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Effective Justice?

Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union

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1. Introduction

1.1 Background

The European Union and its Member States are parties to the UNECE's Convention on access to information, public participation in decision making and access to justice in environmental matters (the "Aarhus Convention").[1] Most of the provisions in the Convention are implemented in the Union by various directives, e.g. Directive 2003/35 on public participation (PPD), the EIA directive (85/337, today 2011/92), the IPPC/IED directives (96/61 today 2008/1, and 2010/75) and the ELD (2004/35).[2] However, in some aspects, the implementation of the requirements for access to justice has been left to the Member States, resulting in great disparities from one legal order to another. In order to strengthen the third pillar of the Convention and to get the Member States in line with the recent developments of the case law of the Court of Justice of the European Union (CJEU), the Commission has launched a study on access to justice and its effectiveness in the Member States of the Union. The first study was presented in November 2012[3] and covered 17 of the Member States; Belgium (BE), Cyprus (CY), the Czech Republic (CZ), Denmark (DK), France (FR), Germany (DE), Hungary (HU), Ireland (IE), Italy (IT), Latvia (LV), Netherlands (NL), Poland (PL), Portugal (PT), Slovakia (SK), Spain (ES), Sweden (SE) and United Kingdom (UK). The remaining 11 countries were studied in the first half of 2013. Accordingly, this synthesis report covers all 28 Member States of the European Union.[4]

The aim of the study is to analyse the implementation of Article 9.3 of the Aarhus Convention on access to justice in the Member States of the European Union. The study also covers the implementation of Article 9.4 on the effectiveness of the review procedure to the extent that it relates to situations where Article 9.3 is applicable. Furthermore, the aim is to evaluate the influence of the developments in the case law of the CJEU on the national legal systems (e.g. cases C-237/07 *Janecek* (2008), C-427/07 *Irish costs* (2009), C-75/08 *Mellor* (2009), C-263/09 *DLV* (2010), C-115/09 *Trianel* (2011), C-240/09 *Slovak Brown*

[1] Ireland was the last Member State of the EU to ratify the Convention. The formal instruments of ratification were lodged with the United Nations on 20 June 2012 and the Convention entered into force on 18 September 2012 (IE (Ryall), page 1).

[2] For the decision making by the institutions of the Union, the Aarhus Convention is implemented by Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 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.

[3] http://ec.europa.eu/environment/aarhus/studies.htm.

[4] Note, however, that the information available for the first seventeen countries studied is almost one year old and therefore might in some respects be less up to date.

Bear (2011), C-128/09 *Boxus* (2011), C-182/10 *Solvay* (2011), C-416/10 *Križan* (2013) and C-260/11 *Edwards* (2013)). However, the scope of the study does not extend to rules that are applicable to the already existing mechanisms under EU legislation on access to justice in the above mentioned directives, except in so far as these also clarify the conditions for access to justice generally or there is an overlap with the different regimes.

The national reports are written by distinguished scholars, judges or experienced lawyers of environmental law in those countries:

Austria: Professor Verena Madner, Vienna University of Economics and Business, and Umweltsenat

Belgium: Professor Luc Lavrysen, Universiteit Gent

Bulgaria: Attorney Alexander Kodzhabashev, Sofia Bar Association

Croatia: Professor Tamara Capeta, University of Zagreb

Cyprus: Director Melina Pyrgou, Pyrgou Law Firm, Nicosia

Czech Republic: Attorney Mr Pavel Černý, Environmental Law Service

Denmark: Professor Helle Tegner Anker, Københavns Universitet

Estonia: Lecturer of Environmental Law Kaarel Relve, University of Tartu

Finland: Administrative judge Emil Waris, Administrative Court of Åland

France: Maître de conférences en droit Jessica Makowiak, Université de Limoges

Germany: Professor Bernhard Wegener, Friedrich-Alexander Universität Erlangen-Nuernberg

Greece: Dr Angelika Kallia-Antoniou, attorney at the Supreme Court, professor on environmental law at the National School of Public Administration

Hungary: Professor Gyula Bándi, Pàzmány Péter Catholic University, Budapest

Ireland: Dr Áine Ryall, University College Cork

Italy: Professor Roberto Caranta, Università degli Studi di Torino

Latvia: Lecturer on Environmental Law Silvija Meiere, University of Latvia, Riga

Lithuania: Dr Indre Zvaigzdiniene, University of Vilnius

Luxembourg: Solicitor in England and Wales Carole Biot-Stuart, Heisdorf

Malta: Senior lecturer Dr Simone Borg, University of Malta

Netherlands: Professor Chris Backes, Maastricht University

Poland: Professor Jerzy Jendrośka, Opole University, and attorney of law Magdalena Bar, Centrum Prawa Ekologicznego, Wrocław

Portugal: Professor Alexandra Aragão, Universidade de Coimbra

Romania: Dr Cătălina Rădulescu, Bankwatch Association Romania

Slovakia: Attorney of law Eva Kováčechová, ELAW Advocate

Slovenia: Legal adviser Borut Šantej, Institute for Cultural Heritage of the Republic of Slovenia

Spain: Professor Angel-Manuel Moreno Molina, Universidad Carlos III de Madrid

Sweden: Professor Jan Darpö, Uppsala Universitet

United Kingdom: Professor Richard Macrory, University College of London, and solicitor Carol Day, WWF/UK

1.2 The questionnaire and the national reports

The national reports have been written from a questionnaire which was drafted in close cooperation between the Commission and seven of the national experts. The questionnaire covers a number of issues under six headings.

The first (part A) concerns national legislation, administrative decision making and the role of the courts in the environmental area. Under this item, the

reporter is also asked to evaluate the national report from the 2007 Milieu study on the implementation of Article 9.3 of the Aarhus Convention in 25 of the Member States[5] and to elaborate on the relevant administrative and legal developments since that report was published.

Part B covers questions on standing; it includes some general questions on the underlying philosophy, standing for individuals, standing for groups and, finally, standing for environmental NGOs ("ENGOs").

Part C concerns the effectiveness of the judicial review procedure, with specific questions on procedural remedies, suspensive effect, criteria for injunctive relief, requirements for timeliness and effectiveness in the administrative procedures and in the courts, examples of alternative dispute resolution (ADR), examples of undue delay in the environmental procedure and cases where the environment has suffered considerable damage despite the fact that there was a positive outcome for the environment in the judicial review.

Part D raises questions about the costs of the environmental procedure: court fees, the loser pays principle, lawyers' fees, costs for expert witnesses, bonds (cross-undertakings in damages) and examples of the rules governing liability for costs having a chilling effect on the willingness of members of the public to challenge environmental decision making. Also in this section are questions about legal aid and other methods of public and private funding for participation and litigation in the environmental area.

Part E asks the national reporters to elaborate on seven example situations involving the decision-making procedure and the possibilities for members of the public – including ENGOs – to initiate administrative appeals and judicial review, and the cost and effectiveness of that procedure. The examples cover some typical situations of environmental decision making in which Article 9.3 and 9.4 of the Aarhus Convention are applicable.

Finally in Part F, the reporters are asked to give their overall opinion on the main problems in their legal system when it comes to the implementation of Articles 9.3 and 9.4 of the Aarhus Convention and how their country would have to change its national system in order to conform with the requirements of the proposed Access to Justice Directive from 2003.[6]

The quality of the national reports is generally good or very good. All main elements of the questionnaire are well elaborated upon. Naturally, the emphasis on the different elements varies from one country to another, reflecting that

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[5] *Summary report on the inventory on the EU Member States' measures on access to justice in environmental matters*. Milieu Environmental Law and Policy, Brussels 2007-09-17. The report is published on the web-site of the Commission: http://ec.europa.eu/environment/aarhus/study_access.htm.

[6] Commission's Proposal for a directive of the European parliament and of the Council on access to justice in environmental matters, COM(2003)624 final of 24 October 2003.

the problems of the environmental procedures differ. In addition to this, the length and the level of detail vary depending upon the complexity of the different legal systems. It is also noteworthy that in some of the reports, the distinction between the national implementation of Articles 9.2 and 9.3 of the Aarhus Convention is less clear. This can however be explained by the open design of the questionnaire. The answers to section E of the questionnaire give complementary information to the general questions as regards the environmental decision-making procedure in some typical situations, as well as the possibilities for the public to challenge those decisions, and at what cost and to what effect. However, the questionnaire is less clear in defining the group of individuals who, as members of the public, are thereby are able to trigger an administrative appeal or judicial review. Accordingly, some national reports give quite a bit of detail on this theme, whereas others give less information. Something similar can be said about the responses to questions concerning the cost issue in section D. To some extent, this complicates the conclusions to be drawn from the study, something which I will discuss further below in section 2.

1.3 The synthesis report

The aim of this synthesis report is to sum up the main outcomes and draw some conclusions from the national reports. In addition to this, a number of key issues concerning the implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the European Union are discussed. For reasons that will be elaborated upon below, the synthesis report is written from the perspective that there is a need for a common legislative framework in this area in order to furnish a level playing field for environmental democracy in the European Union. The legal study is complemented by a study on the economic impact of widening access to justice in environmental decision making in the Union.[7] Together, the two studies will form a platform of knowledge for the Commission to utilize in deciding how to develop its efforts to strengthen the enforcement of EU environmental law throughout the Union.

The synthesis report is divided into five sections. The first is this introduction. In the second, I give a general picture from the national reports on the state of play in implementing Articles 9.3 and 9.4 of the Aarhus Convention in the Member States. In section 3, I draw some conclusions from the national reports and make recommendations on a number of the key issues. A summary of the proposals is given in the fourth section. The report concludes with three tables: one on the main barriers to effective justice in the environmental area in

[7] Faure, M & Philipsen, N & Backes, C & Choukroune, L & Fernhout, F & Mühl, M: Possible Initiatives on Access to Justice in Environmental Matters and their Socio-Economic Implications. Maastricht University Faculty of Law, Metro Institute 2013-01-09. See http://ec.europa.eu/environment/aarhus/studies.htm

the Member States (A), another on the issue of costs (B) and a third on the effectiveness of the procedure (C).

Some clarification about the concepts and expressions used in this synthesis report is needed. The study concerns the administrative and judicial procedures to which members of the public have access when challenging actions and omissions by public authorities or private persons which contravene provisions of environmental law, and, additionally, the costs and the effectiveness of those legal means. Although the administrative and judicial procedures in the studied countries vary greatly, obviously there is a need to use common expressions when describing them in this report.

I use the expression *administrative appeal* as a common descriptor for the procedures for appealing a decision or omission by an authority to a higher lever within the administrative system or to a specific appeal body or tribunal - such as the Nature and Environmental Appeals Board in Denmark (Natur- og Miljøklagenævnet), the Planning Appeals Board (An Bord Pleanála) in Ireland, the Environmental and Development Planning Tribunal in Malta and the Austrian Independent Environmental Senate (Umweltsenat).

Judicial review is used to describe a challenge to an administrative action or inaction in court, irrespective of whether it is a procedure that merely rules on whether the administrative body followed required procedures or a more or less full trial on its merits and irrespective of whether the court is a general court or an administrative court.

I use *environmental proceedings* in a general sense. Depending on the context, the expression can therefore mean administrative appeal or judicial review or sometimes even both. It is often difficult to make a clear distinction between the two elements of the environmental procedure. An example of this confusion is that some "administrative bodies or tribunals", sufficiently independent and impartial, can be regarded as courts in the meaning of the Aarhus Convention.

I use the expression *civil action* to describe an action in which members of the public can sue the operator of an illegal activity directly in court, be it for an injunction or for precautionary measures to be undertaken or for damages.

A final expression which has little meaning in most of the studied countries is *supervisory decision*. Still, I use it as a common descriptor for a decision on an enforcement issue, undertaken by a supervisory body, which relates to a certain activity or operator. This can be expressed as a decision to act or not to act, or even a "0-decision", that is, silence on the matter. A typical supervisory decision may be an order to an operator to undertake certain measures, to decide a sanction fee for a violation of a permit, or to notify the prosecutor for breaches of environmental law.

In this context, I also want to make a general language reflection. In a comparative study, one must be aware of the fact that different legal systems may use words and expressions that sound and look alike, but which sometimes have a distinct national meaning, even when they are translated to a common language. This goes for example for "decision", "act" and "regulatory act". First of all, in an administrative context, it is often not easy to distinguish what is a decision in an individual case and what is a regulatory act. Second, what is defined as an act in one country may be defined as a decision in another. I think it is fair to conclude therefore – here as in any kind of comparative legal research – that there is a need for caution against national preconceptions (*Vorverstehen*) on the understanding of the expressions used in the report.[8]

[8] For further discussion of what constitutes an administrative decision, see Eliantonio, M & Backes, C & van Rhee, CH & Spronken, TNBM & Berlee, A: Standing up for your right(s) in Europe. A comparative study on legal standing (Locus Standi) before the EU and Member States' Courts. Study for the European Parliament (PE 462.478) August 2012, part 4.2 (p. 67).

