COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Managing Editor: Alison McDonnell
Common Market Law Review
Europa Instituut
Steenschuur 25
2311 ES Leiden
The Netherlands
e-mail: a.m.mcdonnell@law.leidenuniv.nl
tel. + 31 71 5277549
fax: + 31 71 5277600

Establishment and Aims
The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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The right to "not prohibitively expensive" judicial proceedings under the Aarhus Convention and the ECJ as an international (environmental) law court: *Edwards and Pallikaropoulos*

Case C-260/11, *Edwards and Pallikaropoulos* v. *Environmental Agency*, Judgment of the Court of Justice (Fourth Chamber) of 11 April 2013, EU:C:2013:221

1. Introduction

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) was adopted by the then European Community, its Member States and 19 other States on 25 June 1998 in Aarhus, Denmark, within the framework of the United Nations Economic Commission for Europe (UNECE), a regional commission set up in 1947 by the United Nations Economic and Social Council (ECOSOC). It entered into force definitively on 30 October 2001, and was approved on behalf of the European Community in February 2005.[1] It is based on the premise that every person has the right to live in an environment adequate to his or her health and well-being, and even the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations. To be able to assert this right and observe this duty, the Aarhus Convention rests on three "pillars": citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters. These pillars depend on each other for the full implementation of the Convention's objectives.[2]

The EU implemented the first and second "pillars" of the Aarhus Convention by way of Directive 2003/4 on public access to environmental information[3] and Directive 2003/35 providing for public participation in

1. Council Decision 2005/370/EC of 17 Feb. 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information public participation in decision-making and access to justice in environmental matters, O.J. 2005, L 124/1.

2. UNECE, *The Aarhus Convention: An Implementation Guide,* 2nd ed. (2014), UN Doc. ECE/CEP/72/Rev.1, p. 19.

3. Directive 2003/4/EC of the European Parliament and of the Council of 28 Jan. 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, O.J. 2003, L 41/26.

respect of the drawing up of certain plans and programmes relating to the environment,[4] respectively.[5] Both Directives also contain provisions on the third pillar, in that their beneficiaries were given a right to access to justice in order to protect the rights conferred on them by the Directives. Thus, Article 6 of Directive 2003/4 provides that Member States must ensure that any applicant who considers that his request for information has not been dealt with in accordance with the Directive must have access to an administrative review procedure as well as to a review procedure before a court of law or another independent and impartial body. Similarly, Directive 2003/35 inserted Article 10(a) into Directive 85/337 (the EIA Directive)[6] and Article 15(a) into Directive 96/61 (the IPPC Directive),[7] providing access to a review procedure before a court of law or another independent and impartial body for members of the public concerned to challenge the substantive or procedural legality of any decisions, acts or omissions subject to public participation provisions of those Directives.

The costs involved in gaining access to justice are a crucial factor in exercising those rights in practice. Both Article 10(a) of the EIA Directive and Article 15(a) of the IPPC Directive provide that any such procedure "shall be fair, equitable, timely and not prohibitively expensive". The reference for a preliminary ruling from the UK Supreme Court in *Edwards* gave the ECJ the opportunity to clarify the notion of prohibitively expensive procedures in relation to Aarhus Convention claims. The Court's approach was subsequently confirmed in *Commission* v. *UK*,[8] which likewise concerned UK

4. Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, O.J. 2003, L 156/17.

5. The Aarhus Convention was further implemented in EU law by EC Regulation 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, O.J. 2006, L 264/13 (Aarhus Regulation), which applies the provisions of the Convention to EU institutions and bodies.

6. Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, O.J. 1985, L 175/40, as amended by Directive 2003/35 (cited *supra* note 4), codified by Directive 2011/92/EU of the European Parliament and of the Council of 13 Dec. 2011 on the assessment of the effects of certain public and private projects on the environment, O.J. 2012, L 26/1.

7. Council Directive 96/61/EC of 24 Sept. 1996 concerning integrated pollution prevention and control, O.J. 1996, L 257/26, as amended by Directive 2003/35 (cited *supra* note 4), and codified by Directive 2008/1/EC of the European Parliament and of the Council of 15 Jan. 2008 concerning integrated pollution prevention and control, O.J. 2008, L 24/8, later replaced by Directive 2010/75/EU of the European Parliament and of the Council of 24 Nov. 2010 on industrial emissions (integrated pollution prevention and control), O.J. 2010, L 334/17.

8. Case C-530/11, *Commission* v. *UK*, EU:C:2014:67.

cost rules in Aarhus Convention cases. *Edwards* not only provides an "outsider's" perspective in the UK debate on cost rules reform, but also has wider implications for EU Member States seeking to reform cost rules. Furthermore, it highlights the role of the ECJ in the development of international environmental law, and international law more generally. The comments in this case note focus on these two key points.

2. Legal and factual background

Mr Edwards challenged the decision of the Environment Agency to approve the operation of cement works, which included waste incineration, in Rugby (UK), on the basis of the fact that the project had not been the subject of an environmental impact assessment. He was granted legal aid to cover the costs of the proceedings. The action was dismissed on the merits and Mr Edwards brought an appeal before the Court of Appeal, where on the final day of the hearing, he decided to withdraw the case. Ms Pallikaropoulos was subsequently granted leave to take part as appellant in the remainder of the proceedings. She did not satisfy the necessary requirements for entitlement to legal aid, but the Court of Appeal agreed to cap her liability for costs at £2,000. The appeal was dismissed and costs were awarded against her. Ms Pallikaropoulos appealed to the House of Lords. She also requested that she should not be required to give a guarantee in respect of foreseeable costs, to the sum of £25,000. That request was refused. Ms Pallikaropoulos further applied for a protective cost order (PCO) whereby her liability for costs would be capped should her appeal not be allowed. That application too was refused. The House of Lords affirmed the Court of Appeal's decision to dismiss the appeal and ordered Ms Pallikaropoulos to pay the respondents' costs of the appeal, the amount of which, in the event of disagreement between the parties, was to be fixed by the Clerk of the Parliaments. The respondents submitted two bills for recoverable costs for £55,810 and £32,290.

In the course of the proceedings the jurisdiction of the House of Lords was transferred to the newly-established UK Supreme Court. The rules of procedure of the Supreme Court provide that every detailed assessment of costs is carried out by two cost officers.[9] Ms Pallikaropoulos asked the cost officers to consider whether the EIA and IPPC Directives' requirement for any procedure within their scope to be fair, equitable, timely and not prohibitively expensive, had been properly applied in her case. The cost officers accepted jurisdiction to apply the Directives and reserved their final decision as to the actual costs. The respondents appealed against the decision

9. Rule 49(1) of the UK Supreme Court Rules 2009 (SI 2009/1603).

of the cost officers and two questions were referred to a panel of five Supreme Court judges, respectively on the possibility for cost officers to take up jurisdiction to limit costs through the process of a detailed costs assessment and, in case of a positive answer, what factors had to be taken into account when making such an assessment. The panel held that the question whether the procedure was prohibitively expensive was within the sole jurisdiction of the court adjudicating on the substance of the case. The panel also took the view that the question whether the order that Ms Pallikaropoulos pay the respondents' costs was contrary to those Directives had not been examined by the House of Lords when it considered her application for a PCO. Under those circumstances, the UK Supreme Court decided to stay the proceedings and request guidance from the ECJ regarding the award of costs in environmental judicial review proceedings against an unsuccessful claimant in the light of Article 9(4) of the Aarhus Convention, as implemented by Article 10(a) of the EIA Directive and Article 15(a) of the IPPC Directive.

