



The role of national judges and prosecutors in enforcing EU nature protection law - preliminary reference and requirements for access to justice

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This morning

- The global/European/domestic context
- Some principles of EU law
- The cooperation domestic courts - the CJEU
 - Requests for preliminary rulings
 - Some statistics
- Education/exchange/networking
- Access to justice

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The judiciary has been considered as one of the many parts of this strive to reach sustainable development and enforce environmental law

Exhaustive laws covering all areas of environmental law

Directives that set the floor for the national legislation

Harmonized legislation eg chemicals (based on trade) – what we have in common as members of the EU

the national judge acts as a mediator between EU law and national law and we are required to ensure that national law is interpreted in consistency of EU law

Different layers of law

- International Conventions (Aarhus, Bern, ECHR, etc.)
- EU law – procedural/substantive
- Domestic law (federal law - regional law)
- Case law – [CJEU](#), [ECtHR](#) – [ACCC](#) etc.
- “Soft law”
- Principles of environmental law



The situation for judges has not been facilitated during the last years there is so complex bunch of laws and principles and treaties that you have to work with. So this is to illustrate the cake with different layers.

ECHR → raised in cases of climate law
ACCC → Aarhus Compliance Committee

Some principles of EU law and the relation to domestic law

- **Primacy** of EU law - [Costa v ENEL \(Case 6/64\)](#)
- **Direct – indirect** effect – loyalty - [Case 26-62 van Gend & Loos](#)
- Domestic rules of procedure – regard to principles of **equivalence** and **effectiveness** - Ensure EU rights, [C-312/93 Peterbroek](#)

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Fundamental principles for the interpretation of EU law

CJEU → important role in forming these principles based on loyalty etc

Indirect effect: you must as far as possible interpret the provision in a manner that is consistent with the provisions of EU law even if they don't have direct effect → interpret domestic law in the light of EU law.

Principle of equivalence: In the absence of EU rules in the field, it's for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedure and rules governing actions for safeguarding rights which individuals derived from EU law, provided first that such rules are not less favorable than those governing similar domestic actions.

Principle of effectiveness: not render virtually impossible or excessively difficult the exercise of rights conferred by EU

General principle of non ultra petita: It's apparent from the case law that that principle does not as a rule require that national courts raise of their own motion,

when the examination of that issue would mean to go beyond the ambit of the dispute defined by the parties themselves. → don't surprise the parties and go beyond what they have raised in the case!

Art. 191 TFE - Union policy on the environment shall

- (1) contribute to pursuit of the following objectives:
 - preserving, protecting and improving the quality of the environment,
 - protecting human health,
 - prudent and rational utilisation of natural resources,
 - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
- (2) aim at a high level of protection taking into account the diversity of situations in the various regions of the Union.
- It shall be based on the **precautionary principle**
- and on the principles that **preventive** action should be taken,
- that environmental damage should as a priority be rectified at **source** and that the **polluter should pay**.

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EU environmental principles:

1. precautionary principle
2. Principle of prevention
3. polluter pays principle
4. Environmental damage should be rectified at source

principles according to TFEU → rules for EU and MS → not directly applicable in courts → but these principles have been implemented in other legislation → CJEU often refers to them --> globally recognized principles

The Court of Justice

- Art. 19 (1) TEU - The Court of Justice (...) shall **ensure that in the interpretation** and application of the Treaties the law is observed. Member States shall provide **remedies sufficient to ensure effective legal protection** in the fields covered by Union law.
- Art. 19 (3) TEU. The Court of Justice of the European Union shall, in accordance with the Treaties:
 - (a) rule on actions brought by a Member State, an institution or a natural or legal person;
 - (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
 - (c) rule in other cases provided for in the Treaties.
- Art. 267 - The Court of Justice of the European Union shall have jurisdiction to give MS Courts **preliminary rulings** concerning:
 - (a) the interpretation of the Treaties
 - (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union

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CJEU = Cornerstone for the whole EU system when it comes to the judicial order
Privilege to interpret EU law firsthand
National judges → preliminary rulings

Preliminary rulings – Article 267 TFEU

- **Obligatory – optional**

- If the last instance ([CILFIT C-283/81](#))

- All courts or tribunals ([Foto-Frost, 314/85](#) and [Cartesio, C-210/06](#) p. 88:

“Article 267 TFEU (then 234 EC) gives national courts the right – and, where appropriate, imposes on them the obligation – to make a reference for a preliminary ruling, as soon as the national court perceives either of its own motion or at the request of the parties that the substance of the dispute raises one of the points referred to in the first paragraph of Article 234 EC. It follows that national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them **raises questions involving interpretation of provisions of Community law, or consideration of their validity**, necessitating a decision on their part.”

