national level must enable the court or tribunal hearing the matter to apply effectively the relevant principles of EU law.<sup>268</sup> Once this fundamental condition is satisfied, a system of judicial review which is limited as regards the assessment of certain questions of fact is not necessarily incompatible with EU law. Sixth, interim measures must be available, where appropriate, to ensure effective judicial protection.<sup>269</sup> Seventh, as regards the ban on prohibitive costs, the Court has insisted that the public concerned must not be prevented from seeking judicial review “by reason of the financial burden that might arise as a result.”<sup>270</sup> Overall, and by way of general principle, the cost of proceedings must neither exceed the financial resources of the person bringing the case nor appear to be “objectively unreasonable”.<sup>271</sup> However, Member States still enjoy a “broad discretion” as to the choice of methods that may be used to secure this objective.<sup>272</sup> All the relevant provisions of national law (and, in particular, any legal aid scheme or costs protection regime), must be taken into consideration in assessing the situation.<sup>273</sup> The Court has also provided a set of general criteria to be applied by national courts when determining whether costs are prohibitive in particular cases.<sup>274</sup> In setting these criteria, the Court is alert to the significant differences that

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<sup>266</sup> Case C-137/14 *Commission v Germany* EU:C:2015:683 para 81.

<sup>267</sup> Case C-72/12 *Gemeinde Altrip (Municipality of Altrip), Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate* EU:C:2013:712.

<sup>268</sup> Case C-71/14 *East Sussex County Council v Information Commissioner, Property Search Group and Local Government Association* EU:C:2015:656.

<sup>269</sup> Case C-416/10 *Križan and Others v Slovenská inšpekcia životného prostredia* EU:C:2013:8.

<sup>270</sup> Case C-260/11 *R (Edwards) v Environment Agency* EU:C:2013:221 para 35.

<sup>271</sup> *ibid*, para 40.

<sup>272</sup> *ibid*, para 37.

<sup>273</sup> *ibid*, para 38.

<sup>274</sup> *ibid*, paras 36-48.

exist between national legal systems across the EU. As Advocate General Kokott explained in *Edwards*, there are “no simple criteria governing when a costs claim is prohibitive.”<sup>275</sup> It is not surprising therefore to find that the criteria developed by the Court so far are pitched at a general level and leave Member States a significant element of flexibility to deliver an appropriate costs regime in light of their particular national arrangements. This flexibility, and the lack of sharper guidance from the Court to date, inevitably leaves potential for further disagreement as to the precise implications of the ban on prohibitive costs. This state of affairs is likely to lead to more references concerning issues around costs into the future. The extent to which, if at all, a Member State must provide legal aid (or some equivalent form of financial assistance) in certain cases in order to ensure that access to justice is not prohibitively expensive, is one obvious issue that has not been resolved authoritatively so far. Finally, the public must be informed of the right of access to justice so as to enable effective engagement of this right in practice.<sup>276</sup> At a more general level, the Court confirmed in *Križan* that enforcing the requirements of the IPPC directive (now the industrial emissions directive) via judicial review does not amount to an unjustified interference with the developer’s right to property under Article 17 of the EU Charter.<sup>277</sup>

### **Significant themes emerging from the jurisprudence**

A number of significant themes run through this line of jurisprudence. The Court draws regularly on the express obligation under the Aarhus Convention to provide “wide access to justice” to support a robust approach to the right to an effective remedy and an expansive attitude to standing, in particular. It refers consistently to the fact that the review procedure has the objective of contributing “to preserving, protecting and improving the quality of the environment and protecting human health.” As the analysis of the jurisprudence presented in Part II demonstrates, the Court relies on those objectives to justify a purposive approach to interpretation of the access to justice obligations. In *Edwards*, the Court brought a number of these themes together when it emphasised that the objective of delivering “wide access to justice” for the public concerned reflected the EU legislature’s desire “to preserve, protect and improve the quality of the environment and to ensure that, to that end,

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<sup>275</sup> Case C-260/11 R (*Edwards*) v *Environment Agency* EU:C:2012:645 para 42 of the Opinion.

