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### **Access to Justice in environmental matters. Perspectives from the European Union Forum of Judges for the Environment**

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#### **1. Introduction**

Following up the recommendations made during the UNEP Global Judges Symposium of 2002 in Johannesburg and the Ad Hoc Planning Meeting in January 2003 in Nairobi, the judges from Western Europe present at that meeting, considered to set up a regional forum of judges for the environment. The idea was discussed further in London in October 2002, during an IUCN<sup>i</sup> symposium and in Rome in May 2003 during the Symposium on Environmental Law for Judges organised with the Italian Council of the Judiciary<sup>ii</sup> by ICEF, in collaboration with UNEP and IUCN<sup>iii</sup>.

On 28 February 2004, the *EU Forum of Judges for the Environment (EUFJE)* was established on the initiative of Guy Canivet, First President of the *Cour de Cassation* (France), Amedeo Postiglione, Judge of the *Corte Suprema di Cassazione* (Italy), Luc Lavrysen, Judge of the Constitutional Court (Belgium) and Lord Justice Robert Carnwath, Judge of the Court of Appeal (England and Wales)<sup>iv</sup>.

The objective of the Forum is to promote the enforcement of national, European and international environmental law in a perspective of sustainable development. The aim of the Forum is in particular to exchange experiences in the area of training of the judiciary in environmental law, contribute to a better knowledge of environmental law, share experiences with environmental case law and contribute to a more effective enforcement of environmental law. Every judge in the European Union and the European Free Trade Association with a special interest in environmental law can become a member of the Forum. Judges from countries that have applied for membership of the European Union may be admitted as observers. In that capacity we are welcoming each year a representative of the Council of State of Turkey, and last year also judges from Serbia and Ukraine. Representatives of the United Nations Environment Programme (UNEP), the European Commission (EU) and the Council of Europe may attend the meetings as observers. The activities of EUFJE are supported by DG Environment of the European Commission.

It was agreed at the inaugural meeting in the European Court of Justice in Luxembourg on 26 April 2004 that the early work of EUFJE was to obtain information about environmental law training facilities offered to members of the judiciary in each of the participating states, as well as particular courts or tribunals which have jurisdiction in respect of environmental cases. On 3 December 2004, EUFJE held its first Annual Conference in the Council of State of the Netherlands, in The Hague<sup>v</sup>. In the following years annual conferences were held in London in 2005 (on waste legislation), in Helsinki in 2006 (on *Natura 2000*), in Luxembourg in 2007 (on criminal enforcement of environmental law), in Paris in 2008 (on soil pollution), in Stockholm in 2009 (on the Integrated Pollution Prevention and Control Directive), in Brussels in 2010 (on the Application of European Biodiversity Law at national level), in Warsaw in 2011 (on Environmental Protection and Town and Country Planning), in The Hague in 2012 (on the Role of EU Environmental Law in the Courts of the Member States) and in Vienna in 2013 (on Access to Justice in Environmental Matters).

During the Brussels Conference in 2010 the Forum brought together for the first time public prosecutors from the different members states of the EU. In doing so, the Forum was instrumental in the creation of the European Network of Prosecutors for the Environment (ENPE)<sup>vi</sup>.

The Forum is involved in the activities of the Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters), especially those of the Task Force on Access to Justice<sup>vii</sup>. Members of the Forum attended the different meetings of the Task Force and were also involved in the preparation of its capacity building activities for judges in Kiev<sup>viii</sup>, Tirana<sup>ix</sup> and Almaty<sup>x</sup>.

The Forum is giving also input to DG Environment of the European Commission while developing proposals for EU legislation with a particular relevance for judges, as that is the case with the access to justice proposal<sup>xi</sup>, the legal instrument on environmental inspections<sup>xii</sup> or when it is evaluating existing legislation such as the environmental liability directive<sup>xiii</sup>.

## **2. Access to justice in environmental matters**

It should not be a surprise that the EU Forum of Judges for the Environment has a particular interest in access to justice in environmental matters. Looking to the past, one can say that except for a few EU member states with wide access to justice provisions for citizens and/or for environmental NGOs, such as Portugal, Latvia, the UK, Ireland, the Netherlands and, to some extent, France, in most EU member states, access to justice for the protection of the environment used to be difficult for individual persons and groups defending collective interests<sup>xiv</sup>. We believe that the Aarhus Convention and its EU implementing provisions are causing in this respect a slow but steady change toward a more effective access to justice for the protection of the environment. An important role in this respect is played by the Aarhus Convention Compliance Committee and the Court of Justice of the EU.