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When working in a court of the last instance, then you are obliged to forward a request for preliminary ruling if you meet a problem of EU law.

For other judges, in principle, it's optional. But according to the Foto-Frost doctrine, national courts may consider the validity of a community act. However, they themselves have no jurisdiction to declare that a community act is invalid. Only the CJEU is responsible for ensuring that community law is applied uniformly in all the member states and has the jurisdiction both to declare void and or invalid an act of community institution.

CILFIT criteria: **very narrow scope** that you can avoid referring a question to the court:

- if the question is irrelevant for the resolution of the dispute.
- The provision of EU law in question has already been interpreted by the court
- The correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt

The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its

interpretation gives rise and the risk of divergences in judicial decisions within the Community.

→ very narrow scope for the last instances to avoid asking the European Court of Justice

In the report from the European Forum for judges for the environment, they had a special workshop on the cooperation with the European Court of Justice → state can be liable under the Frankovic provisions (article 47 of the Charter)

Ruling of the Court → regarded as binding for the EU matter

Requests for preliminary rulings

- The reference and the questions – where to find guidance?
 - reformulation
- **Rules of Procedure** of the Court of Justice, Article 94
- **Recommendations** to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2024/C 6008)
- **Fact sheet:** Urgent preliminary ruling procedure and expedited procedure

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Court of Justice

Court of Justice > Procedure



Procedure

Texts governing procedure

[Consolidated version of the Treaty on European Union](#)

[Consolidated version of the Treaty on the Functioning of the European Union](#)

[Consolidated version of the Treaty establishing the European Atomic Energy Community](#)

[Protocols: Annexes to the Treaty on the Functioning of the European Union](#)

[Charter of Fundamental Rights of the European Union](#)

[Statute of the Court of Justice of the European Union \(1-9-2024\)](#)

[Council Decision of 25 June 2013 increasing the number of Advocates-General of the Court of Justice of the European Union \(2013/336/EC\)](#)

[Council Decision \(EU\) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#)

[Rules of Procedure of the Court of Justice \(1-9-2024\)](#)

[Supplementary Rules \(14-1-2014\)](#)

[Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings \(1-10-2024\)](#)

From the introduction of the recommendations

- 1. The reference for a preliminary ruling, ..., is a **fundamental mechanism of EU law**. It is designed to **ensure the uniform interpretation and application of EU law** within the European Union, by offering the courts and tribunals of the Member States a means of bringing before the Court of Justice of the European Union for a preliminary ruling questions concerning the interpretation of EU law or the validity of (EU) acts, it being specified that, while all requests for a preliminary ruling must be addressed to the Court of Justice, the answer to the questions referred by the national courts or tribunals will be provided, depending on the subject matter of the request, either by the Court of Justice or by the General Court.
- 2. The preliminary ruling procedure is **based on a close cooperation between the Court of Justice and the General Court, on the one hand, and the courts and tribunals of the Member States, on the other**. In order to ensure that that procedure is fully effective, it is necessary to recall its essential characteristics and to provide further information That information – which applies to all requests for a preliminary ruling (I) – is supplemented by provisions concerning requests for a preliminary ruling requiring particularly **expeditious handling** (II) and by an annex which summarises, by way of reminder, all the elements that must be included in a request for a preliminary ruling.