<sup>276</sup> Case C-427/07 *Commission v Ireland* EU:C:2009:457.

<sup>277</sup> Case C-416/10 *Križan and Others v Slovenská inšpekcia životného prostredia* EU:C:2013:8.

the public plays an active role.”<sup>278</sup> It is clear from the jurisprudence to date that the Court’s main objective is to ensure that the public, and NGOs in particular, can champion environmental interests. This involves the public bringing alleged breaches of EU environmental law before their national courts and being able to rely on the right to effective judicial protection. As Advocate General Sharpston observed in *Edwards*, the public interest in environmental protection is particularly important because “the environment cannot defend itself before a court”, but needs to be represented by active citizens or NGOs.<sup>279</sup> In *Altrip*, Advocate General Cruz Villalón recalled the ground-breaking judgment in *Van Gend en Loos*<sup>280</sup> and stressed the role of the citizen “as guardian of compliance” with EU law.<sup>281</sup> The Aarhus Convention adopts a similar approach by placing the public concerned at the heart of supervising and enforcing environmental law in practice.

The judgments delivered by the Court in the preliminary rulings it has determined to date communicate to the national judiciary in unequivocal terms their obligation to deliver “wide access to justice” in environmental matters. Giving effect to this obligation may require the national courts to set aside restrictive national procedural rules and / or to interpret national law, to the fullest extent possible, in light of the obligations set down in the Convention and EU law. *LZ*, in particular, highlights the fundamental significance of the doctrine of consistent interpretation in this context. It also provides a vivid illustration of how far the Court of Justice expects the national courts to go to deliver effective protection of EU environmental law. It is clear from the Court’s contemporary jurisprudence that the overall goal of its robust and purposive approach in this particular policy area is to contribute to the improvement of environmental protection by widening access to the courts for individuals and NGOs.

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<sup>278</sup> Case C-260/11 R (*Edwards*) v *Environment Agency* EU:C:2013:221 paras 31-32.

<sup>279</sup> Case C-260/11 R (*Edwards*) v *Environment Agency* EU:C:2012:645 para 42 of the Opinion.

<sup>280</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1. In *Van Gend en Loos*, the Court ruled that:

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 [EEC Treaty] to the diligence of the Commission and of the Member States.

In this case, Article 12 of the EEC Treaty (concerning the elimination of custom duties as between the Member States) had to be interpreted as producing direct effects and creating individual rights which national courts must protect.

<sup>281</sup> Case C-72/12 *Gemeinde Altrip (Municipality of Altrip), Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate* EU:C:2013:422 para 98 of the Opinion.

## General Observations

### *The vital role of the preliminary ruling procedure*

Where domestic arrangements fall short of what is required under the Convention and EU law, the Court of Justice expects the national courts to respond proactively in their role as EU courts to fill local implementation gaps. The preliminary ruling procedure enables national courts to seek the authoritative view of the Court of Justice where there is any doubt as to whether (usually deeply entrenched and highly regarded) national rules meet the standards set by the Convention and EU law. National courts may not always feel comfortable setting aside a long-standing procedural rule without the explicit backing of the Court of Justice via a preliminary ruling. Such hesitation is understandable given the already very significant impact of the access to justice obligations for the legal systems in a number of Member States. The rulings concerning standing in *Djurgården*, *LZ*, *Trianel*, *Altrip* and *Gruber*, for example, highlight the dramatic implications of the obligation to deliver “wide access to justice” for the relevant national legal systems, and those of Germany and Austria, in particular. The same is true for Ireland and the United Kingdom as regards the judgments interpreting the ban on prohibitive costs.

