EXPLANATORY CONSULTATION TEXT

Introduction

The public consultation is to seek the views of the general public and all stakeholders in order to help:

- Assess whether legislative action at EU level would have added value in ensuring effective and non-discriminatory access to justice in environmental matters across the EU Member States (subsidiarity test)
- Identify those issues where targeted EU legislative action would be needed to fulfil the objective of ensuring access to national courts in environmental matters (proportionality test)

The consultation uses a questionnaire.

Background

1. Already in 1963, the then European Court of Justice[1] ruled in the famous *Van Gend & Loos* case[2] that "*the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals*" and added that "*The vigilance of individuals concerned to protect their rights amounts to an effective supervision* [of EU law].

The application of EU law by national courts is therefore a keystone of the European construction, and effective access to national courts a basic component of the EU legal order. In fact national courts have universal competence to apply EU law being "*le juge du droit commun de l'Union"*.
This has been confirmed explicitly by foundational provisions such as

- Article 19(1) of the Treaty on European Union: "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*."
- Article 47(1) of the Charter of Fundamental Rights of the European Union: "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article*".

2. Environmental law presents specific features in terms of access to justice and effective application, in particular concerning standing, i.e. entitlement to bring a law suit ("the fish cannot go to court", to quote Advocate General Sharpston), and remedies, including injunctive relief, to avoid irreparable damage while legal review is pending,. Furthermore, the role of public authorities is much more important than in civil or commercial law, and very often administrative courts are key to upholding environmental law.

Recognizing these specific features, the EU and its Member States negotiated and concluded with other European States the 1998 "Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" (hereafter, "the Aarhus Convention"). The Aarhus Convention was ratified by the EU and is part of the *acquis*; it implements Principle 10 of the Rio Declaration on Environment and Development as far as the European continent is concerned.

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[1] After adoption of Lisbon Treaty: Court of Justice of the European Union ("CJEU")

[2] Case 26/62.

Article 9 of the Aarhus Convention imposes on its Contracting Parties obligations concerning access to justice:

- Article 9(1) establishes obligations on access to justice to protect access to information rights,
- Article 9(2) establishes obligations on access to justice to protect public participation rights, and
- Article 9(3) establishes obligations on access to justice to uphold the law relating to the environment in general; it covers both environmental breaches by the public authorities (vertical access) or by the citizens (horizontal access).

A common set of provisions are found in Article 9(4) and (5) and cover the cost/expense of legal action (which should not be prohibitive), injunctive relief, information and financial assistance mechanisms.

3. In 2003, to make sure that Member States would comply with their EU and international obligations, the European Commission proposed three Directives, one for each of the three pillars of the Aarhus Convention, i.e. access to information, public participation and access to justice. While EU law provisions on access to justice were adopted to implement Articles 9(1) and 9(2) of the Aarhus Convention, in Directives (EC) No 2003/4/EC and 2003/35/EC[3], Member States remained unconvinced that legislative action at EU level was needed to implement Article 9(3), and the Commission proposal COM (2003)624 of 24 October 2003 therefore remains pending before the co-legislators.

4. What is the situation after ten years?

First, the CJEU has started to develop an extensive case law on access to justice in environmental matters, based on the principle of effectiveness of EU law, EU law requirements to protect human health, and obligations under the Aarhus Convention. A summary of the case law is provided in the Annex. By way of example, in *Janecek*[4] – which involved a citizen challenging a local administration's failure to adopt a required air quality plan – the CJEU invoked human health as a reason to give standing. This has wide implications given that human health concerns are reflected in EU water, waste and chemical legislation as well as in air quality legislation, and given that the environment can be especially important for the health of vulnerable members of society, such as children. All EU Member States have ratified the UN Convention on the rights of the child (from 0-18), which, amongst other matters, refers to clean drinking water and environmental sanitation, subjects covered by EU environment legislation[5].

Through its case-law, the CJEU has partly filled the gap left by the absence of EU legislation concerning the Member States obligations under Article 9(3) of the Aarhus Convention. The direction of this case law is firm: in the last reported case on environmental law, the CJEU

[3] The most important existing binding rules in secondary legislation on access to justice in the field of the environment are those found in the Public Participation Directive, 2003/35/EC. These give rights of access to justice in relation to environmental impact assessment (EIA) and integrated pollution prevention and control (IPPC).

[4] See Annex for details

[5] See in particular Article 24 of the Convention

confirmed again, on 11 April 2013, its strong view that "*members of the public and associations are naturally required to play an active role in defending the environment*"[6].