## 2.1. The Access to Justice provisions of the Aarhus Convention

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the 'Environment for Europe' process, in the framework of the United Nations Economic Commission for Europe (Geneva). The Convention, which is in force since 30 October 2001, has now been ratified by 46 Parties, including the European Union and all Member States of the European Union. The GMO-Amendment to the Convention, which is not into force yet, has been ratified by 28 Parties, including the European Union and 23 of its Member States. The PRTR- Protocol that is in force since 8 October 2009 has been ratified by 33 Parties, including the European Union and 24 of its Member States.

The Aarhus Convention links environmental rights and human rights. It acknowledges that we owe an obligation to future generations. It establishes that sustainable development can be achieved only through the involvement of all stakeholders. It focuses on interactions between the public and public authorities in a democratic context and it is forging a new process for public participation in the negotiation and implementation of international agreements. The Convention is therefore not only an environmental agreement, it is also a Convention about government accountability, transparency and responsiveness. The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice.

As its title suggests, the Convention contains three broad themes or 'pillars': access to information, public participation and access to justice. However, the Convention also contains a number of important general features.

The third pillar of the Convention (article 9) aims to provide access to justice in three contexts: a) review procedures with respect to access to information requests, b) review procedures with respect to specific (project-type) decisions which are subject to public participation requirements, and c) challenges to breaches of environmental law in general. Thus the inclusion of an 'access to justice' pillar not only underpins the first two pillars, it also points the way to empowering citizens and NGOs to assist in the enforcement of the law.

Article 9 (1) deals with Access to Justice concerning *information appeals*. A person whose request for information has not been dealt with to his satisfaction must be provided with access to a review procedure before a court of law or another independent and impartial body established by law. The latter option was being included to accommodate those countries which have a well-functioning office of Ombudsperson. The Convention attempts to ensure a low threshold for such appeals by requiring that where review before a court of law is provided for (which can involve high costs), there is also access to an expeditious review procedure which is free of charge or inexpensive. Final decisions must be binding on the public authority holding the information, and the reasons must be stated in writing where information is refused.

Article 9 (2) deals with Access to Justice concerning Public *participation appeals*. The Convention provides for a right to seek a review in connection with decision-making on projects or activities covered by Article 6 of the Convention. The review may address either the substantive or the procedural legality of a decision, or both. The scope of persons entitled to pursue such an appeal is similar to, but slightly narrower than the 'public concerned', involving a requirement to have a 'sufficient interest' or maintain impairment of a right, though the text also states that these requirements are to be interpreted in a manner which is consistent with 'the objective of giving the public concerned wide access to justice'.

Article 9 (3) concerns general violations of environmental law. The Convention requires Parties to provide access to administrative or judicial procedures *to challenge acts and omissions by private persons and public authorities which breach laws relating to the environment*. Such access is to be provided to members of the public 'where they meet the criteria, if any, laid down in national law' - in other words, the issue of standing is primarily to be determined at national level, as is the question of whether the procedures are judicial or administrative.

Finally, there is article 9 (4) that sets particular quality standards for the different procedures provided for in the other paragraphs of that article. These procedures shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

## 2.2. The Compliance Committee of the Aarhus Convention

Article 15 of the Aarhus Convention on review of compliance, requires the Meeting of the Parties to establish "optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention". At its first session (October 2002), the Meeting of the Parties adopted *decision I/7 on review of compliance* and elected the first Compliance Committee. The compliance mechanism may be triggered in four ways: (1) a Party may make a submission about compliance by another Party; (2) a Party may make a submission concerning its own compliance; (3) the secretariat may make a referral to the Committee; (4) members of the public may make communications concerning a Party's compliance with the convention. The last mentioned way is very original as it is very exceptional that international conventions accept that members of the public may set into motion the compliance mechanism<sup>xv</sup>. It has also proved to be the most used way to trigger the compliance mechanism, as 96 of the 97 cases have been introduced in this way<sup>xvi</sup>. In addition, the Committee may examine compliance issues on its own initiative and make recommendations, prepare reports on compliance with or implementation of the provisions of the Convention at the request of the Meeting of the Parties and monitor, assess and facilitate the implementation of and compliance with the reporting requirements under article 10 (2) of the Convention. In the course of its work the Committee developed specific details of its *modus operandi*<sup>xvii</sup>. Since its establishment, the Committee has reached an important number of findings with regard to compliance by individual Parties. The

Committee's considerations with regard to specific provisions of the Convention have been compiled in a brochure by *Resource & Analysis Centre "Society and Environment"*<sup>xviii</sup>.

The Compliance Committee (ACCC) has so far had the opportunity to interpret some of the provisions of article 9 of the Convention while dealing with these communications of the public. We highlight the most important "findings and recommendations" of the ACCC with regard to article 9 of the Convention.