3. Opinion of Advocate General Kokott[10]

The Advocate General dealt first with discretion for domestic measures. As neither the Aarhus Convention nor the two Directives provide any specific guidance in that regard, it is in principle for the Member States to determine how to ensure that the judicial proceedings covered are not prohibitively expensive within the meaning of Article 9(4) Aarhus Convention, Article 10(a)(5) EIA Directive and Article 15(a)(5) IPPC Directive.

In contrast, for example, to the concepts of "sufficient interest" and "impairment of a right", the provisions at issue do not contain a reference to national law to interpret the concept of "prohibitively expensive". The concept should therefore be given an autonomous and uniform Union interpretation. The Advocate General took the view that the proceedings may not be so expensive that the costs threaten to prevent them from being conducted. Reasonable but prohibitive costs are possible in particular in environmental proceedings relating to large-scale projects, since these may be very burdensome in every respect, for example with regard to the legal, scientific and technical questions raised and the number of parties. Under Article 9(4) Aarhus Convention, Article 10(a) EIA Directive and Article 15(a) IPPC Directive, it is therefore in principle for the Member States to determine how to avoid judicial proceedings not being conducted on account of their costs. However, those measures must ensure in a sufficiently clear and binding manner that the objectives of the Aarhus Convention are satisfied in each

10. Opinion of A.G. Kokott, EU:C:2012:645.

individual case and, at the same time, observe the principles of effectiveness and equivalence – the standard limits to the procedural autonomy of the Member States under the Court's case law – and the fundamental rights under EU law.

Furthermore, the Advocate General explained that while Article 47 of the EU Charter of Fundamental Rights relates to the protection of individual rights, legal protection in environmental matters in general and in the Aarhus Convention in particular also or exclusively serves the public interest, which therefore duly needs to be taken into account in assessing whether costs of proceedings are prohibitive.

Nevertheless, a person who combines extensive individual economic interests with proceedings to enforce environmental law can, as a rule, be expected to bear higher risks in terms of costs than a person who cannot anticipate any economic benefit. Hence, the threshold for accepting the existence of prohibitive costs may be higher where there are individual economic interests.

The Advocate General also emphasized that the level of permissible costs must be interpreted against the background of the Aarhus Convention's objective of ensuring "wide access to justice". Nevertheless, the fact that, despite the refusal of an application for a PCO, the claimant has not in fact been deterred from bringing or continuing with the proceedings may be taken duly into account afterwards in an order for costs if the obligation to prevent prohibitive costs was observed in the decision on the application for a PCO. However, the proceedings covered are not concluded until the decision in question becomes final. As a result, prohibitive costs must be prevented at all levels of jurisdiction.

Finally, the Advocate General took the view that it is compatible with Article 9(4) Aarhus Convention and with the provisions of the EIA Directive and the IPPC Directive to re-examine at each level of jurisdiction the extent to which prohibitive costs must be prevented.

4. The judgment of the Court of Justice

In its judgment, the Court examined the questions referred under two subheadings, respectively pertaining to the notion of "not prohibitively expensive" and the relevant criteria for assessing that requirement.

With respect to the first issue, the Court started by emphasizing that Article 3(8) Aarhus Convention states that the powers of national courts to award reasonable costs in judicial proceedings are not to be affected. As EU law must be "properly aligned" with the Convention, the requirement under Article

10(a) EIA Directive and Article 15(a) IPPC Directive that judicial proceedings should not be prohibitively expensive does not prevent the national courts from making an order for costs.

The Court next pointed out that this requirement concerns all the costs arising from participation in judicial proceedings, and must therefore be assessed as a whole, taking into account all the costs borne by the party concerned. Furthermore, the Court agreed with the Advocate General that an autonomous and uniform interpretation throughout the Union was required. Again in agreement with the Advocate General, the Court referred to the objective of the EU legislature to give the public concerned "wide access to justice", as evidenced by the third paragraph of Article 10(a) EIA Directive and the third paragraph of Article 15(a) IPPC Directive. It connected that objective, first, to the desire of the Union legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role and, second, to the observance of the right to an effective remedy enshrined in Article 47 of the Charter, and to the principle of effectiveness, referring in that regard, as the Advocate General had done, to *Lesoochranárske zoskupenie: I (LZI)*.[11] The Court further referred to the UNECE's *The Aarhus Convention: An implementation guide*,[12] which provides that the cost of bringing a challenge under the Convention or to enforce national environmental law must not be so expensive as to prevent the public from seeking review in appropriate cases.

The Court concluded that the requirement that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking or pursuing a claim for a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required (as courts in the UK may be) to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.

With respect to the second issue, the Court pointed out that, as EU law does not provide any precise guidance with respect to the notion of "prohibitively expensive" proceedings, account must be taken of all the relevant provisions of national law and, in particular, of any national legal aid scheme as well as of

11. Case C-240/09, *Lesoochranárske zoskupenie,* EU:C:2011:125.
12. Cited *supra* note 2, albeit to the first (and at the moment of the judgment only) edition.

any costs protection regime as regards the methods likely to secure the objective of ensuring effective judicial protection without excessive cost in the field of environmental law. Furthermore, as both the interest of the person wishing to defend his rights and the public interest in the protection of the environment must be taken into account, the relevant assessment by the national court cannot be carried out solely on the basis of the financial situation of the person concerned, but must also be based on an objective analysis of the amount of the costs. Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear to be objectively unreasonable.

More in particular, as regards the analysis of the financial situation of the person concerned, the national court's assessment cannot be based exclusively on the estimated financial resources of an "average" applicant. Other elements that the national court may take into account include 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 and the potentially frivolous nature of the claim at its various stages. In that regard, the fact that the claimant has not been deterred, in practice, from asserting his or her claim is not in itself sufficient to establish that the proceedings are not prohibitively expensive.

Finally, the Court held that the requirement that judicial proceedings should not be prohibitively expensive cannot be assessed differently by a national court depending on whether it is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal.

5. Comments

This section considers two main issues. First, the consequences of the Court's ruling for cost rules within the Member States are examined. In particular, it is argued that the principles laid down by the Court are applicable beyond Aarhus Convention cases, and the difficulties that come with the Court's approach are illustrated by reference to the recent changes to cost rules in relation to Aarhus Convention claims adopted by the UK. Second, the increasing role of the ECJ as an international law court is explored. In that regard, this section provides illustrations of how the EU's enforcement mechanisms also function as enforcement mechanisms of international law within the Union. Finally, the question whether the Court is an accessible international law court is considered.

5.1. *The EU shaping the Member States' legal costs systems*

5.1.1. *Costs rules principles: Proportionality and predictability*

In *Edwards*, the Court for the first time provided detailed guidance on EU law requirements regarding Member State costs rules. In order for costs not to be prohibitively expensive for the purposes of the Aarhus Convention, they must not be so expensive as to prevent members of the public from seeking review in appropriate cases. For that purpose, a judge must take into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment. Costs may neither be subjectively nor objectively unreasonable. As to their subjective unreasonableness, the judge may take the financial situation of the applicant into account without basing that assessment solely on the financial resources of an average applicant,[13] as well as other factors relating to the situation of the applicant, not specified in the judgment.[14] One could think, for example, of an applicant's personal or professional situation. Moreover, the fact that the applicant has not been deterred from bringing proceedings is not in itself sufficient to establish that the proceedings were not prohibitively expensive in regard of the applicant.[15] As to their objective unreasonableness, the Court may take into account whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant, and or 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.[16] When making that assessment the national court should have regard to all costs arising from participation in judicial proceedings, not only the costs directly connected with the case pending before it. [17] Furthermore, account must be taken of any legal aid scheme as well as cost protection rules.[18] Lastly, the requirement that proceedings are not prohibitively expensive cannot be assessed differently depending on the instance in which the national court is adjudicating.[19]

What emerges from both these subjective and objective factors is the strong focus on the reasonableness and proportionality of costs, obliging a court to take the particular circumstances of the applicant and the case into account when determining whether costs are prohibitively expensive. This means that national cost rules must leave a national court ample discretion to assess the proportionality of costs, both in respect of the applicant and in regard of the

13. Judgment, para 41.
14. Ibid., para 42.
15. Ibid., para 43.
16. Ibid., para 42.
17. Ibid., paras. 27–28.
18. Ibid., para 38.
19. Ibid., para 45.

proceedings. It probably precludes any cost rules system with stringent cost allocation rules, applying fixed tariffs without a possibility to deviate from them.