Second, national courts have quickly embraced this case law, by systematically giving effect to the rulings of the CJEU in domestic cases.

Third, the compliance mechanism of the Aarhus Convention, the "Aarhus Convention Compliance Committee" (ACCC), has found that several Member States were in breach of their obligations under Article 9(3). The EU judiciary has recently shown openness towards integrating the assessments of the ACCC into its own[7].

The current situation is therefore one where the discretion of the Member States in implementing their obligations under Article 9(3) of the Aarhus Convention is more and more limited by judge-made law. The main source of this case law is domestic litigation brought by individuals or associations in specific cases or projects of concern to them in their own Member State. But the effect is felt throughout the Union.

5. What is the view of the EU institutions on this state of affairs?

The European Commission is concerned by the legal uncertainty that stakeholders currently face. While the application of environmental law on the ground always requires the identification of an "appropriate balance" between the various interests involved, this balance is now defined exclusively by courts with the sole guidance of the CJEU and to some extent the ACCC.

In its March 2012 Communication on "Improving the delivery of the benefits from EU environment measures: building confidence through better knowledge and responsiveness" [8], the Commission observed that: "*the wider context has changed, in particular the Court of Justice has confirmed recently that national courts must interpret access to justice rules in a way which is compliant with the Aarhus Convention. National courts and economic as well as environmental interests face uncertainty in addressing this challenge."*

The Council[9] and the European Parliament[10] have both called for action to improve access to environmental justice.

In terms of a concrete instrument, the European Parliament and the Committee of the Regions have already indicated that the best instrument to achieve that objective would be a Directive on access to justice.[11]

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6 Case C-260/11, *Edwards*, at 40.

7 See the opinion of Advocate General Kokott in case C-260/11 Edwards, at 36.

8 COM(2012)95 of 7 March 2012.

9 Conclusions on setting the framework for a Seventh EU Environment Action Programme at the 3173rd Environment Council meeting Luxembourg, 11 June 2012:"*- improving complaint handling at national level, including options for dispute resolution, such as mediation ;- improving access to justice in line with the Aarhus Convention,*"

10 European Parliament resolution of 20 April 2012 on the review of the 6th Environment Action Programme and the setting of priorities for the 7th Environment Action Programme – A better environment for a better life (2011/2194(INI)): "68. *Underlines that the 7th EAP should provide for the full implementation of the Aarhus Convention, in particular regarding access to justice;"*

11 Opinion of the Committee of the Regions at its 98th plenary session, 29–30 November 2012 - ENVE-V-024

6. On this basis, the Commission proposal for a 7th Environmental Action Programme[12] sets out the general objective of ensuring that by 2020 the principle of effective legal protection for citizens and environmental associations is facilitated.

It states that this requires *"ensuring that national provisions on access to justice reflect the case-law of the CJEU, and promoting non-judicial conflict resolution as a means of finding amicable solutions for conflicts in the environmental field."* The proposal also states that any actions set out in it shall be in accordance with the principles of smart regulation.

More concretely, according to the Commission, the following more specific objectives could define whether legislative action at EU level is required to remove the existing legal uncertainty and ensure effective and predictable access to courts:

(a) Four objectives identified from the case-law:

- *Ensure a right of access to national courts in line with the case-law* to address the issue of standing (locus standi) for individuals and environmental associations in national systems.

- *Ensure an adequate scope of judicial review in national courts* to address the issue of the appropriate standard of review,.

- *Ensure that procedures before national courts are not prohibitively expensive* to address the issue of prohibitive cost barriers.

- *Ensure that national courts apply effective remedies, including injunctive relief*, to provide greater clarity in line with the case-law.

(b) Two objectives identified by the institutions

- *Ensure as far as possible the efficiency of access to justice in terms of timeliness and reduction of administrative burden* to avoid problems, such as delays, backlogs and increased administrative burden.

- *Promote non-judicial conflict resolution* as a complementary solution[13].

7. After informal discussions with Member States, it appears that there are essentially two options to address the above-mentioned objectives.

The first option is to continue to rely on litigation and other non-legislative activities to try to ensure a satisfactory level of environmental access to justice. This would involve relying on litigation in national courts to fully consolidate the CJEU case-law and on the further

12 COM(2012)710

13 Non-judicial conflict resolution, notably mediation, may have a role to play in reducing the need for court action by resolving conflicts in an amicable way. The proposal for the 7th EAP makes reference to this. There already exists an EU instrument on the use of mediation in civil and commercial matters which may serve as a model, namely Directive 2008/52 on certain aspects of mediation in civil and commercial matters.

development of the latter. This option would also mean possible use of guidance documents, training activities and compliance promotion actions.

