EUROPEAN COMMISSION
DIRECTORATE-GENERAL
ENVIRONMENT

WORKING DOCUMENT
ON POSSIBLE OPTIONS FOR A NEW COMMISSION INITIATIVE ON ACCESS TO JUSTICE

I. Introduction

The aim of this paper is to facilitate an exchange of views on access to justice in environmental matters in the light of recent policy documents, political developments and the case-law of the Court of Justice of the European Union ("the Court").

By way of background, provisions on access to justice are already found in some existing secondary legislation concerning access to information, environmental impact assessment and industrial permits. These provisions reflect those of Article 9(1) and (2) of the Aarhus Convention.

Basing itself on Article 9(3) of the Aarhus Convention, the Commission made a proposal[1] in 2003 to extend access to justice provisions to the wider environment *acquis.* This stalled but, since 2003, the Court has delivered a number of important rulings confirming that, even in the absence of specific access to justice provisions in secondary EU legislation, there are rights of access based on general principles of EU law.

The Commission drew attention to these rulings in its 2012 Communication on implementing EU environment law[2] and the Commission's proposal for a 7th Environment Action Programme[3] identified a need to ensure that national provisions on access to justice reflect the case-law of the Court.

The Commission commissioned a number of academic studies on the issue.[4] They supported its analysis that there was a need for national provisions to reflect the case-law.

The June 2012 Environment Council conclusions[5] called for the improvement of access to justice in line with the Aarhus Convention. In resolutions from 2012[6] and 2013[7], the European Parliament called for a directive on access to justice. The Committee of the Regions has also shown support for a directive on access to justice.[8]

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

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1 COM(2003) 624 final – 2003/246/COD

2 Improving the delivery of the benefits from EU environment measures: building confidence through better knowledge and responsiveness (COM/2012/95). "

3 COM(2012)710final

4 See summary in Jan Darpo, 2012, "Effective justice? Synthesis report of the study on the implementation of Articles 9(3) and (4) of the Aarhus Convention in seventeen Member States of the European Union available at http//ec.europa.eu/environment/Aarhus

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

6 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));

7 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))

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

While some of the case-law relates to specific existing access to justice provisions[9] 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.

Based on information assembled to date, this paper summarises the issues as well as possible objectives and options in order to help frame the exchange of views. It is proposed that the discussion be guided by the questions presented at the end of each section.

By way of reference, there is an annex setting out a time-line on the topic, the relevant provisions of the Aarhus Convention, a summary of the case-law and summaries of the academic studies the Commission has obtained[10].

II. Issues to be addressed

The issues presented below relate to

A. The general uncertainties arising from the implications of the Court's access to justice case-law and the case-law trends;
B. The entitlement of citizens and NGOs to bring cases to national courts, i.e. standing;
C. The degree of scrutiny that national courts should apply to the issues presented to them;
D. The costs of bringing actions;
E. The remedies that national courts should employ when they find a breach of EU law or see a risk of a breach;
F. The efficiency of national court procedures;
G. The possible role of alternative dispute resolution mechanisms, in particular mediation.

A. *General uncertainties*

The following general uncertainties can be mentioned:

- Uncertainty resulting from the full implications of the existing case-law;
- Uncertainty resulting from the scope for – and probability of - future interpretative case-law.

The full implications of the existing case-law have not yet been tested:

- Within particular strands of the case-law, the rationale for some decisions can be applied to other parts of the environment *acquis.* For example, the health rationale for recognising standing in the *Janecek* case – see reference in the annex - in relation to air legislation could be extended to other environment legislation that has a significant health component;
- Moreover, different strands of the case-law could be brought together. For example, although it has arisen in relation to existing Aarhus-derived legislation, the case-law on costs could be found to have relevance for the standing rights confirmed in *Janecek.*

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

10 It should be stressed that these studies represent the views of the consultants and not necessarily those of the Commission.

Leaving aside the existing case-law and its implications, the pattern of recent years shows an appetite on the part of national courts to put interpretative questions to the Court on access to justice. There is no reason to suppose that this pattern will end.

B. *Issues related to standing*

The *Janecek* and the *Slovak Brown Bears cases* – see references in the annex - imply the need for each Member State to at least ensure that citizens and/or NGOs have access to justice in the specific subject-areas concerned by those rulings, i.e. EU air quality legislation in the case of the former and derogations under the EU Habitats Directive in the case of the latter.