As mentioned above, that approach was subsequently confirmed in *Commission* v. *UK*.[20] The principle of proportionality of costs was, however, complemented with a principle of predictability, the Court holding that reasonable predictability as regards both cost allocation and the amount of fees contributes to compliance with the requirement that judicial proceedings should not be prohibitively expensive.[21] This implies that the national court's discretion in assessing the proportionality of costs should somehow be limited. Member States should therefore seek a middle ground between predetermined tariffs and court discretion. In that respect, it appears that the importance of the principle of predictability increases with the cost of judicial proceedings.[22] The more expensive judicial proceedings are, the higher the predictability of costs and cost allocation should be.

5.1.2. *Application beyond Aarhus Convention cases*

The principles of proportionality and predictability were set out by the Court in the context of judicial review proceedings falling within the scope of the Aarhus Convention. It may be tempting to limit their effect to such proceedings, as the United Kingdom did when it redesigned its cost rules for judicial review proceedings falling within the scope of the Aarhus Convention.[23] There are, however, reasons to believe that the principles set out by the Court in *Edwards* and in *Commission* v. *UK* are the specific application in the context of the Aarhus Convention of a number of principles that have been developed by the Court in other areas of law. In that regard, *Edwards* and *Commission* v. *UK* may be part of a blueprint for any cost rules in terms of compliance with EU law, regardless of the area of law in which they are being applied.

20. Case C-530/11, *Commission* v. *UK*.

21. Ibid., para 54. See already Case C-427/07, *Commission* v. *Ireland*, EU:C:2009:457, para 94. However, in that case, the ECJ focused on the precise and clear implementation of the EIA and IPPC Directives, and did not state that predictability of costs was an element of the requirement that proceedings should not be prohibitively expensive. See also Lenaerts, Maselis and Gutman (Nowak Ed.), *EU Procedural Law* (OUP, 2014), pp. 169–170.

22. Case C-530/11, *Commission* v. *UK*, para 58.

23. See however *The Secretary of State for Communities and Local Government* v. *Venn* [2014] EWCA Civ 1539 (27 Nov. 2014), point 34. See further Pedersen, "The price is right: Aarhus and access to justice", 33 *Civil Justice Quarterly* (2014), 15–16, suggesting that the fact that the cost cap only applies to judicial review cases, thereby excluding significant areas of statutory appeals and environmental claims in nuisance and negligence law, may potentially fall foul of Art. 9(3) Aarhus Convention. See *infra* section 5.1.3.

First, the principle of predictability can already be found in *AMOK Verlags*. There, the Court held that a lawyer established in a Member State but offering his services in another Member State must be subject to the cost rules of the latter Member State, even if this would mean that reimbursement of lawyers' fees by an unsuccessful party in a dispute to the successful party would be limited. This would be in line with the objectives of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services[24] and the only way to comply with the principle of predictability, "and thus of legal certainty",[25] for a party as to the application of the cost rules in the event of being unsuccessful. The principle of predictability appears thus to be a specific emanation of the principle of legal certainty, which is a general principle of EU law,[26] and therefore applicable outside the context of Aarhus Convention claims.

Second, the principle that costs should be proportionate appears in the Court's case law in various forms. For example, the requirement that a global assessment of costs should be made, encompassing the various stages of proceedings, is characteristic of the Court's generous approach towards the definition of costs. On that basis, it held that costs paid for legal representation for the purposes of the presentation of an initial request for a payment order, should be considered recoverable costs for the purposes of Article 3(1) of Directive 2000/35 on late payments.[27] Costs associated with exequatur proceedings in accordance with Regulation 44/2001 were also deemed to be recoverable costs within the scope of Article 14 of the IP Enforcement Directive.[28] The same applies to legal costs in the context of an action for damages to compensate for the injury caused as a result of a seizure carried out in another Member State with the aim of preventing an infringement of an intellectual property right, when a question arises about a decision – given in that other Member State – that the seizure was unjustified.[29] Given the

24. Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, O.J. 1977, L 78/17.

25. Case C-289/02, *AMOK Verlags*, EU:C:2003:669, para 30.

26. See e.g. Case C-427/14, *SIA Veloserviss*, EU:C:2015:803, para 30 and the case law cited therein; further see Tridimas, *The General Principles of EU Law*, 2nd ed. (OUP, 2007), Ch. 6.

27. Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, O.J. 2000, L 200/35; Case C-235/03, *QDQ Media,* EU:C:2005:147, para 17. However, since the case before the national court concerned a dispute between private parties, and Spanish law could not be interpreted in conformity with the Directive, the Directive could not itself offer a basis for the inclusion of expenses of representation in the recoverable costs.

28. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, O.J. 2004, L 157/45. See Case C-406/09, *Realchemie Nederland*, EU:C:2011:668, para 49.

29. Case C-681/13, *Diageo Brands*, EU:C:2015:471, para 76.

specific aim of the IP Enforcement Directive, namely preventing injured parties from being deterred from bringing legal proceedings in order to protect their IP rights, the Court deemed such a wide approach justified.[30] This is an aspect of the objective reasonableness of costs, since the Court deems their recoverability necessary in the light of the nature of the proceedings, without taking into account the specific situation of the applicant. Another example of this in the case law is the fact that costs for legal representation cannot be excluded from the amount of recoverable costs if legal representation is either mandatory[31] or necessary.[32] Conversely, this means that unnecessary costs should be excluded from the costs that a successful applicant can recover, as they would probably not be objectively reasonable in the light of the dispute.

The Court has made this connection between legal representation and costs on various occasions, either explicitly or implicitly. In Case C-63/01, *Evans,* the Court ruled that Article 1(4) of Directive 84/5 on car insurance[33] implied that costs incurred by victims in connection with the processing of their application for compensation are not included in the compensation awarded for damage or injury caused by an unidentified or insufficiently insured vehicle to be paid out by the body authorized under national law.[34] Yet, if it appeared that such reimbursement was necessary in order to safeguard their rights, refusal of reimbursement would be problematic from the point of view of the principle of effectiveness.[35] The fact that legal assistance is necessary in such proceedings is a factor to be taken into account in respect of the less advantageous position in which victims find themselves.[36]

This brings us to the question of legal aid. Indeed, where legal representation is mandatory or necessary, the question of costs implies the question whether legal aid is available. In that regard, both the nature of the proceedings and the (financial) situation of the applicant should be taken into account. This appears for example from *Agrokonsulting*, where the Court found that the significant distance between the applicant's place of residence and the location of the court house was not *per se* problematic from the point of view of the principle of effectiveness, since an individual in a position such as that of the applicant was not obliged to appear in person but could be