As general issues are concerned, the ACCC was of the opinion that regulating matters subject to articles 6 (dealing with public participation for project type decisions) and 7 (dealing with public participation for plans, programs and policies) of the Convention exclusively through acts enjoying the protection of *ouster clauses* would be to effectively prevent the use of access-to-justice provisions. Where the legislation gives the executive a choice between an act that precludes participation, transparency and the possibility of review and one that provides for all of these, the public authorities should not use this flexibility to exempt from public scrutiny or judicial review matters which are routinely subject to administrative decisions and fall under specific procedural requirements under domestic law. Unless there are compelling reasons, to do so would risk violating the principles of the Convention. The Committee finds this approach to be out of compliance with the obligations to ensure that members of the public concerned have access to a review procedure and to provide adequate and effective remedies in accordance with article 9, paragraphs 2–4, of the Convention (C/08, *Armenia*, ECE/MP.PP/C.1/2006/2/Add.1, paras. 38-39).

As Article 9 (2) is concerned the Committee held that it applies to decisions with respect to permits for specific activities where public participation is required under article 6. For these cases, the Convention obliges the Parties to ensure standing for environmental organizations. *Environmental organizations, meeting the requirements referred to in article 2, paragraph 5, are deemed to have a sufficient interest to be granted access to a review procedure before a court and/or another independent and impartial body established by law.* Although what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided "*with the objective of giving the public concerned wide access to justice*" *within the scope of the Convention.* (C/11, *Belgium*, ECE/MP.PP/C.1/2006/4/Add.2, para 2). While referring to "the criteria, if any, laid down in national law" in article 9, paragraph 3, the Convention neither defines these criteria nor sets out the criteria to be avoided and allows a great deal of flexibility in this respect. On the one hand, the Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On other the hand, the Parties may not take the clause "where they meet the criteria, if any, laid down in its national law" as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all members of the public, especially environmental organizations, from challenging acts or omissions that contravene national law relating to the environment. The phrase "the criteria, if any, laid down in national law" indicates that the Party concerned should exercise self-restraint not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception (ACCC/C/2005/11 concerning *Belgium*, paras. 34–36).

With regard to Article 9 (3) the Committee is of the opinion that Private nuisance is a tort (civil wrong) under the United Kingdom's common law system. A private nuisance is defined

as an act or omission generally connected with the use or occupation of land which causes damage to another person in connection with that other's use of land or interference with the enjoyment of land or of some right connected with the land. The Committee finds that in the context of the present case, *the law of private nuisance is part of the Party concerned's law relating to the environment* and therefore within the scope of article 9, paragraph 3, of the Convention (C/23, United Kingdom, ECE/MP.PP/C.1/2010/5/Add.1, para. 45).

The characteristics of the *General Spatial Plans* indicate that that these plans *are binding administrative acts*, which determine future development of the area. They *are mandatory for the preparation of the Detailed Spatial Plans, and thus also binding, although indirectly, for the specific investment activities, which must comply with them*. Moreover, they are subject to obligatory SEA and are related to the environment since they can influence the environment of the regulated area. Consequently, the General Spatial Plans have the legal nature of acts of administrative authorities which may contravene provisions of national law related to the environment and the Committee reviews access to justice in respect to these plans in the light of article 9, paragraph 3, of the Convention (C/58, Bulgaria, ECE/MP.PP/C.1/2013/4/Add.1, para. 64).

The Committee emphasizes that article 9, paragraph 4, of the Convention applies also to situations where a member of the public seeks to *appeal an unfavourable court decision* that involves a public authority and matters covered by the Aarhus Convention. Thus the Party concerned is obliged to implement the Convention in an appropriate way so as to *prevent unfair, inequitable or prohibitively expensive cost orders being imposed on a member of the public in such appeal cases* (C/24, Spain, ECE/MP.PP/C.1/2009/8/Add.1, para. 107).

Since the communicant's judicial review proceedings were judicial procedures under article 9, paragraph 3, of the Convention, these proceedings were also subject to the requirements of article 9, paragraph 4, of the Convention. *The Committee finds that the quantum of costs awarded in this case, £39,454, was prohibitively expensive within the meaning of article 9, paragraph 4, and thus, amounted to non-compliance. (...) The Committee in this respect also stresses that 'fairness' in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant, a public body. The Committee, moreover, finds that fairness in cases of judicial review where a member of the public is pursuing environmental concerns that involve the public interest and loses the case, the fact that the public interest is at stake should be accounted for in allocating costs.* The Committee accordingly finds that the manner in which the costs were allocated in this case was unfair within the meaning of article 9, paragraph 4, of the Convention and thus, amounted to non-compliance (C/27, United Kingdom, ECE/MP.PP/C.1/2011/2/Add.1, paras. 44- 45).