Direct challenges include the following:

- The need for each Member State to ensure that its access to justice rules comply with these rulings;
- The need for the Commission to uphold these rulings in as much as they now form part of EU law on access to justice.

The legal-factual studies that the Commission has undertaken point to problems of non-adaptation to these rulings.

A more indirect challenge includes the following:

- Ensuring that standing rights are not restricted in other areas of EU environment law to which the rationales of *Janecek* and *Slovak Brown Bears* apply by analogy.

The extent of further litigation will depend on whether, when and to what extent these challenges are addressed.

C. *Issues related to the scope of judicial review*

The case-law shows that access to justice involves not only questions of standing and the costs of litigation but also questions of how wide and deep should be the scrutiny by national courts of the administrative decisions contested before them. In particular, should national courts confine themselves to the procedural correctness of the decision-making process or should they also enter into the substantive legality of the decisions - and if so how?

D. *Issues related to costs*

The academic studies – as well as complaints – indicate that high costs remain a barrier to access in some jurisdictions. There is also a developing case-law on this.

E. *Issues related to the remedies for addressing breaches or alleged breaches*

As will be seen from the Annex, the case-law extends to how national courts should deal with situations where they find that there is a breach of EU environment law.

This strand of the case-law shows the interest of the Court in ensuring that there are effective remedies in order to guarantee the full effectiveness of EU law. Such remedies may mean revoking or suspending certain administrative decisions or even awarding compensation to a plaintiff.

This strand of the case-law includes the following challenges:

- Defining when and to what extent a development consent should be invalidated for breach of a procedural or substantive requirement;
- Defining when injunctive relief should be granted;
- Defining when and to what extent compensation should be given for a breach.

F. *Issues related to ensuring the efficiency of judicial procedures*

Article 9(4) of the Aarhus Convention provides that judicial procedures should be "timely". The efficiency of a procedure will also play a role in the cost of a court case.

A 2013 European Parliament resolution[11] calls for more effective procedures, including by reducing undue delays in environmental litigation. The proposal for the 7th EAP has an overarching objective of smart regulation[12], in order to ensure that unnecessary administrative burden is not imposed on Member States.

The Supreme Court Judges Association, ACA-Europe, has sought to compare best practices across jurisdictions[13] and has looked at the following: timeliness and means to expedite cases, the use of penalties in case of abuse of rights, use of electronic resources, the possibility of fast-track proceedings, restrictions on the right of appeals, means to handle vexatious claims, and the possible role of specialist judges/courts.

G. *Issue of defining a possible role of alternative dispute resolution (mediation)*

Alternative dispute 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 promotion of alternative dispute resolution.

There already exists an EU instrument on the use of mediation in civil and commercial matters which may serve as a model[14].

The Commission has also undertaken a study which explores the use of mediation in the environmental field in a number of Member States.[15]

Questions:

1. Do you agree that these issues arise in relation to access to justice?

2. Do you consider that there are other issues which need to be taken into account?

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11 "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;

12 All measures, actions and targets set out in the new general environment action programme should be taken forward in accordance with the principles of smart regulation and subject to comprehensive impact assessment where appropriate"

13 Preventing backlog in administrative justice, Luxembourg 2010 based on the XXIInd Congress of ACA Europe

14 Directive 2008/52 on certain aspects of mediation in civil and commercial matters.

15 "Environmental complaint-handling and mediation mechanisms at national level (2013) available at: http://ec.europa.eu/environment/aarhus/pdf/mediation_and_complaint-handling.pdf;

III. What would be the objectives of action to address these issues?

It would seem appropriate that any objectives would reflect the issues previously described.

The proposal for a 7th EAP sets out the general objective of ensuring that by 2020 the principle of effective legal protection for citizens and their organisations is facilitated. It states that this requires *"ensuring that national provisions on access to justice reflect the case-law of the Court of Justice of the European Union, 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.

To this might be added the following more specific objectives:

- *Ensure a right of access to national courts in line with the case-law* to address the issue of standing for individuals and NGOs 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* to provide greater clarity in line with the case-law.
- *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 alternative dispute resolution* as a complementary solution

Questions:

3. Do you agree that these are appropriate objectives to pursue?

4. Do you consider that there are any other objectives which need to be taken into account?

IV. What are the options to address the identified issues and objectives?

The Commission has identified the following options for addressing the challenges of ensuring a satisfactory level of access to justice. Following each option, there is a brief summary of the 'pros' and 'cons', taking into account the findings of an economic study[16] that analysed them.