30. Case C-406/09, *Realchemie Nederland*, paras. 48–49.
31. Case C-289/02, *AMOK Verlags*, para 39.
32. Case C-63/01, *Evans*, EU:C:2003:650, para 77.
33. Directive 84/5/EEC of 30 Dec. 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, O.J. 1984, L 8/17.
34. Case C-63/01, *Evans*, para 78.
35. Ibid.
36. Ibid., para. 77.

represented, and because legal aid was available.[37] Conversely, in the context of asylum and immigration law, the Court held that legal assistance during the hearing prior to the adoption of a return decision was not necessary, and that a Member State is therefore not obliged to bear the costs of such legal assistance by way of free legal aid.[38]

A specific question in this regard is the right to legal aid of legal persons.[39] The Court has underlined in various cases the right of a company to legal representation – or legal assistance – in the context of competition law proceedings.[40] The right to legal representation must, however, include a right to legal aid when necessary, as otherwise the right to legal representation cannot be exercised in a meaningful way. The question of the right to legal aid of companies – or more precisely legal persons – was before the Court in *DEB*.[41] There, it held that legal aid cannot in principle be excluded under Article 47 Charter.[42] The requirements a national court should take into account in order to determine a legal person's eligibility for legal aid are very similar to the criteria laid down in *Edwards* for the purposes of assessing whether judicial proceedings are prohibitively expensive.

Thus, the Court held in *DEB* that it is as such not prohibited that the conditions attached to the eligibility for legal aid may impact on access to justice, provided that the core of the right to access to justice is not impaired and that the limitation is proportionate.[43] This is very similar to the idea in *Edwards* that national courts have the power to award reasonable costs.[44] Furthermore, when assessing the conditions attached to legal aid, courts may take into account "the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively".[45] These same criteria can be found in *Edwards* in relation to the assessment of the objective reasonableness of legal costs,[46] which also focuses on the case as such. There is also a clear similarity in relation to subjective factors to be taken into account. Next to the applicable rules, the grant of legal aid to legal persons

37. Case C-93/12, *Agrokonsulting*, EU:C:2013:432, para 50.
38. Case C-249/13, *Boudjlida*, EU:C:2014:2431, para 71.
39. See the partial overview of the practices of the Member States in that regard in the Opinion of A.G. Mengozzi in Case C-279/09, *DEB*, EU:C:2010:489, paras. 76–80.
40. See e.g. Joined Cases C-46/87 & 227/88, *Hoechst*, EU:C:1989:337, para 16.
41. Case C-279/09, *DEB*, EU:C:2010:811.
42. Ibid., para 52.
43. Ibid., para 60.
44. Judgment, para 26.
45. Case C-279/09, *DEB*, para 61.
46. Judgment, para 42.

must be assessed in the light of their situation.[47] The subject-matter of the litigation may also be taken into consideration, in particular its economic importance.[48] For the purposes of taking account of the financial capacity of a legal person applicant, consideration may be given *inter alia* to the form of the company (whether it is a capital company or a partnership, whether it is a limited liability company or otherwise); the financial capacity of its shareholders; the objectives of the company; the manner in which it has been set up; and, more specifically, the relationship between the resources allocated to it and the intended activity.[49]

While specifically tailored in *DEB* to legal persons and for the purposes of legal aid, the equivalent requirements appear in *Edwards* in relation to costs, namely that both the financial situation and other factors connected with the situation of the applicant can be taken into account.[50] Another point of *Edwards*, namely that all costs associated with judicial proceedings must be taken into account,[51] was also reflected in *DEB*, namely that a court should take into account for the purposes of legal aid "the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts".[52] A final similarity concerns the interest of society in the outcome of the proceedings. In that regard, the Court held in *DEB* that legal aid may not depend on the public interest of society in the case but must be assessed on the basis of the right of the person whose rights under EU law are violated. The interest of society can, however, be taken into account as an element of the proportionality assessment.[53] That balance can also be found in *Edwards*, the Court explicitly ruling out the possibility of taking solely the public interest into account.[54]

That said, as Advocate General Kokott rightly pointed out in her Opinion in *Edwards*, legal protection under the Aarhus Convention goes further than effective legal protection under Article 47 Charter, which expressly relates to the protection of individual rights. In *DEB* and similar cases, the basis for the assessment of the need to grant aid for effective legal protection is therefore the actual person whose rights and freedoms as guaranteed by EU law have been violated, rather than the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid. By contrast, legal

47. Case C-279/09, *DEB*, para 52.
48. Ibid., para 53.
49. Ibid., para 54.
50. Judgment, paras. 41–42.
51. Judgment, para 27. See already in that sense the Opinion of A.G. Kokott in Case C-427/07, *Commission* v. *Ireland*, EU:C:2009:9, para 93.
52. Case C-279/09, *DEB*, para 54.
53. Ibid., para 42.
54. Judgment, para 39.

protection in environmental matters "generally serves not only the individual interests of claimants, but also, or even exclusively, the public".[55]

It appears from all the above that the Court's case law on legal costs and legal aid runs largely in parallel. This is due to the fact that the ability to take part in legal proceedings, especially when represented, is a question of financial means, and thus appropriate support must be available. Since legal aid is a means to cover legal costs, it seems logical that granting legal aid depends largely on the same factors as the factors taken into account in order to assess the reasonableness of legal costs.

The above arguably shows that the factors listed in *Edwards* and *Commission* v. *UK* are particular instances of principles that apply throughout the case law of the Court in areas not confined to the Aarhus Convention. While the parameters set out by the Court in *Edwards* and *Commission* v. *UK* were developed against the background of an explicit requirement in the applicable EU legislative framework that the legal proceedings were not to be "prohibitively expensive",[56] the underlying principles were used by the Court before *Edwards*,[57] and could be used in the future to assess both Member State cost rules and legal aid rules, as well as rules pertaining to court fees, either in the context of the implementation of EU legal instruments or, in the absence of such rules, within the national procedural autonomy framework.[58] Member States seeking to reform rules on costs, legal aid, or court fees should therefore take a close look at the Court's case law in this area.

5.1.3. *The tension between predictability and proportionality in the new UK cost rules in relation to Aarhus Convention judicial review claims*

Already during the proceedings in *Edwards*, the UK reformed its costs rules for judicial review proceedings falling in the scope of the Aarhus Convention. The reform was both the result of an internal review on legal costs and a reaction to the pending infringement proceedings in *Commission* v. *UK*. A consultation on "Cost Protection for Litigants in Environmental Judicial

55. Opinion, paras. 39–40. Compare with the Opinion of A.G. Kokott in Case C-243/15, *Lesoochranárske zoskupenie VLK: (LZ II),* EU:C:2016:491, para 99, referring to Art. 9(4) Aarhus Convention as a "specific expression" of Art. 47 Charter.

56. As pointed out by A.G. Jääskinen in his Opinion in Case C-61/14, *Orizzonte Salute*, EU:C:2015:307, para 23, footnote 13.

57. See e.g. Case C-472/99, *Clean Car Autoservice*, EU:C:2001:663, para 32; Case C-215/11, *Szyrocka*, EU:C:2012:794, paras. 34–35.

58. See e.g. Case C-61/14, *Orizzonte Salute*, EU:C:2015:655, paras. 56–58 and 77, adopting a similar proportionality and reasonableness assessment, though without referring to *Edwards*, presumably because of the rather specific context, i.e. judicial proceedings relating to the award of public contracts in Italy governed by EU public procurement law.

Review Claims" was launched,[59] which led to the amendment of the Civil Procedure Rules (CPR),[60] and the corresponding Practice Direction.[61] The changes entered into force on 1 April 2013 and applied to cases brought after June 2013.