The Committee concludes that, despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements under the Convention. At this stage, the Committee considers that *the considerable discretion of the courts of England and Wales in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest.* The Committee also notes the Court of Appeal's judgement in *Morgan v. Hinton Organics*, which held that the principles of the Convention are "at most" a factor which it

“may” (not must) “have regard to in exercising its discretion”, “along with a number of other factors, such as fairness to the defendant”. The Committee in this respect notes that “fairness” in article 9, paragraph 4, *refers to what is fair for the claimant*, not the defendant. In the light of the above, the Committee concludes that the Party concerned has not adequately implemented its obligation in article 9, paragraph 4, to ensure that the procedures subject to article 9 are not prohibitively expensive. In addition, the Committee finds that the system as a whole is not such as “to remove or reduce financial [...] barriers to access to justice”, as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider (C/33, *United Kingdom*, ECE/MP.PP/C.1/2010/6/Add.3, paras. 135-136)

### 2.3. The Court of Justice of the European Union

As has been indicated above, the EU is a party to the Aarhus Convention. The Decision on the conclusion of the Aarhus Convention by the EU was adopted on 17 February 2005<sup>xix</sup>. The EU is a Party to the Convention since May 2005. The EU has also adopted some implementing legislation. In 2003 two Directives concerning the first and second “pillars” of the Aarhus Convention were adopted<sup>xx</sup>. Provisions for public participation in environmental decision-making are furthermore to be found in a number of other environmental directives, such as Directive 2001/42/EC of 27 June 2001 on the assessment of certain plans and programmes on the environment and Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy. Both Directives 2003/4/EC and 2003/35/EC contain also provisions on access to justice<sup>xxi</sup>.

Furthermore there is Regulation (EC) N° 1367/2006 of the European Parliament and of the Council 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* entered into force on 28 September 2006 and became of application on 17 July 2007. The “Aarhus Regulation” covers not only the institutions, but also bodies, offices or agencies established by, or on the basis of the EU Treaties. The Aarhus Regulation extends Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents to all EU institutions and bodies. The Aarhus Regulation furthermore requires those institutions and bodies to provide for public participation in the preparation, modification or review of “plans and programmes”.

The Court of Justice of the European Union (CJEU) plays a crucial role in the interpretation and implementation of EU law, including international agreements to which the EU is a part. The Court of Justice cooperates with all the courts of the Member States, which are the ordinary courts in matters of European Union law. To ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law. *A reference for a preliminary ruling*

may also seek the review of the validity of an act of EU law. The Court of Justice's reply is not merely an opinion, but takes the form of a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court's judgment likewise binds other national courts before which the same problem is raised. Besides that, the CJEU is competent to *adjudicate actions for failure to fulfil obligations*. These actions enable the Court of Justice to determine whether a Member State has fulfilled its obligations under European Union law. Before bringing the case before the Court of Justice, the European Commission conducts a preliminary procedure in which the Member State concerned is given the opportunity to reply to the complaints addressed to it. If that procedure does not result in the Member State terminating the failure, an action for infringement of EU law may be brought before the Court of Justice. The action may be brought by the Commission - as, in practice, is usually the case - or by a Member State. If the Court finds that an obligation has not been fulfilled, the State must bring the failure to an end without delay. If, after a further action is brought by the Commission, the Court of Justice finds that the Member State concerned has not complied with its judgment, it may impose on it a fixed or periodic financial penalty. However, if measures transposing a directive are not notified to the Commission, it may propose that the Court impose a pecuniary penalty on the Member State concerned, once the initial judgment establishing a failure to fulfil obligations has been delivered<sup>xxii</sup>.

Over the last few years an intensive dialogue between national judges and the CJEU has been established in relation to access to justice in environmental matters, while the European Commission is also bringing some infringement cases to the Court. That gave the Court the possibility to interpret different aspects of Art. 9 of the Aarhus Convention or of its EU implementing legislation.

A first, very important case, to mention is the so called *Slovak Brown Bear Case*<sup>xxiii</sup> in which the CJEU concluded, on the one hand, that Article 9(3) of the Aarhus Convention does not contain obligations that are sufficiently clear and precise to be capable of regulating the legal position of individuals directly and therefore its provisions do not have direct effect. The CJEU emphasized that under Article 9(3), only individuals who met "*the criteria, if any, laid down by national law*" would be entitled to exercise the rights it provides. In the absence of EU rules governing these matters, it was for the domestic legal system of each Member State to lay down the relevant criteria and procedural rules. However, the CJEU went on to state that in relation to a species protected by EU law, and in particular under the Habitats Directive, *Member State courts must interpret national laws and procedural rules in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3)*. The court held that this approach must be taken by Member State courts *to allow individuals, including NGOs, to challenge any proceedings that are liable to be contrary to EU environmental law*.