- *1st option*: business-as-usual, soft-law approach, involving existing cooperation with judges, stakeholders, eJustice portal and a commentary or guidelines explaining the significance and implications of Treaty provisions and case-law.

  Pros:
  - Less burden for the Member States and institutions as legislators, in the short term,
  - Very broad discretion for Member States until intervention by the Court.

  Cons:
  - No legal certainty for the stakeholders, including economic operators,
  - Possible further Aarhus Compliance Committee findings against Member States for non-compliance with Article 9 (3) and/or (4) of the Aarhus Convention,
  - Possible further Court rulings based on general principles of EU law,
  - Very high costs of legal uncertainty,
  - High costs for danger of pollution havens and distortion of competition,
  - There is a danger for investors that their projects are stopped for years by national courts until preliminary references are dealt with by the Court due to the many questions that may arise in an uncertain legal environment,
  - Slow process of developing case-law, with an uncertain outcome, where the EU legislators may miss an opportunity to influence this process.

- *2nd option*: in addition to the elements of the 1st option, use of Article 258 of the Treaty on the Functioning of the European Union (TFEU)[17] to address any gaps in Member State provisions for ensuring access in line with Court case-law[18], and the latest Treaty provisions. Under this option, Commission would use its enforcement powers to secure what the case-law already indicates as necessary.

  Pros:
  - The Court can provide a very broad interpretation of access to justice based on general principles of EU law in areas not already covered by existing EU secondary legislation on access to justice (some might see this as a con).

  Cons:
  - It could result in protracted litigation in an environment of high legal uncertainty causing additional costs for all stakeholders,

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16 Possible initiatives on access to justice in environmental matters and their socio-economic implications, Final Report submitted by: Maastricht University Faculty of Law, METRO(2013) led by Professor Faure available at http//ec.europa.eu/environment/aarhus

17 i.e. The provision that allows the Commission to take legal action against Member States.

18 notably *Janecek* and *the Slovak Brown Bears case* - see in Annex

- There is a danger for investors that their projects are stopped for years by national courts until preliminary references are dealt with by the Court due to the many questions that may arise in an uncertain legal environment,
- Slow process of developing case-law, with an uncertain outcome, where the EU legislators may miss an opportunity to influence this process.

- *3rd option*: legislation targeted more precisely on entitlement to access implied by the case-law of the Court with the conditions of access mirroring those already established for environmental impact assessment.

  Pros:
  - Greater legal certainty would be beneficial for all stakeholders, including civil society, business, but also judges,
  - Member States could influence the exact scope and level of access to justice through the inter-institutional process (rather than be subject to court judgments),
  - A new instrument could take into consideration all relevant arguments of the stakeholders and incorporate case-law developments,
  - Potentially the danger of pollution havens could be avoided,
  - Eventual distortion of competition in the internal market could be avoided by ensuring a fairly even level of access to justice in the EU Member States,
  - The benefits of a legal instrument are likely to outweigh the costs both for the Commission and the stakeholders,
  - A new proposal would also imply a full-fledged impact assessment covering all Member States, with provisions adapted to all national legal characteristics.

  Cons:
  - As a legislative instrument would determine the case-law of the Court, the latter would be left with a smaller influence on the specificities of access to justice (some might see this as a pro).

- *4th option*: retain the Access to Justice Proposal with possible minor adaptations. The pros and cons would be similar to those applying to the 3rd option with the following differences.

  Pros:
  - Very broad interpretation of Article 9 (3) – the article the proposal was intended to address - as compared to Option 3 (some might see this as a con),
  - Potentially a faster track procedure could be used to adopt the proposal, as the Commission would not have to withdraw the old proposal and propose a new instrument, but use the existing one – however, this would presuppose a Council willingness to re-activate the proposal,

  Cons:
  - Less possibility to take into account relevant case-law developments and Member States concerns,
  - At the time of adoption, the EU had fewer Member States, therefore the initial preparations did not take into account the characteristics of all national legal systems.

As an overall conclusion, the economic study suggests that the most effective option would the 3rd option, as a minor modification of the proposal would not suffice due to the elapsed time since its adoption and in light of major developments.

Questions:

5. Do you consider these options to be appropriate ones for further analysis?

6. Do you consider that there are other options that should be considered for further analysis?

ANNEX

1. Time-line on Access to Justice

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[19]
- Commission makes a general proposal on access to justice[20]

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[21]

2009 Entry into force of the Lisbon Treaty and the Charter of Fundamental Rights, incorporating the principle of effective judicial protection[22]

2012

- Commission Communication on "Improving the delivery of the benefits from EU environment measures: building confidence through better knowledge and responsiveness"[23] *inter alia* refers to access to justice
- 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[24]

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19 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)

20 COM(2003) 624 final – 2003/246/COD

21 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)

22 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)

23 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."