Individual applicants will henceforth be maximally liable for £5,000 and legal persons for £10,000. The caps cannot be altered or contested when granted. This raises two problems. First, it will depend on the specific case whether the costs for which a claimant is liable are reasonable. Would a small NGO now feel comfortable going to court knowing that it may potentially be liable to pay £10,000 when losing the case?[62] Moreover, a potential liability of £5,000 would still deter people earning below £15,000 per year from going to court.[63] Second, can a system of fixed costs be compatible at all with the principle of reasonableness, given the fact that reasonableness inherently entails an element of assessment, which is excluded under such a system?[64] There is now a total absence of discretion, in the sense that judges are not allowed to take objective or subjective factors into account. That being said, the result is total predictability as to the maximum amount of costs, which remedies the major deficiency in the previous cost allocation system, for which the UK was found to be in breach of its EU law obligations in *Commission* v. *UK*.

Matters are, however, less predictable when entering the appeal stage. As the Court stated in *Edwards*, the assessment of whether judicial proceedings are prohibitively expensive should not differ depending on whether a judge is adjudicating at first instance or on appeal.[65] For appeals in fixed cost cases, the applicable cost rule gives considerable discretion to the appeal judge to take into account the means of both parties, all the circumstances of the case, and the need to facilitate access to justice.[66] This method of assessment differs manifestly from that applicable to first-instance proceedings: no assessment

59. Ministry of Justice, *Cost Protection for Litigants in Environmental Judicial Review Claims – Outline Proposals for a Cost Capping Scheme for Cases which Fall within the Aarhus Convention*, Consultation Paper CP16/11, 19 Oct. 2011, available at <www.consult.justice.gov.uk/digital-communications/cost_protection_litigants>.

60. Section VII in Part 45 CPR on "Costs limits in Aarhus Convention claims" was inserted in the CPR.

61. Practice Direction 45.43.

62. Ministry of Justice, *Cost Protection for Litigants in Environmental Judicial Review Claims – Outline Proposals for a Cost Capping Scheme for Cases which Fall within the Aarhus Convention*, Response to Consultation CP(R) 16/11, p. 10.

63. Ibid., pp. 10 and 19, conclusion No. 3.

64. Judgment, para 35; See, however, the corresponding Scottish rules, which provide that a court may lower the sum of the £5,000 cap on cause shown by the applicant: Rule 58A–4(2) Court of Session Rules.

65. Ibid., paras. 44–45.

66. Rule 52.19 CPR.

and a fixed costs cap. This does not protect claimants from being presented with unpredictably high legal costs at the appeal stage. However, it does allow the appeal judge to take costs incurred at earlier levels into account, which is in line with the requirement that all costs associated with judicial proceedings should be taken into account.[67]

In sum, the replacement of court-made rules with a strict rule-based instrument providing for fixed costs seems to have addressed a main concern regarding costs in judicial review proceedings relating to environmental matters, namely unpredictability. Yet, it appears that the UK may have overshot its target, opting for a large amount of predictability without the possibility for judges to take specific circumstances into account. That may possibly have been a reaction to the reasoned opinion of the Commission in the infringement proceedings in *Commission* v. *UK*, where the focus was indeed on predictability and the effective implementation of Union law. However, *Edwards* has shown that there should be room for a specific assessment, taking into account both the personal situation of a claimant and the context of the proceedings. The issue was eventually taken up in the 2015 Consultation regarding Costs Protection in Environmental Claims, which may lead to further amendments of Part 45 CPR.

5.2. *The ECJ as an international (environmental) law court*

5.2.1. *EU enforcement of international law*

Whatever the merits of the Court's decision in *Edwards* or the usefulness of its guidance to the national courts, it is clear that EU law in general and the ECJ in particular acts as a crucial enforcement mechanism for the Aarhus Convention. Part of the explanation lies in the fact that the Court's normal jurisdiction applies to treaties concluded by the EU, as regards their interpretation and the validity of the decisions to conclude them on the EU's behalf.[68] Article 216(2) TFEU provides for agreements concluded by the Union to be "binding upon the institutions of the Union and on its Member States". Such agreements prevail over EU secondary law,[69] and their provisions form an integral part of the EU legal order as from their entry into force.[70] The direct consequence thereof is that the validity of an EU act may be affected by the fact that it is incompatible with rules of international law when

67. Judgment, para 27.

68. See e.g. Case C-366/10, *Air Transport Association of America and Others* (ATAA), EU:C:2011:864, on which see De Baere and Ryngaert, "The ECJ's judgment in Air Transport Association of America and the international legal context of the EU's climate change policy", 18 EFA Rev. (2013), 389–410.

69. Case C-366/10, *ATAA*, para 50.

70. Case C-181/73, *Haegeman*, EU:C:1974:41, para 5; and Case C-366/10, *ATAA*, para 73.

a number of (rather stringent) conditions are fulfilled.[71] While the Court has not yet invalidated an EU act in the light of the Aarhus Convention either through a reference for a preliminary ruling on the validity of an EU act or through a direct action,[72] it has interpreted and applied the Convention either directly or through the EU implementing legislation in a growing number of cases,[73] thereby enhancing the enforcement of the Convention in the Member States' legal orders.

71. Case C-366/10, *ATAA*, paras. 52–55: First, the EU must be bound by those rules (Joined Cases C-21-24/72, *International Fruit Company and Others*, EU:C:1972:115, para 7); second, the nature and the broad logic of the Treaty in question must not preclude the ECJ from examining the validity of an EU act in the light of its provisions (Joined Cases C-120 & 121/06 P, *FIAMM et al.* v. *Council and Commission*, EU:C:2008:476, para 110); third, the Treaty provisions relied upon for the purpose of examining the validity of the EU act in question appear, as regards their content, to be unconditional and sufficiently precise (Case C-344/04, *IATA and ELFAA,* EU:C:2006:10, para 39), i.e. they contain a clear and precise obligation that is not subject, in its implementation or effects, to the adoption of any subsequent measure (Case C-12/86, *Demirel*, EU:C:1987:400, para 14).

72. For a recent example of an unsuccessful action for annulment of an act of secondary EU legislation on the basis of the Aarhus Convention, see Joined Cases C-401-403/12 P, *Council* v. *Vereniging Milieudefensie and Others*, EU:C:2015:4, paras. 54–55; and Joined Cases C-404 & 405/12 P, *Council and Commission* v. *Stichting Natuur en Milieu and Pesticide Action Network Europe*, EU:C:2015:5, in which the ECJ held that Art. 9(3) Aarhus Convention does not contain an unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals, and so does not meet the conditions for provisions of an international agreement to which the EU is a party to be relied on in support of an action for annulment of an act of secondary EU law. For a comment, see Gáspár-Szilágyi, "The relationship between EU law and international agreements: Restricting the application of the *Fediol* and *Nakajima* exceptions in *Vereniging Milieudefensie*" 52 CML Rev. (2015), 1059–1077. Building on the judgment in *Vereniging Milieudefensie*, the Opinion of A.G. Sharpston in Case C-543/14, *Ordre des barreaux francophones et germanophone and Others*, EU:C:2016:157, para 92, argues that, as the procedures referred to in Art. 9(1) to (3) Aarhus Convention each refer to criteria of national law, and given that the Court has held, on that ground, that Art. 9(3) does not contain an unconditional and sufficiently precise obligation capable of regulating the legal position of individuals directly and is subject, in its implementation or effects, to the adoption of a subsequent measure, Art. 9(4) Aarhus Convention, which relates to the procedures referred to in Art. 9(1) to (3), "cannot be relied upon to call into question the validity of a provision of Union legislation". Relying on that point of A.G. Sharpston's Opinion, the Court held that Art. 9(4) Aarhus Convention "cannot be relied on to challenge the validity of Directive 2006/112": Case C-543/14, *Ordre des barreaux francophoues et germanophone and Others,* EU:2016:605, para 54 (it held that the same was true regarding Art. 9(5) Aarhus Convention: Ibid., paras. 55–56. Contrast with the Opinion of A.G. Kokott in C-243/15, *Lesoochranárske zoskupenie*, paras. 61–62, taking the view that "it is clear from Art. 1 of the Aarhus Convention that that Convention is, by virtue of its nature and purpose, intended to create rights for individuals and associations in the field of environmental protection", and that "the Court has already held that Art. 11 of the EIA Directive is directly applicable in relation to the rights of environmental associations. The same must also be true of Art. 9(2) of the Convention, since that provision is the same in all significant respects as Art. 11 of the EIA Directive".