2. Outcomes from the national reports

2.1 General background on the implementation of Article 9.3 of the Aarhus Convention

A general background to the Aarhus Convention and the implementation of Articles 9.3 and 9.4 in the European Union and its Member States is presented in the introduction of the Milieu report. Since the publication of the Milieu report in 2007, the Member States studied show diverging trends.

On the one hand, the possibilities for members of the public to challenge environmental decisions have been improved in some countries in different ways, e.g. by relaxation of the standing criteria for individuals or ENGOs (BE, BG, EE, DE, EL, IE, LU, SE, SI, SK) or increased possibilities to go to court (AT, CZ, FR, HR, LT, MT, PL, RO). To some extent, this has been the result of pressure from the European Commission or the Compliance Committee of the Aarhus Convention. In addition to this, the development of case law in the CJEU has played a positive role for the development of access to justice in many Member States.

On the other hand, there is also a tendency in the opposite direction, much in line with the strong movement for "better regulation". A rather common feature in the countries studied is that large scale projects, such as nuclear power stations, offshore activities, infrastructural projects and other activities considered to be of vital public interest are decided at a high level of the administrative hierarchy (government or central authorities) or are approved according to a "plan". The possibilities for the public to effectively challenge in court such policy decisions commonly are weak or non-existent. In several of the Member States studied, there has been an increasing tendency to "lift up" the decision making of such projects. The aim has been, *inter alia*, to improve the effectiveness of the decision making procedure. However, as a result – deliberate or not – the possibilities for public access to justice have been impaired directly or indirectly (BE, DE, EL, EL, ES, NL, RO, SE, UK). A closely related trend is that in some countries, the use of generally binding rules (GBR) which replace individual permits have disallowed the public from "interfering" in decision making (NL, SE). In addition to this, in some countries, the standing criteria for individuals in environmental cases have been made stricter (NL, RO). Furthermore, several of the Member States studied have introduced appeal fees (DK), have introduced or raised court fees (CZ, EE, EL, LV, RO, UK) or have started to apply the loser pays principle in some environmental cases (BE, ES). The overall picture of the status of the implementation of Articles 9.3 and 9.4

in the Member States in the European Union can therefore be described in the same terms as in the Milieu Report, that is, diverging, random and inconsistent.

Another noteworthy phenomenon which is quite common among the Member States is the clear distinction between procedures for public participation and other kinds of decision-making procedures on environmental matters, where the access to justice possibilities are much wider in the former than in the latter. To a great extent, this is evidently due to the implementation of the requirement in the EIA, IPPC/IED, ELD and the Habitats Directives. But also beyond Union law, there is a distinction between areas of environmental law in which traditional public participation and access to justice seem to be more or less part of the game – e.g. in planning and building legislation – and other areas where the public has little or no influence. Many of these latter decisions are made pursuant to certain "sectorial" legislation concerning hunting, forestry, fishing, mining, etc. Commonly, in a permit procedure in those areas, only the applicant and the authority are regarded as "parties". In some legal systems, although such a decision may derogate from Union law on protection of the environment, no one else can challenge that decision in court.

There are also diverging tendencies among the Member States studied as to the means available for access to justice according to Article 9.3 of the Aarhus Convention. In most countries, administrative decisions can be contested both through administrative procedures and through the courts. Sometimes, the administrative remedies must be exhausted before utilizing judicial review. Administrative remedies usually consist of appeals to the authority that issued the contested decision, or to a body that is hierarchically superior. In other countries, some administrative appeal is made to special tribunals which are equipped with technical experts of their own (BE (Flemish region), DK, IE, LT, MT, SE, UK). From experience, decision making in the environmental area can be improved by such measures.

This report focuses on the judicial review of administrative decisions, but obviously judicial remedies are available in other contexts. Civil remedies are almost always available to owners of neighbouring lands that suffer injury to their property or persons due to harmful emissions. In most Member States, a private party cannot bring a criminal claim, but can report criminal violations to the public prosecutor. However, in the United Kingdom (and rarely, Belgium), a private party can seek to initiate a criminal case in the criminal court. In France, private parties and ENGOs can also do so, but only if they have sustained damage. Additionally, in some of the studied countries, the ENGOs are equipped with the possibility to sue the operator of a hazardous activity in

court for damages on behalf of the environment (FR, EL, IT, LU, PL, PT, RO), although in some cases, any award of money will be paid to the state budget. Obviously, constitutional courts may also decide on important matters concerning environmental law in those legal systems which are equipped with such courts. One must keep these remedies in mind to get the full picture of access to justice.

Finally, the attitude of the courts differs from one country to another. In some Member States – such as the United Kingdom – the courts have taken a lead position in trying to improve access to justice for the public concerned. In others, the courts have adhered to a more conservative interpretation of individual "rights" and have been quite reluctant to widen access to justice on behalf of the environment. I am under the impression that the courts in Austria, Germany and the Czech Republic can provide examples of this traditional stance.[9]

2.2 Standing for individuals, groups and ENGOs

The national reports confirm the diverse picture shown by the Milieu Report 2007 on standing in administrative appeals and judicial review. Among the Member States, there are great variations between those systems which allow anyone to challenge administrative decisions and omissions on environmental matters (*actio popularis*) and those which restrict the possibility for judicial review only to those members of the public who can show that their individual rights have been affected. *Actio popularis* prevails in Portugal, is quite common in Slovenia and Spain and provided for in the generally applicable Environment Protection Act in Romania. In Belgium, Estonia, Finland and Sweden, any resident of a municipality can challenge in court certain local decisions.[10] The system in Latvia also can be said to allow for *actio popularis*, as anyone who participates in the decision-making procedure in environmental matters is allowed to challenge that decision in court. According to the case law of the Council of State in Greece, standing in environmental cases has been made so accessible that it is described as "*quasi actio popularis*".[11] In Ireland and Romania – and in some situations also in Croatia and Finland – anyone can trigger enforcement actions if there is a breach of environmental law. Finally, the possibility to initiate private prosecution in the UK can also be described as a form of *actio popularis*.

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[9] According to the national report from the Czech Republic, the Czech Constitutional Court is of the opinion that ENGOs cannot claim a right for a favourable environment, as this right "as it can self-evidently" belong only to natural, not legal persons (CZ (Černý) p. 13), see also the Aarhus Convention's Compliance Committee case *C/2010/50* para 49.

[10] Standing up for your right(s) in Europe (p. 70), EE (Relve) p. 9 and FI (Waris) p. 6.

[11] Greece (Kallia) p. 20.

In contrast to this, the protective norm theory (*Schutznormtheorie*) is applied in many countries, at least to some extent. In the strictest form – applied in Germany and Austria – the theory means that in order to be allowed to bring a case to the administrative court, the applicant has to show that the decision or omission may concern his or her individual or subjective public-law right. For example, in the case of a permit for an industrial installation, affected persons can only challenge those parts of the decision which are designated to protect their individual interests in a very limited sense ("rights"), commonly concerning discharges known to be hazardous to human health. Even if they are allowed to appeal the decision, all other arguments that are invoked in favour of the cause are dismissed as being outside the scope of the trial. Thus, general issues of environmental protection are regarded as the prerogative of the administration and can never be brought before the court for review. In the Netherlands, a form of *actio popularis* – similar to the one in Latvia where participation automatically gives access to environmental proceedings – was replaced in 2004 with an interest-based approach, which in turn was abandoned in 2010 and 2013, when the *Schutznormtheorie* was introduced. Even if the Dutch variety of the theory is a milder one and does not concern standing, it nevertheless limits the arguments that the claimant can use and therefore restricts the scope of judicial decision making.[12] Some of the studied countries link the possibilities for members of the public to go to court to traditional property rights in a narrow sense (CY, CZ, HR, SK). These systems come quite close to those utilizing a strict application of the *Schutznormtheorie*.

Most of the studied countries belong to a middle group which is more or less "interest-based" when determining standing (BE, BG, DK, FI, FR, EL, HU, HR, IE, NL, LU, IT, SK, SE, SI, UK). Even if the distinction between a "right-based" and an "interest-based" system is not always easy to identify – at least in my view – one may say that the latter mentioned countries have a more liberal approach to standing. If potential litigants live or spend time in the vicinity of the abovementioned industrial activity and there is a risk that they will be affected by emissions, disturbances and other inconveniences from that activity, they are allowed to challenge the permit in court. In addition to this, there is commonly no or little restriction as to the scope of the trial, meaning that any argument can be used to forward their cause, including general compliance with environmental law.

A reservation is needed here. Standing for individuals is an issue which basically is left to the courts to decide. However – and this is a shortcoming in the design of the questionnaire for this study – most national reports say little about case law on the matter, although there are exceptions. Accordingly, our

[12] NL (Backes) p. 9.

knowledge is limited when it comes to the exact definition of the group of individuals who may appeal an administrative decision as members of the public in the different countries studied. From examples in the national reports, it is still possible to draw some conclusions. The United Kingdom report refers to a Scottish plaintiff who lived about 6 km from an area which he used for bird-watching and recreation, and where a development was planned and decided upon. The plaintiff was refused standing for judicial review in the Outer Court of Session on the basis that he did not have "title and interest to sue". However, in light of recent case law of the Supreme Court, the authors of the UK report conclude that the bird-watcher probably today would have been permitted to bring judicial review against this decision.[13] In the Italian report, we are informed about a person who lived in the vicinity of a beach where a permit was issued to allow a small building for sanitary purposes to serve the public. Despite the fact that he lived 2 km away and that the building in no way limited his access to the beach, the man was granted standing.[14] In a comparison with the Swedish system – which I still would describe as quite generous to individual members of the public in allowing access to justice – those two gentlemen would not even come close to the gateway to the court!

Standing for ENGOs is commonly granted by tradition or express legislation. In countries where access to the courts is wide both for individuals and organisations along the lines of *actio popularis* there is little reason to define standing criteria for ENGOs. In the other countries studied, commonly, there is a basic condition that the statutes of the organisation should cover environmental protection, recreational purposes, historic heritage or whatever is relevant for the challenged decision. This criterion is sometimes replaced or complemented with a requirement for activity in this area of law. Occasionally, the statutes have been read quite narrowly by the courts, and the ENGO has only been allowed to challenge issues that are expressly mentioned in them (NL). In some of the Member States, the statutes also have had significance in case law as a geographic criterion (AT, BE, ES, FI, HU, NL). That is, if the activities of the ENGO according to its statutes are confined to one region, it is not allowed to appeal decisions in another. In Italy, the ENGO is required to show that it has been active in 5 out of 20 regions, thus discriminating against local ENGOs. The same goes for Slovenia, where ENGOs must have been active in the whole of the country's territory in order to be recognized.

A requirement for registration of the ENGO is common in the Member States studied (AT, FI, FR, DE, EL, HU, LT, LU, IT, LV, PL, RO, SI, SK). Al-

[13] UK (Macrory & Day), p. 12.
[14] IT (Caranta) p. 11.

so a criterion about length of existence or activity is usual, varying between one year (SK and IE in some cases), two years (ES, HR), three years (AT, BE, FR, DE, LU and SE) and even five years in two cases (CY and SI). Additional criteria exist in some states; only Slovenia and Sweden have a general numeric criterion for ENGO standing (30 and 100 members respectively), whereas Denmark uses the same numeric requirement in planning law only and Slovakia requires ENGOs to have 250 members as prerequisite for challenging IPPC permits. Openness and democratic structure is used as a criterion in Germany and Italy, thus excluding well-known NGOs such as WWF (DE) and Greenpeace (both countries) from standing in environmental cases. This was also previously used as a standing criterion for ENGOs in Sweden, but was abandoned after the CJEU's judgment in the *DLV* case in 2008. Today, there is instead a non-profit criterion, which is also used in Austria, Belgium, Germany, Poland and Slovenia. In Estonia and in Sweden, there is a democratic criterion as well. In the first mentioned country, ad hoc groups must show that the organisation represents a significant percentage of the inhabitants of the affected area.[15] In Sweden, an alternative to the numeric criterion is that the ENGO can show that it has "support from the public".

In some of the studied countries, ENGOs have standing to challenge in court any decision according to planning and environmental law in a wide sense, including nature protection, recreation and cultural heritage. In others, their standing is confined to certain legislation and/or specific kinds of decisions, such as permits, derogations, etc. (AT, CZ, DE, FI, SE, SI).

One final observation shall be made on participation in the environmental decision-making procedure. As mentioned above, participation can be used as a gate-opener for access to justice, in the legal literature sometimes called "indirect *actio popularis*" or "multi stage *actio popularis*". But more common in the Member States studied is a system in which participation – or prior exhaustion of administrative appeal – is a prerequisite for access to justice. Understood this way, only those who have raised their voices in the participatory stage of the decision-making procedure are allowed to challenge the final outcome in court (AT, LV, DE, HU, IE, NL, SI, SK). In some of these countries, this prerequisite is read narrowly, only allowing those issues that were objected to in the participatory stage to be challenged in court (AT, DE, IE, NL).