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Cooperation is highlighted in this material

The essential elements of a request for a preliminary ruling

Whether transmitted electronically or by post, all requests for a preliminary ruling must mention:

- the **identity of the court or tribunal** making the reference and, where appropriate, the chamber or formation of the court or tribunal having jurisdiction (see, in that respect, paragraphs 3 to 7);
- the **precise identity of the parties** to the main proceedings and of anyone representing them before the referring court or tribunal (with regard to the parties to the main proceedings, see, however, paragraphs 21 and 22 of the present recommendations, in relation to the protection of personal data);
- the **subject matter of the dispute** in the main proceedings and the relevant facts (see paragraph 15);
- the **relevant provisions of national law** and of or tribunal to inquire about the interpretation or validity of EU law (see paragraphs 8 to 11 and 15 to 18);
- **the questions** referred for a preliminary ruling EU law (see paragraphs 15 and 16);
- **the reasons that prompted the referring court** (see paragraph 19) and, if applicable,
- the possible **need for specific treatment** of the request, related, for example, to the need to preserve the anonymity of individuals concerned by the dispute or to the particularly expeditious way in which the request should be dealt with by the Court (see paragraph 33 et seq.)

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Refusal to rule

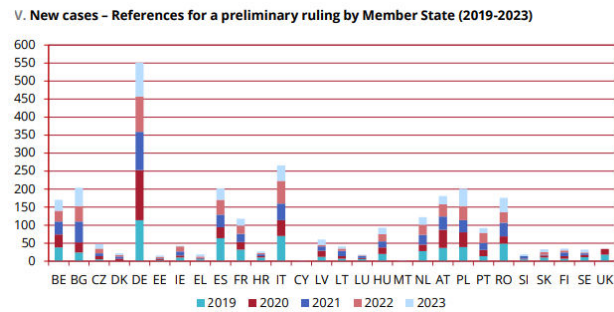
- Questions have **no bearing on the outcome** of the dispute in the main proceedings
- The problem is **hypothetical**
- The court does **not have before it the factual or legal material** necessary to give a useful answer to the questions submitted to it
- The national court should, in its request for a preliminary ruling, expand on its definition of the **factual and legislative context** of the dispute in the main proceedings and give the **necessary explanation** of the reasons for the choice of the provisions of EU law which it seeks to have interpreted and of the link it establishes between those provisions and the national law applicable to the proceedings pending before it

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Austrian case → It must be held that the inaction on the part of EU legislature, as the court has already held, a national court cannot ask the court to declare by way of preliminary ruling that an EU institution has failed to act, a failure to act which can be established only in the context of an action to that effect brought by a member state on the basis of article 265 TFEU against an institution.

Accelerated procedure → case when it was not granted from this year → a court asked for accelerated preliminary ruling procedure because the dispute had been pending before the national court since October 2018, 4 years before they asked → CJEU: the fact that the referring court is required to do everything possible to ensure that the case in the main proceedings is resolved swiftly, is not in itself sufficient to justify the use of expedited procedure. There must be some other factors

Preliminary rulings



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duration of proceedings was 16.1 months, but the average duration for urgent preliminary ruling proceedings was 4.3 months → considerable difference
urgent preliminary ruling proceedings → Important in some cases

References for a preliminary ruling by Member State	2019	2020	2021	2022	2023	Total
Belgium	38	36	36	30	30	170
Bulgaria	24	28	58	43	51	204
Czech Republic	5	9	8	13	12	47
Denmark	1	6	6	4	5	22
Germany	114	140	106	98	94	552
Estonia	3	3	2	4	4	16
Ireland	10	5	11	14	2	42
Greece	5	2	2	4	6	19
Spain	64	30	35	41	32	202
France	32	21	23	23	19	118
Croatia	10	4	5	4	4	27
Italy	70	44	46	63	43	266
Cyprus	1	0	0	0	1	2
Latvia	12	17	12	4	15	60
Lithuania	7	7	15	6	6	41
Luxembourg	6	3	5	2	2	18
Hungary	20	18	17	20	18	93
Malta	1	0	0	0	2	3
Netherlands	28	18	27	28	21	122
Austria	37	50	37	34	23	181
Poland	39	41	34	39	48	201
Portugal	14	17	20	28	13	92
Romania	49	20	38	29	40	176
Slovenia	5	2	7	0	6	20
Slovakia	10	6	2	7	8	33
Finland	7	7	10	6	5	35
Sweden	11	6	5	2	8	32
United Kingdom	18	17	0	0	0	35
Total	641	557	567	546	518	2 829

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Frequency of reference of Member States
Germany is leading

The cooperation CJEU and the courts of the Member States. EUFJE findings:

