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Access to Justice in Environmental Decision-making in the Member States of European Union – National Peculi-arities and Common Tendencies

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Access to Justice in Environmental Decision-making in the Member States of European Union – National Peculiarities and Common Tendencies

Summarizing the outcomes of the study "Effective Justice?" 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"). 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).[1] 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 in 2012-2013 launched a study on access to justice and its effectiveness in the Member States of the Union. The study thus covered the following 28 European countries: Austria (AT), Belgium (BE), Bulgaria (BU), Croatia (HU), Cyprus (CY), the Czech Republic (CZ), Denmark (DK), Estonia (EE), Finland (FI), France (FR), Germany (DE), Greece (EL), Hungary (HU), Ireland (IE), Italy (IT), Latvia (LV), Lithuania (LT), Luxembourg (LU), Malta (MT), Netherlands (NL), Poland (PL), Portugal (PT), Romania (RO), Slovakia (SK), Slovenia (SI), Spain (ES), Sweden (SE) and United Kingdom (UK).

The aim of the study was 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 covered 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 of the study was 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 Bear* (2011), C-128/09 *Boxus* (2011), C-182/10 *Solvay* (2011), C-416/10 *Križan* (2013) and C-260/11 *Edwards* (2013)).[2]

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[1] 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.

[2] This case law is commented upon by JeanFrancois Brakeland in *Access to justice in environmental matters – development at EU level.* The article is published in Gyoseiho-kenkyu, 2014, No 5, an anthology of contributions at the conference 'Towards an effective guarantee of green access', held at Osaka University in Japan in March 2013. All contributions in the anthology are in Japanese, although Brakeland's article is also available in English here:http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2014/05/arten-

The national reports in the study were written by distinguished scholars, judges or experienced lawyers of environmental law in those countries. The synthesis report with conclusions and recommendations was processed in a smaller group, but all responsibility – including any shortcomings - remains with the author.[3] This article summarizes the main outcomes of the study concerning access to justice in environmental decision-making in the Member States of the Union.

1.2 The prior proposal for an access to justice directive

Upon the approval of the Aarhus Convention in 2005, the EU made a declaration that Union legislation did not fully covered the obligations of Article 9.3, and that, consequently, "*its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community (…) adopts provisions of Community law covering the implementation of those obligations*".[4] The background was that a proposal for a Directive on access to justice in environmental matters was presented by the Commission two years earlier, but the progress was slow.[5] Due to strong resistance from some of the larger Member States the work went into stalemate and the proposal was withdrawn in 2014. Nevertheless, the proposal has played an important role on the implementation of Article 9.3 in the Union and it is therefore worth pointing at some of its key elements.

The Directive aimed at furnishing rules concerning judicial and administrative review procedures to challenge acts and omissions by public authorities. Although there was 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 did not differentiate between access to a court or an administrative body, although a quality criterion was set that

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brakelandup.pdf. The conference papers can be found at http://greenaccess.law.osaka-u.ac.jp/english/international-symposium-march-2013.

[3] The final version of the synthesis report "Effective Justice" was published in November 2013 and can be found on the website of the EU Commission, together with all 28 country reports. http://ec.europa.eu/environment/aarhus/access_studies.htm A version in Chinese is published on EU-China Partnership for XX

[4] Bilaga till rådets beslut (2005/370) om ingående av Århuskonventionen, se http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en#EndDec. Jag väljer den engelska texten framför den svenska översättningen som är "*dess medlemsstater ansvarar för att fullgöra dessa skyldigheter (…) och kommer att fortsätta med detta fram till dess att gemenskapen (…) eventuellt antar gemenskapsrättsliga bestämmelser som täcker genomförandet av dessa skyldigheter.*". Det kan nämligen diskuteras om den svenska texten rätt återspeglar förklaringen, då den läsas som att Unionen skulle kunna låta bli att uppfylla sina konventionsförpliktelser.