[15] EE (Relve) p. 11f.

2.3 Access to what?

Effective access to justice for members of the public includes many more factors than just standing. A crucial question in this context is to what they are entitled when they are allowed to challenge an environmental decision in court. Will the court review both substantive and procedural issues at stake in the contested decision? And what kind of power has the court – is the procedure cassatory, meaning that the court is confined to remitting the case back to the authorities, leaving the door open for still another (bad) decision, or can it replace the decision with a new one in a reformatory procedure? Some of these questions concerning the effectiveness of justice will be dealt with in sections 2.5 and 3.4 below. Here, it suffices to make a general statement that the relationship between standing and the scope of the trial seems to be that "the wider the entrance, the smaller the room". In other words, those systems with a generous attitude towards standing tend to offer a more limited scope of judicial review, typically limited to legal (as opposed to factual) issues in a more or less restricted manner in a cassatory procedure. An example of this from the national reports is that the Czech courts, including the Constitutional Court, have developed a doctrine in which ENGOs only have standing to defend their procedural rights, not the substantive outcomes of an EIA or the subsequent permit decision.[16] Similar examples are reported from Portugal, where the courts are said to limit their review to formal requirements, despite clear requirements in the law for a fuller scope of trial.[17]

On the other hand, those systems with more restrictive standing requirements more often offer a review of the "substantive legality", or even the merits, of the contested decision in a reformatory procedure. Thus, if the complainant is allowed through the gateway, he or she will get the "full monty", so to speak. This is sometimes described as the review being more "intense". In Germany for example, property owners who are allowed to challenge a decision in administrative court are given strong protection against the authorities' actions and inactions. In Sweden, Finland and France, the court can actually undertake certain supervisory measures relating to a contested activity or deal with interim matters of its own accord. Such steps surely would be strange for an English or Portuguese court to contemplate.

The difference between these two perspectives can be illustrated by the possibilities for members of the public to challenge administrative omissions. In a legal system that is characterized by more restrictive standing requirements and more intensive judicial review, the administration sometimes is given less dis-

[16] CZ (Černý) p. 5, 13-14. It may be noted that the Compliance Committee recently found this doctrine in non-compliance with Art. 9.2 of the Aarhus Convention, see *C/2010/50 Czech Republic* (2012-06-29), para 78-81.
[17] PT (Aragão) p. 30.

cretion to refrain from acting. Its decision – or non-decision, in this scenario – is given little or no deference; the court will replace it with its own, based on the merits of the case. On the other hand, in the first type of system, which has more liberal standing requirements but limits judicial review to scrutinizing legal issues, the courts are likely to allow administrative bodies more discretion to decide when to act or not. The result is that systems with "generous" standing criteria sometimes turn out to be not very generous in allowing members of the public to challenge administrative omissions. However, the issue concerning administrative inaction is much more complicated and also involves factors such as the distribution of power between the administration and the courts. Furthermore, in some of the Member States, supervisory decisions are not appealable for the public concerned, except according to specific legislation. Irrespective of the underlying reasons for this situation, in more or less all of the studied countries, there seem to be concerns about the lack of possibilities to challenge administrative omissions, and alternatively, the lack of effectiveness when doing so.

2.4 Costs in the environmental procedure[18]

The cost of the environmental procedure is addressed in Articles 9.4 and 9.5 of the Aarhus Convention. According to the first mentioned provision, the procedures under Article 9.3 must not be "prohibitively expensive". According to Article 9.5, the Parties shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. Costs in the environmental procedure include participation or administrative appeal fees, court fees and other court costs, lawyers' fees, experts' and witness' fees and bonds for obtaining injunctive relief (also called securities or cross-undertakings in damages).

Generally, there are no fees for participating in environmental decision making or for launching an administrative appeal, although there are exceptions (DK, IE, MT, SI[19]). However, in most of the studied countries there are fees for going to court. The only exception from this is Sweden, where it is free for members of the public to challenge environmental decisions. Occasionally in other countries, it happens that individuals and ENGOs are exempted from paying court fees in environmental cases (HU, LT, PT, SK). Court fees will generally

[18] The text in this section has largely been prepared by Ms Carol Day, solicitor at WWF/UK. For further information and references on the cost issue, see paper prepared for the 4th meeting of the Task Force on Access to Justice under the Aarhus Convention; Darpö, J: *On Costs in the Environmental Procedure*. 31 January 2011, published on: http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppatoj/analytical-studies.html.

[19] ENGOs are exempted.

have to be paid to lodge an appeal and the higher the court, the more expensive the fee. In general, they are not a significant obstacle in themselves, averaging around 100-200 € in the first instance and 500 € at the appeal stage. Court fees are notably high in the United Kingdom Supreme Court at over 5,000 €. In some countries, multiple claimants will each have to pay a court fee for the same claim (e.g. CZ). This contrasts with Slovakia, in which the court case relates to the petition and not the applicant.

In many of the studied countries, the system of calculating court fees in civil cases is based upon the economic value of the case, "*Streitwert*" (interest in question). This system also applies in Germany and Portugal in environmental cases when members of the public challenge administrative actions and inactions. In Germany, the value of the case is calculated according to an administrative guidance document, the *Streitwertkatalog*.[20] The calculation is made from the viewpoint of the plaintiff's interest in the case, whereas the interest of the operator is irrelevant. The court fee is then based on a percentage of that value.[21] These court fees range from 700 to 1,200 € in an ordinary case concerning environmental matters. However, according to the *Streitwertkatalog* the court fee increases if experts are involved. According to the national report from Germany, the court fee will range from 4,000 to almost 8,000 € per instance in a typical nature protection case. Also the lawyers' fees are determined by the value of the case, and range from 700 to 3,000 € per instance.[22]

In many of the Member States studied, appeals to a court require assistance by a lawyer (AT, ES, FR, EL, HR, LU, MT, PT, SI, SK, UK). In some countries legal representation is not required for first instance proceedings (e.g. CZ, DE, FR, NL, PL). However, legal assistance is commonly required when the appeal is lodged before the supreme courts. Lawyers' fees vary significantly from one country to another. For example, the typical costs of an ENGO undertaking proceedings under the Nature Protection Act in Germany was estimated as 25,000 € and the costs involved in one 4-day hearing in the High Court in Ireland exceeded 86,000 €.[23] It is not unusual for legal proceedings in the United Kingdom and Ireland to exceed 50,000 €. In Spain, experts report that a minimum of 3,000 € should be budgeted for, while in Belgium it would be unusual

[20] Information about *Streitwert* in Germany has been furnished by Mr Werner Heermann at the Association of European Administrative Judges (AEAJ).
[21] Or more precisely, one fee (Gebühr) is decided and the court fee is based upon a number of those Gebühren. For example, if the value of the case is calculated to 15,000 €, one Gebühr is 242 €. The court fee in first instance of the administrative court is then 726 € (3 Gebühren), second instance 968 € (4 Gebühren) and third instance 1,210 € (5 Gebühren). In a case for injunctive relief, the correspondent court fees are 249 €, 332 € and 415 €.
[22] DE (Wegener) p. 17f.
[23] IE (Ryall), page 34.

for a case to cost less than 2,000 €. In Greece, a case in the Council of State costs at least 2,800 €. On the other hand, cases in Sweden and Finland are in general "free", meaning that each party bears its own costs. In short, costs in the various countries vary greatly - but from the information provided by the national reports it can be inferred that court proceedings in most countries cost between 2,000-10,000 €, without taking into account the costs that may be incurred by expert advice.

Generally, each party has to bear his or her own costs in administrative appeals in environmental cases. In contrast to this, the basic principle for the cost distribution in court – both in civil cases and on judicial review – is the "loser pays principle" or "the costs follow the event". This principle – or a modified form of it – applies in court in most of the studied countries with the exception of Finland, Sweden and – in judicial review cases - Slovenia, whereas in Luxembourg the principle does not apply to lawyers' costs. In Italy, applying the loser pays principle previously was an exception, but has become more common recently. Following the CJEU's judgment in *C-427/07*, Ireland has adopted specific measures with regard to the costs of litigation in EIA, IPPC/IED and SEA cases and certain categories of legal proceedings aimed at enforcing planning and environmental law. In those cases, the general rule is that each party bears his or her own costs. The application of the loser pays principle in most countries will be at the discretion of the judge, who sets the amount of the total or partial costs of the winning party to be covered by the loser. Systems with fixed schemes for lawyers' fees, or systems in which only a proportion of the winners' actual costs can be reimbursed from the losing party are quite common.

According to the national report from the United Kingdom, although judges in that country have discretion with respect to costs, only recently have the courts departed from the general principle that the losing party pays all of the winning party's costs. Claimants can request a cap on costs to be reimbursed through a Protective Cost Order ("PCO"), but difficulties persist in relation to the conditions accompanying such an order. These conditions are, in general, difficult to meet in England and even more so in Scotland.

Even though the loser pays principle prevails in the Czech Republic, Estonia, the Netherlands, Poland and Slovakia, the public authorities cannot – or seldom utilize the possibility to – recover their own legal costs ("one-way cost shifting"). In practice, therefore, losing a case on behalf of the public interest when challenging an environmental decision by an authority need not be prohibitively expensive in those countries.

The cost of expert advice is usually borne by the parties and can be considerable. For example, in France, those costs can typically run to around 15,000 € and in Portugal the cost of obtaining frequently necessary factual evidence such as aerial photographs or laboratory analyses is reported as being beyond some ENGOs' budgets. Something similar is reported from the Austrian, German, Greek, Romanian and Slovenian ENGOs. However, sometimes these costs can be reimbursed from the losing party. Even so, costs of expert advice are widely reported as being problematic.

As will be elaborated in the next section, in some of the Member States studied, a plaintiff has to pay a bond/security or cross-undertakings in damages in order to obtain an injunction of an environmental decision or activity.[24] If the requesting party ultimately loses the case, the bond is used to pay any damages to the other party that were incurred as a result of the delay in the activity. The high costs connected with such a system can represent a significant burden for members of the public challenging acts or omissions by the administration. The requirement to pay bonds may necessitate the deposit of a significant sum that would only be recovered if the party requesting the injunction wins the case. Experts in Cyprus, Belgium, Ireland, Italy, Spain and the United Kingdom reported difficulties in obtaining effective remedies due to the actual or potential costs of securing interim relief.

Almost all of the Member States studied have established legal aid schemes to ameliorate the costs of judicial proceedings, at least for individual members of the public concerned. In Ireland, however, the legal aid scheme is underfunded and restricted in scope and in Cyprus and Greece, although legal aid is theoretically available, the national experts are unaware of an environmental case in which it had been obtained.

The conditions for granting legal aid vary from country to country, but are commonly dependent on the income status of the applicant, often set at a (very) low level. In most Member States, legal aid is not available to ENGOs or associations, is only available in very exceptional cases, or lawyers are not keen on undertaking it because it is poorly paid. The exceptions are Denmark, Romania, Slovenia, Spain and Hungary, where organisations representing public interests have the possibility to access legal aid. In Austria, the Czech Republic, France, Germany, Slovakia and Sweden, the government provides some funding for ENGOs to enable various participatory activities, in some of those

[24] There are actually also examples of the opposite. In Finland and Sweden, the operator has to pay a security when asking for a "go-ahead decision", that is to start operating according to a permit which is challenged in court.

countries even including participation in judicial proceedings. Generally however, because of the high costs of the environmental procedure, public interest groups rely on either in-house lawyers or lawyers providing services on a *pro bono* basis.

In summary, we can see from the national reports that the cost of judicial procedures is considered to be an obstacle to access to environmental justice – or at least, to have a dissuasive effect thereupon – in the following countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia, Spain and the United Kingdom.

2.5 Effectiveness in the environmental procedure[25]

There is a basic requirement in the Aarhus Convention for the environmental procedure to be effective. According to Articles 9.4 and 9.5, the procedures in Article 9.3 must provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable and timely. Each Party is also responsible for informing the public about the possibilities of administrative and judicial review procedures to ensure rights according to the Convention.

Expressly stipulated time limits and deadlines for completing administrative procedures are quite common in the countries studied. The opposite is true for judicial procedures, where time limits for the delivery of judgments are rarely set in law, except for a statement that judgments must be issued "without undue delay" or "within a reasonable time". There are, however, also examples of stipulated time limits, e.g. in Austria, where administrative courts of first instance have to issue a ruling within six months generally or the Czech Republic and the Netherlands, where certain legislation on infrastructural and building projects requires the courts to decide appeal cases within three and six months respectively. In those countries where timeliness is regulated only by a general proclamation, problems with delay are widely reported in the national reports and in many countries this is regarded as an important barrier to effective justice (BU, HR, CY, FR, EL, HU, IE, IT, LT, MT, PT, RO, SK, ES, SE, UK).

