

Workshop for Judges and Prosecutors:
NATIONAL JUDGES AND THE EU AARHUS ACQUIS
Focus on Access to Justice, 8 March 2021, 12:45 to 13:30



Source: www.uvp-portal.de/

▪ **IV. 3RD PILLAR OF THE AARHUS CONVENTION: ACCESS TO JUSTICE (cont.)**

“Litigation costs and time limits of the procedures”

Dr Matthias Keller, Presiding Judge, Administrative Court Aachen



The first slide shows the topic of the training module and speaks for itself.

Foreword

- The following presentation is meant to initiate an exchange of thoughts and experiences about the Aarhus Aquis within EU law among legal practitioners from different MS (peer discussion).
- It cannot be avoided that it reflects my practical experience as an administrative judge working in the German judiciary.
- I hope the more general and less specific issues I picked up are relevant for your work as well. Feel free to add other topics of concern in the course of the presentation.

Looking forward to our discussion!

Matthias Keller



The slide shows the foreword and speaks for itself.

List of Topics

- Setting the scene
- Litigation costs
- Time limits



Here, the list of topics is shown.



Setting the scene



The slide is a title.

« Ceci n'est pas une pipe. »

« La trahison des images » (René Magritte)



That is for your inspiration.

The dove sitting on a hammer is a symbol relevant to us as lawyers.

I picked this to give you an idea of the overall importance of a sound system of peace, justice, and strong institutions.

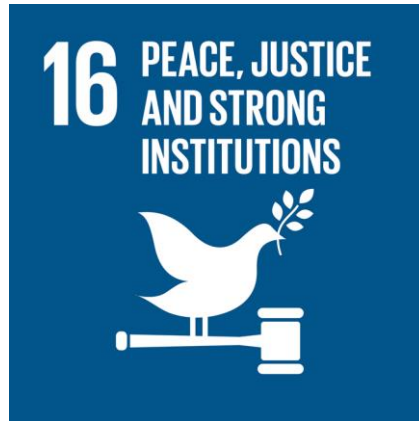


SUSTAINABLE
DEVELOPMENT GOALS

„SDG 16“

▪ 16.3

Promote the rule of law at the national and international levels and **ensure equal access to justice for all.**



And it is present as symbol to the Sustainable Development Goal 16.

It was created by the United Nations and it is, in short, it aims to [...]

So, those are values, but we have to decide how to achieve those values. But this is also the overall idea that is widely shared.

The Aarhus Convention (AC) guarantees in its Article 9
a wide access to justice in environmental matters („3rd pillar“).



So, a little more concrete than SDG...

It is important for the audience to have an easy approach to a complicated topic. The Aarhus Convention is a mixed agreement signed and ratified by the EU and the MS. They both have to comply with its requirements, inter alia wide access to justice in environmental matters. This should be reason enough to place the Aarhus Convention on the very top of the legal pyramid.



Article 9 AC guarantees access to justice in its para. 1,2,3 :

- Para. 1: relates to **environmental information**
 (Art.4 AC).

- Para. 2: covers **specific activities**
 (Art. 6 AC / public participation)

- **Article 9 para. 3 AC:**
All other kinds of acts and omissions
by private persons and public authorities
that may have contravened **national law**
relating to the environment.
Ergo: Environmental disputes stemming from all branches of law
(private, criminal and administrative) are covered!





**All other
green cases**

Recent example: General Court, Judgment from 27th January 2021 in case T-9/19:
The EIB's decision on financing a biomass power generation plant in Spain ("Curtis-project")
is covered by Art. 9 (3) AC and therefore challengeable by an ENGO (here: ClientEarth).




Art. 9 of the Aarhus Convention has a far reaching scope. The slide is meant to raise the awareness of that legal fact. The access to justice guarantee covers the request for environmental information (para. 1). The audience may possibly be aware of the fact that those specific activities that demand a public participation under Art. 6 of the Aarhus Convention (like power plants, big wind farms etc.) are an essential part of the guarantee to challenge those projects in a court of law. However, the most important provision for the national legal practitioner is Art. 9 (3) of the Aarhus Convention. It focuses on cases that concern "national law relating to the environment" which reflects nothing less than the everyday work in national courts.