In the *DLV case*<sup>xxiv</sup> the Court held that members of the 'public concerned' within the meaning of Article 1(2) and 10a of Directive 85/337/EEC must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, *regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views*. Article 10a of Directive 85/337/EEC precludes a provision of national law which reserves the right to bring an appeal against a decision on



projects which fall within the scope of that directive, as amended, *solely to environmental protection associations which have at least 2 000 members*, as provided for in the Swedish legislation.

In the *Trianel* case<sup>xxv</sup> the Court came to the conclusion that Article 10a of Directive 85/337/EEC *precludes legislation which does not permit non-governmental organizations promoting environmental protection, as referred to in Article 1(2) of that directive, to rely before the courts, in an action contesting a decision authorizing projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337/EEC, on the infringement of a rule flowing from the environment law of the European Union and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.* Such a non-governmental organization can derive, from the last sentence of the third paragraph of Article 10a of Directive 85/337/CEE *the right to rely before the courts, in an action contesting a decision authorizing projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337/EEC on the infringement of the rules of national law flowing from Article 6 of Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this.*

In the *Altrip* case<sup>xxvi</sup> the Court judged that Article 10a of Directive 85/337/EEC must be interpreted as precluding the Member States from limiting the applicability of the provisions transposing that article to cases in *which the legality of a decision is challenged on the ground that no environmental impact assessment was carried out, while not extending that applicability to cases in which such an assessment was carried out but was irregular.* Furthermore, subparagraph (b) of Article 10a of Directive 85/337/EEC must be interpreted as not precluding national courts from refusing to recognize impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, that will be the case *only if the court of law or body hearing the action does not in any way make the burden of proof fall on the applicant and makes its ruling, where appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of all the documents submitted to it, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337/EEC.*

In the *Boxus*<sup>xxvii</sup> and *Solvay*<sup>xxviii</sup> cases the CJEU decided that Article 1(5) of Directive 85/337/EEC must be interpreted as meaning *that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of that directive have been achieved by the legislative process, are excluded from the ambit of that directive.* It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply

'ratify' a pre-existing administrative act, by merely referring to overriding reasons relating to the general interest without a substantive legislative process enabling those conditions to be fulfilled having first been opened, cannot be regarded as a specific legislative act for the purposes of that provision and is therefore not sufficient to exclude a project from the ambit of Directive 85/337/EEC. Furthermore, Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337/EEC, must be interpreted as meaning that: i) when a project falling within the ambit of those provisions is adopted by a *legislative act*, it must be possible for the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive to be submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law; ii) *if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.*

In the *Križan* case<sup>xxix</sup> the CJEU ruled that Article 267 TFEU must be interpreted as meaning that a national court, such as the referring court, is obliged to make, of its own motion, a request for a preliminary ruling to the Court of Justice of the European Union even though it is ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State concerned and even though a national rule obliges it to resolve the dispute by following the legal opinion of that latter court. Furthermore, Article 15a of Directive 96/61/EC must be interpreted as meaning that members of the public concerned must be able, in the context of the action provided for by that provision, to ask the court or competent independent and impartial body established by law *to order interim measures* such as temporarily to suspend the application of a permit, within the meaning of Article 4 of that directive, pending the final decision. A decision of a national court, taken in the context of national proceedings implementing the obligations resulting from Article 15a of Directive 96/61/EC and from Article 9(2) and (4) of the Aarhus Convention which annuls a permit granted in infringement of the provisions of that directive is not capable, in itself, of constituting an unjustified interference with the developer's right to property enshrined in Article 17 of the Charter of Fundamental Rights of the European Union.

In the so-called *Irish costs* case<sup>xxx</sup>, the Court held that it is clear from paragraphs (a) and (b) of the first paragraph of Article 10a of Directive 85/337/EEC, and from paragraphs (a) and (b) of the first paragraph of Article 15a of Directive 96/61/EC, that the Member States must ensure that, in accordance with the relevant national legal system, *members of the public concerned* having a sufficient interest, or alternatively, maintaining the impairment of a right, where the administrative procedural law of a Member State requires this as a precondition, *have access to a review procedure under the conditions specified in those provisions*, and must determine what constitutes a sufficient interest and impairment of a right consistently with the objective of giving the public concerned *wide access to justice*. As regards *the costs of proceedings*, it is clear that the procedures established in the context of those provisions *must not be prohibitively expensive*. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement. *Although it is common ground that the Irish 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, that is merely a discretionary practice on the part of the courts.* That mere practice which cannot, by definition, be certain,

in the light of the requirements laid down by the settled case-law of the Court cannot be regarded as valid implementation of the obligations arising from the said provisions. Furthermore the Court held that in the absence of any specific statutory or regulatory provision concerning practical information on access to administrative and judicial review procedures offered to the public, the mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters.