[25] Besides the national reports of this study, an important source of information for this section are the studies undertaken by Ms Yaffa Epstein on behalf of the Task Force on Access to Justice under the Aarhus Convention: *Access to Justice: Remedies*. Geneva 2011-03-09 and *Approaches to Access: Ideas and Practices for Access to Justice in Environmental Matters in the Areas of the Loser Pays Principle, Legal Aid, and Criteria for Injunctions.* Study prepared for the 4th session of the Meeting of the Parties 29 Jun – 1 July 2011, both published on: http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppatoj/analytical-studies.html.

Nearly every Member State in this study has an Ombudsman institution, usually selected by the legislative bodies of their State. The Ombudsmen are generally independent review institutions that aid individuals and entities in disputes with administrative bodies. Commonly, an Ombudsman can investigate complaints and report on its findings. The institution tends to be quite flexible, inexpensive, and simple to access. Due to the fact that the Ombudsman's powers are usually limited to non-legally binding activities such as investigating, reporting, mediating and recommending, they are commonly disqualified from being considered to be an effective remedy according to Article 9.4. In practice they are often nevertheless very useful and therefore considered a complementary safeguard of environmental rights. Many Member States report that the political pressure to follow the recommendations of the Ombudsman generally leads to compliance.[26] It is also noteworthy that in some countries (AT, CZ, EL, HU, PL, RO, ES), the Ombudsman can actually bring cases to court or even intervene in on-going environmental cases.

Launching an administrative appeal commonly postpones the contested decision. Such "suspensive effect" exists in most of the Member States studied, the exceptions being Belgium, Cyprus, Denmark, Estonia, France, Greece, Luxembourg, Malta, the Netherlands, Portugal, Romania and Spain. In most legal systems however, certain decisions always take direct effect or, alternatively, there is a possibility for the authorities to issue a "go-ahead decision" of their own accord or on application from the operator. In contrast, judicial review commonly does not have suspensive effect, with the exception of Bulgaria, Finland, Germany and Sweden and – as regards courts of first instance – Austria. This is also true in cases brought under some specific legislation in Latvia.

If procedures do not have suspensive effect, members of the public may apply for an injunction to pause an environmentally damaging decision or activity while other remedies are pursued. The criteria for obtaining an injunction vary by country, but they fall into four basic categories: *periculum in mora* (danger in delay), *prima facie* case (likelihood of success on the merits), personal harm and weighing of interests.[27] In quite a few of the countries studied, the limited possibility to obtain injunctive relief in due time is regarded as an important procedural problem when challenging environmental decision making in court. Together with the slowness of the procedure and a general lack of effective enforcement mechanisms, this seems to be an important barrier to access to justice in Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Greece, Hungary, Luxembourg, Portugal, Romania, Slovakia, Spain and the United

[26] Epstein: *Access to Justice: Remedies* p. 84.
[27] For more information on suspensive effect and injunctive relief, see Epstein: *Access to Justice: Remedies* p. 86ff.

Kingdom. In some of the studied countries, the complexity of the environmental legislation and the procedural system is also highlighted as a major concern. Lack of confidence in the court system is mentioned in two or three of the studied countries.

As previously mentioned, in some of the Member States studied, the party who requests an injunction must pay a bond/security/undertakings in damages (BE, CY, ES, IE, IT, UK). In all of those countries, the system is described as a barrier to access to justice, even if the court has discretion to waive or reduce the bond in order to comply with the Aarhus Convention requirement for affordable remedies.

A final issue in the questionnaire concerned the existence of cases that – due to ineffective means for injunctive relief, high costs for cross-undertakings in damages and/or time consuming procedures – have been "won in court, but lost on the ground". Quite a few of the national reports described such cases: the *Fluxys Gas Pipeline* case in Belgium,[28] the *Kanfanar quarry* in Croatia,[29] the *D8 Highway* in the Czech Republic,[30] the *Wattelez* case in France[31], *Eemscentrale* in the Netherlands,[32] *Castro Verde Highway* (cf. *C-239/04*) in Portugal,[33] the *Pezinok landfill* and the *Mochovce power plant* in Slovakia.[34] From Spain,[35] the *M-30 Highway* in Madrid and the hotel *El Algarrobico* in Almería were mentioned and from the United Kingdom, the famous – although somewhat dated – *Lappel Bank* case (cf. C-44/95).[36] Another example is *Santa Caterina Valfurva*, well known from the case law of CJEU.[37]

[28] BE (Lavrysen) p. 31.
[29] HR (Capeta) p. 23.
[30] CZ (Černý) p. 18.
[31] FR (Makowiak), p. 15.
[32] NL (Backes) p. 22.
[33] PT (Aragão) p. 21.
[34] SK (Kováčechová) p. 21.
[35] ES (Moreno Molina) p. 20.
[36] UK (Macrory & Day) p. 23.
[37] C- 304/05 *Santa Caterina Valfurva*, see Hadroušek, D: Speeding up Infringement Procedures: Recent Developments Designed to Make Infringement Procedures More Effective. Journal of European Environmental & Planning Law (JEEPL) 2012 p. 235 (at p. 236).

3. Proposals and further challenges

Under this heading, I make general reflections on some of the key issues concerning the implementation of Article 9.3 of the Aarhus Convention in the Member States of the European Union. In this context, I also make some recommendations on how to formulate appropriate provisions of Union law to further this cause.

Drafts of the synthesis reports were communicated to the national experts in August 2012 and June 2013. Valuable comments, proposals for clarification and alternative view-points were provided from almost 20 national experts.[38] In this final version of the synthesis report, I have taken into account most of these, if not all. Any contribution to the discussion on access to justice in environmental matters comes from the fruitful cooperation between the national experts as a collective. However, all responsibility for this report – including any shortcomings - remains with the author.

3.1 The legislative framework

3.1.1 The four options

In the communications from the Commission, there are four options mentioned for further action at Union level for the implementation of Article 9.3 in the Member States.

The first is to retain the proposal for an access to justice directive along the lines of COM(2003)624 with possible minor modifications.

Next would be to make a new legislative proposal, targeted more specifically on standing as implied by *Janecek* and the *Slovak Brown Bear* case and mirroring the requirement for effectiveness already established for EIA through the PPD (2003/35).

The third option would be a soft-law approach, involving existing cooperation with judges and stakeholders. Also, some form of commentary or guidelines would be developed by the Commission, explaining the significance and implications of Treaty provisions and case-law.

The final option would be to use infringement proceedings in accordance with Article 258 TFEU to bring Member State provisions for ensuring access in line with ECJ case-law, notably *Janecek* and *Slovak Brown Bear*, and the latest Treaty provisions.

[38] I am also grateful for the comments from the former Chair of the Aarhus Convention's Compliance Committee, Veit Koester, today adjunct professor at Roskilde University.

3.1.2 A need for a directive on access to justice

Considering the four options for further action at the Union level, I would strongly advise the Commission to choose a legislative alternative. From the national reports in this study, I think it is obvious that a common legal framework is needed to bring all Member States in line with Articles 9.3 and 9.4 of the Aarhus Convention. There is a basic uncertainty and also opposing opinions about the requirements of Article 9.3 - what measures are needed, what kind of decisions are covered, what kind of body (administrative or judicial) should undertake the review, what kind of review is needed, etc.? My conclusion is that in order to furnish a level playing field and to promote predictability and legal certainty, there is a need for a Union directive on access to justice in environmental matters. The alternatives are not very tempting - to rely on Article 258 TFEU alone surely will be too ineffective and time consuming, and the result too piecemeal. Something similar can be said about waiting to see how the case law of the CJEU under Article 267 will develop. Having read the national reports, it is noteworthy that quite a few of the Member States have not yet adapted their legislation to *Janecek*, despite the fact that five years have elapsed since the CJEU's judgment. Thus, to rely on the CJEU and the national adaption to its case law alone is too uncertain and slow. However, the jurisprudence of the CJEU will continue to play a dynamic role in this area, as a legislative framework at the Union level on access to justice will have to be quite basic, dealing only with the main elements of judicial review of administrative decisions in a general way. Finally, both options 1 and 2 consist of legislative measures at the Union level. The choice between them is a political one, on which I have no firm stand. However, the old proposal for an access to justice directive had some elements which in my view are indispensable.

3.1.3 The prior proposal for an access to justice directive (2003/0246/COM)

A proposal for a Directive on access to justice in environmental matters was presented by the Commission in October 2003. Its aim is to furnish rules concerning judicial and administrative review procedures to challenge acts and omissions by public authorities. Although there is in the proposal a general requirement that the Member States shall provide members of the public with the legal means to challenge illegal activities and omissions in breach of environmental law by private parties, this provision (Article 3) only mirrors the wording of Article 9.3 of the Aarhus Convention. Furthermore, the proposal does not differentiate between access to a court or an administrative body, although a quality criterion is set that the reviewing body shall be "independent and impartial" and its decisions have legally binding effect (Article 2(f)).

The scope of the proposal is wide. "Environmental law" is defined as Union legislation with the objective of protecting or improving the environment, including human health and the protection or the rational use of natural resources (Article 2(g)). The general definition is followed by a catalogue of examples, including water, soil and atmospheric protection, town and country planning, nature conservation and biological diversity, waste management, chemicals and biotechnology. In addition to this, and for obvious reasons, Union legislation on EIA and access to environmental information are included.

The basic provision on access to justice is given in Article 4. Here, it is stipulated that members of the public shall have access to environmental proceedings, including interim relief, in order to challenge the substantive and procedural legality of administrative actions and inactions in breach of environmental law. Standing criteria for individuals may be either interest-based or right-based, which is left to the Member States to decide.

However, in order to seek judicial review, members of the public are obliged to first ask for internal review within the administration (Article 6). Provisions concerning this procedure include time limits for the request and the answer in writing from the administration. If the decision is not given in time or if the applicant finds it is unsatisfactory, he or she can ask for environmental proceedings by a court or an independent body of law.

ENGOs are given standing if they bring an action which is within the scope of their statutes and falls within their geographic area of activity (Article 5). The ENGOs shall be recognised in the Member States, either on an ad hoc basis or by an advance recognition procedure. There are some additional criteria, such as that the ENGO must be an independent and non-profit legal person, have adequate organisation, be legally constituted and have been actively working with environmental protection for a period which is to be fixed by the Member States (not exceeding three years), and must have auditor controlled statements of accounts (Article 9).

Finally, according to the proposal, the Member States shall provide for adequate and effective environmental proceedings that are objective, equitable, expeditious and not prohibitively expensive (Article 10).

3.2 General issues on judicial review

3.2.1 Introduction

In my view, Article 47 of the European Charter of Fundamental Rights and Article 19 TEU are the given starting points in discussing access to justice in environmental matters within the Union. While the former provision guarantees an effective remedy before a tribunal to everyone whose "rights and freedoms"

follow from Union law, Article 19.1(2) goes further in demanding that Member States "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". Thus, this provision confirms the principle of effective legal protection that has been developed in the case law of the CJEU.[39] In my understanding, in the field of environmental law, this principle covers not only traditional "rights" – such as the possibility to do business, property rights or even the protection from emissions that might be hazardous to human health – but also procedural rights for the public concerned.[40] This is not the place to go into too much detail about the relationship between the Union law obligation to implement Article 9.3 of the Aarhus Convention[41] and the direct effect of Union law provisions which are unconditional and sufficiently precise.[42] I think, however, a reasonable conclusion is that those who are affected by a Union law provision about the environment must have the possibility to challenge in a national court any action or inaction by the public authorities concerning an issue regulated in that legislation. This is also how I understand the Aarhus Convention's Compliance Committee when they stated that "in the context of article 9, paragraph 3, applicable European Community law relating to the environment should also be considered to be a part of the domestic national law of a member state".[43]

3.2.2 The scope of application

A preliminary issue to address when contemplating legislation on access to justice in environmental decision making at Union level is how to define that field of law. The proposal for an access to justice directive used a very broad definition of "environmental law", including planning law and health issues. Considering the wide area of application of the Aarhus Convention, I think this model also should be used in the future directive on the matter. Whereas Article 9.2 is confined to permit decisions for listed operations and other activities having a "significant effect on the environment", Article 9.3 has a much wider scope, as it covers national laws "relating to the environment". In case *C/2011/50 CZ*, the Compliance Committee stated that members of the public should have the possibility to challenge "an alleged violation of any legislation in some way relating to the environment".[44] In a number of cases, the Committee also has

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[39] C-432/05 *Unibet* and subsequent case law.
[40] See Jans, JH & Vedder, HHB: *European Environmental Law*. Europa Law Publishing, 4th ed. 2011, p. 274ff.
[41] C-240/09 *The Slovak Brown Bear* para 50.
[42] C-287/98 *Linster*, para 32, C-435/97 *WWF*, para 68 and C-72/95 *Kraaijeveld*, para 22-24,C-127/02 *Waddenzee* para 66, etc.
[43] Communication *C/2008/18 Denmark*, para 59, reiterated in the Report 2008-05-22 to the third Meeting of the Parties (ECE/MP.PP/2008/5. para 65).
[44] *C/2010/50 Czech Republic*, para 84.

found that Article 9.3 covers different kinds of plans, health issues, noise and a wide range of environmental legislation.[45] Furthermore, in *Janecek*, the CJEU found that an affected person should have the possibility to challenge with legal means any administrative decision or omission that concerned his rights according to Directive 96/62 on ambient air, including the requirement for the authority in charge to draw up an action plan. I think therefore that any other approach than the one expressed in the 2003 proposal is hard to advocate. This approach is also necessary in order to clarify that the access to justice directive has a much wider scope than the legislation that was included in the PPD (certain plans, EIA Directive, IPPC/IED directives), as it covers all other areas of Union law on activities which have an effect on the environment, not least planning and building, water operations, infrastructural projects, nature conservation and species protection. If a narrower scope is chosen, delimitation problems will inevitably result. Also, a narrower scope will leave it open for the CJEU to find room for still more Union legislation which should be covered by Article 9.3 of the Aarhus Convention. The advantages of such an order are not obvious.