The second option is to put in place new EU legislation extending environmental access to justice to areas not covered by existing EU legislation on the subject.

This option could imply either the restart of the legislative work on the pending 2003 Commission proposal (the European Parliament has adopted amendments in first reading), or its withdrawal and the submission of a new proposal by the Commission, covering those issues that have been identified as requiring action at EU level.

8. To support the reflection, a comprehensive academic background material is now available to the public (at http://ec.europa.eu/environment/aarhus/studies.htm):

- a study coordinated by Professor Michael Faure from Maastricht University on the possible economic implications of access to justice in environmental matters.

- a set of studies coordinated by Professor Jan Darpö from Uppsala University, chair of the Aarhus Convention Access to Justice Task Force, describing the implementation of Articles 9 (3) and (4) of the Aarhus Convention by each of Member States (currently, only 17 Member States have been finalised, but the remaining 11 Member States should be completed in June 2013), as well as a synthesis report.

- A study on national complaint-handling mechanism which also includes an examination of national mediation mechanisms in 10 Member States.

ANNEX

1. History of policy development on Access to Justice in environmental matters

1996 Still-evolving body of access to justice case-law starting with the *Kraaijeveld* ruling recognising access to justice irrespective of specific formal provisions of EU law

1998 Signature by European Community of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention)

2001 Entry into force of the Aarhus Convention

2003 European Community enacts Aarhus-inspired access to justice legislation for environmental impact assessment (EIA), integrated pollution prevention and control (IPPC) and access to information[14]
Commission makes a general proposal on access to justice[15]

2005 Last meeting held in Council dealing with the Commission's Access to Justice Proposal

2005 Ratification of the Aarhus Convention by Council Decision 2005/370/EC, without a wider access to justice instrument in place

2006 Access to justice in environmental matters at EU level addressed by adoption of the Aarhus Regulation[16]

2009 Entry into force of the Lisbon Treaty and the Charter of Fundamental Rights, incorporating the principle of effective judicial protection[17]

2012

- Commission Communication on "Improving the delivery of the benefits from EU environment measures: building confidence through better knowledge and responsiveness"[18] *inter alia* refers to access to justice

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14 See Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41, 14.2.2003, p. 26) and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156, 25.6.2003, p. 17)

15 COM(2003) 624 final – 2003/246/COD

16 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 (OJ L 264, 25.9.2006, p. 13)

17 The Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) strengthen access to justice in general, including via explicit reference in Article 19(1) of the TEU on sufficient remedies to ensure effective legal protection and incorporation of the Charter on Fundamental Rights (Article 47 of which covers the conditions of access, including legal aid)

18 Improving the delivery of the benefits from EU environment measures: building confidence through better knowledge and responsiveness (COM/2012/95). Having noted the lack of progress with the 2003 proposal, the Communication observes that "the wider context has changed, in particular the Court of Justice has confirmed recently that national courts must interpret access to justice rules in a way which is compliant with the Aarhus Convention. National courts and economic as well as environmental interests face uncertainty in addressing this challenge."

- Commission launches country studies on access to justice as well as a study on economic impacts of possible Commission initiatives.
- Commission convenes two expert groups to present the studies in November[19]
- European Parliament Resolution on the review of the 6th Environment Action Programme [20] *inter alia* calls for a directive on access to justice
- June 2012 Council Conclusions[21] *inter alia* call for improved access to justice in environmental matters
- Opinion of the Committee of the Regions calls for an access to justice directive[22]
- Proposal for a 7th EAP[23] aims at improved access to justice in line with the case-law

2013

- European Parliament Resolution[24] *inter alia* calls again for a directive on access to justice
- Meeting of the competent Working Group of the Council on 13 May 2013.

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20 European Parliament resolution of 20 April 2012 on the review of the 6th Environment Action Programme and the setting of priorities for the 7th Environment Action Programme – A better environment for a better life (2011/2194(INI)); "68. Underlines that the 7th EAP should provide for the full implementation of the Aarhus Convention, in particular regarding access to justice; stresses, in this connection, the urgent need to adopt the directive on access to justice; calls on the Council to respect its obligations resulting from the Aarhus Convention and to adopt a common position on the corresponding Commission proposal before the end of 2012;"

21 Conclusions on setting the framework for a Seventh EU Environment Action Programme at the 3173rd ENVIRONMENT Council meeting Luxembourg, 11 June 2012

22 calling for "…; general criteria for national complaint-handling; and a Directive on Access to Justice;"

23 To maximise the benefits of EU environment legislation, highlights that EU citizens will gain better access to justice in environmental matters and effective legal protection, in line with international treaties and developments brought about by the entry into force of the Lisbon Treaty and recent case law of the European Court of Justice."