The exact wording of Art. 9 (3) AC („catch-all clause“):



„(...) 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.**”



This slide goes deeper into Art. 9 (3) of the Aarhus Convention and presents this provision once more as a “catch-all clause”.

All implemented **procedures** under Art. 9 (1,2,3) AC have to provide a - so to say - „**green due process**“!



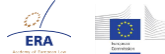
Art. 9 (4) AC:

“(…) 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.**”



Art. 9 (4) of the Aarhus Convention is introduced as a safeguard of – what the author calls – “green due process”. The topics of the presentation “timely” and “not prohibitively expensive” are highlighted.

➤ Litigation costs



The slide is a title

Understanding ... „不致过于昂贵“



„Не связанные с
недоступно высокими затратами“

**“not prohibitively
expensive”**

„Nicht übermäßig teuer.“

”Sans que leur coût soit prohibitif.”



When introducing an abstract notion (“not prohibitively expensive”) in a language that is for almost everyone not a working language, one should be aware of the pitfalls that have to be overcome in order to reach a proper understanding in the domestic legal context.

„not prohibitively expensive“
CJEU: uniform interpretation throughout the EU
(C-260/11 p. 29/39)



The slide is meant to inspire those participants who like to approach legal problems by arguments drawn from theories on “language, law and understanding”. Judges are used to manage the subtleties of their domestic legal language. Therefore, they may be interested in the general challenges we face when we read (foreign) words and try to comprehend them.




"not prohibitively expensive."
(replicated in Directives)

- **Article 11 (4) EIA Directive** (= Environmental Impact Assessment Directive, 011/92/EU)
"Any such procedure shall be fair, equitable, timely and
not prohibitively expensive."
- **Article 25 (4) IED Directive** (= Industrial Emissions Directive, 2010/75/EU)
"Any such procedure shall be fair, equitable, timely and
not prohibitively expensive."
- **Article 23 Seveso III Directive, 2012/18/EU (a little hidden)**
"... access to the review procedures set up
in Article 11 of Directive 2011/92/EU

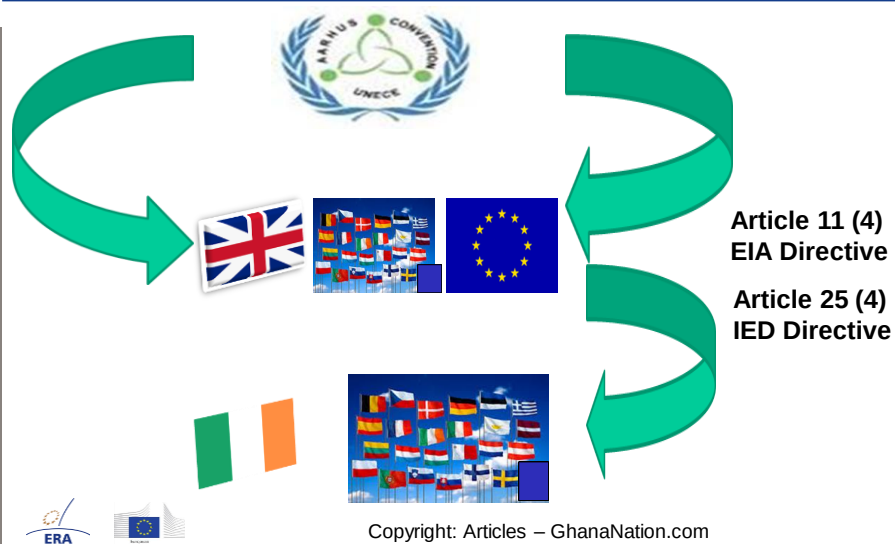



As a change this slide returns to the concrete legal context. It lists three EUDirectives (EIA / IED / Seveso) where the key word "not prohibitively expensive" is replicated.



Problems: "not prohibitively expensive."

EU Commission / Court of Justice



During the last years it has turned out that the Common Law Countries within the EU are facing difficulties to comply with the standard that legal proceedings in environmental matters should not be "prohibitively expensive".

**Prohibitive costs ‘one of Ireland’s great difficulties’
in bringing environmental cases,
says Chief Justice Frank Clarke .**



Copyright: Niall Sargent / Green News.IE



Ireland is taken as an example.