Similarly, the Court held in the *Edwards* case<sup>xxxix</sup>, regarding the UK practice, that the requirement, under the fifth paragraph of Article 10a of Directive 85/337/EEC and the fifth paragraph of Article 15a of Directive 96/61/EC, *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.* Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment. In the context of that assessment, 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 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. By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him. Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal. In the *UK costs* case<sup>xxxix</sup> the CJEU added that it is also apparent that the regime laid down by case-law *does not ensure the claimant reasonable predictability as regards both whether the costs of the judicial proceedings in which he becomes involved are payable by him and their amount, although such predictability appears particularly necessary because, as the United Kingdom acknowledges, judicial proceedings in the United Kingdom entail high lawyers' fees.* The Court also upheld the Commission's argument that the system of *cross-undertakings* in respect of the grant of interim relief constitutes an additional element of uncertainty and imprecision so far as concerns compliance with the requirement that proceedings not be prohibitively expensive.

### 3. The National Judges responses

There is clear evidence that under the influence of the Aarhus Convention, the Findings and Recommendations of its Compliance Committee and the case law of the CJEU on the Aarhus Conventions and its implementing EU provisions, judges in various member states are re-interpreting their national provisions on access to justice, when the legislator is not taking the requested action, to bring them in line with the Aarhus Convention.

The *Belgian Supreme Court* that has developed in the past very strict standing rules e.g. radically changed its approach with a Judgment of 11 June 2013<sup>xxxiii</sup>. The Court held that Art. 3 (4) of the Aarhus Convention stipulates that Each Party “shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation”. Art. 9 (3) of the Convention stipulate that: “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.” Art. 2(4) define “the public” as “one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organizations or groups”. Therefore, says the Court, it follows from these provisions that Belgium has engaged itself to secure access to justice for environmental NGOs when they like to challenge acts or omissions of private persons and public authorities which contravene domestic environmental law, provided they meet the criteria laid down in national law. Those criteria may not be construed or interpreted in such a way that they deny such organizations in such a case access to justice. Judges should interpret the criteria laid down in national law in conformity with the objectives of art. 9 (3) of the Aarhus Convention. According Art. 3 of the Preliminary Title of the Criminal Procedure Code, the legal action to repair damages belong to the victims. They shall demonstrate a direct and personal interest. When such an action is introduced by an environmental NGO and aims to challenge acts and omissions that contravene domestic environmental law, such an environmental NGO has a sufficient interest to do so.

Applying the criteria set forward by the CJEU in *Boxus* and *Solvay*, the Belgian Constitutional Court came<sup>xxxiv</sup> to the conclusion, looking also to the parliamentary discussions<sup>xxxv</sup>, that the Decree (Act) of the Walloon Parliament of 17 July 2008 does not satisfy the conditions set out by the CJEU to be considered as a “specific legislative act” that can be exempted from full judicial review. The Court annulled the articles 1 to 6 and 15 to 17 of the Decree for violation of the articles 10, 11 and 23 of the Constitution, in combination with the aforementioned provisions of the Aarhus Convention and Directive 85/337/EEC. It declares that the other articles (that were not challenged by a demand for annulment) are violating the same provisions, so that they must be set aside by the courts.

In Germany the *Bundesverwaltungsgericht*<sup>xxxvi</sup> granted an environmental NGO standing to appeal a clean air plan *as section 42 (2) (2) of the German Code on Administrative Court Procedure needed to be interpreted in light of Art. 23 of directive 2008/50/EC and Art. 9 (3)*

*Aarhus Convention*. According to Art. 42 (2) (2) of the Code of Administrative Court Procedure, standing is dependent on an allegation of violation of a subjective individual right. Considering the findings of the CJEU in the Slovak Brown Bear case (C -240/09), the Court did not find that the doctrine of individual legal protection (*Schutznormtheorie*) needed repealing. Rather, the provision on standing in the law needed to be interpreted in conformity with the findings of the CJEU in the Slovak Brown Bear (C - 240/09) and Janecek (C- 237/07) cases. In the latter case, the CJEU had affirmed that individuals as well as legal persons could bring actions regarding clean air plans, if maximum permissible values had been exceeded. As rightful protectors (*prokuratorische Rechtsstellung*) of objective environmental interests on matters concerning EU environmental law, the Court found that registered environmental interest organisations according to section 3 of the German Environmental Appeals Act can claim standing before German administrative courts. According to the BVerwG, this provision establishes a general principle that recognised NGOs can be considered as the public “concerned” (following article 2 paragraph 5 of the Aarhus Convention). Hence, they must now be regarded as individually affected and, consequently, given access to justice in decisions concerning the amendment of clean air plans following Art. 23 of directive 2008/50/EC.