- The knowledge about EU law and Article 267 TFEU
- Tendencies to refer questions
- Lack of data on preliminary references and follow up judgments
- When CJEU reformulates questions or setting open criteria to be applied by the referring court, creates hurdles



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European forum had a workshop under cooperation between member states and CJEU → it can be hard for the court of justice to strike a balance between answering the question, leaving an adequate margin of appreciation for the referring judge and steering the follow up judgment in the right direction. It's recalled that referring judges are rarely involved at the proceedings before the CJEU and the that the view and subsequent interpretation of the question posed by the referring judge is represented by an agent to the

Advisory opinions at the ECtHR



Additional Protocol 16 to the ECHR

Article 1

- 1. **Highest courts and tribunals** of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the **interpretation or application of the rights and freedoms** defined in the Convention or the protocols thereto.
- 2. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.
- 3. The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.

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Advisory opinions at the ECtHR cannot be binding unlike the CJEU.
But only the last instance courts can request advisory opinions.

Division of powers between the members of the convention: politics-judiciary

ECtHR – Klimaseniorinnen Schweiz

- 412. Judicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government. However, **democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law.** The remit of **domestic courts and the Court** is therefore **complementary** to those democratic processes. **The task of the judiciary is to ensure the necessary oversight of compliance with legal requirements.** The legal basis for the **Court's intervention is always limited to the Convention**, which empowers the Court to also determine the proportionality of general measures adopted by the domestic legislature (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts)). **The relevant legal framework determining the scope of judicial review by domestic courts may be considerably wider** and will depend on the nature and legal basis of the claims introduced by litigants.

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Division of powers between the members of the convention: politics-judiciary

About the project

National judges play a key role in the implementation of EU environmental law. The capacity of national courts to guarantee the correct and efficient application of EU environmental law is an essential factor for addressing the legitimate expectations of EU citizens in this domain. Recognising the need to reinforce cooperation with national judges, the European Commission's Environment Directorate-General launched a special programme for this purpose. Since 2012, the Academy of European Law has been contracted to develop training modules on various topics of EU environmental law as well as to organise workshops and seminars on the implementation of EU environmental law.

SPECIALISED EXCHANGES

ABOUT

Specialised exchanges offer judges, prosecutors and court staff an in-depth training experience in their field of expertise in another EU Member State. Participants explore the judicial system of the host country with a special focus on the topic of the exchange, discuss common challenges and solutions, and cultivate their mutual trust for future cooperation.

Best practices observed by former participants are not only limited to their area of expertise but also extend to subjects such as digitalisation and use of technologies, cooperation with other professionals, communication to the parties and access to information.

<http://www.ejtn.eu>

<http://www.eufje.org>



Welcome

2024 EUFJE ANNUAL CONFERENCE
HUMAN RIGHTS APPROACH TO THE PROTECTION
OF THE ENVIRONMENT AND FUTURE GENERATIONS
18-19 OCTOBER 2024 — BUDAPEST

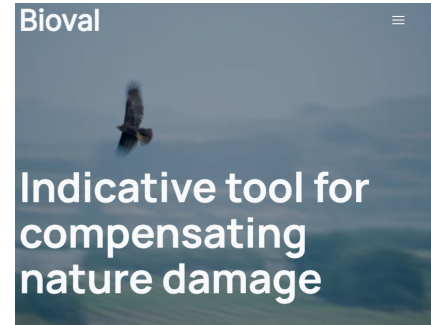
News /
Actualités

Publication of "The
Road to Peace:
justice for the
protection of human
rights to the
environment and
peace. sustainability

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Compensation - the BIOVAL tool website

- [Project by EUFJE, IMPEL and ENPE](#)
- [Determine financial compensations for ecological and societal losses - valuing ecological damage to \(around 100\) vertebrates \(started a work to include values for habitats\)](#)
- [Adapt values in Member States](#)
- [Methodology.](#)
- [List of compensation values](#)
- [Case law](#)
- <https://biovaltool.eu/>
- Workshop in Brussels 13 December 2024



Bioval [Calculation Method](#) [List of Compensations](#) [Case Law](#) [Contact](#) [EN](#) / [FR](#)

List of Compensations

This list of compensation values is an indicative assessment for the Member States of Europe. For other regions or countries the assessment should be adapted to the local context.