In *Križan*, the Court recalled the fundamental importance of the dialogue with national courts facilitated by the preliminary ruling procedure.<sup>282</sup> It took this opportunity to reaffirm the well-established principle that a rule of national law, even of a constitutional order, cannot remove a national court’s discretion to make a reference where that court considers it appropriate and necessary.<sup>283</sup> In this case, a national rule which obliged the Supreme Court to follow the rulings of the Constitutional Court could not operate to prevent the Supreme Court (the referring court here) from seeking a reference for a preliminary ruling.<sup>284</sup> The Court was adamant that rules of national law “cannot be allowed to undermine the unity and effectiveness” of EU law.<sup>285</sup>

It seems likely that the inclusion of explicit access to justice provisions in the text of key environmental directives triggered references to Luxembourg that might not

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<sup>282</sup> Case C-416/10 *Križan and Others v Slovenská inšpekcia životného prostredia* EU:C:2013:8 para 66.

<sup>283</sup> *ibid*, paras 66-73.

<sup>284</sup> *ibid*, para 71.

<sup>285</sup> *ibid*, para 70.

have been made otherwise. More specifically, a national court may well have hesitated to make a reference when asked, pre-Aarhus, to examine national procedures and remedies for compatibility with EU law on the basis of the general principle of effective judicial protection alone. There is no doubt that the arrival of explicit access to justice provisions has increased the visibility of the right to effective judicial protection in environmental matters and provided litigants before the national courts with a firmer basis on which to challenge restrictive national rules and to seek a reference. The relevant principles will continue to evolve as further cases come before the Court of Justice and new guidance is provided via preliminary rulings. There is always the risk, of course, that some restrictive domestic rules will escape scrutiny by the Court where a national court declines to make a reference and determines that domestic arrangements are acceptable without any input from Luxembourg. This possibility confirms the continued contemporary importance of the Commission's role as "Guardian of the Treaties" in overseeing the application of EU law via Article 258 TFEU. Here, too, of course, the public and NGOs play a vital role in alerting the Commission to any national provisions that create barriers to access to justice.

By way of conclusion on the significance of the preliminary ruling procedure, it is notable that national courts in only seven of the 28 Member States (Sweden, Slovakia, Germany, Belgium, United Kingdom, Austria and, most recently, Ireland) have made references to date concerning the Aarhus access to justice obligations. This state of affairs raises a number of interesting questions for a future comparative research project. These questions include, for example: to what extent are issues concerning access to justice in environmental matters being pleaded before national courts across the EU?; are individuals and NGOs who seek to enforce environmental law by relying on the access to justice obligations asking national courts to make references on particular points?; if so, how are national courts responding to these requests?; what triggered the references in the specific cases that have come before the Court of Justice to date?; how did the national court respond on receiving the preliminary ruling back from Luxembourg?; what impact have the Court's rulings had at national level (i) in the jurisdictions where national courts have made references and (ii) in the other Member States (e.g. legislative changes, amendments to procedural rules, new judicial practices, the introduction of financial assistance



mechanisms etc.)?; do national authorities, including the national courts, respond differently to preliminary rulings when compared with findings and recommendations of the Compliance Committee? It is notable that these issues have attracted limited attention in the literature to date.

***What has the Aarhus Convention added to the principle of effective judicial protection?***

Stepping back and looking at the Court of Justice jurisprudence as a whole, it is clear that the Aarhus-inspired access to justice obligations have “added value” to, and expanded on, the pre-existing principle of effective judicial protection in the specific environmental law context. Two developments, confirmed in the jurisprudence, are particularly noteworthy here. First, the privileged position that NGOs now enjoy in terms of supervision and enforcement of environmental law is a direct result of the special rights granted to these organisations under the Convention and EU law. The Court clearly considers that opening up access to justice for NGOs before the national courts is essential to deliver the fundamental objective of preserving, protecting and improving the quality of the environment for the benefit of present and future generations. Second, since the introduction of an express ban on prohibitive costs, there is a much sharper focus on whether the costs associated with review proceedings prevent effective access to justice in certain cases. It is notable that the costs issue did not feature very prominently in the pre-Aarhus case law on effective judicial protection. The ban on prohibitive costs which is now firmly in place, taken in conjunction with Article 47 of the EU Charter (with its express reference to the right to legal aid in certain circumstances), means that we are likely to see further developments in the jurisprudence on the scope and implications of the ban on prohibitive costs into the future. The obligation to provide a “timely” review procedure is another underexplored element of the access to justice obligation that will, no doubt, require careful consideration and elaboration by the Court in a future reference for a preliminary ruling.