[5] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters (2003/0246/COM).

the reviewing body shall be "independent and impartial" and its decisions have legally binding effect (Article 2(f)).

The scope of the proposal was wide. "Environmental law" was 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 was 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 was included.

The basic provision on access to justice was 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 included 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.

Environmental non-governmental organisations ("ENGOs") were 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). According to the proposal, 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 proposed Directive, the Member States shall provide for adequate and effective environmental proceedings that are objective, equitable, expeditious and not prohibitively expensive (Article 10).

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 was presented already in 2007 in a report published by the Commission ("the Milieu report).[6] Since the publication of this report, 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

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6 http://www.google.se/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDUQFjAC&url=http%3A%2F%2Fec.europa.eu%2Fenvironment%2Faarhus%2Fpdf%2Fconf%2Fmilieu.pdf&ei=Lj7kVOWKHIP0OrePgPgI&usg=AFQjCNGciqCNdeB2CiTZVs3BpEttARfZLw&bvm=bv.85970519,d.ZWU

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 haz-

ardous 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.[7]

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.[8] 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*".[9] 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*.

In contrast to this, the protective norm theory (*Schutznormtheorie*) is applied in many countries, at least to some extent. In the strictest form – ap-

[7] 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.

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

[9] Greece (Kallia) p. 20.

plied 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.[10] 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 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

[10] NL (Backes) p. 9.

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.[11] 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.[12] 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). Also 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 respec-

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

tively), 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.[13] 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).

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,

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

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.[14] 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.[15]

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 discretion 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 pow-

[14] 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.
[15] PT (Aragão) p. 30.

er 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[16]

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[17]). 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 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

[16] 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.

[17] ENGOs are exempted.

an administrative guidance document, the *Streitwertkatalog*.[18] 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.[19] 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.[20]

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 €.[21] 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 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,

[18] Information about *Streitwert* in Germany has been furnished by Mr Werner Heermann at the Association of European Administrative Judges (AEAJ).
[19] 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 €.
[20] DE (Wegener) p. 17f.
[21] IE (Ryall), page 34.

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.[22] 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

[22] 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.

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 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[23]

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).

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.[24] It is also notewor-

[23] 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.

[24] Epstein: *Access to Justice: Remedies* p. 84.

thy 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.[25] 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 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

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

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,[26] the *Kanfanar quarry* in Croatia,[27] the *D8 Highway* in the Czech Republic,[28] the *Wattelez* case in France[29], *Eemscentrale* in the Netherlands,[30] *Castro Verde Highway* (cf. *C-239/04*) in Portugal,[31] the *Pezinok landfill* and the *Mochovce power plant* in Slovakia.[32] From Spain,[33] 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).[34] Another example is *Santa Caterina Valfurva*, well known from the case law of CJEU.[35]

[26] BE (Lavrysen) p. 31.
[27] HR (Capeta) p. 23.
[28] CZ (Černý) p. 18.
[29] FR (Makowiak), p. 15.
[30] NL (Backes) p. 22.
[31] PT (Aragão) p. 21.
[32] SK (Kováčechová) p. 21.
[33] ES (Moreno Molina) p. 20.
[34] UK (Macrory & Day) p. 23.
[35] 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. Summarizing the recommendations

3.1 Introduction

The second half of the Synthesis report contained 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, some recommendations also were made on how to formulate appropriate provisions of Union law to further this cause. There is not room to repeat all this in an article, but the recommendations are summarized below. Perhaps they can function as food for further thoughts on access to justice on environmental matters in wider regions of the world, even in those countries which are not Parties to the Aarhus Convention.

3.2 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".

3.3 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".
- 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.

3.4 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.

3.5 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.

3.6 Some closing remarks

Finally, some words should be said 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 re-

quirements for being a tribunal according to Article 6 of the European Convention of Human Rights and a court under Article 267 TFEU.[36] 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 EU 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.

[36] 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.