24 European Parliament resolution of 12 March 2013 on improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness (2012/2104(INI)) "29. Regrets that the procedure for adopting the proposal for a directive on public access to justice in environmental matters(9) has been halted at first reading; calls, therefore, on the co-legislators to reconsider their positions with a view to breaking the deadlock; 30. Recommends, therefore, the pooling of knowledge between the respective judicial systems of the Member States that deal with infringements of, or failure to comply with, EU environmental legislation;(…)
"41. Emphasises the important role of the citizens in the implementation process, and urges the Member States and the Commission to involve them in a structured way in this process; notes also, in this regard, the importance of citizens´ access to justice; 42. Calls on the Commission and the Member States to explicitly define a specific timeframe in which court cases relating to the implementation of environmental law shall be resolved, in order to prevent the implementation of the environmental law and delays in court cases from being used as an excuse to avoid compliance and hinder investments; calls on the Commission to assess how many investments have been held back because of delays in legal proceedings relating to irregularities on the implementation of environmental legislation;"

2. Access to Justice Provisions of the Aarhus Convention

"Article 9

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
(a) Having a sufficient interest or, alternatively,
(b) Maintaining impairment of a right,
where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial

review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

3. Case-law of the CJEU

The summary below is not intended to be exhaustive.

The CJEU case-law on access to justice continues to evolve. Most of it is the result of preliminary references from national courts to the CJEU in which the former seek clarification of what their role should be in applying EU environment law.

While some of the case-law relates to specific existing access to justice provisions[25] and while some of it touches on the Aarhus Convention, other parts rest on general principles of EU law, in particular the principle that there should be effective judicial protection of rights derived from secondary EU law.

A. Standing, effective judicial protection of rights derived from EU secondary law

To bring an action before a national CJEU, a potential plaintiff must have an entitlement to do so. This is sometimes referred to as "locus standi" or "standing". Many legal systems are restrictive when it comes to standing to bring challenges against decisions, acts or omissions of public authorities. This creates an obstacle to challenges related to environment law because it can often be difficult to demonstrate that the decision, act or omission sought to be challenged directly touches the plaintiff. The Aarhus Convention tries to overcome this through provisions on standing that are set out in Article 9(2) and 9(3). These give a particular recognition of the role of environmental associations in environmental protection.

The line of case-law summarised under this sub-heading points to:

- The general importance the CJEU attaches to the effective protection of rights derived from EU secondary law and its willingness to develop a case-law on entitlement;
- A rationale for access based on human health considerations;
- A rationale for access based on the role of environmental associations in defending nature;
- The CJEU support for a wide interpretation of the role of associations under existing access to justice provisions derived from Aarhus.

(1) Case C-72/95, *Kraaijeveld*[26]

This case, which pre-dates Aarhus, involved a challenge to the adequacy of a Member State's transposition of the Environmental Impact Assessment ("EIA") Directive[27].

The CJEU stated:

25 i.e. in relation to environmental impact assessment (EIA) and integrated pollution prevention and control (IPPC)

26 Case C-72/95 ECR 1996 Page I-05403

27 Directive 2011/92/EU

"56 (…) In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out in the directive (…).
58 (…) Indeed, pursuant to the principle of cooperation laid down in Article 5 of the Treaty, it is for national courts to ensure the legal protection which persons derive from the direct effect of provisions of Community law (see, in particular, Case C-213/89 Factortame [1990] ECR I-2433, paragraph 19, …)."

(2) Case C-237/07, *Janecek*[28]

The CJEU recognised a citizen's entitlement to challenge the absence of an air quality management plan, despite the fact that national law considered that the citizen had no standing to bring such a case and that there were no specific access to justice provisions in the relevant EU air legislation.

The CJEU stated:

"(…)
42 The answer to the first question must therefore be that Article 7(3) of Directive 96/62[29] *must be interpreted as meaning that, where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution."*

(3) Case C-240/09, *Slovak Brown Bears*[30]

This case concerned an environmental association's entitlement to challenge a ministerial hunting derogation from the strict species protection provisions of the Habitats Directive[31]. The CJEU found that Article 9(3) of the Aarhus Convention had no direct effect but that, despite the absence of access to justice provisions in the Habitats Directive, Member State courts should nevertheless facilitate access by environmental associations.