In addition to this, I think it is necessary that some provisions in an access to justice directive are generally applicable, covering also activities under the PPD. The requirements in Article 9.4 and 9.5 of the Aarhus Convention about costs and effectiveness in the environmental procedure cover both Article 9.2 and 9.3. As will be discussed in sections 3.6 and 3.7, I think there is a need for express Union law provisions on these issues. In my view, they should be made generally applicable for all Union law on the environment.

Furthermore, I think it is advisable to choose a similar definition of "administrative acts" and "administrative omission" as in the 2003 proposal, thus emphasising the legally binding and external effects of the former and the legal requirement to act in the latter. This solution has the advantage that "acts and omissions" would become an autonomous legal term of Union law, which I think is necessary as Article 9.3 concerns all kinds of different standpoints by the public authorities in the environmental field. Another argument for the necessity of such a definition is – as was pointed out in the introduction – that the understanding varies greatly among the Member States as regards what constitutes an "act" or a "decision".

3.2.3 The relationship between Article 9.2 and Article 9.3

Some more words should also be said about the relationship between Articles 9.2 and 9.3. According to the former provision, members of the public shall

[45] See *C/2008/11 Belgium*, *C/2011/58 Bulgaria*.

have the possibility to challenge any "decision, act or omission" concerning the permitting of those activities covered by Article 6 of the Aarhus Convention. As mentioned above, this provision is implemented through the PPD (2003/35) to the EIA Directive and IPPC/IED Directives. According to Article 25 IED, members of the public concerned shall have access to review procedures in court to challenge "the substantive or procedural legality of decisions, acts or omissions" subject to public participation procedures according to Article 24. In that provision, a reference is made to Article 21(5)(a), where it is stated that the permit conditions of an IED installation shall be reconsidered and, where necessary, updated when the pollution caused by the installation is of such significance that the existing emission limit values of the permit need to be revised or new such values need to be included in the permit.[46] In my understanding, this means that the public concerned shall have the possibility to challenge in court any decision in such a reconsideration procedure, irrespective of whether the authority decides to update the permit condition or not. Thus, the possibility to challenge the authority's omission in that respect belongs to Article 9.2 of the Aarhus Convention and Article 24 IED. Understood otherwise, the word "omission" would lose all meaning. This is also how I interpret the CJEU's reasoning in *Mellor*, which concerned the requirements according to the EIA Directive when an authority finds that an EIA is *not needed* for an activity.[47] Similar reasoning can be found in the *Boxus case*, where the national courts are called upon to check the legality of a measure undertaken in a Member State, whereby certain projects *are exempted* from the requirements of the EIA Directive.[48] To conclude, if an authority chooses not to update a permit condition covered by Article 9.2 and its implementation in Union law, this still falls under Article 9.2, not under Article 9.3.[49]

3.2.4 Civil law action in court

Finally something should be said about direct civil action in court. For reasons of subsidiarity, the proposal for an access to justice directive is limited in this respect to only noting this possibility according to Article 9.3 of the Aarhus Convention. The proposal therefore in its operational parts deals exclusively with administrative and judicial review procedures to challenge acts and omissions by public authorities. However, leaving aside the discussion about the principle of subsidiarity, there are strong reasons for Union requirements for national legislation that enables members of the public to use the "administra-

[46] Similar provisions are already at place in Articles 16, 15 and 13(2)(a) in the IPPC Directive.
[47] C-75/08 *Mellor* para 66.
[48] Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus* (2011-10-18), para 57.
[49] For a similar reasoning, see the Compliance Committee in case *C/2010/50 Czech Republic,* para 82.

tive law" instruments to address the authorities when there are breaches of environmental law. As seen from the national reports, the possibility for members of the public to use civil action against the operator of an illegal activity is widespread. It is even so that in some countries, there is a tendency that the possibility to address the supervisory authorities is weakened or even abolished in certain cases, and instead, members of the public can only sue the operator in court directly (HU, NL). I think this development raises serious concerns about the access to justice possibilities for the public, as there seems to be a unanimous opinion among the national experts that civil actions are almost never used. The explanation for this state of affairs has not been analyzed, but it is reasonable to assume that the inequality of arms is often decisive in this respect. The ordinary citizen does not sue multinational companies. In my view, civil actions in this context furnish members of the public with such great disadvantages that one actually can question whether they can be regarded as an effective remedy according to Articles 9.3 and 9.4 of the Aarhus Convention, at least in those legal systems where the plaintiff is obliged to prove damage in order to successfully bring such a case.[50] Civil law remedies may, however, in the future be developed in line with the ideas of "collective redress" or "collective interest litigation" in the environmental area, which hopefully will alter this picture.[51]

3.3 Standing for the members of the public

3.3.1 Definition of "the members of the public"

When defining the circuit of individuals who shall have standing in environmental cases, the Aarhus Convention uses different terms in Articles 9.2 and 9.3. In the first provision, standing belongs to those members of the "public concerned" who either have "sufficient interest" or maintain an "impairment of a right". These alternatives are meant to include both the right-based legal systems, as well as the interest-based. In contrast, in Article 9.3, standing belongs to "members of the public" meeting criteria in national law. The latter wording is wider, allowing for *actio popularis*, but the Aarhus Convention does not require such a solution.[52] Neither does it require abstract norm control, a procedural solution which is quite common in the Member States of the Un-

[50] This is also my understanding of the Compliance Committee's standpoint in case *C/2010/48 Austria* para 73.
[51] See Standing up for your right(s) in Europe, p. 116ff for recommendations on how to develop the civil law possibilities for collective interest litigation, also the European Commission's recent recommendation (2013-06-11) for collective redress mechanisms to ensure access to justice in different areas of Union law, http://ec.europa.eu/justice/newsroom/civil/news/130611_en.htm.
[52] This was made clear in a decision from the Compliance Committee in a case concerning Belgium (*C/2005/11 Belgium* para 35).

ion.[53] The proposal for an access to justice directive used a very broad definition of "members of the public", namely "one or more natural or legal persons and in accordance with national law, associations, organisations or groups made up by these persons". In order to stress the importance of having a link or a connection between the persons who are challenging an administrative act or omission and the issue at stake, I think one might narrow down this wide definition to one similar to that used in Article 1.1(e) EIA Directive (2011/92), that is, "the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures (…). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest". In my understanding, to use this wording is also in line with the recent development of the case law of the CJEU and the principle of effectiveness.

3.3.2 Standing for individuals

In all legal systems with which I am familiar, standing for individuals has been left for the courts to decide. General criteria are commonly expressed in provisions of procedural law, but the closer examination and delimitation of the group of individuals who are concerned is something that needs to be done on a case-by-case basis. This approach is basically also suitable for Union legislation on the issue. However, I have some reservations about the *Schutznormtheorie* and whether a narrow interpretation of that theory is in compliance with the Aarhus Convention. My concerns mainly relate to the scope of the trial, which I will comment upon in the next section. But it also pertains to the issue of standing in those cases where individuals are only allowed to bring a case if they are affected by discharges of substances which may be hazardous to their health. In my understanding, this is a far too narrow delimitation of standing. Members of the public might be affected by many more discharges, disturbances and inconveniences from different activities and should therefore have the possibility to challenge administrative actions and inactions that concern those operations. In order to underline this, I would avoid the "double approach" in the access to justice provisions in Article 11 of the EID Directive and Article 16 of the IPPC Directive, that is, the reference to the public concerned as those who have a sufficient interest *or* maintain the impairment of a right. I do not think there is a need for a specific reference to the right-based and the interest-based approaches when defining "members of the public", as

[53] Even though the possibility of abstract norm control exists in many Member States, it cannot be regarded generally as a requirement under EU law – or required by the European Convention of Human Rights for that matter (ECtHRs judgments in the cases *Norris v. Ireland*, *Klass v. Germany* and *Västberga taxi v. Sweden*).

both approaches are covered by the general definition "likely to be affected by or having an interest in". The specific definition is still an issue that I think preferably should be dealt with by the national courts, and at the end of the day, the CJEU. I think therefore it suffices to use a definition in Union law on standing for individuals in an Article 9.3 context that merely reflects Article 1.1(e) in the EIA Directive.

3.3.3 Standing for ENGOs and groups

In contrast, in many of the Member States studied, standing for ENGOs is decided by criteria in express legislation. However, the picture is ambiguous and the varieties many, which is why there are strong reasons for using express criteria also at the Union level. As mentioned above, the criteria for ENGO standing in the proposal for an access to justice directive were that the organisation must be independent and non-profit and that the action must fall within its geographic area of activity and be covered by the objective in the organisation's statutes. There is additionally a time criterion, requiring that the ENGO must have been active for a fixed period of time, not exceeding three years. There is also a requirement for the ENGO to have its annual statements of accounts certified by a registered auditor. Registration of the ENGO was prescribed in the proposal, either on an ad hoc basis or by an advance recognition procedure. Those criteria are the same as the ones used in Article 11 of the Aarhus Regulation (1367/2006), except for the time criterion, which requires ENGOs to have been active for at least two years.

I think that some of these criteria from the 2003 proposal should be used in the future legislation implementing Article 9.3 of the Aarhus Convention. For the most part, they seem to be judicious as they, on the one hand, recognize the importance of the influence of civil society in environmental decision making, and, on the other, require some level of stability or engagement of the ENGO in order to achieve standing. In my view, the most controversial criterion is the required time of activity, registration and the need to have the organisation's annual accounts certified by an official auditor. The last mentioned criterion is economically burdensome for many smaller ENGOs and has little justification. Additionally, I am unable to see a need for a common requirement for registration of the ENGO, as this is an issue that can best be handled according to national legislation by the Member States.

In addition to this, the time criterion is an effective barrier to access to justice for ad hoc organisations. As these organisations play an important role in the public participation in environmental decisions, this criterion should be abandoned. This view of mine has support from all the national experts of the study who have voiced their opinion on the issue. On the other hand, if there is

a great resistance among the Member States to such a proposal, one might contemplate a "combined approach", emphasising the democratic aspect. Such an approach would use a time criterion *or* the requirement for public support for the legal challenge, indicated by a number of signatures from members of the public in the area affected by the activity in question. This solution is found in some legal systems for "municipal action", for example in Austria where 200 signatures are required in order to bring certain actions. If such a solution is preferable, I would propose a two year time requirement, combined with the possibility for ad hoc groups to show that they represent a significant part of the public concerned or, alternatively, have collected a certain number of signatures to get access to justice. In my view, the number required should, however, not exceed 100 signatures. Thus, standing would be allowed for ENGOs which have existed for two years *and* to ad hoc organisations with shorter time of activity if they are able to present evidence of democratic support.

3.3.4 An anti-discrimination clause

Another issue that needs to be addressed is about discrimination against foreign citizens and ENGOs. According to Article 3.9 of the Aarhus Convention, the public shall have access to justice without discrimination as to citizenship, nationality or domicile and, in the case of ENGOs, without discrimination as to where it has its registered seat or an effective centre of its activities. The reports from the countries say very little on this issue, but at least in some Member States, criteria for ENGO standing may be limiting the possibilities for foreign organisations to go to court. In my country, there is a requirement for ENGOs to have been active for three years "in Sweden".[54] In Luxembourg, only organisations "of national importance" will be registered, which may discriminate against foreign ENGOs.[55] In order to have standing in Slovenia, a foreign ENGO is required to show that it has been active in five other Member States.[56] Although the actual effect of these provisions can be debated, very little has been done among the Member States to implement the discrimination prohibition in Article 3.9 of the Aarhus Convention, at least in express terms. In order to clarify the situation, this is an issue that needs to be addressed in Union legislation. As with other geographic criteria, a solution to this can be to state that the statutes are decisive in this respect. However, it should be noted that foreign ENGOs may be affected by an operation in different ways - either because they are active for the protection of a certain area which is not confined by administrative country borders, or because they are active in an area

[54] SE (Darpö) p. 10.
[55] LU (Biot-Stuart) p. 11.
[56] SI (Šantej) p. 15.

which is affected by discharges or other kinds of disturbances from that operation. Examples of the latter can be long-ranging emissions of pollutants into the air or transboundary waste movements. In my view, both these situations must be covered in a provision designed to meet the non-discriminatory requirement of Article 3.9 of the Aarhus Convention.