In terms of effectiveness and enforcement of EU law more generally, it is interesting to consider the potential wider implications of the Aarhus-inspired access to justice obligations at national level beyond the specific area of environmental protection. The line of jurisprudence considered in this paper demonstrates how the Court of

Justice has fleshed out aspects of the principle of effective protection in light of specific Aarhus obligations. This is particularly the case as regards the ban on prohibitive costs, where the Court's judgments to date have had profound implications for how common law jurisdictions, in particular, deal with costs in environmental matters. It is certainly arguable that a requirement that costs are not prohibitive is simply one element already inherent in the general principle of effective judicial protection. In other words, it is not only cases coming within the scope of the Aarhus Convention that should benefit from a ban on prohibitive costs. The free-standing principle of effective judicial protection surely demands that costs must not be prohibitive in all cases involving efforts to enforce EU law rights before the national courts? This view finds further support in Article 47(3) of the EU Charter. It will be interesting to see whether this line of argument gains traction at national level and before the Court of Justice into the future. At this stage, it would appear that the principle of effective judicial protection provides strong potential for the current sharp focus on affordable costs in the Aarhus cases to "spill-over" into other areas of EU law where high costs are currently preventing effective access to justice. The same can be said of the standards that Aarhus has set as regards the scope and intensity of judicial review and the requirement that review procedures must be "timely". As things stand, however, what could be described as a "gold plating" of effective judicial protection applies to cases falling within the scope of the Aarhus Convention due to the specific access to justice obligations found in that particular instrument. It is difficult to justify this double standard when all EU law rights, and not just those coming within the scope of the Aarhus Convention, are subject to the principle of effective judicial protection.

There is no doubt that national courts will continue to seek guidance from Luxembourg on the correct interpretation of the Aarhus Convention and the EU measures giving effect to the Convention. The jurisprudence of the Court of Justice to date is therefore best considered as a work in progress. The principles articulated by the Court will continue to evolve and mature as new issues are presented to it for consideration. As more references are determined, and guidance transmitted back to national courts, the basic principles should begin to settle. As regards a potential EU measure to implement Article 9(3) of the Convention in the Member States, the "roadmap" document published recently by the Commission indicates that an

“interpretative Communication”, rather than a new legislative proposal in the form of a directive, is the preferred approach. We await a formal decision from the Commission on this long-running matter. A “soft” law approach will disappoint NGOs and others who continue to campaign for a new proposal for a directive on access to justice in environmental matters in the Member States.

The access to justice obligations articulated in the Aarhus Convention raised high expectations among the public and NGOs of significant improvements in access to effective review procedures. Experience to date has shown that these obligations are taking some considerable time to unfold and to bed down. It is also clear that significant input from the Court of Justice is necessary to aid interpretation and implementation by the national courts. This situation is likely to continue, at least in the medium term. At a more general level, it remains to be seen whether the standards of judicial protection which the Court is developing based on the influence of the Aarhus Convention might “spill-over” into other areas of EU law over time. In other words, the Aarhus-inspired jurisprudence may well have interesting consequences for the development of the principle of effective judicial protection in areas of EU law beyond environmental protection.

The analysis of the jurisprudence of the Court of Justice presented in this paper reveals that the Court has not referred to Compliance Committee findings in any of its judgments to date. The Committee’s findings in cases involving EU Member States have featured in Opinions from time to time, usually by way of background and context to the Advocate General’s analysis. The interplay between the Court of Justice, the Compliance Committee and the national courts is currently underexplored in the literature. A particular theme that merits careful analysis in a future research project is whether, and if so, to what extent, conflicting approaches to the access to obligations are emerging from the national courts, the Court of Justice and the Compliance Committee? Or is it the case that there is a general convergence around basic principles? The preliminary ruling procedure, where it operates as intended, should eliminate, or at least reduce, the scope for conflicting interpretations between the national courts and the Luxembourg court. How the findings and recommendations of the Compliance Committee are folded gradually into both the national legal systems and the EU legal order itself is a far more complex question that merits careful study in its own right.

