

Effective Justice?

***- Synthesis report in EC study on
implementation of Art. 9.3 and 9.4 of the AC
in 17 of the Union's Member States***

***Presentation at Meeting with EC Expert
Group for National judges
Brussels 2012-11-26***

***Professor Jan Darpö
Faculty of Law/
Uppsala Universitet***



Background

- **Aarhus Convention 1998 46 signatories →**
EU: Article 9.2; PPD 2003, ELD 2004, etc.
Article 9.3; The declaration
- **Case law CJEU**
 - ✱ C-237/07 *Janecek*, C-427/07 *Irish costs*, C-75/08 *Mellor*, C-263/09 *DLV*, C-115/09 *Trianel*, C-240/09 *Slovak Brown Bear*, C-128/09 *Boxus*...
 - ✱ + pending: C-416/10 *Križan* (PR from SK on injunction), C-260/11 *Edwards* (PR from UK on costs), C-530/11 *Commission v. UK* (IC on costs) and C-72/12 *Altrip* (PR from DE on scope of review) ...and *Janecek*...
- **Implementation of Art. 9.3...???**



Aim of the study

- The **situation of today** as regards the implementation of Art 9.3 and 9.4...
- To give **background knowledge** and **some ideas** - further legislative action or not...
- **17 MS:** BE, CY, CZ, DK, FR, DE, HU, IE, IT, LV, NL, PL, PT, SK, ES, SE and UK...
- **Experts:** Academics, judges, lawyers...
- **Other recent studies**
 - ✱ Faure e.a. 2012 (EC): socio-economic implications
 - ✱ Backes e.a. 2012 (EP): Standing in administrative, civil and criminal law...

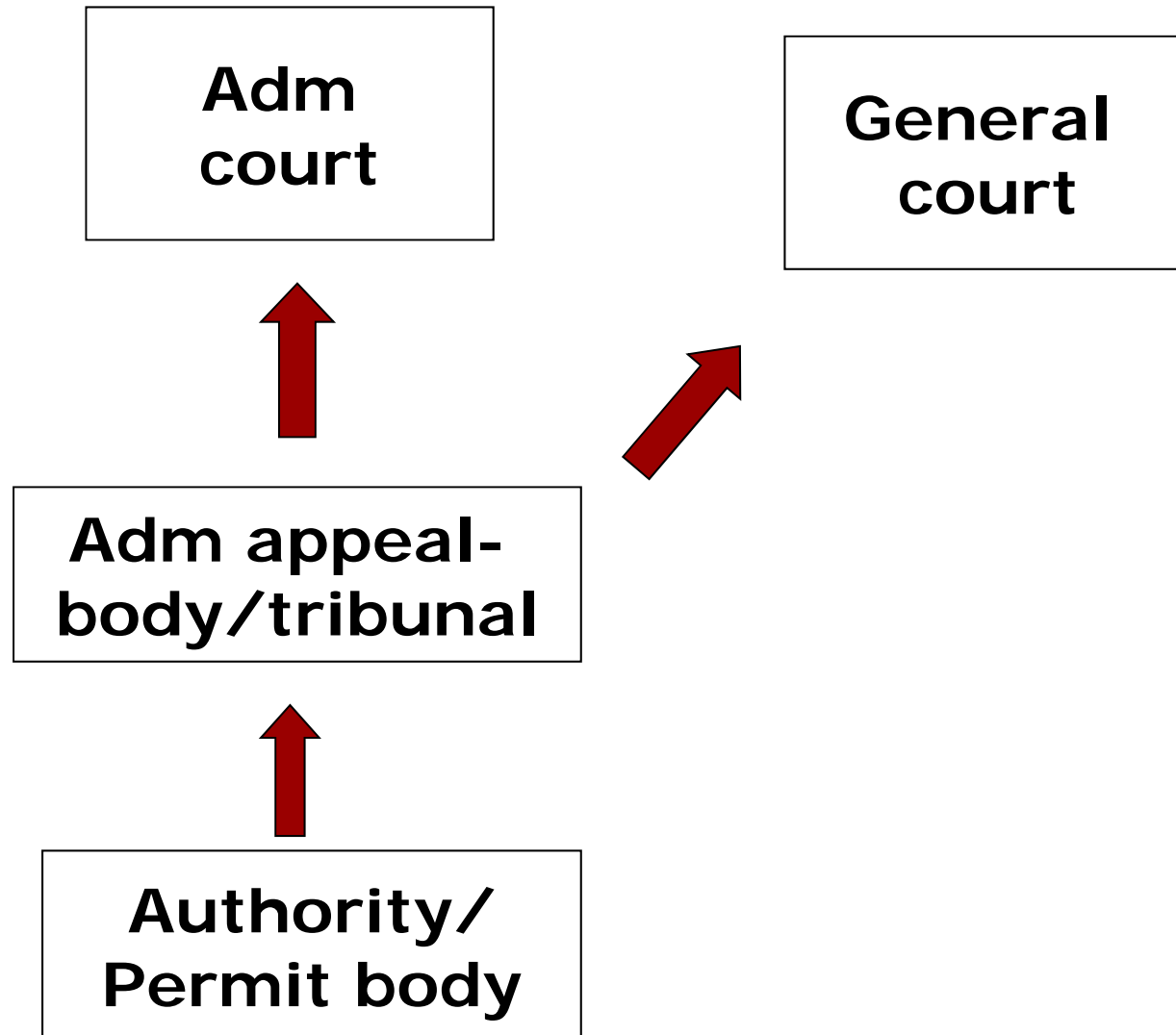


The questionnaire

- A. Legislation, decision-making, adm
appeal and JR, the role of the courts...**
- B. Standing for individuals and ENGOs...**
- C. Suspensive effect, injunction,
remedies, timeliness, ADR...**
- D. Costs in the envtl procedure...**
- E. 7 example situations...**
- F. Conclusion, challenges...**
- Draft synthesis report and feed back..**



Different Procedural Systems



What is to be reviewed..?