- European Parliament Resolution on the review of the 6th Environment Action Programme [25] *inter alia* calls for a directive on access to justice
- June 2012 Council Conclusions[26] *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[27]

- Proposal for a 7th EAP[28] aims at improved access to justice in line with the case-law

2013

- European Parliament Resolution[29] *inter alia* calls again for a directive on access to justice

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25 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;"

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

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

28 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."

29 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

"(...) 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 Court

The summary below is not intended to be exhaustive.

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

To bring an action before a national court, 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 acts or omissions which do not affect the rights of the plaintiff. This creates an obstacle to challenges related to environment law because it can be difficult to demonstrate that the 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 to environmental NGOs ("eNGOs").

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

- The general importance the Court 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 eNGOs in defending nature;
- The Court's support for a wide interpretation of the role of eNGOs under existing access to justice provisions derived from Aarhus.

(1) Case C-72/95, *Kraaijeveld*[30]

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[31].

The Court stated:

> *"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, ...)."*

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

31 Directive 2011/92/EU

(2) Case C-237/07[32], *Janecek*

The Court 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 Court stated:

> *"(...)*
> *42 The answer to the first question must therefore be that Article 7(3) of Directive 96/62[33] 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[34], *Slovak Brown Bears*

This case concerned an eNGO's entitlement to challenge a ministerial hunting derogation from the strict species protection provisions of the Habitats Directive[35]. The Court 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 must nevertheless facilitate access by eNGOs.

The Court 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 (...).*
> ...
> *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.*
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> *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*

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

33 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

34 Case C-240/09 Lesoochranárske zoskupenie [2011] ECR I-000 not yet reported

35 Directive 92/43/EEC

following administrative proceedings liable to be contrary to EU environmental law."

(4) Case C-263/08[36]

The case involved a challenge to Swedish national rules which restricted standing to NGOs with at least 2000 members. The Court 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[37]**- *Trianel***

This case involved a challenge to national legislation providing that only eNGOs, 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 Court held that this is contrary to EU law, and that eNGOs 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*[38]

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

The Court 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.

However, the Court 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.

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

37 Trianel-case, C-115/09. ECR [2011] - not yet reported

38 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

(7) C-427/07[39] *Commission v Ireland*

The Court 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[40] *Edwards* and *C-530/11 Commission v UK*[41].

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 Court found that the test can include subjective or case-specific criteria but that these should never be objectively unreasonable.

The Court 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 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.

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

40 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

41 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.

(9) 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.

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 Court 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*[43]

In the context of a dispute related to the EIA Directive, the Court ruled that it is for the national court to determine whether it is possible under national law for a consent already granted to be revoked or suspended, or alternatively, to grant compensation for the harm suffered.

The Court 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*

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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

43 Case C-201/02. European Court Reports 2004 Page I-00723

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*[44]

The Court 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*[45]

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

The Court 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 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."

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

45 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

5. The Executive summary of the "Economic implications of access to justice" study[46]

Aim and scope of the study

The aim of this research is to present, at EU level, the socio-economic effects of changes in the regulation of public access to justice in environmental matters. Background is Article 9 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which under the third pillar calls for a reasonable entitlement to access (locus standi) and reasonable conditions of access (i.e. fair and effective procedures in terms of time and costs). Whereas the first two pillars of the Aarhus Convention have been covered in EU law by means of two Directives from 2003, proposal COM(2003)624 from that same year, directed at implementing provisions relevant to the third pillar, received strong opposition from a number of Member States. Recent events - such as the entry into force of the Lisbon Treaty, but in particular developments in CJEU case-law - have put this pending proposal and alternative ways of improving access to justice back in the spotlight.

Our analysis of the economic effects of an increased access to justice addresses four options that were proposed in the Invitation to Tender:

1. Business-as-usual, soft-law approach;
2. Addressing any existing gaps in MS provisions for ensuring access to justice on the basis of Article 258 TFEU;
3. Drafting a new legislative proposal (or significantly amend COM(2003)624) targeted more precisely on entitlement to access implied by the cases *Janeček* and *Slovak Brown Bear*, with the conditions of access mirroring those already established for environmental impact assessment;
4. Sticking to the original proposal, i.e. COM(2003)624, with possible minor modifications.