## **Conclusion**

The basic principle of effective judicial protection can be stated in deceptively simple terms. But teasing out its specific content, and what the principle means in practice for national legal systems, is an ongoing task for the Court of Justice and the national judiciaries. The devil is very much in the detail here. The preliminary ruling procedure has proven invaluable in elaborating the meaning of the new access to justice obligations. It has also enabled the Court to flesh out specific aspects of the principle of effective judicial protection as it applies to environmental law enforcement in the Member States. We have seen significant improvements in access to justice in recent years due to the Court's robust and purposive approach when interpreting what the Aarhus Convention requires of the Member States as regards standing, the scope and intensity of judicial review, interim relief, costs and information for the public on the right of access to justice. The jurisprudence to date therefore confirms a new and highly dynamic phase in the evolution of EU environmental law enforcement as the Court works to embed the access to justice obligations in the national legal systems. The Court's general approach is now reasonably well-established: it seeks to equip individuals and NGOs to champion environmental law enforcement at local level and insists that the national courts deliver effective judicial protection. The Court has drawn consistently on the fundamental public interest in environmental protection as its justification for a robust approach to access to justice. At the same time, however, the Court remains alert to the diverse legal systems operating across the 28 Member States. This complex reality leaves the Court with a constant balancing exercise between the principle of effective judicial protection, on the one hand, and national procedural autonomy, on the other. The jurisprudence demonstrates that the Court is careful not to undermine its co-operative relationship with the national courts by being too forceful or too prescriptive. While promoting effectiveness and the rule of (environmental) law, the Court is careful to allow Member States an appropriate element of flexibility when implementing the access to justice obligations. The result is that, notwithstanding the baseline of judicial protection set by the Aarhus Convention and EU law, significant variations in local arrangements governing access to justice in environmental matters will continue across the 28 Member States.

**APPENDIX**

**Table of Court of Justice of the EU judgments  
concerning access to justice in environmental matters  
in the Member States**

**1 January 2009 – 31 July 2016**

<b>Case</b>	<b>Type of proceedings</b>	<b>Advocate General Opinion delivered</b>	<b>Judgment delivered</b>	<b>Issues arising relevant to access to justice in environmental matters</b>	<b>Reference to findings of Aarhus Convention Compliance Committee and / or to the Aarhus Convention Implementation Guide</b>
<b>C-427/07</b> <b><i>Commission v Ireland</i></b>	Art 226 EC / now Art 258 TFEU	15 Jan 2009  Kokott AG	16 July 2009  Second Chamber	Transposition of Art 10a EIA dir & Art 15a IPPC dir  Costs  Informing public of right of access to justice	
<b>C-263/08</b> <b><i>Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd (Djurgården)</i></b>	Art 234 EC / now Art 267 TFEU  <i>Högsta Domstolen /</i> Supreme Court  Sweden	2 July 2009  Sharpston AG	15 Oct 2009  Second Chamber	Interpretation of Art 1(2) Art 6(4) & Art 10a EIA dir  NGO Standing	AG referred to Implementation Guide in the context of environmental NGOs and interpretation of “the public concerned”.  AG noted that Implementation Guide referred to and commented on the specific Swedish rule at issue in this case.