The CJEU stated:

"47 *In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case (…).*
…

28 Case C-237/07 ECR 2008 Page I-06221

29 Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1

30 Case C-240/09 Lesoochranárske zoskupenie [2011] European Court Reports 2011 Page I-01255

31 Directive 92/43/EEC

50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court , in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law."

(4) Case C-263/08, Djurgarden[32]

The case involved a challenge to Swedish national rules which restricted standing to environmental associations with at least 2000 members. The CJEU held that the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of the EIA Directive and in particular the objective of facilitating judicial review of projects which fall within its scope.

(5) Case C-115/09, *Trianel*[33]

This case involved a challenge to national legislation providing that only environmental associations , who can demonstrate that their rights were impaired can have standing in courts for purposes of access to justice in relation to EIA and integrated pollution prevention and control ("IPPC"). The CJEU held that this is contrary to EU law, and that environmental association need not demonstrate an impairment, as they fulfil the EIA Directive's requirement of promoting environmental protection.

(6) C-128/09, *Boxus and Others*; C-182/10, *Solvay and Others*[34]

The parliament of the Walloon Region adopted a legislative instrument approving certain transport projects, thereby appearing to limit the possibility for citizens and environmental associations to challenge them pursuant to the EIA Directive.

The CJEU found that by virtue of their procedural autonomy, the Member States have a discretion in implementing Article 9(2) of the Aarhus Convention and Article 11 of the EIA Directive, subject to compliance with the principles of equivalence and effectiveness. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and impartial body established by law is to have jurisdiction in respect of the review procedure referred to in those provisions and what procedural rules are applicable.

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32 Case C-263/08. ECR [2009] Page I-09967 (Djurgarden-ruling)

33 Trianel-case, C-115/09. ECR [2011] - European Court Reports 2011 Page I-03673

34 Joined cases C-128/09 to C-131/09, C-134/09 and C-135/09. ECR reports - not yet reported and Solvay and Others C-182/10. ECR [2012], not yet reported

However, the CJEU ruled that based on Article 9 of the Aarhus Convention and Article 11 the EIA Directive would lose all effectiveness if the mere fact that a project is adopted by a legislative act which does not fulfil the conditions set out in paragraph 37 of the judgment were to make it immune to any review procedure for challenging its substantive or procedural legality within the meaning of those provisions.

B Costs of bringing a legal challenge

The cost of bringing legal challenges is a potential obstacle to access to justice. Article 9(4) of the Aarhus Convention thus requires procedures not to be prohibitively expensive. This stipulation is found in EU secondary legislation in the existing provisions on access to justice for EIA and IPPC and the case-law below involves interpretation of these provisions.

(7) C-427/07, *Commission v Ireland*[35]

The CJEU held that the Irish transposition of the Public Participation Directive was not in conformity with EU law. It found that a national practice under which the courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party is merely discretionary and did not satisfy the duty to transpose.

(8) C-260/11, *Edwards*[36] and *C-530/11, Commission v UK*[37]

Edwards arose out of an unsuccessful challenge in the UK courts to an approval given to a cement works. The unsuccessful plaintiff was ordered to pay the costs of the national proceedings and, in this context, the UK Supreme Court introduced a preliminary reference focusing on the interpretation of the proviso that costs should not be prohibitively expensive. In particular it asked whether there should be a "subjective" test (i.e. how much a specific plaintiff could afford) or an "objective" test (i.e. general affordability independent of the means of the actual plaintiff) or a combination of these. The CJEU found that the test can include subjective or case-specific criteria but that these should never be objectively unreasonable.

The CJEU ruled that:

> *The requirement that…"that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. (…)*
> *(...) the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for*

35 Case C-427/07. ECR [2009] Page I-06277

36 Case C-260/11: Reference for a preliminary ruling from Supreme Court of the United Kingdom— Regina on the application of David Edwards, Lilian Pallikaropoulos v Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs in OJ C 226, 30.7.2011, p. 16–16

37 Case C-530/11: Action brought on 18 October 2011 — European Commission v United Kingdom of Great Britain and Northern Ireland in OJ C 39, 11.2.2012, p. 7–8 - On-going cases on the topic of prohibitive costs.

the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime. (…)

C Scope of judicial review

The scope of the review in respect of which access is granted is an important consideration. It determines whether the plaintiff should be allowed to invoke only procedural defects or be allowed to raise issues of substantive legality as well.