73. See, most recently, Case C-243/15, *LZ II*.

The issue raised in *Edwards* is a good example in that regard. The UK had been the object of a number of decisions issued by the Aarhus Convention Compliance Committee (ACCC), a body set up by the Parties to the Aarhus Convention to monitor their compliance with the Convention, concerning prohibitively expensive costs in the context of judicial review proceedings on matters within the scope of the Aarhus Convention.[74] The ACCC can provide advice and facilitate assistance regarding implementation to individual Parties in consultation with the Party concerned or even, subject to agreement with the Party concerned, make recommendations, request the submission of a compliance strategy or make recommendations on measures to address a matter raised by a member of the public.[75] Its decisions, while having *de facto* normative weight, are, however, not legally binding.[76] Furthermore, an ACCC decision in relation to the UK may not be of much practical use for those filing a complaint with the ACCC, as the Aarhus Convention is, within the UK, "not directly applicable in domestic law".[77] The lack of enforceability of the

74. UNECE, *Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report of the Compliance Committee on its Twenty-Ninth meeting, Addendum, Findings and recommendations with regard to communication ACCC/C/2008/27 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*, Adopted by the Compliance Committee on 24 Sept. 2010, UN Doc. ECE/MP.PP/C.1/2010/6/Add.2, 9–10, paras. 49–53; UNECE, *Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report of the Compliance Committee on its Twenty-Ninth meeting, Addendum, Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*, Adpoted by the Compliance Committee on 24 Sept. 2010, UN Doc. ECE/MP.PP/C.1/2010/6/Add.3, 32–33, paras. 141–145.

75. UNECE, *Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report of the First Meeting of the Parties, Addendum, Decision I/7, Review of Compliance*, adpoted at the first meeting of the Parties held in Lucca, Italy, on 21–23 Oct. 2002, UN Doc. ECE/MP.PP/2/Add.8.

76. Cf. the Opinion of A.G. Sharpston in Case C-204/09, *Flachglas Torgau*, EU:C:2011:413, para 58, referring with approval to the submissions of the German Government and the Commission that the implementation guide "has no authoritative status as regards the interpretation of the Convention".

77. *R. (on the application of Edwards and another (Appellant))* v. *Environmental Agency and Others (Respondents)* (No. 2) [2013] UKSC 78, para 1. However, see *Walton* v. *The Scottish Ministers* (Scotland) (Rev. 1) [2012] UKSC 44, para 100: "The decisions of the Committee deserve respect on issues relating to standards of public participation." And see UNECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Forty-eighth meeting, Findings and recommendations with regard to communication ACCC/C/2012/77 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, Adopted by the Compliance Committee on 2 July 2014, UN Doc. ECE/MP.PP/C.1/2015/3, 13, para 79: "The Committee takes this opportunity to point out that the Party concerned, being a Party to the Convention, is bound by the Convention under

Aarhus compliance mechanism can be contrasted with the enforcement mechanisms under EU law. Through the preliminary ruling procedure, the ECJ has given binding guidance as to how the criterion of prohibitively expensive costs should be assessed. Contrary to ACCC decisions, preliminary rulings are binding on Member State courts, and provide a benchmark on the basis of which to evaluate their national cost rules. Moreover, it was in reaction to the Commission's reasoned opinion in the infringement proceedings in *Commission* v. *UK* that the UK changed its rules on costs in relation to matters covered by the Aarhus Convention.[78] A reasoned opinion by the Commission, while not binding on the Member State,[79] appeared to be enough to induce the UK to adapt its legislation, which is of course precisely the goal of the pre-litigation procedure under Article 258 TFEU.[80] This is but one illustration of how Union law and its enforcement mechanisms can make the application of international environmental law more effective in the Member States. Two further examples can help to illustrate that point.

First, in *Bund für Umwelt*,[81] an NGO brought proceedings against a decision relating to the construction and operation of a coal-fired power station near a special area of conservation within the meaning of the Habitats Directive.[82] Under German administrative law, parties can in principle only bring judicial proceedings against administrative measures in case of impairment of a rule protecting individual rights (so-called *Individualrechtsschutz*).[83] Since the rules allegedly breached only concerned

international law and that the nature of its nations legal system or lack of incorporation of the Convention in national law are not arguments that it can successfully avail itself of as justification for improper implementation of the Convention."

78. Hurst, "The new costs rules and practice directions", 32 *Civil Justice Quarterly* (2013), 153–166, at 158. However, it should be pointed out that problems relating to costs in the context of the Aarhus Convention had already been signalled by UK judges before the Commission initiated infringement proceedings.

79. Case C-48/65, *Lütticke* v. *Commission*, EU:C:1966:8.

80. Lenaerts et al., op. cit. *supra* note 21, p. 186.

81. Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland*, EU:C:2011:289.

82. Council Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, O.J. 1992, L206/7, as amended by Directive 2006/105/EC of 20 Nov. 2006, O.J. 2006, L363/368.

83. Note that limited litigation rights for environmental protection associations in matters of nature conservation already existed at the level of the Länder and the Federation at the time; see Wörlen, "Compatibility of the German administrative litigation system with international and European environmental law", in Holtwisch, Fajardo del Castillo and Tichá (Eds.), *Strengthening European Environmental Law in an Enlarged Union* (Shaker Verlag, 2004), p. 124. With the enactment of the 2005 Umwelt-Rechtsbehelfsgesetz, further litigation rights were given to recognized environmental protection organizations in a number of other limited areas*, inter alia* decisions relating to the EIA Directive. The main problem was the condition that they must act on the basis of a rule conferring rights upon individuals, which limited the action possibilities of environmental protection associations to act truly on behalf of the

the general public and not the protection of individual rights, the Higher Administrative Court for the Land of North Rhine-Westphalia considered that the NGO could not bring proceedings.[84] Nevertheless, it was not insensitive to the NGO's arguments that standing conditions under German administrative law violated the right of access to justice under the Aarhus Convention and EU implementing legislation, and it referred a number of questions to the ECJ.[85] In its judgment, the ECJ held that Article 10(a) EIA Directive (and hence Art. 9(2) Aarhus Convention) precluded national legislation excluding NGOs promoting environmental protection from bringing court proceedings on the ground that the infringement of the rule flowing from EU environmental law only protects the interest of the general public and not the interest of individuals, and that such NGOs could derive a right to court directly from the Directive.[86] The judgment had an immediate impact in the German legal order when the Bundesverwaltungsgericht quashed a judgment of the Higher Administrative Court of Hesse[87] on the grounds that it had violated Article 10(a) EIA Directive (and thus the Aarhus Convention) by declaring inadmissible an action brought by an NGO on the ground that no individual rights had been impaired.[88] The Bundesverwaltungsgericht further stated that the applicable German legislation should no longer be applied and that NGOs could rely directly on Article 10(a) EIA Directive to bring judicial proceedings as long as the necessary amendments had not been adopted.[89] The Higher Administrative Court for the Land of North Rhine-Westphalia reached the same conclusion shortly afterwards.[90] Eventually, the relevant German legislation was amended.[91]

environment, in absence of any private interest in the matter; see Schlacke, "Das umwelt-rechtsbehelfsgesetz", *Natur und Recht* (2007), 8–16.