3.3.5 Participation as a prerequisite for standing

A very common prerequisite for standing in the Member States studied is participation in the decision-making procedure that precedes the contested decision. Even if this is a widespread practise, I have concerns as to the negative effect on access to justice. Individual members of the public have a basic confidence that the authorities are protecting their interests and rely on the idea that they are "doing their job". It is actually quite common that even a permit decision comes as a surprise for neighbours and people residing in the vicinity. To respond to them afterwards with the argument that they should have showed more interest in the preparatory stage of the decision making is therefore not very convincing. In addition to this, one might argue that this issue was addressed and decided upon by the CJEU in the *DLV* case. Here, the court stated that the public concerned should have access to justice "regardless of the role they might have played in the examination of that request by taking part in the procedure before that [permit] body and by expressing their views".[57] Although the issue at stake in the *DLV* case was not whether participation was a prerequisite for access to justice, the CJEU statement has widely been understood to mean that participation cannot be used as a condition for standing in environmental cases.[58] Be that as it may, I think it should be made clear in future legislation at Union level on access to justice that members of the public shall have standing even without having participated in the decision-

[57] C-263/08 *DLV*, para 39.

[58] See for example Jans & Vedder at p. 232f. The CJEU statement was actually an answer to one of the questions from the Swedish Supreme Court, which had a less accurate formulation. Also, the arguments of the parties and interveners in the case in the CJEU did not clarify the issue. The Swedish Government, on the one hand, argued that there was no need for further access to justice for the public concerned, as the public already had been invited to participate in the decision-making procedure in the permit body, which happened to be a court (The Environmental Court of Stockholm). On the other hand, the Commission argued that any party who had participated in the preparatory procedure should have standing (the "indirect" or "multi stage" *actio popularis* view-point). The answer from the CJEU to this was that when the Environmental Court of Stockholm acted as a permit body, it was merely "exercising administrative powers" (para 37). Furthermore, the CJEU stated that the right to access to justice does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law. Finally, CJEU said "that participation in an environmental decision-making procedure is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure" (para 38).

making procedure. A solution for this might be to use the CJEU's wording from the *DLV* case.

3.4 The intensity or scope of the review

3.4.1 Introduction

As has been mentioned in section 2.3, effective access to justice for members of the public includes many more factors than just standing. A crucial question in this context is to what members of the public are entitled when they are allowed to challenge an environmental decision in court. The only guidance on this question lies within the wording "substantive and procedural legality" in Article 9.2 and its implementation in EU law. In Article 9.3, the only determination of the scope of review is that members of the public shall have access to "administrative or judicial procedures". In Article 4 of the proposal for an access to justice directive, this is specified as "environmental proceedings, (…), in order to challenge the procedural and substantive legality of administrative acts and omissions in breach of environmental law". The problem is that the expression "substantive legality" is inherently ambiguous and that there are different ideas in the legal orders of the Member States as to what does or does not constitute effective judicial review.[59] In my understanding, this goes back to the different underlying philosophies for judicial review in the Member States. Whereas judicial review in some systems seems to be oriented towards protecting the rights of individuals, others are more aligned to protect from "wrongs", that is to protect the law itself, or the lawful application of the legislation.[60] In addition to this, some systems seem to use a presumption of legality in the administrative decision making, whereas in others, courts do not give such preferential treatment to the authorities. In my understanding, the different conditions for obtaining injunctive relief reflect those disparities in perspectives on judicial review.

These differences are clearly reflected even in the national understanding of those parts of the Aarhus Convention that are implemented in Union law. An example of this is shown in the national reports in this study, illustrating that in some countries the ENGOs' access to justice only allows them to challenge issues concerning their participatory rights under the EIA and IPPC Directives. As already been mentioned, this is in breach of the Aarhus Convention. It is a misconception of the requirement for judicial review, as it is meaningless to have access to justice unless you are able to challenge the final outcome of the

[59] See IT (Caranta) on p. 30 with references.

[60] In my understanding, this is also the perspective that GA Kokott applies in her opinion (2012-10-18) in C-260/11 *Edwards*.

decision-making procedure, that is, the permit decision. Clearly, this is also the viewpoint of the CJEU in the *DLV* case and other Aarhus related judgments. In any event, I think this must be made clear also in any upcoming legislation at Union level implementing Article 9.3 of the Aarhus Convention.

And this is where I think the *Schutznormtheorie* generates problems as regards the scope of the trial. According to the strict interpretation of that theory, members of the public – even if they are let through the gateway to the court – are only allowed to forward arguments that concern their individual or subjective public rights. Accordingly, a question of whether the decision is illegal in any other aspect lies outside the scope of the trial. In this respect, the *Schutznormtheorie* serves only a limited purpose as to legality control. Instead, it merely offers particular privileged interests protection and shields business and the administration from judicial control.[61] Something similar can be said about those systems which restrict standing to individuals with property rights.[62] In my view, this perspective is incompatible with modern environmental law and the ideas of protection of collective interests. It also decreases the possibilities for effective judicial control of the national applications of Union legislation and thus contravenes Article 19 TEU.

3.4.2 An express provision on the scope of the review

Basically, I think this is an issue that should be decided by the CJEU from national examples in Article 258 TFEU or Article 267 TFEU proceedings. The wording "the substantive and procedural legality of any administrative acts and administrative omissions" surely suffices to show that the trial concerns the legality of the administrative decision in all aspects. Accordingly, in *Trianel*, the CJEU made the important statement that ENGOs are carriers of such "rights" that follows from provisions of EU environment law and for which they should enjoy legal protection. In other words, ENGOs should have standing to enforce rules of national law implementing EU environmental law and the rules of Union environmental law that have direct effect, meaning that they are unconditional and sufficiently precise.[63] For individual members of the public concerned, however, national procedural law may confine the scope of the trial to "individual public-law rights". The meaning of the latter concept will be elaborated upon in the *Altrip* case (C-72/12).[64] However, it still might be worthwhile to make a clarification about the scope of the trial in legislation on

[61] Wegener, B: Subjective Public Rights – Historic Roots and Requisite Adjustments to the Confines of Legal Protection (not yet published).
[62] See Compliance Committee case *C/2010/50 Czech Republic* para 76.
[63] C-115/09 *Trianel,* para 45 and 48.
[64] See opinion (2013-06-20) by GA Cruz Villalón (62012CC0072).

access to justice. This would also be a way of emphasising that the national court has a responsibility to review the legality of an administrative action or inaction of its own accord in line with the *inquisitorial* or *ex officio* principle, not least in order to improve the application of the principle of effective legal protection under EU law. At the same time, one would lighten the burden of proof required from members of the public challenging an administrative decision, something that has been highlighted as a problem in some of the national reports.

A way of doing this could be to clarify the expression "substantive legality", by stating that the applicant should have the possibility to challenge the "content of the contested decision" (merits review), as opposed to simply the manner in which it has been made. In addition to this, it should be made clear that the reviewing body is responsible for investigating the case in "any relevant aspect that the applicant invokes". Obviously, there are other legal solutions to this problem, but in my view, it needs to be addressed.

3.5 Administrative omissions

3.5.1 Introduction

Another issue that has been highlighted in the national reports of this study is the lack of possibilities to challenge administrative omissions. In nearly all Member States there are concerns on this subject. The proposal for an access to justice directive dealt with this issue by way of a procedure for request for internal review (Article 6). In case of administrative acts or omissions,[65] the public concerned would be allowed to ask for internal review by an authority designated for this purpose, and the authority would then be obliged to deliver a written decision to the requester within certain time limits. If a decision was not delivered in time, or the requester found the answer unsatisfactory, he or she might initiate environmental proceedings in a court or another independent appeal body.

3.5.2 A prescribed procedure for the handling of administrative omissions

I think this part of the proposal has many advantages and therefore is worth considering. However, preferably this should be done not only in relation to Article 9.3 issues, but as a general concept for access to justice in environmental matters according to Union law. It has been observed in many Member States that the lack of possibilities to challenge administrative omissions is a la-

[65] Administrative omission is defined in Article 2(e) as "any failure of a public authority to take administrative action under environmental law, where it is legally required to do so".

cuna in access to justice even despite provisions in place to implement Article 9.2 of the Aarhus Convention in existing directives. An example of this is given in section 3.2, relating to Article 25 IED, where the national authorities are obliged to reconsider the permit conditions for the installations in order to revise the existing emission limit values. Clearly, this is a situation where the authorities may be "legally required" to take action. What then if the authority does not act in accordance with the legal requirement? It has been reported that imaginative national legislators do not regard such a silence as a challengeable administrative omission, as this cannot clearly be read from the provisions in IPPC/IED Directives. I think that if they instead asked themselves how the CJEU would regard such an administrative omission, the answer would become obvious. In any event, as Union law commonly leaves much room for the national authorities to decide what administrative actions or inactions shall be regarded as "decisions", and as administrative omissions are widely reported to be a major concern in relation to all kinds of environmental legislation at Union level, I think there is a need for clarification at that level as regards the state of affairs. The model used in the proposal for an access to justice directive is a way forward in doing so.

3.6 Costs in the environmental procedure

3.6.1 Introduction

As mentioned in section 2.4, the cost of judicial procedures is considered to have a "clear chilling" effect or even to constitute an obstacle to access to environmental justice in quite a few of the studied countries. The problems concern high court fees, the loser pays principle in relation to cost liability for the lawyers of the operator and/or the authorities, compulsory use of attorneys in court, expenses for expert witnesses and high bonds for obtaining injunctive relief. In addition to this, uncertainty as regards the cost issue is widely reported to amount to an important barrier to the willingness to challenge administrative decisions in environmental matters. This latter mentioned issue has in part been dealt with by the CJEU in the *Irish costs* case, where the court found that mere judicial discretion to decline to order the unsuccessful party to pay the costs of the procedure cannot be regarded as valid implementation of the requirement for a not "prohibitively expensive" cost regime.[66]

[66] See also Compliance Committee case C/2008/27 *UK* and C/2008/33 *UK*.

3.6.2 Express provision on "not prohibitively expensive"

Obviously, there is a need to address these problems. Some basic requirements for the implementation of Article 9.4 of the Aarhus Convention should therefore be given in future Union legislation on access to justice. In this section, I therefore make some proposals on the cost issue. The costs of bonds or cross-undertakings in damages will be discussed in next section.

First of all, I think it should be stated that administrative fees for the participation in environmental decision making are not in line with the spirit of the Aarhus Convention and the principle of effective legal protection according to Union law. I am aware that this view-point of mine contradicts that of CJEU in C-216/05. However, in that case, the court ruled on the question of whether a system with participation fees *was in breach* with Union law, which the court answered in the negative. In contrast to that, I am expressing the view which I think *is in line with* the Convention and Union law, and that is something different.[67] The legal systems shall/should encourage civil society's early engagement in decision making, not discourage it. In cases in which administrative appeal fees or court fees are used in the national systems, they should be set at a reasonable level, preferably applying a flat rate. If a *Streitwertkatalog* is used, the value of the environmental cases should be set at a similar, reasonable level.

3.6.3 The application of the loser pays principle

Many Member States use the loser pays principle in judicial review of administrative decisions, even concerning environmental matters. Although that principle cannot be said to contravene the Aarhus Convention as such,[68] its application may be restricted. One way of doing this, would be to prescribe certain conditions in the national cost regimes in environmental cases. In my view, the first of those conditions would be a general statement that the costs in environmental proceedings shall be set by the application of an objective test in relation to what is prohibitively expensive for an ordinary citizen, civil society group or ENGO in relation to the cost of living in the country. It is also necessary to state that the insufficient financial capacity of the claimant may not constitute an obstacle for him or her to use legal means for challenging environ-

[67] In addition to this, the CJEU's judgment is rather old and perhaps does not reflect the position of the court of today.

[68] This was clarified in the discussion on the 4th session of the Meeting of the Parties to the Aarhus Convention in Chisinau (Moldova) in 2011. The background was that the Compliance Committee in the findings concerning Spain in *C/2008/24* had found that an automatic application of the loser pays principle at the level of appeal was not in line with the Convention (para 117). This triggered an intense debate on the meeting. The MoP finally endorsed the findings (Decision IV/9f, para 1(c)), but not the statement about the loser pays principle, arguing that the statement did not belong to the findings. This enabled the MoP to confirm its practise hitherto, i.e. to endorse findings of the Compliance Committee on non-compliance. For a further analysis on this, see Veit Koester in Environmental Policy and Law 41/4-5 (2011) p. 196-205, on page 197.

mental decision making. Furthermore, the public interest in environmental protection in the case should be taken into due account. The rules on cost liability shall contribute to the aim of wide access to justice for members of the public. In my understanding, this would be in line with the recent CJEUs judgment in the *Edwards case* (C-260/11).