It should be stressed that our study was running parallel to another research that addressed access to justice in EU Member States from a legal perspective. Hence, the goal of our study was not to examine to what extent Member States accurately implemented the environmental acquis with respect to access to justice, nor the Aarhus Convention. Also, the report did not aim to provide an impact assessment of the costs of

[46] Possible initiatives on access to justice in environmental matters and their socio-economic implications, Final Report submitted by: Maastricht University Faculty of Law, METRO(2013) led by Professor Faure available at http//ec.europa.eu/environment/aarhus

access to justice. Rather, the four options of access to justice were examined from a Law and Economics and Law and Sociology perspective.

Chapters 2 and 3 of the report provide the legal background and closer examination of the four options. Chapter 4 provides the economic framework for analyzing access to justice in environmental matters, both from a theoretical perspective and applied to the four options. The results of a brief Law & Society analysis are presented in Chapter 5. Chapter 6 contains a small number of country studies. The empirical analysis contained in that chapter, in which the results obtained in the theoretical study are tested by means of interviews, is crucial since it provides indications on how stakeholders experience the differences between the four options. Conclusions and policy recommendations are presented in Chapter 7.

Background of the study (Chapters 1-3)

Case law based on Directive 2003/35/EC provides a broad interpretation of the possibilities of access to justice in the areas where the EIA and IPPC Directives apply. However, the interpretation and application of Article 9(2) of the Aarhus Convention still significantly differs in the Member States. The most important development in case law comes from the *Slovak Brown Bear Case,* which forces national courts to interpret law as much as possible in such a way as to enable environmental NGOs, in line with Article 9(3) of the Aarhus Convention, to challenge administrative environmental decisions in Member States. However, this case alone will not lead to a full application of Article 9(3) since substantial differences between EU Member States in the application of Article 9(3) do exist and are likely to remain. Nevertheless, many Member States may anyway be forced to bring their national legislation in line with the obligations resulting from the Aarhus Convention as interpreted by the CJEU.

Law and Economics (Chapter 4)

Several economic perspectives on access to justice are presented, including a welfare economic analysis and a behavioral approach, which focuses on the question how different rules affect the incentives of stakeholders. Starting point of the economic analysis is that access to justice is considered positively, provided that such access does not lead to frivolous litigation. Environmental harm is seen as a negative externality which can be reduced by litigation. A judgment can be considered as a public good (since others than the parties involved may benefit from it) and when e.g. injunctive relief is awarded (prohibiting e.g. the legal installation of a harmful activity) such a decision can generate positive externalities. However, economists also stress that cases may generate high costs and therefore strongly advocate settlements over trials. In the behavioral Law and Economics literature particular 'biases and heuristics' are discussed that may affect the behavior of the judiciary, which may

result in potential plaintiffs not bringing particular suits, preventing a maximization of social welfare. Standing for NGOs is from an economic perspective considered as positive since it can remedy the "rational apathy" problem that may emerge when the damage has a very widespread character, an argument that often applies to environmental harm. The same rationale that justifies class actions in case of consumer losses of a scattered nature also justifies standing for environmental NGOs, under the important condition that these eNGOs serve a public interest goal.

Addressing the question how the four options will affect the incentives of the various stakeholders involved, we conclude that the first two options (business as usual and addressing existing gaps via case law) have the disadvantage that legal uncertainty will to a large extent remain. Options 3 and 4 both rely on the creation of a new directive, which is likely to reduce uncertainty costs. In both options access to justice would be enlarged, especially in option 4 (sticking to the original proposal COM (2003) 624). This may potentially even lead to overdeterrence where questions could arise as a result of the broad scope of the proposal. This could hence lead to a slight preference for option 3 (drafting a new legislative proposal taking into account the recent case law). Our economic analysis added an additional perspective by looking at the extent to which the various options create a level playing field for industry and plaintiffs. Theoretically, differences between Member States as far as access to justice in environmental matters is concerned, could endanger the level playing field. Options 1 and 2 do not guarantee a level playing field, whereas this is more likely under options 3 and 4. However, in option 4 cross-border NGO standing would not be regulated. This would hence once more suggest a slight preference for option 3.