84. Oberverwaltungsgericht NRW, 8 D 58/08.AK.

85. Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland*, para 50.

86. Ibid., paras. 50 and 59.

87. VGH Hessen, 16.09.2009 – 6 C 1005/08.T.

88. BVerwG 7 C 21.09 (2011), DE:BVerwG:2011:290911U7C21.09.0.

89. BVerwG 7 C 21.09 (2011), DE:BVerwG:2011:290911U7C21.09.0, para 28.

90. Oberverwaltungsgericht NRW, 8 D 58/08.AK (01/12/2011). See similarly Case C-240/09, *Lesoochranárske zoskupenie*, and the subsequent proceedings before the Slovak Supreme Court, in which the latter overturned its settled case law by ruling that environmental protection associations should be granted the status of "party to the proceedings" so as to enable them to challenge the legality of decisions negatively impacting on the environment: Najvyšší súd Slovenskej republicky, No. 3 Sţp/49/2009, 2 Aug. 2011. The dialogue between the Slovak Supreme Court and the ECJ on judicial protection under the Aarhus Convention is continuing, notably through a reference for a preliminary ruling in a second case, Case C-243/15, *LZ II*.

91. Gesetz vom 21.01.2013 zur Änderung des Umwelt-Rechtsbehelfsgesetzes und anderer umweltrechtlicher Vorschriften, Bundesgesetzblatt Teil I 2013 Nr. 3 28.01.2013 S. 95. Yet German legislation turned out to be still not entirely in compliance with EU law requirements: Case C-137/14, *Commission* v. *Germany*, EU:C:2014:67. See also Minami, "The Aarhus

Second, in *Solvay*,[92] members of the public challenged before the Belgian Constitutional Court a Decree of the Walloon Parliament "ratifying" a number of planning and environmental permits. The Walloon Parliament had ratified these permits by decree after annulment proceedings had been started against the permits before the Belgian Council of State. By incorporating them in a legislative act, the Walloon Parliament immunized the permits against judicial review by the Council of State, which, as the supreme administrative court, only has jurisdiction to review the legality of administrative acts and not of legislative acts. The Decree was subsequently challenged before the Constitutional Court on the ground that the legislative procedure leading to the adoption of the Decree suffered from defects. The main problem was that the Constitutional Court had no jurisdiction to verify the correctness of the decision-making procedure for the adoption of a legislative act. Consequently, it was not possible under Belgian law to have the legality of the Decree reviewed on that ground. Upon a reference from the Constitutional Court,[93] the ECJ ruled *inter alia* that Article 9(2) to (4) Aarhus Convention required that the decision-making procedure leading up the a legislative act falling within the scope of the Aarhus Convention must be amenable to review by a court or an independent body.[94] In its subsequent judgment, the Belgian Constitutional Court concluded that, although it had no competence under national law, it was obliged to review the decision-making process leading up to the adoption of the Decree as a result of the ECJ's judgment.[95] Consequently, the Decree was annulled and proceedings before the Council of State became pending again.[96]

These examples have in common that the national courts in question were only prepared to give full effect to the Aarhus Convention after an intervention by the ECJ. This is remarkable, since these courts were also bound by the Aarhus Convention through their national legal order and could have reached

Convention and cases of non-compliance with environmental impact assessment requirements: The EU and Japan" in Nakanshi (Ed.), *Contemporary Issues in Environmental Law: The EU and Japan* (Springer, 2016), pp. 54–56.

92. Case C-182/10, *Solvay*, EU:C:2012:82. See also Joined Cases C-128-131, 134 & 135/09, *Boxus*, EU:C:2011:667.

93. Belgian Constitutional Court, 30 March 2010, No. 30/2010.

94. Case C-182/10, *Solvay*, para 52. See also Joined Cases C-128-131, 134 & 135/09, *Boxus*, para 57.

95. Belgian Constitutional Court, 22 Nov. 2012, No. 144/2012, B.13.

96. Ibid., B.14.1 and B 14.2. See further on the possible implications of the *Boxus* and *Solvay* case law within UK constitutional law: *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, on which see Craig, "Constitutionalizing constitutional law: HS2", (2014) *Public Law*, 373–392; and Elliott, "Constitutional legislation, European Union law and the nature of the United Kingdom's contemporary constitution", 10 EuConst (2014), 379–392.

the same conclusion without an intervention by the ECJ. The German courts, for example, were well aware of the problem of restricted standing conditions for NGOs long before the ECJ's judgment in *Bund für Umwelt*, and the topic had been the subject of debate in legal scholarship for decades.[97] It thus seems that Member State courts respond differently to rules of international law when at the same time EU law obligations are involved. A core element in this is the judicial architecture of the EU,[98] with the ECJ playing the role of catalyst through the preliminary ruling procedure. By attaching its authority and the EU principles of primacy and effectiveness to the Aarhus Convention, the ECJ obliged the national courts to leave aside deeply entrenched rules of national procedural law and to give full effect to EU law and hence to international law. The effect of the intervention by the ECJ should not be underestimated: strong supranational courts of regional integration organizations like the EU can play an important role in the development and enforcement of international law. [99]

5.2.2. *The ECJ as an accessible (international law) court*

The Aarhus Convention is only one example of how the Union legal order in general and the ECJ in particular has functioned as a powerful catalyst for the effect of international treaties in the national legal orders of the Member States.[100] For the Court to play that role, it is not even strictly necessary that the Union should be a party to the international agreement in question:[101] as soon

97. Schmid, Schrader and Zschiesche, *Die Verbandsklage im Umwelt- und Naturschutzrecht* (Beck, 2014), pp. 1–4; Rizou, *Zugang zu Gerichten im Umweltrecht* (Peter Lang, 2006), p. 149; Rebhinder, "Germany", in Ebbesson (Ed.), *Access to Justice in Environmental Matters in the EU – Accès à la Justice en Matière d'Environnement dans l'UE* (Kluwer Law International, 2002), p. 248.

98. Cf. De Baere and Roes, "EU loyalty as good faith", 64 ICLQ (2015), 841 and 845.

99. See also Nollkaemper, "The role of national courts in inducing compliance with international and European law – A comparison", in Cremona (Ed.), *Compliance and the Enforcement of EU Law* (OUP, 2012), pp. 188–193.

100. See in that sense also Ziegler, "International law and EU law: Between asymmetric constitutionalisation and fragmentation", in Orakhelashvili (Ed.), *Research Handbook on the Theory and History of International Law* (Edward Elgar, 2011), pp. 280–281, arguing that through its special enforcement instruments, EU law reinforces international law substantively and procedurally.