C-260/11, p.33:

The Aarhus Aquis (Aarhus and Directives) puts an obligation on the legislator **to shape a cost regime** in a way that ...

the public concerned (NGOs/citizens)

is not deterred to bring „Green Cases“

against - example given - a permit to build a power station.



Of course no one, neither NGOs nor citizens, should be deterred to bring a green case, for example, against a power station.

In „Edwards und Pallikaropoulos“ (C-260/11, p.33) the CJEU put emphasis on how a national cost regime should be shaped.

Of course,
the same goes with this green case ...



Copyright: Tim Buley, Costs in Environmental Cases, p. 15

This caricature speaks for itself.

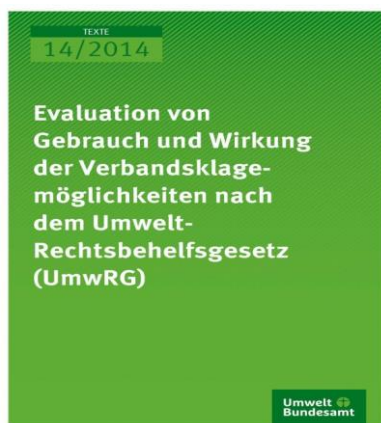
Like **Chief Justice Frank Clarke** from Ireland you should have a
critical look ...
at your domestic cost regime ...



Chief Justice Frank Clarke from Ireland is taken as a role model for a judge being aware of how important a compliant cost regime is. Then the German situation is examined.

Federal Environmental Agency (Umweltbundesamt) :

Empirical Study and Evaluation of NGO claims
under the German Environmental Appeals Act from 2006



Year	Number of NGO claims
2007	4
2008	12
2009	9
2010	13
2011	13
2012	7



German data are presented.

NGOs in Germany were asked on how much they had to pay for the environmental litigation



Year	Number of NGO claims
2007	4
2008	12
2009	9
2010	13
2011	13
2012	7

Various answers
by the asked NGOs:

It went from

“6.000,- €”

to “150.000 €”!



Available online / English abstracts

Some (vague) answers and (meaningful?) numbers are given

German rules on costs...



The German court determines the value of the claim (Streitwert), let's say for challenging a permit (waste incineration)

Value of the case: **15. 000 €**

Under German cost rules
court fees would be :

roughly 900 €

Lawyer's fees :

roughly 1.700 €



The audience gets an idea about the cost regime in Germany and should be given the opportunity to exchange information about other national cost regimes.

German rules on costs...



If the value of the case is **30.000 €**
and the case is dealt in **three instances**
and **three lawyers** are involved the NGO may be faced
(roughly) with **31.000 € costs** when loosing the case.

Prohibitively expensive?



Here the participants may express their own view.

You may find some guidance in these

3 leading cases

- Case C-427/07 *Commission v Ireland*
- Case C-260/11 *Edwards and Pallikaropoulos*
- Case C-530/11 *Commission v United Kingdom*



The slide presents the leading cases on the topic.

C-260/11: Edwards and Pallikaropoulos

In this case the CJEU made clear that a cost regime has to be shaped in such a way that EU rights can be effectively exercised.

(cf. Article 47 of the EU Charter of Fundamental Rights and the principle of effectiveness)



Good guidance on more general questions may be drawn from C-260/11 (“Edwards and Pallikaropoulos”).

How to define “costs” in this context?

C-427/07 p. 92:

“all the costs arising from participation in judicial proceedings”

- ✓ costs
- ✓ court fees
- ✓ cost of evidence and experts' fees
- ✓ *financial guarantees / bonds / cross-undertakings*



Her a definition of “costs” is provided.

Predictability counts ...

C-530/11 p. 58:

The CJEU has made very clear that transposition into national cost regimes should ensure for the claimant a reasonable predictability as regards costs of the judicial proceedings.



The importance of the predictability in the context is highlighted.

The (difficult) control of the national court ...

- *C-530/11 p. 68:*

“... it is incumbent upon the court which rules on this issue to make sure that the resulting financial risk for the claimant is also included in the various costs generated by the case when it assesses whether or not the proceedings are prohibitively expensive.”