(9) C-72/12, Altrip[38]

The case is a preliminary ruling request from the German Federal Administrative Court concerning Germany's implementation of the access to justice provisions of the (EIA Directive). In particular, the national court has asked if the obligation to carry out a substantive and procedural review of a decision would require that a decision based on an incorrect EIA can be challenged. The court has also asked if it is compliant with EU law that an EIA decision can only be reversed if the error affects subjective rights of the applicant and if without the error the decision would have been different in respect of these rights.

The case is on-going.

D Effective remedies

Access to justice inevitably brings up the issue of remedies: what is the national court to do if it finds that there has been a procedural or substantive breach of EU environment law?

Article 9(4) of the Aarhus Convention refers to *"adequate and effective remedies, including injunctive relief as appropriate"*.

The case-law summarised under this sub-heading highlights:

- The openness of the CJEU to consider effective remedies other than by reference to Aarhus;
- The issue of revocation of consents given in breach of procedural or substantive requirements;
- The need for injunctive relief to form part of the measures to give effect to existing access to justice provisions;
- The potential for far-reaching consequences for procedural autonomy in order to ensure the effectiveness of EU environment law;
- The potential for state liability to compensate for breaches of EU environment law.

(10) Case C-201/02, Wells[39]

In the context of a dispute related to the EIA Directive, the CJEU ruled that it is for the national court to determine whether it is possible under national law for a consent already

[38] Altrip C-72/12 Case: Reference for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court) Leipzig (Germany) lodged on 13 February 2012 — Gemeinde Altrip (Municipality of Altrip), GebrüderHörtGbR, Willi Schneider v Rhineland-Palatinate in OJ C 133, 5.5.2012, p. 15–16

[39] Case C-201/02. European Court Reports 2004 Page I-00723

granted to be revoked or suspended, or alternatively, to grant compensation for the harm suffered.

The CJEU stated:

> *"70 (…) the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in (…in the EIA Directive). The detailed procedural rules applicable in that context are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.*

(11) C-416/10, Križan[40]

The CJEU held that by virtue of their procedural autonomy, the Member States have discretion in implementing Article 9 of the Aarhus Convention and Article 15a of Directive 96/61 (supposing by way of analogy that these provisions are applicable to the EIA Directive access to justice provisions), subject to compliance with the principles of equivalence and effectiveness. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and impartial body established by law is to have jurisdiction in respect of the review procedure referred to in those provisions and what procedural rules are applicable. It must be added that the guarantee of effectiveness of the right to bring an action provided for in that Article 11 of the EIA Directive requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent pollution, including, where necessary, by the temporary suspension of a disputed permit pending the final decision.

(11) Case C-420/11, Leth[41]

This preliminary reference concerned the consequences of an omission to undertake an EIA, in particular the possibility for citizens to seek compensation.

The CJEU stated:

> *"47Consequently, it appears that, in accordance with European Union law, the fact that an environmental impact assessment was not carried out, in breach of the requirements of Directive 85/337, does not, in principle, by itself confer on an individual a right to*

40 Križan and Others C-416/10. ECR - not yet reported

41 Case C-420/11: Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 10 August 2011 — Jutta Leth v Republic of Austria, Land Niederösterreich OJ C 319, 29.10.2011, p. 10–10; 2013 ECR - not yet reported

compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of environmental effects. However, it is ultimately for the national court, which alone has jurisdiction to assess the facts of the dispute before it, to determine whether the requirements of European Union law applicable to the right to compensation, in particular the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied."

(12) C-72/12 *Altrip*[42]

The case is a preliminary ruling request from the German Federal Administrative Court concerning Germany's implementation of the access to justice provisions of the (EIA Directive). The Federal Administrative Court has asked whether provisions of German law are compatible with the access to justice provisions of the EIA Directive. In particular, the national court has asked if the obligation to carry out a substantive and procedural review of a decision would require that a decision based on an incorrect EIA can be challenged. The court has also asked if it is compliant with EU law that an EIA decision can only be reversed if the error affects subjective rights of the applicant and if without the error the decision would have been different in respect of these rights.

The case is on-going.

[42] Altrip C-72/12 Case: Reference for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court) Leipzig (Germany) lodged on 13 February 2012 — Gemeinde Altrip (Municipality of Altrip), GebrüderHörtGbR, Willi Schneider v Rhineland-Palatinate in OJ C 133, 5.5.2012, p. 15–16