- **Article 9.2:** Art. 6: Permits, listed activities, SIE, substantive and procedural legality of any decision, act, omission...
- **Article 9.3:** Adm or judicial procedures to challenge **acts and omissions** by **private persons and PA** which contravene “**national law**” on the environment...
- Article 9.4:...adequate and **effective remedies**, including injunctive relief as appropriate... fair, equitable, **timely** and **not prohibitively expensive**...



Main outcomes

- **Diverging, random and inconsistent...**
- **Compared with Milieu 2007;
more lenient - more strict...**
- **No level playing field...**
- **Many obstacles and barriers...**
- **Differences depending on area of
(community) law...**
- **The role of the national courts...**



Standing for individuals

- **Great variety: from Actio popularis (PT) to Schutznormtheorie (G)**
- **Some (property) right based, most interest based**
- **Application by courts differs; the two gentlemen, shore protection...**



Standing for ENGOs I

- **Less differences (DE \leftrightarrow UK)...**
- **Statutes: Geographic, substance...**
- **Regional (and local) ENGOs sometimes discriminated...**
- **Sometimes limited to appeal against certain decisions (9.2), often not...**
- **Preclusion in some countries...**

Standing for ENGOs II

- **Registration: often...**
- **Minimum duration: often (1-5 yrs)...**
- **Non profit or democratic structure: sometimes...**
- **Numeric criterion: rarely...**



Scope of the appeal trial

- **Scope and intensity:** “the wider the entrance, the smaller the room”...
- **Review of infringement of rights, interests or full legality...**
- **Preclusion of arguments...**
- **Reformatory or cassatory procedure**
– what remedies do the court have..?



Costs

- **Court fees:** between 100 - and 5.000 €, commonly fixed (Streiwertkatalog.)..
- **Costs for lawyers:** between 0 and 10.000 €...
- **Costs for experts:** courts' responsibility, tables, without limits...
- **Cost distribution:** all models (LPP, PCOs, OCS, security/bonds...
- **Legal aid** with significance...
- **Barrier to A2J:** (BE), CY, FR, DE, IE, IT, NL, UK...



Effectiveness of A2J

- **Duration!** (rare positive exceptions)...
- **Usually no suspensive effect...**
- **Injunction sometimes difficult to obtain** (bonds)
- **Many cases** 'won in court, but lost on the ground': *Fluxys* (BE), *D8 Highway* (CZ), *Wattelez* (FR), *Santa Caterina* (IT), *Eemscentrale* (NL), *Castro Verde Highway* (PT), *Pezinok* (SK), *M-30 Highway* (ES), *Lappel Bank* (UK).



Action required?

- **AC/EC \leftrightarrow (Procedural) Autonomy MS...**
- **Effectiveness and effective judicial protection...**
- **'Level playing field'...**
- **Need to implement art. 9.3 Aarhus, basic uncertainty...**
- **Need to strengthen implementation elements of 9.2 Aarhus...**
- **Other solutions not effective (Art 258/267 TFEU), time consuming and too piecemeal...**



1. General issues

- **Broad scope of application; EU ‘environmental law’...**
- **Access for public (likely to be) affected, avoiding double standard of Dir. 2003/35...**
- **ENGOS: No registration, no auditing requirement, no time criterion
OR 2 yrs + democratic support...**



2. The procedure

- **Clarification on ‘procedural and substantive legality’, full legality control...**
- **Ex officio investigation of legality of all invoked aspects**
- **A2J regardless of participation...**
- **Challenging of omissions must be possible**



3.



- No fee for participation in environmental proceedings...
- Flat rate for courts fees at reasonable level...
- Objective test (or combined with subjective, with the aim of having a clear and transparent framework) of prohibitive costs...
- Public authorities should pay their own costs (OCS)...
- Legal aid should take public interest into account...
- 'Mischief-makers and busy bodies' dealt with by cost rules...



4. Effective remedies

- Importance of injunctive relief should be stressed, weighing of interests...
- Arguments to refuse injunctive relief should be defined...
- No bonds and security payments...
- Requirement for timeliness...
- ADR..?



To summarize

- **Art. 9.3 should be clarified in express EU law...**
- **Some aspects of Art. 9.2 may be clarified in EU law...**
- **Dialogue on procedural practice needed...**
- **Additional soft law approach (guidelines) recommended...**
- **Study good examples, e.g. on environmental appeal boards, ADRs...**



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What now..?

- **2013 study of the 11 remaining Member States**

...and then..?

Case Law Data Base of the Task Force on Access to Justice

<http://www.unece.org/env/pp/a.to.j.html>

EU: T-264/04 *WWF-EPO*

C-355/08 *WWF RAC*

C-427/07 *Irish costs*

C-263/08 *DLV*

C-240/09 *Slovak Brown Bear*

C-115/09 *Trianel*

<http://aarhusclearinghouse.unece.org/>



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....and finally...

THANK YOU FOR LISTENING..!



jan.darpo@jur.uu.se

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