Species	Compensation	Categorisation	Extinction risk	Cultural significance	Ecosystem significance	Contribution to Nature
Eurasian eagle owl	€ 20.000	Largely being	Least concern	High	Highly significant	Normal
Barn owl	€ 20.000.00	Largely being	Endangered	High	Highly significant	Normal
Scops owl	€ 20.000	Largely being	Critically endangered	Normal	Medium significant	Normal
Great owl	€ 40.000	Largely being	Critically endangered	High	Highly significant	Normal

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<http://www.aeaj.org>



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<https://www.environmentalprosecutors.eu>



<https://www.envicrimenet.eu>



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**THE RIGHT TO
INFORMATION**



**THE RIGHT
TO PARTICIPATE**



**THE RIGHT
TO JUSTICE**



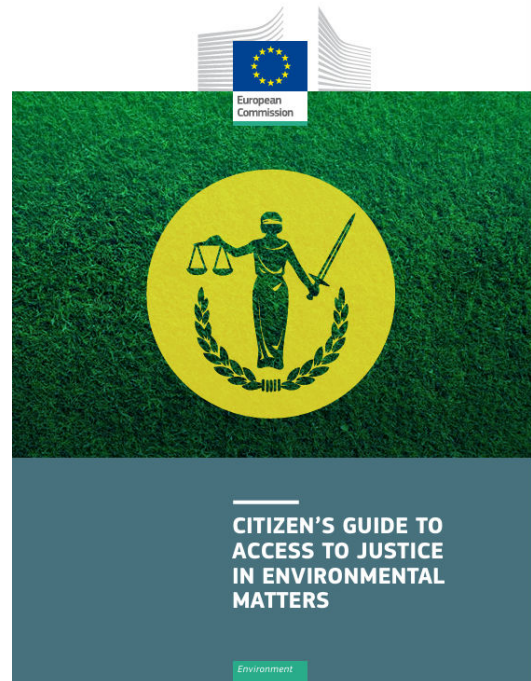
It is organized around **three pillars**, reflective of these core rights which provide a valuable, mutually reinforcing mechanism to hold Governments and decision makers accountable.



Access to Justice

- Third pillar of the Aarhus Convention
 - Article 9 (1)
 - Article 9 (2)
 - Article 9 (3)
- [Commission Notice on access to justice in environmental matters \(2017/C 275/01\)](#)
- Case law CJEU
- Practice from Aarhus Convention Compliance Committee - <https://unece.org/env/pp/cc>

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Guidance from the Commission, updated in 2017 and will be updated this autumn with references to the relevant case law from CJEU

Some EU legislation

- [The revised Industrial and Livestock Rearing Emissions Directive \(Directive 2010/75/EU or 'IED 2.0'\) as amended by Directive 2024/1785](#)
- [The Environmental Impact Assessment \(EIA\) Directive \(2011/92/EU as amended by 2014/52/EU\)](#)
- [The Regulation \(EU\) 2021/1767 amending Regulation \(EC\) No 1367/2006 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](#)
- [SLAPP Directive - Directive \(EU\) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings \('Strategic lawsuits against public participation'\)](#)
- [The Charter of Fundamental Rights of the European Union, 2012/C 326/02](#)

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Plaumann test

SLAPP Directive → protects environmental defenders from harassment, while they are exercising their rights

Access to Justice - Article 9.1

- Each Party shall, within the framework of its national legislation, ensure that **any person** who considers that his or **her request for information under article 4 has been ignored**, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has **access to a review procedure** before a court of law or another independent and impartial body established by law.
- Directive 2003/4/EC on Access to Environmental Information
- Case C-71/14 East Sussex (56)

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Access to Justice Article 9.2

Ensure that 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

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Access to Justice Article 9(3)

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

The Slovak Brown Bear I C-240/09: Article 9(3) of the Aarhus Convention has **no direct effect** (does not contain any clear and precise obligation capable of directly regulating the legal position of individuals, since it is subject to the adoption of subsequent measures by contracting parties). It is for the national courts to **interpret its national law in a way which, to the fullest extent possible, is consistent** with the objectives laid down in A 9(3) of the Aarhus convention

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Thank you for
your
attention!

The fishes go to court!

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