The advantage of option 3 is that compared to options 1 and 2 it provides more legal certainty and that there may be a higher deterrent effect in terms of internalizing environmental externalities. In economic terms option 3 may even lead to an optimal number of suits, while it would be less costly than option 2, since calls on the CJEU could be avoided. Option 3 might also have the advantage compared to option 4 that it is less controversial, given the high opposition that originally occurred against proposal COM(2003) 624. Option 3 potentially also has the advantage of creating fewer possibilities for strategic behavior by NGOs, and less of a danger of overdeterrence. Perhaps the new draft, under option 3could include more precise definitions and eventually not aim at explicit criteria for recognition of NGOs. Also the environmental mediation that could be included in option 3 could (under specific conditions) have the advantage of creating a low-cost alternative compared to the court system.

Law and Society (Chapter 5)

The Law and Society approach enlightens why generally a requirement of locus standi is necessary, but also shows that sticking to a very strict standing requirement and hence restricting access to justice may not be in the public interest in the environmental

cases addressed in this study. Options 1 and 2 would not bring legal certainty, but may rather result in an extremely diverse legal environment. Option 4 could have advantages, but given the opposition to the Commission's original proposal, this option may not be very realistic, even when taking into account that there is now some CJEU case law. Option 3 may represent the "best of both worlds" by on the one hand allowing an implementation of case law and the environmental acquis with respect to access to justice, while at the same time preserving some regulatory autonomy for the Member States. However* in order to make environmental access to justice work, it is important to develop a genuine legal culture in favor of environmental public interest litigation. Hence, lawyers and civil society organizations could accompany the process of implementing option 3.

Empirics (Chapter 6)

Chapter 6 presents the empirical part of the research and more particularly country studies relating to Latvia, the United Kingdom and Germany. The goal of these country studies was to test the hypotheses formulated in the earlier chapters and more particularly to examine the preferences of stakeholders (plaintiffs, operators, administrative authorities, judiciary) in the Member States with regard to the four regulatory options central to this study. Rather than asking interviewees to react to these options directly, specific elements that are part of one or more of these options were discussed, such as suspensive effect, possible outcomes of proceedings, system costs, requirements for eNGOs and litigation between private parties.

Interestingly, all interviewees held that it could be useful to provide a definition of the concept *'environmental matters* ', to which Article 9 (3) of the Aarhus Convention refers. This follows up on the importance of legal certainty that was explicitly mentioned in the economic analysis. On the other hand, no one objected that this definition would follow from national law rather than EU law. Currently e.g. Latvia is doing without such a definition and decides on a case-to-case basis whether (an aspect of) the case is environmental, apparently not leading to large difficulties.

Latvia and the UK have broad standing rules. Latvia moreover has very low costs for access to justice. Despite the combination of broad standing rules and low costs, there have been few environmental cases in Latvia. Although various possible explanations for that result were provided, an important one seems to be the quality and functioning of eNGOs. Well-functioning eNGOs are able to bundle and channel environmental complaints, rather than creating excessive litigation.

Only Germany has particular demands as far as the recognition of NGOs is concerned. If option 3 were followed, one could consider that the new directive provides particular minimum requirements for eNGOs. These requirements could guarantee that eNGOs indeed act for the goal for which they have been created.

The economic notion of legal certainty is, as we mentioned earlier, an important issue for many respondents in the countries we analyzed. Surprisingly, however, the respondents did not expect that "leveling the playing field" would be considered as a major issue for enterprises. It was generally believed that the less enterprises are hindered by eNGOs, the better. However, it was not held that differences in that respect between Member States constitute a major argument in favor of harmonization. Reducing legal certainty, however, would.

To a large extent the interviews confirmed the theoretical preference for option 3. A new directive would have the advantage of e.g. providing some requirements for the functioning of NGOs. This would at the same time allow NGOs to have the positive function of streamlining and channelling social unrest and thereby preventing litigation. From that perspective, locus standi for environmental NGOs (not necessarily for individuals) would not be problematic.

Policy suggestions

Based on our theoretical and empirical research, opt for option 3, i.e. a new legislative proposal (or significantly amended COM(2003)624) incorporating the recent CJEU case law. This would also have the possibility of introducing an optional environmental mediation.

Additional policy suggestions are formulated with a slight degree of caution. The reason is that some of these recommendations are based on reactions from respondents during the interviews and have not always been subject of thorough theoretical research (for details see Chapters 6 and 7).