The *Czech* administrative courts, including the Supreme Administrative Court, follow the CJEU case law and are consistent with it. The *Slovak Brown Bear* and the *Trianel* decisions were referred to in several cases, for example the decision of 22 July 2011, File No. 7 As 26/2011 -175, the decision of 31 January 2012, File No. 2 Ao 9/20 11-72, the decision of 27 April 2012, File No. 7 As 25/201 2-21, the decision of 5 February 2012, File No. 1 Ao 1/20 12-66 and the decision of the Regional Court in Brno of 14 December 2011, File No. 30 Ca 23/2008-123. The *DLV* decision was referred to in the decision of 13 October 2010, File No. 6 Ao 5/2 010-43 and the decision of 26 June 2013, File No. 6 Aps 1/2013 -51<sup>xxxvii</sup>.

#### 4. Conclusion

Article 9 of the Aarhus Convention is a crucial provision in view of improving the implementation and enforcement of environmental law in the member states of the convention, including the member states of the European Union, that are now all parties to the Convention. The openness of the Aarhus Convention Compliance Committee to communications of the public and the intensive dialogue between national judges and the CJEU on the interpretation of that article and its implementing EU legislation, are important factors to give rise to an abundant jurisprudence on the interpretation of the access to justice provisions. Both bodies are interpreting the provisions in a way that they are really becoming effective for the protection of the environment. National judiciaries, which have been traditionally reluctant to open up their doors for public interest litigation, are starting to follow up this approach, and are re-interpreting national procedural laws in a way that they are becoming consistent with the Convention. When this way of acting is confirmed and becoming systematic, one may expect that citizens and NGOs will indeed become important partners in the enforcement of environmental law, and that judges can fully use their

mandate to uphold the rule of law for the benefit of the protection of the environment. We can only welcome such an evolution.

<sup>i</sup> See on IUCN's early involvement in networking of the judiciary in environmental matters: N. ROBINSON, "The Courts confront environmental legal challenges after the Johannesburg Summit", in A. POSTIGLIONE (ed.), *The role of the judiciary in the implementation and enforcement of environmental law*, Brussels, Bruylant, 2008, 81-88.

<sup>ii</sup> A. POSTIGLIONE (ed.), *The role of the judiciary in the implementation and enforcement of environmental law*, Brussels, Bruylant, 2008, 502 p.

<sup>iii</sup> [www.iucn.org](http://www.iucn.org)

<sup>iv</sup> G. CANIVET, "Forum of European Judges for the Environment" in A. POSTIGLIONE (ed.), *The role of the judiciary in the implementation and enforcement of environmental law*, Brussels, Bruylant, 2008, XIII.

<sup>v</sup> L. LAVRYSEN, "The role of National Judges in Environmental law", *Environmental law and policy at the turn to the 21st century : liber amicorum Betty Gebers - Umweltrecht und -politik an der Wende zum 21. Jahrhundert*. Berlin, Lexion, 2006, p. 81-96; <http://inece.serverbox.net/newsletter/12/lavrysen.pdf>

<sup>vi</sup> [http://www.eufje.org/EN/conferences/brussels\\_2010/program\\_including\\_presentations](http://www.eufje.org/EN/conferences/brussels_2010/program_including_presentations)

<sup>vii</sup> <http://www.unece.org/env/pp/ppdm.html>

<sup>viii</sup> <http://www.unece.org/environmental-policy/treaties/public-participation/meetings-and-events/public-participation/2007/high-level-judicial-seminar-on-access-to-justice-in-environmental-matters-for-eastern-europe-and-south-caucasus-region/docs.html>

<sup>ix</sup> <http://www.unece.org/environmental-policy/treaties/public-participation/meetings-and-events/public-participation/public-participation/2008/high-level-judicial-seminar-on-access-to-justice-in-environmental-matters-for-the-south-eastern-european-region/docs.html>

<sup>x</sup> <http://www.unece.org/centralasianmeeting2012.html>

<sup>xi</sup> [http://ec.europa.eu/environment/consultations/access\\_justice\\_en.htm](http://ec.europa.eu/environment/consultations/access_justice_en.htm)

<sup>xii</sup> [http://ec.europa.eu/environment/consultations/inspections\\_en.htm](http://ec.europa.eu/environment/consultations/inspections_en.htm)

<sup>xiii</sup> <http://ec.europa.eu/environment/legal/liability/index.htm>

<sup>xiv</sup> See: *Milieu Ltd, Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, Brussels, 2007, 23 p + annexes; J. Darpö, "Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9 (3) and 9 (4) of the Aarhus Convention in Seventeen of the Member States of the European Union", J.H. Jans, R. Macrory & A.-M. Moreno Molina (eds.), *National Courts and EU Law, The Avosetta Series (10)*, Europa Law Publishing, Groningen, 2013, p. 169-212.