The crucial point is to achieve the awareness of the national judge as an EU judge when it comes to the question whether or not the domestic proceedings are prohibitively expensive.

All three instances ? Yes!

- *C-260/11 p. 45 and 48:*

The cost requirements are applicable at all stages of proceedings, i.e. not only at the stage of first-instance proceedings, but also at the stages of an appeal or second appeal.



The judge should look and assess the cost regime as a whole, meaning at all stages of proceedings.

What about the “loser pays principle” ?

- *C-260/11 p. 43:*

This principle cannot replace
a deeper assessment of the costs
where subjective and objective considerations are
taken into account.



Following the “losers pays principle” is not enough. A deeper assessment has to be done.

What are subjective elements?

C-260/11 p. 42:

- the financial situation of the person 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 and
- the potentially frivolous nature of the claim at its various stages.



The cost assessment should encompass various subjective elements.

What is the „objective test“?

- *C-530/11 p. 47:*

The objective test is aimed at ensuring that the costs are not objectively unreasonable.

The costs of proceedings must, therefore, neither exceed the financial resources of the person concerned nor, appear, in any event, to be objectively unreasonable.



An “ objective test” has to answer the question whether cost are objectively unreasonable.

The discretion of the domestic judges ...

when deciding on the allocation of costs

should be exercised in a way
that the costs of proceedings
do not turn out to be “objectively unreasonable”.

So, be creative ... within the limits of your judicial
power ... that goes without saying.
(one way cost shifting ?!)



The slide calls for a creative exercise of discretion when it comes to the allocation of costs within environmental legal proceedings

Legal aid

- Legal aid schemes are extremely important to reduce the cost risk of litigation in environmental cases.
- However, take a critical look whether your domestic scheme is “fair” to NGOs.
- Article 47(3) of the Charter of Fundamental Rights does require that *‘legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice’*.



Legal aid schemes remain a major device within a court system to guarantee access to justice in an effective manner.

➤ Time limits of the procedure



The slide is a title.

Article 9 (4) AC: “procedures must be timely”

- “Justice delayed is justice denied.”
(by William ... either Gladstone or Penn)
- Article 47(2) of the EU Charter of Fundamental Rights and Article 6(1) of the European Convention on Human Rights guarantee a “reasonable length of proceedings”.
- ... a key guarantee that judicial review will be efficient.



The framework of the EU legal order is to be recalled whenever it comes to the requirement that “procedures must be timely.

Time limits

- *C-348/15 p. 41:*
- Reasonable time limits for bringing proceedings are in the interest of legal certainty.
- This protects both the individual and the administrative authority concerned.



Every practitioner should know the importance of time limits.

For more (easy to get) information, google ...

Commission Notice on Access to Justice in Environmental Matters

C(2017) 2616 final

And recently by the Commission:

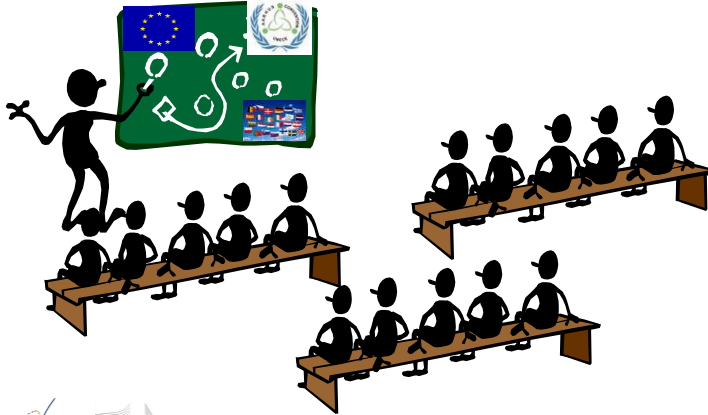
Improving access to justice in environmental matters in the EU
and its Member States COM(2020) 643 final



The Commission Notice on Access to Justice in Environmental Matters is introduced as a helpful piece of comprehensive information. Experience shows that judges focus very much on legal texts and overlook other information for a better understanding of the matter.

Thank you for giving me the most precious
things an administrative judge has...

....your time and your attention !



This last slide speaks for itself.