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<p><b>C-240/09</b> <b>Lesoochránárske zoskupenie</b> <b>(LZ)</b></p>	<p>Art 234 EC / now Art 267 TFEU <i>Najvyšší súd Slovenskej republiky / Supreme Court</i>  Slovakia</p>	<p>15 July 2010  Sharpston AG</p>	<p>8 March 2011  Grand Chamber</p>	<p>Interpretation &amp; impact of Art 9(3) Aarhus Convention at national level  Whether Art 9(3) has direct effect?  Right of NGO to bring judicial review proceedings  Habitats dir</p>	
<p><b>C-115/09</b> <b>Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV</b> <b>v</b> <b>Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH &amp; Co KG</b> <b>(Trianel)</b></p>	<p>Art 234 EC / now Art 267 TFEU <i>Oberverwaltungsgericht für das Land Nordrhein-Westfalen / Higher Administrative Court for the Nordrhein-Westfalen Land</i>  Germany</p>	<p>16 Dec 2010  Sharpston AG</p>	<p>12 May 2011  Fourth Chamber</p>	<p>Interpretation of Art 10a EIA dir  NGO standing</p>	<p>AG referred to ACCC/C/2008/31 (Germany) &amp; noted that this communication was stayed by Compliance Committee pending CJEU ruling.  AG referred to Implementation Guide with reference to the special role of environmental NGOs</p>
<p><b>C-128/09, C-129/09, C-130/09, C-131/09; C-134/09 and C-135/09</b> <b>Boxus and Roua et al v Région wallonne</b></p>	<p>Art 234 EC / now Art 267 TFEU <i>Conseil d'État</i>  Belgium</p>	<p>19 May 2011  Sharpston AG</p>	<p>18 Oct 2011  Grand Chamber</p>	<p>Interpretation of Art 9(2) Aarhus Convention  Art 1(5) &amp; Art 10a EIA dir  Right to judicial review to verify compliance with EIA dir</p>	

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<p><b>C-182/10</b> <b><i>Solvay v Région wallonne</i></b></p>	<p>Art 267 TFEU <i>Cour constitutionnelle</i> Belgium</p>	<p>No Opinion</p>	<p>16 Feb 2012 Fourth Chamber</p>	<p>Interpretation of Art 2(2) Art 3(9) Art 6(9) &amp; Art 9(2)-(4) Aarhus Convention  Art 1(5) &amp; Art 10a EIA dir  Status of Aarhus Convention Implementation Guide  Right to judicial review to verify compliance with EIA dir</p>	<p>CJEU examined status of Implementation Guide.</p>
<p><b>C-416/10</b> <b><i>Križan and Others v Slovenská inšpekcia životného prostredia</i></b></p>	<p>Art 267 TFEU <i>Najvyšší súd Slovenskej republiky / Supreme Court</i> Slovakia</p>	<p>19 April 2012 Kokott AG</p>	<p>15 Jan 2013 Grand Chamber</p>	<p>Interpretation of Art 9 Aarhus Convention Art 15a IPPC dir  Effective legal remedy  Interim measures  Right to property Art 17 EU Charter</p>	
<p><b>C-260/11</b> <b><i>R (Edwards) v Environment Agency</i></b></p>	<p>Art 267 TFEU Supreme Court United Kingdom</p>	<p>18 Oct 2012 Kokott AG</p>	<p>11 April 2013 Fourth Chamber</p>	<p>Interpretation of Art 9(4) Aarhus Convention Art 10a EIA dir Art 15a IPPC dir  Costs</p>	<p>CJEU referred to Implementation Guide in context of interpreting concept of costs that are “not prohibitively expensive”.  AG referred to Compliance Committee findings in ACCC/C/2008/23 (United Kingdom) ACCC/C/2008/27 (United Kingdom)</p>