<sup>xv</sup> N. Goeteyn & F. Maes, "Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance ?", *Chinese Journal of International Law*, 2011, p. 811, 815

<sup>xvi</sup> <http://www.unece.org/env/pp/pubcom.html>

<sup>xvii</sup> [http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC\\_GuidanceDocument.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf)

<sup>xviii</sup> <http://www.rac.org.ua/en/activities/publications/cc-case-law/> (first edition) and <http://www.rac.org.ua/en/activities/publications/cc-case-law-2nd/> (second edition)

<sup>xix</sup> Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, *O.J. L*, 17 May 2005.

<sup>xx</sup> 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, *O.J. L*, 14 February 2003; 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, *O.J. L*, 25 June 2003.

<sup>xxi</sup> Furthermore, on 24 October 2003 the Commission presented a Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters [COM(2003) 624]. It was recently withdrawn by the European Commission (*OJ C*, 21 May 2014) that had to acknowledge that the proposal received insufficient support from the member states to be able to be adopted the Council with the necessary qualified majority. The Commission is preparing a new proposal and has commissioned different studies in the preparation of it (see: <http://ec.europa.eu/environment/aarhus/studies.htm>). The Commission organised also in the run up to a new proposal a public consultation on 'Access to justice in environmental matters – options

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for improving access to justice at Member State level'. The public consultation was organised from 28th June until 23rd September 2013. See : <http://ec.europa.eu/environment/aarhus/consultations.htm>

<sup>xxii</sup> [http://curia.europa.eu/jcms/jcms/Jo2\\_7024/](http://curia.europa.eu/jcms/jcms/Jo2_7024/)

<sup>xxiii</sup> CJEU (Grand Chamber), 8 March 2011, *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (Case C-240/09).

<sup>xxiv</sup> CJEU, 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* (Case C-263/08).

<sup>xxv</sup> CJEU, 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* (Case C-115/09).

<sup>xxvi</sup> CJEU, 7 November 2013, *Gemeinde Altrip and Others v Land Rheinland-Pfalz* (Case C-72/12).

<sup>xxvii</sup> CJEU (Grand Chamber), 18 October 2011, *Antoine Boxus and Others v. Région wallonne* (Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09).

<sup>xxviii</sup> CJEU, 16 February 2012, *Marie-Noëlle Solvay and Others v Région wallonne* (Case C-182/10).

<sup>xxix</sup> CJEU (Grand Chamber), 15 January 2013, *Jozef Križan and Others v Slovenská inšpekcia životného prostredia* (Case-416/10).

<sup>xxx</sup> CJEU, 16 July 2009, *Commission of the European Communities v Ireland* (Case C-427/07).

<sup>xxxi</sup> CJEU, 11 April 2013, *David Edwards, Lilian Pallikaropoulos v Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs* (Case C 260/11).

<sup>xxxii</sup> CJEU, 13 February 2014, *European Commission v United Kingdom of Great Britain and Northern Ireland* (Case C-530/11).

<sup>xxxiii</sup> Hof van Cassatie, 11 June 2013, Nr. P.12.1389.N

<sup>xxxiv</sup> Constitutional Court, Nr. 144/2012, 22 November 2012, *M.-N. Solvay c.s. v. Walloon Region*

<sup>xxxv</sup> It seems that the UK Supreme Court is for constitutional reasons not willing to take a similar approach in a comparable case: UK Supreme Court, Judgment of 22 January 2014, *R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport and another and Others*, [2014] UKSC 3, [http://supremecourt.uk/decided-cases/docs/UKSC\\_2013\\_0172\\_Judgment.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2013_0172_Judgment.pdf)

<sup>xxxvi</sup> BVerwG, 7 C 21.12, 5 September 2013,

<http://www.bverwg.de/entscheidungen/entscheidung.php?ent=050913U7C21.12.0>

<sup>xxxvii</sup> <http://www.eufje.org/uploads/documentenbank/d9635f2c7f27054bcfc8afafa15859fb.pdf>