Another basic condition would be to put an end to the phenomenon that the public authorities have the possibility to recover their costs in the administrative and legal proceedings. Winning or losing, playing the part of the respondent in judicial review certainly is one of an administration's basic tasks; it should not be reimbursed for performing this function. Instead, there should preferably be one-way cost shifting with respect to public authorities, that is, authorities still are obliged to pay the costs of the claimants if they are successful in their legal action.

Additionally, in order to meet the requirement for predictability, schedules for the capping of costs in environmental proceedings are recommended. If cost schedules are not set by express legislation, there should exist a possibility for the applicant to get a separate decision on the cost issue, along the lines of the UK system of Protective Cost Orders.

A problem with a system of specific measures with regard to the costs of litigation in environmental cases is the deterrent effect on the willingness of the lawyers to be engaged. Obviously, legal aid is a way to handle this and such a system is a general requirement according to Article 47 of the European Charter of Fundamental Rights.[69] In my view, there should be a general requirement to consider the public interest at stake in the case when deciding whether to grant legal aid. Furthermore, the system should allow for ENGOs to receive legal aid under certain conditions, one of those being that the litigation is brought in the interest of the public or that the case is of general interest for some other reason. It might also be worthwhile recommending, on a voluntary basis, the establishment of funds for ENGOs and public interest lawyers who specialize on legal aid in environmental cases.

Finally, I want to draw attention to the fact that the weakening of the loser pays principle does not have straightforward consequences, something that has been highlighted by some of commenting national experts. A cap on costs that are to be reimbursed by the winning party can be problematic as it prevents claimant lawyers from recovering their full costs. It has been noted that full costs recovery enables claimant lawyers to offset the loss from other cases and thus make environmental representation possible, where otherwise it would not be. This is something that needs to be carefully considered in any future Union legislation

[69] C-279/09 *DEB.*

on cost liability in environmental cases. It should also be made clear that the provisions on costs in any forth-coming directive shall not impose to the Member States the application of a costs regime where it does not already exist.

3.6.4 Experts' costs

Finally, there is a need to address the concerns with high – or even extremely high – experts' costs. This is a complicated issue, which involves, among others, factors such as the competence of the reviewing body. Obviously, the problems are diminished if appeal or judicial review is made to a specialized tribunal or court with experts of their own. In the Netherlands, for example, the court may ask the Administrative Courts Advisory Foundation to provide an extensive report on the technical elements of the case. This independent foundation, funded by the Dutch Government, hosts about 45 experts in all areas of environmental science and physical planning. Claimants can suggest the court ask for such a report, but it is up to the court to decide.

However, the competence of the reviewing body is hardly an issue that can be addressed in an access to justice directive. What can be done, however, is to insert the provision mentioned in section 3.4.2 about the responsibility for that body – be it an administrative tribunal or a court of justice – to investigate all arguments in the case of its own accord in line with the *ex officio* (or *inquisitorial*) principle. This way, the burden of proof for the litigants will be eased and accordingly their need to use experts of their own decreased.

3.6.5 Alternative Dispute Resolution

ADR (alternative dispute resolution) or mediation has also been discussed in the context of an access to justice directive. Such mechanisms already exist in many of the countries studied, but play – Austria being the exception[70] – an insignificant role in environmental cases.[71] In my view, it would not therefore be appropriate to propose ADR as an obligatory component of judicial review. The possibility to use such mechanisms could, however, be recommended on a voluntary basis.

[70] AT (Madner), p. 23.

[71] In 2012 the Commission launched a study to explore 10 Member States' complaint-handling and mediation mechanisms in the environmental field, see http://ec.europa.eu/environment/aarhus/studies.htm. A further study concluding the remaining Member States is expected in 2013-2014.

3.7 Effectiveness in the procedure

3.7.1 Introduction

One of the major problems highlighted in the national reports concerns the effectiveness of the judicial procedures in environmental matters. This problem relates to the slowness and length of the procedure and the absence of suspensive effect of an appeal/judicial review proceedings, in combination with strict conditions or high costs for obtaining injunctive relief.

3.7.2 Criteria for injunctive relief

In those countries where an appeal or the launching of judicial review proceedings does not suspend the contested decision, the availability of the injunction is decisive in environmental cases. As has been shown in section 2.5, there are many cases that are "won in court, but lost on the ground" in the countries studied due to the lack of effective instruments to stop the challenged activity. This might have been prevented if the criteria for injunctions were not so strict. One might add that the existence of such cases clearly shows that there are strong reasons also more generally for a generous attitude towards those who challenge administrative decisions. This is particularly serious in environmental cases because legal procedures can take many years, and once environmental damage has occurred, it may be impossible to repair. In some of the Member States studied, criteria for injunctions extend beyond the traditional ones about danger in delay, prima facie case and personal harm in that they give more room for weighing the interests in the conflict.

Although this weighing of interests traditionally is at the discretion of the court, I think there is a need for a provision on injunctions in the future directive in order to signal a more generous attitude and remind the courts of their responsibility. This has also been emphasized by the CJEU in recent case law, where the court has stated that members of the public concerned must be able to ask for interim measures such as the temporary suspension of the challenged permit while the case is pending (C-416/10 *Križan* (2013) para 110). The provision should emphasize that the interest of the operator should be weighed against the opposing interests and the effects to the environment if the operation is allowed to commence. Attention should also be paid to how controversial the case is and the parties involved. If the operation concerns vital public interests or interests that are protected under EU environmental law, the starting point should be that the operator must have very strong reasons for commencing before the case is finally decided. To this end, mere economic interests do not suffice. The same should apply in situations where there is widespread resistance against the operation among the public.

3.7.3 Bonds or cross-undertakings in damages

Another aspect of a more generous attitude towards members of the public who take legal action to challenge administrative actions and inactions is the absence of bonds or cross-undertakings in damages. In my view, there is little reason for such a requirement. If the court grants injunctive relief, it has reason to do so and, accordingly, it follows that the operator then should have to wait for the final outcome of the proceedings. This perspective dominates in most of the countries studied, or alternatively, it is regarded as unwise to proceed with an operation if judicial review has been granted.[72] An express provision which prohibits bonds or cross-undertakings in damages should therefore be inserted in the forthcoming Union legislation on access to justice.

3.7.4 Express provision on timeliness

Finally, there is a need for a provision stating that administrative appeal and judicial review shall be timely. As this is already required according to the EIA Directive and IPPC/IED Directives with little or no effect in the national courts, the provision should be expressed in a more stringent way. If there should be precise time limits, or just a general statement with some edge, leaving room for the national courts and the CJEU to decide, is an issue for further discussion.

3.7.5 Malicious or capricious actions

Still another issue concerning effectiveness of the environmental procedure should be addressed. The administration and the operators have a legitimate interest in avoiding actions which are malicious or capricious. In the countries studied, that issue is dealt with by way of stronger liability for costs for the claimant, in addition to a possibility for the court to directly dismiss such an action. As it is sometimes difficult to distinguish a well-founded action from malicious or capricious ones from the outset, I think this is a good way of dealing with the problem. Such a provision might therefore be included in the regulation of costs.[73]

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[72] Interestingly, this is also the opinion of the Association of European Administrative Judges (AEAJ) in their Recommendation on Interim Relief in Environmental Matters (adopted in Vilnius 22 September 2011), where the organisation expresses: "(T)he working group objects any liability of the appellant, when interim relief is granted and the court decides adversely in the main proceedings. Such a liability affects the right of effective legal protection. According to the Aarhus Convention and the Directive 2003/35/EC legal remedies shall not be prohibitively expensive", see http://www.aeaj.org/spip.php?rubrique52.

[73] This seems also be the attitude of the CJEU in *Edwards* (see the citation above in footnote 62 from para 47 of that judgment).

3.8 Some closing remarks

I close this synthesis report with some final words about the relationship between administrative appeal and judicial review in the environmental area. As a general trend in the countries studied, I would say that the barriers to access to justice for members of the public are bigger in those systems where the public merely has the possibility to apply for judicial review directly in court in order to challenge an administrative action or inaction, compared with the systems which include an intermediate step with administrative appeal. Commonly, administrative appeal offers a possibility to have the full case reviewed on the merits by a body higher up in the hierarchy, sometimes at the national level. It is reasonable to believe that such a body by virtue of its experience analyzing all – or at least all the most significant – appealed decisions will achieve a higher degree of competence. The appeal commonly has suspensive effect, the reviewing body usually has an obligation to investigate the case, and administrative procedural law usually allows for more relaxed proceedings than those in a court. The procedure is often reformatory, effective and timely, and the costs for the parties are commonly low. Furthermore, if such an administrative body is independent and impartial and its decision final in the administrative proceedings, it may even meet the requirements for being a tribunal according to Article 6 of the European Convention of Human Rights and a court under Article 267 TFEU.[74] Having done so, such bodies also meet the requirements of Article 9.3 of the Aarhus Convention in offering "administrative or judicial procedures" for the members of the public. This further improves the effectiveness of such an order, as the subsequent judicial review can be confined to points of law in a written procedure.

If and when the European Commission takes action towards legislation at Union level for the implementation of Article 9.3 of the Aarhus Convention, such a piece of legislation certainly will not include anything about the need for administrative appeal bodies, as this would be to interfere with the procedural autonomy of the Member States. However, and this is my final point, it would be worth studying the different administrative tribunals and their pros and cons, in order to improve and spread the knowledge of the good examples to other Member States and other Parties to the Aarhus Convention.

[74] See C-9/97 and C-118/97 about the Finnish Maaseutuelinkeinojen Valituslautakunta (Rural Business Appeals Board) and C-205/08 about the Austrian Umweltsenat.

4. Summarizing the recommendations

General proposals

- There is a need for a Union directive on access to justice in environmental matters.
- The scope of application for that directive should mirror the 2003 proposal, covering all Union legislation that has the objective of protecting or improving the environment, including legislation relating to human health and the protection or the rational use of natural resources.
- Some of the 2003 proposal's definitions should also be used, e.g. "administrative acts" and "administrative omission".

Standing and the scope of the review

- The definition of those members of the public who shall be afforded access to justice under the directive may be copied from the basic one used in the EIA Directive, that is, "the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures (…). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest".
- The double approach to standing for individuals used in the EIA Directive and the IPPC/IED Directive, expressly referring to interest-based or right-based systems should be avoided.
- There are good reasons for having criteria for ENGO standing and they can – at least to some extent – reflect the ones used in the 2003 proposal. However, the requirements for registration and auditing of the annual accounts should be avoided. Also the time criterion may be abandoned, or, at least, combined with a general possibility to show public support by presenting 100 signatures from members of the public in the area affected by the activity at stake.
- The directive should contain an express provision on anti-discrimination, reflecting Article 3.9 of the Aarhus Convention.

- A provision clarifying that members of the public should have access to a review procedure regardless of the role they have played in the participatory stage of the decision making should also be included.
- The scope of review should include both the procedural and the substantive legality of the contested decision. In order to clarify the latter, the directive might indicate that the applicant should have the possibility to challenge the content of the contested decision and that the reviewing body is responsible for investigating the case in any relevant aspect that the applicant invokes.
- The issue of administrative omissions needs to be addressed. The model used in the 2003 proposal for an access to justice directive, which outlined a procedure for challenging non-decisions or passivity by the responsible public authorities, is a way forward for so doing.

Costs in the environmental procedure

- Rules for the capping of costs in the environmental procedure should be included in the directive. However, those rules should be made generally applicable for all Union law on the environment.
- A general provision on costs should be included in the access to justice directive, emphasizing that the costs in environmental proceedings shall be set by the application of both a subjective test and an objective test. Accordingly, what is prohibitively expensive for an ordinary citizen, civil society group or ENGO shall be decided taking into account both the claimant's financial situation and the cost of living in the country. The provision shall also state the necessity to take due account of the public interest in environmental protection in the case. The rules on cost liability shall contribute to the aim of wide access to justice for members of the public.
- A provision is needed stating that fees for the participation in environmental decision making shall be avoided. In addition to this, appeal fees and court fees should be set at a reasonable level, preferably applying a flat rate.
- Schedules for the capping of costs in environmental proceedings are recommended. If cost schedules are not set by express legislation, there should exist a possibility for the applicant to get a separate decision on the cost issue at an early stage of the proceedings.

- With respect to public authorities, a provision on one-way cost shifting is needed.
- There is also a need for a provision stating that when deciding on legal aid, due account should be taken of the public's interest in the case. In addition to this, the schemes should allow for ENGOs to receive legal aid under certain conditions.
- Stronger liability for costs may apply in malicious and capricious cases.

Issues on effectiveness

- A provision on injunctive relief is needed that emphasizes the importance of the availability of such an interim decision from the reviewing body. The provision should be made generally applicable for all Union law on the environment.
- The provision on injunctive relief should stress the importance that national courts must give to environmental protection and other public interests when deciding on injunctive relief. If the operation concerns vital public interests or interests that are protected under EU environmental law, the starting point should be that the operator must have very strong reasons for commencing before the case is finally decided. To this end, mere economic reasons do not suffice. The same should apply in situations where there is widespread resistance against the operation.
- An express provision which prohibits bonds or cross-undertakings in damages should be inserted in the forthcoming directive.
- Finally, an express provision on the requirement of timeliness of the environmental procedure is needed.