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					<p>ACCC/C/2008/33 (United Kingdom) ACCC/C/2011/57 (Denmark) ...</p> <p>...</p> <p>ACCC/C/2008/24 (Spain) and ACCC/C/2009/36 (Spain) in relation to the issue of prohibitively expensive costs.</p>
<p><b>C-72/12</b></p> <p><b><i>Gemeinde Altrip (Municipality of Altrip), Gebrüder Hört GbR, Willi Schneider v Rhineland-Palatinate (Altrip)</i></b></p>	<p>Art 267 TFEU</p> <p><i>Bundesverwaltungsgericht</i> Federal Administrative Court</p> <p>Germany</p>	<p>20 June 2013</p> <p>Cruz Villalón AG</p>	<p>7 Nov 2013</p> <p>Second Chamber</p>	<p>Interpretation of Art 10a EIA dir</p> <p>Scope of right to challenge decisions involving EIA</p> <p>Conditions of admissibility</p> <p>NGO standing</p> <p>Temporal application of Art10a EIA dir</p>	<p>AG referred to Implementation Guide in context of standing requirements.</p> <p>AG referred to Compliance Committee findings in ACCC/C/2010/48 (Austria) in the context of restrictions on standing.</p>
<p><b>C-530/11</b></p> <p><b><i>Commission v United Kingdom</i></b></p>	<p>Art 258 TFEU</p>	<p>12 Sept 2013</p> <p>Kokott AG</p>	<p>13 Feb 2014</p> <p>Second Chamber</p>	<p>Transposition and implementation of Art 10a EIA dir and Art 15a IPPC dir</p> <p>Art 9 Aarhus Convention</p> <p>Costs</p>	<p>AG referred to Implementation Guide in the context of the requirement for interim relief and costs that are not prohibitively expensive.</p>
<p><b>C-570/13</b></p> <p><b><i>Gruber v Unabhängiger Verwaltungssenat für Kärnten</i></b></p>	<p>Art 267 TFEU</p> <p><i>Verwaltungsgerichtshof / Administrative Court</i></p> <p>Austria</p>	<p>13 Nov 2014</p> <p>Kokott AG</p>	<p>16 April 2015</p> <p>Fifth Chamber</p>	<p>Interpretation of Art 11 EIA dir (ex Art 10a)</p> <p>Standing to invoke review procedure</p>	<p>CJEU referred to Implementation Guide in the context of standing requirements.</p>



## Access to Justice in Environmental Matters

<p><b>C-71/14</b></p> <p><b><i>East Sussex County Council v Information Commissioner</i></b></p>	<p>Art 267 TFEU</p> <p>First-tier Tribunal (General Regulatory Chamber, Information Rights)</p> <p>United Kingdom</p>	<p>16 April 2015</p> <p>Sharpston AG</p>	<p>6 Oct 2015</p> <p>Fifth Chamber</p>	<p>Interpretation of Art 5(2) &amp; Art 6 Dir 2003/4/EC</p> <p>Reasonable costs for supply of information</p> <p>Judicial review</p>	<p>AG referred to Implementation Guide in the context of: Member State obligations to provide “registers” or lists of environmental information; the nature of the right of access under Art 7 Dir 2003/4/EC; the concept of reasonable costs; and the requirement for a review procedure.</p>
<p><b>C-137/14</b></p> <p><b><i>Commission v Germany</i></b></p>	<p>Art 258 TFEU</p>	<p>21 May 2015</p> <p>Wathelet AG</p>	<p>15 Oct 2015</p> <p>Second Chamber</p>	<p>Infringement of Art 11 EIA dir (ex Art 10a) &amp; Art 25 Industrial Emissions dir (ex Art 15a IPPC dir)</p>	<p>AG noted the view expressed by the Compliance Committee in ACCC/C/2008/31 (Germany) concerning restrictions on admissibility of actions.</p>
<p><b>C-243/15</b></p> <p><b><i>Lesoochranské zoskupenie VLK v Obvodný úrad Trenčín</i></b></p> <p><b>(LZ II)</b></p>	<p>Art 267 TFEU</p> <p>Najvyšší súd Slovenskej republiky / Supreme Court</p> <p>Slovakia</p>	<p>30 June 2016</p> <p>Kokott AG</p>	<p>Pending</p>	<p>Interpretation of Art 6 &amp; Art 9 Aarhus Convention</p> <p>Right of NGO to enforce environmental law</p> <p>Habitats dir</p> <p>Effective judicial protection</p>	<p>AG referred to Implementation Guide in context of interpretation of Art 6 Aarhus Convention.</p>

## Access to Justice in Environmental Matters

<p><b>Case C-470/16</b></p> <p><b><i>North East Pylon Pressure Campaign Ltd v An Bord Pleanála</i></b></p>	<p>Art 267 TFEU</p> <p>High Court of Ireland</p>			<p>Interpretation of Art 11 EIA dir &amp; Art 9(4) Aarhus Convention</p> <p>Costs</p> <p>Impact of Art 9(3) Aarhus convention</p>	
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