- Provide a more precise definition of what the environmental matters are to which Article 9(3) of the Aarhus Convention would be applicable, thereby avoiding complex and too detailed definitions;
- Stimulate the functioning of environmental NGOs;
- Reduce costs and risks for plaintiffs;
- Accompany any formal change in legislation by measures that will promote a behavioral change as far as the legal culture promoting access to justice in environmental matters and compliance with (European) environmental law is concerned

6. Summary of the study on factual findings in 17 Member States[47]

4. Summarizing the recommendations

General proposals

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

Standing and the scope of the review

- The definition of those members of the public who shall be afforded access to justice possibilities under the directive may be copied from the basic one used in the EIA Directive, that is, "the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures (...). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest".
- The double approach to standing for individuals used in the EIA Directive and the IPPC/IED Directive, expressly referring to interest-based or right-based systems should be avoided.
- There are good reasons for having criteria for ENGO standing and they can – at least to some extent – reflect the ones used in the 2003 proposal. However, the requirements for registration and auditing of the annual accounts should be avoided. Also the time criterion may be abandoned, or, at least, combined with a general possibility to show public support by presenting 100 signatures from members of the public in the area affected by the activity at stake.
- The directive should contain an express provision on anti-discrimination, reflecting Article 3.9 of the Aarhus Convention.
- A provision clarifying that members of the public should have access to a review procedure regardless of the role they have played in the participatory stage of the decision making should also be included.
- The scope of review should include both the procedural and the substantive legality of the contested decision. In order to clarify the latter, the directive might indicate that the applicant should have the possibility to challenge the content of the contested decision and that the reviewing body is responsible for investigating the case in any relevant aspect that the applicant invokes.

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47 Jan Darpö, 2012, "Effective justice? Synthesis report of the study on the implementation of Articles 9(3) and (4) of the Aarhus Convention in seventeen Member States of the European Union available at http//ec.europa.eu/environment/Aarhus

- The issue of administrative omissions needs to be addressed. The model used in the 2003 proposal for an access to justice directive, which outlined a procedure for challenging non-decisions or passivity by the responsible public authorities, is a way forward for so doing.

Costs in the environmental procedure

- Rules for the capping of costs in the environmental procedure should be included in the directive. However, those rules should be made generally applicable for all Union law on the environment.
- A general provision on costs should be included in the access to justice directive, emphasizing that the costs in environmental proceedings shall be set by the application of an objective test of what is prohibitively expensive for an ordinary citizen, civil society group or ENGO, taking into account the cost of living in the country. It shall also state the necessity to take due account of the public interest in environmental protection in the case. The rules on cost liability shall contribute to the aim of broad access to justice for members of the public.
- A provision is needed stating that appeal fees and court fees should be set at a reasonable level, preferably applying a flat rate.
- Schedules for the capping of costs in environmental proceedings are recommended. If cost schedules are not set by express legislation, there should exist a possibility for the applicant to get a separate decision on the cost issue at an early stage of the proceedings.
- With respect to public authorities, a provision on one-way cost shifting is needed.
- There is also a need for a provision stating that when deciding on legal aid, due account should be taken of the public's interest in the case. In addition to this, the schemes should allow for ENGOs to receive legal aid under certain conditions.
- Stronger liability for costs may apply in malicious and capricious cases.

Issues on effectiveness

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

Annex A: Barriers in the environmental procedure

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

Country	**Indiv. stand**	**NGOs stand**	**Costs**	**Effective**	**Explanation**
BE		X		X	No standing for ENGOs in certain civil cases. Uncertain A2J in relation to administrative omissions. Unstable case law of the Supreme Administrative Court since the entry into force of the Aarhus Convention…
CY	X	X			Schutznormtheorie, limited possibilities to challenge envtl decisions…
CZ	(X)	X		X	Schutznormtheorie, administrative omissions, seldom injunctive relief and too late, some limitations in the possibilities to challenge land use plans and decisions on "noise exceptions"…
DK			(X)	(X)	Problems with decisions (and non-decisions) that fall outside the administrative appeal system (NMK), potentially high costs in courts, lack of suspensive effect…
FR			(X)	(X)	Costs, partly because of the mandatory representation by a lawyer…
DE	X	X			Limited possibilities for individuals to challenge environment decisions that do not "concern" them according to a narrowly defined Schutznormtheorie, restricted A2J for ENGOs outside EIA procedure and nature conservation law…
HU	X	X			Limited A2J in relation to administrative omissions…
IE			X	X	Wide access to JR, high legal costs, court proceedings can take considerable period of time, complexity of the environmental