Annex A: Barriers in the environmental procedure

This table represents *my view* of the main barriers to access to effective justice in the legal systems included in the study. An **X** indicates that there are significant barriers to access to justice in the indicated area. As already mentioned, one must bear in mind that the table represents an extreme simplification of the reality. In order to get the full picture, the reader is advised to consult the national reports. Additionally, it also reflects my own understanding of the requirements of Articles 9.3 and 9.4 of the Aarhus Convention. My description of the "protected norm theory" (*Schutznormtheorie*) as a barrier to access to justice obviously can be debated. One can also discuss to what extent it is a requirement of the Aarhus Convention that *both* individuals *and* ENGOs have standing in *all kinds of cases* covered by Article 9.3, but this is not necessary to determine in this context.

Country	**Indiv. stand**	**NGOs stand**	**Costs**	**Effective**	**Explanation**
Austria	X	X		X	Strict application of Schutznormtherie, very strict criteria for IR…
Belgium		X		X	No standing for ENGOs in certain civil cases, uncertain A2J in relation to administrative omissions, unstable case law of the SAC since the entry into force of the Aarhus Convention…
Bulgaria	(X)	X	(X)	(X)	Unpredictable standing for individuals, limited ENGO standing in sectorial legislation and against adm omissions, risk of high lawyers' fees, weak legal aid, strict IR criteria in certain cases….
Croatia	X			X	Complexity of the envtl legislation, limited possibilities for individuals to challenge envtl decisions according to specific legislation, slowness in achieving IR…
Cyprus	X	X			Schutznormtheorie, limited possibilities to challenge envtl decisions…
Czech Republic	(X)	X		X	Schutznormtheorie, administrative omissions, seldom injunctive relief in time, some limitations in the possibilities to challenge land use plans and decisions on "noise exceptions"…
Denmark			(X)	(X)	Problems with decisions (and non-decisions) that fall outside the administrative appeal system (NMK), potentially high costs in courts, lack of suspensive effect…

Country	Indiv. stand	NGOs stand	Costs	Effective	Explanation
Estonia			X	X	Chilling effect of costs, ineffective administrative review, strict criteria for injunctive relief…
Finland	(X)	X		(X)	Uncertain A2J in relation to administrative decisions according to specific legislation, uncertain A2J in relation to administrative omissions…
France			(X)	(X)	Costs, partly because of the mandatory representation by a lawyer…
Germany	X	X			Limited possibilities for individuals to challenge envtl decisions that do not "concern" them according to a narrowly defined Schutznormtheorie, restricted A2J for ENGOs outside EIA procedure and nature conservation law…
Greece			X	X	High lawyers' fees, extreme delays in the envtl procedure, strict criteria for IR, weak enforcement, …
Hungary	X	X			Limited A2J in relation to administrative omissions…
Ireland			X	X	High legal costs, court proceedings can take considerable period of time, complexity of the envtl legislation…
Italy		(X)	X	X	Uncertain A2J for local branches of ENGO, uncertain A2J in relation to administrative omissions, costs, lack of efficiency and timeliness….
Latvia	(X)	X		X	Schutznormtheorie in relation to ENGOs in Constitutional Court, decisions on species protection not appealable, slowness…
Lithuania			X	X	Chilling effect of costs, civil liability for cross-undertakings in damages…
Luxembourg	(X)	X	X	(X)	Uneven standing in different acts, "national importance" criteria for ENGO standing, liability for lawyers' fees, complexity of the envtl legislation…
Malta	(X)	(X)	X	X	Uncertain standing in different envtl legislation, uncertainties regarding liability for costs, need for legal aid scheme, strict criteria for IR…
Netherlands	(X)			(X)	Schutznormtheorie as regards scope of the trial, less effectiveness in those cases when legal redress is only available for members of the public by way of action in civil courts…

Country	Indiv. stand	NGOs stand	Costs	Effective	Explanation
Poland	X	X			Limited A2J in some sectorial legislation, administrative omissions, some decisions are made through non-appealable "plans"…
Portugal				X	Slowness, costs of lawyers and of obtaining factual elements of proof, limited intensity of the legal review…
Romania			X	X	Cost issues, slowness, strict criteria for obtaining IR…
Slovakia	X	X		X	Schutznormtheorie, limited A2J in relation to decision-making procedures without any public participation, problems with suspension and injunctive relief…
Slovenia		X	(X)		Limited ENGO standing, cost of experts…
Spain	X		X	X	Costs, slowness, some "plans" (Janecek) and projects approved by parliamentary acts not appealable, general ineffectiveness in the legal system…
Sweden		X			No standing for ENGOs to challenge administrative omissions or decisions outside the scope of the Environmental Code…
United Kingdom			X	X	Costs, inequality of arms in the procedure, complexity of the envtl legislation and legal system, limited scope of review…

Annex B: Costs in the environmental procedure

This table depicts the costs in the environmental procedure as experienced by the *country reporters*. The table is divided into eight different categories, where an **X** *represents the existence of* administrative fees, court fees, mandatory lawyers in court (ML), the Loser Pays Principle (LPP), mitigating factors, such as schemes for lawyers' fees or Protective Cost Orders (PCO), limited responsibility for the costs (one-way cost shifting, OCS) of authorities, legal aid available for the members of the public (LA) and funds available for ENGOs (FU). The table concludes with an evaluation of costs as a barrier to access to justice.

Country	**Adm Fees**	**Court fees**	**ML**	**LPP**	**PCO etc**	**OCS**	**LA**	**FU**	**Costs as barrier to A2J?**
Austria		240€	(X)[75]	X[76]	X[77]	X[78]	X[79]		With regard to costs for private expert opinion...
Belgium	6,20 €	82-350€	(X)[80]	(X)[81]	X[82]		X[83]	(X)	Chilling effect
Bulgaria		5-10 €		X	[84]	[85]			Yes (especially if compared with the low living standard).

[75] Not in administrative procedures or, as from 1st January 2014 on, in procedures before the administrative courts of first instance. In proceedings before the Administrative Court (*Verwaltungsgerichtshof* complaints need to be signed by a lawyer. Mandatory representation by lawyers in proceedings before the civil courts of first instance, if the value of the case exceeds EUR 5.000 and before all higher civil courts.

[76] Not in administrative appeal procedures or, as from 1st January 2014 on, in procedures before the administrative courts of first instance.

[77] Fixed lump sum amounts in proceedings before the the Administrative Court Verwaltungsgerichtshof.

[78] In proceedings before the Administrative Court (Verwaltungsgerichtshof) the reimbursement of the costs by an individual is limited to a lump sum of EUR 610,60. In proceedings before the Constitutional Court (*Verfassungsgerichtshof*) the reimbursement is limited to a lump sum of EUR 2.856. In proceedings before the civil courts, different cost types (*Prozesskosten*) are subject to reimbursement by the loser, whereas a regulation defines lump sums.

[79] Not in administrative procedures or, as from 1st January 2014 on, in procedures before the administrative courts of first instance.

[80] Only in Supreme Court in civil cases.

[81] LPP only in general courts, not before the administrative courts.

[82] Allowance system before ordinary courts.

[83] Only for individuals.

[84] There is a great difference between the amount of attorneys' fees asked by the state authorities and the business. In BG state authorities usually are represented in court by their staff lawyers. The fee asked by state authorities can rarely exceed 100 EUR. This can be seen as a mitigating factor.

[85] Though there is no OCS principle/provision in BG legislation administrative courts often simply do not state on a demand by a business entity for the losing party (an NGO or a citizen) to pay it's fee

Country	Adm Fees	Court fees	ML	LPP	PCO etc	OCS	LA	FU	Costs as barrier to A2J?
Croatia	X	X	X	X			X[86]	X[87]	Yes (uncertainty)….
Cyprus				X[88]					Yes (uncertainty)
Czech Republic		125-200€	X[89]	X		X	(X)	X	
Denmark	500 DKK (60€)	67-10,000 €		(X)			X		Yes (in courts, not in the MKN)…
Estonia		X	(X)[90]	X		X	X[91]	[92]	Yes
Finland		0-226€		(X)[93]				(X)	
France		35-150€	X	(X)			X[94]	(X)	Yes
Germany		SW: 5,000€/i	X[95]	X	(X)			(X)	Yes
Greece		180-700 €	X	X			X		Yes
Hungary		2-10€		X		X	X		
Ireland		200-350€		(X)[96]		(X)	(X)	(X)	Yes
Italy		60-1,500€	X	(X)					Yes
Latvia		14-28€		X					
Lithuania		X		X	X		X		
Luxembourg			X	(X)			X		Yes (high level of lawyers' costs)…

[86] Only for individuals.
[87] Not for litigation.
[88] Preset schedules for litigation costs.
[89] Only in higher courts.
[90] Only in civil proceedings in the Supreme Court.
[91] Available under restrictive conditions.
[92] No specific funds for legal aid available. General funds can be used for this purpose to a limited extent.
[93] Not in the administrative courts.
[94] Only for individuals.
[95] Only in higher courts.
[96] IE has introduced special costs rules for certain categories of environmental litigation. Where the special costs rules apply, each side bears its own costs, subject to certain exceptions.

Country	Adm Fees	Court fees	ML	LPP	PCO etc	OCS	LA	FU	Costs as barrier to A2J?
Malta	X	X	X			X			Yes
Nether-Lands		150-310€	(X)	(X)[97]		X	X		Not generally, but in the civil courts…
Poland		50€/i	X[98]			X	X		
Portugal		50-2,500€/i +	X	(X)					Yes, no top limit for costs…
Slovakia		66€/i							
Slovenia	X	X	[99]				X	X	
Romania		11-66€/decision		X			X		Yes (high costs, very limited availability to legal aid)…
Spain		50-200/300-600€[100]	X[101]	X			X	X	Frequently…
Sweden		No						X	
United Kingdom		60-6,000€		X	X		(X)		Yes

[97] Lawyers are mandatory and loser pays principle applies in civil courts.
[98] Not in the regional administrative courts.
[99] Only in civil cases before the circuit courts and in appellate judicial proceedings.
[100] Proposal pending for raise of court fees.
[101] Mandatory to have two attorneys.

Annex C: Effectiveness in the environmental procedure

This table depicts issues pertaining to the effectiveness of the environmental procedure. As with Table B, it has been filled in *by the country reporters*. The table is divided in to six different categories, where an **X** *represents the existence* of automatic suspensive effect on administrative appeal (SE/AA), automatic suspensive effect on judicial review (SE/JR), strict conditions for obtaining injunctive relief (IR/SC), a requirement for bonds to obtain injunctive relief (BO). An X in the TI-column means that there are problems with the timeliness of the procedure. And, finally, problems with the enforcement of administrative decisions and judgment are indicated by an X in the EnF-column.

Country	**SE/ AA**	**SE/ JR**	**IR/ SC**	**BO**	**TI**	**EnF**	**Explanation**
Austria	X	X[102]	X				
Belgium				(X)		X	Bonds only in exceptional cases…
Bulgaria	X	X			X	X	
Croatia	X[103]		X	X	X	X	
Cyprus			X	X	X		
Czech Republic	X			X			
Denmark	(X)		X	(X)			
Estonia			X	(X)[104]			Restrictive rules for injunctive relief…
Finland	X	X			(X)		Exceptions to suspensive effect exist (e.g. right to commence)…

[102] As regards courts of first instance.
[103] Many exceptions.
[104] Only in civil court proceedings.

Country	SE/ AA	SE/ JR	IR/ SC	BO	TI	EnF	Explanation
France			X		X	X	Only in two cases provided by law, the judge must issue injunction
Germany	(X)	(X)	(X)				
Greece			X		X	X	Strict criteria for IR…
Hungary	X			(X)	X		
Ireland			X	X	X		
Italy	(X)[105]	X		X	X		
Latvia	X	X[106]	X			X	Problems with the enforcement of admin decisions…
Lithuania			X		X		
Luxembourg			X				
Malta			X		X[107]	X	
Nether-Lands		X					

[105] Suspension is possible in appeal procedures, but they are not really used.
[106] For building permits only.
[107] In the Environmental and Development Planning Tribunal, there is a 3 months' time limit, whereas there is no specific time frames for the court proceedings.

Country	SE/ AA	SE/ JR	IR/ SC	BO	TI	EnF	Explanation
Poland	X		X	(X)			Bonds only when challenging construction permits…
Portugal		(X)	X		X	X	
Romania		X	X		X	X	Strict conditions for IR, slow procedures in court...
Slovakia	X		X		X	X	
Slovenia	X		X			X	
Spain			X	X	X	X	
Sweden	X	X			X		If the applicant gets a "go-ahead decision", the criteria for IR are quite generous for the PC…
United Kingdom	X		X	X	X		Complicated structure of appeal (60 different routes), reluctance to ask for IR because of the requirement for bonds…