					legislation…
Country	**Individual Standing**	**NGOs standing**	**Costs**	**Effective**	**Explanation**
IT		(X)	X	X	Uncertain A2J for local branches of ENGO, uncertain A2J in relation to administrative omissions, costs, lack of efficiency and timeliness….
LV	(X)	X		X	Schutznormtheorie in relation to ENGOs in Constitutional Court, decisions on species protection not appealable, slowness…
NL	(X)			X[48]	Schutznormtheorie as regards arguments that the claimant can invoke on judicial review…
PL	X	X			Limited A2J in some sectorial legislation, administrative omissions, some decisions are made through non-appealable "plans"…
PT				X	Slowness, costs of lawyers and of obtaining factual elements of proof, limited intensity of the legal review…
SK	X	X		X	Schutznormtheorie, limited A2J in relation to decision-making procedures without any public participation, problems with suspension and injunctive relief…
ES	X		X	X	Costs, slowness, some "plans" (Janecek) and projects approved by parliamentary acts not appealable, general ineffectiveness in the legal system…
SE		X			No standing for ENGOs to challenge administrative omissions or decisions outside the scope of the Environmental Code…
UK			X	X	Costs, inequality of arms in the procedure, complexity of the envtl legislation and legal system, limited scope of review…

[48] In relation to decisions than can be reviewed by the administrative courts. If legal redress is only available for members of the public by way of action in civil courts, the system is less effective.

Annex B: Costs in the environmental procedure

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

Country	**Adm Fees**	**Court fees**	**ML**	**LPP**	**PCO etc**	**OCS**	**LA**	**FU**	**Costs as barrier to A2J?**
BE[49]	6,20 €	82-350€	(X)	(X)	X		X	(X)	Chilling effect
CY				X[50]					Yes (uncertainty)
CZ		125-200€	X[51]	X		X	(X)	X	
DK	500 DKK 60€	67-10,000 €		(X)			X		Yes (in courts)[52]
FR		35-150€	X	(X)			X[53]	(X)	Yes
DE		SW: 5,000€/i	X[54]	X	(X)			(X)	Yes
HU		2-10€		X		X	X		
IE		200-350€		(X)[55]		(X)	(X)	(X)	Yes
IT		60-1,500€	X	(X)					Yes
LV		14-28€		X					No
NL		150-310€	(X)	(X)[56]		X	X		In civil courts...
PL		50€/i	X[57]			X	X		No

[49] ML: Only in Supreme Court in civil cases, LPP only in general courts, not before the administrative courts, PCO: Allowance system before ordinary courts, LA: Only for individuals.

[50] Preset schedules for litigation costs.

[51] Only in higher courts.

[52] Not in the Nature and Environment Appeal Board, which in many cases is the main road for appeal.

[53] Only for individuals.

[54] Only in higher courts.

[55] IE has introduced special costs rules for certain categories of environmental litigation. Where the special costs rules apply, each side bears its own costs, subject to certain exceptions.

[56] Lawyers are mandatory and loser pays principle apply in civil courts.

[57] Not in the regional administrative courts.

Country	Adm Fees	Court fees	ML	LPP	PCO etc	OCS	LA	FU	Costs as barrier to A2J?
PT		50-2,500€/i+	X	(X)					No top limit for costs…
SK		66€/i							
ES		50-200/300-600€[58]	X[59]	X			X	X	Frequently…
SE		No						X	No
UK		60-6,000€		X	X		(X)		Yes

[58] Proposal pending for raise of court fees.

[59] Mandatory to have two attorneys.

Annex C: Effectiveness in the environmental procedure

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

Country	**SE/ AA**	**SE/ JR**	**IR/ SC**	**BO**	**TI**	**EnF**	**Explanation**
BE				(X)		X	Bonds only in exceptional cases…
CY			X	X	X		
CZ	X			X			
DK	(X)		X	(X)			
FR			X		X	X	Only in two cases provided by law, the judge must issue injunction
DE	(X)	(X)	(X)				
HU	X			(X)	X		
IE			X	X	X		
IT	(X)[60]	X		X	X		
LV	X	X[61]	X			X	Problems with the enforcement of admin decisions…
NL		X					
PL	X		X	(X)			Bonds only when challenging construction permits…

60 Suspension is possible in appeal procedures, but they are not really used.

61 For building permits only.

Country	SE/ AA	SE/ JR	IR/ SC	BO	TI	EnF	Explanation
PT		(X)	X		X	X	
SK	X		X		X	X	
ES			X	X	X	X	
SE	X	X			X		If the applicant gets a "go-ahead decision", the criteria for IR are quite generous for the PC…
UK	X		X	X	X		Complicated structure of appeal (60 different routes), reluctance to ask for IR because of the requirement for bonds…