101. That is well illustrated by the Court's case law with respect to the Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150 (the Geneva Convention). By generally aligning its case law with the Geneva Convention, the Court has enabled the Member States to align their judicial and administrative practices both to their international obligations under the Geneva Convention and their obligations under EU law. In that way, the ECJ – esp. through the preliminary ruling procedure – plays a critical role in providing within the EU the consistency and unity in application and implementation that the Geneva Convention lacked in its original set-up. That alignment of EU law with the Geneva Convention is confirmed by Art. 18, Charter, and has now become part of settled case law: See Joined Cases C-175, 176, 178 & 179/08, *Salahadin Abdulla and Others*, EU:C:2010:105, paras. 52–53, and most recently, Joined Cases C-443 & 444/14, *Alo*, EU:C:2016:127, paras. 28–29. See further De Baere, "The Court of

as EU law contains certain norms originating from international treaties, the Court acts as the guarantor of uniform interpretation and enforcement within the EU legal order.

Conversely, an interpretation of an international law concept by the ECJ may also influence the development of international law outside the EU legal order. *Edwards* could be an appropriate example in that regard. Now the ECJ has given a binding interpretation on the rather abstract concept of "prohibitively expensive costs" for (at least for the time being) 29 of the 47 parties to the Aarhus Convention, courts from outside the EU may well turn to the ECJ's judgment when seeking inspiration for an interpretation of that notion.[102]

Nevertheless, in order to play its role of enforcer of international (environmental) law, it is imperative that the ECJ itself is sufficiently accessible, either indirectly, through references for a preliminary ruling such as in *Edwards*, or directly. Such access requires addressing different types of potential obstacles to access to justice, including costs, but also the stringent *locus standi* conditions for direct actions, or the strict conditions for the review of the legality of EU acts on the basis of international agreements such as the Aarhus Convention.[103] Like the role of costs, the latter two potential obstacles can be illustrated by returning to the Aarhus Convention.

First, access to judicial protection in the Union has been the subject of a number of cases before the ACCC. Given that the involvement of the public in judicial proceedings with respect to environmental issues is one of the main innovations of the Aarhus Convention, the *locus standi* requirements in Article 263(4) TFEU (ex Art. 230(4) EC) are an understandable source of concern for the ACCC. Notably, on 1 December 2008, ClientEarth submitted a communication to the ACCC alleging that the EU had failed to comply with its obligations under the Aarhus Convention, *inter alia* by applying the "individual concern" standing criterion to actions for annulment under Article 263(4) TFEU brought by private individuals and NGOs, and by charging the applicants before the EU Courts with expenses of an uncertain and possibly prohibitive nature in the event of the loss of their case.[104] In Part I of its

Luxembourg acting as an asylum court", in Alen, Joosten, Leysen and Verrijdt (Eds.), *Liberae Cogitationes: Liber Amicorum Marc Bossuyt* (Intersentia, 2013), pp. 107–124.

102. Indeed, the most recent edition of the Convention's *Implementation Guid*e (cited *supra* note 2) refers, next to ACCC decisions, to Case C-427/07, *Commission* v. *Ireland*, as having established that "mere judicial discretion to decline to order the unsuccessful party to pay the costs of the procedure cannot be regarded as valid implementation of the Convention's requirement that the procedure must not be 'prohibitively expensive'", p. 204.

103. See *supra* section 5.2.1.

104. UNECE, *Meeting of the Parties to the [Aarhus Convention], Compliance Committee, Thirty-second meeting, Report of the Compliance Committee Addendum Findings and*

findings, while the ACCC held the claims with respect to costs before the EU courts not to be sufficiently substantiated,[105] the ECJ's case law with respect to *locus standi* for non-privileged applicants came in for heavy criticism. In particular, the ACCC held it to be "clear to the Committee that Article 230(4) TEC, on which the ECJ has based its strict position on standing, is drafted in a way that could be interpreted so as to provide standing for qualified individuals and civil society organizations in a way that would meet the standard of Article 9(3) of the Convention".[106] It also emphasized that while the "system of judicial review in the national courts of EU Member States, including the possibility to request a preliminary ruling, is a significant element for ensuring consistent application and proper implementation of EU law in its Member States, it cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies".[107] Nevertheless, the ACCC held that it was not convinced that the Union had failed to comply with the Aarhus Convention, given the evidence before it, but that it considered that a new direction of the case law of the EU Courts should be established in order to ensure compliance. In particular, the ACCC refrained from examining whether the Aarhus Regulation or any other relevant internal administrative review procedure of the EU met the requirements on access to justice in the Convention, because it was waiting for the outcome of the *Vereniging Milieudefensie* and *Stichting Natuur en Milieu* cases. In the Draft of Part II of its findings, the ACCC made it quite clear that neither the ECJ's judgments in those cases,[108] nor its post-Lisbon case law on *locus standi*,[109] were sufficient to ensure compliance with the Convention, holding that the EU "fails to comply with Article 9, paragraphs 3 and 4 of the Convention with regard to access to justice by members of the public because neither the Aarhus Regulation nor the jurisprudence of the ECJ implements or complies with the obligations arising under those paragraphs".[110] The ACCC recommended that "all relevant EU institutions within their competences take the steps necessary to provide the public concerned with access to justice in

recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, UN Doc. ECE/MP.PP/C.1/2011/4/Add.1, paras. 1–2.

105. Ibid., para 93.

106. Ibid., para 86.

107. Ibid., para 90.

108. Joined Cases C-401-403/12 P, *Vereniging Milieudefensie*; and Joined Cases C-404 & 405/12 P, *Stichting Natuur.*

109. See in particular Case C-456/13 P, *T & L Sugars and Sidul Açúcares* v. *Commission*, EU:C:2015:284.

110. UNECE, *Draft Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) Concerning Compliance by the European Union*, para 115.

environmental matters in accordance with Article 9, paragraphs 3 and 4 of the Convention", and in particular that if the Union were to rely on ECJ case law to correct the non-compliance, the ECJ "a) assesses the legality of the EU's implementing measures in the light of those obligations and acts accordingly; and b) interprets EU law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9, paragraphs 3 and 4".[111]

Second, while *Edwards* and the other examples considered above arguably demonstrate that the ECJ can act as an effective enforcer of international law within the legal orders of the EU Member States, the Court's rather restrictive case law regarding the test to be satisfied for international agreements to be used to review the validity of secondary EU acts[112] and, specifically with respect to the Aarhus Convention, the ECJ's judgments in *Vereniging Milieudefensie* and in *Stichting Natuur en Milieu*,[113] tell an altogether different story,[114] and call for a nuanced assessment of the ECJ's role as an international (environmental) court.

6. Conclusion

The costs of judicial proceedings can have a clear chilling effect or constitute an obstacle to access to environmental justice. As the report drafted on the Commission's request by Jan Darpö, chair of the Aarhus Convention Access to Justice Task Force,[115] shows, while the issues in that regard in the UK legal system are or were arguably marked, they are in no way limited to that Member State.[116] Problems in various Member States include high court fees,

111. Ibid., paras. 116 and 118.

112. See the overview in Kuijper, Wouters, Hoffmeister, De Baere, and Ramopoulos, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor*, 2nd ed. (OUP, 2015), Ch. 12.

113. Joined Cases C-401-403/12 P, *Vereniging Milieudefensie;* and Joined Cases C-404 & 405/12 P, *Stichting Natuur en Milieu*

114. Cf. de Búrca, "Internalization of international law by the CJEU and the US Supreme Court", 13 I-Con (2015), 1004, arguing that the ECJ's approach towards international law has changed from exceptionally open in earlier days to considerably more cautious and conditional more recently, "except in cases in which it is enforcing international law against Member States".

115. Darpö, *Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union,* (2013-10-11/Final).

116. e.g. Case C-543/14, *Ordre des barreaux francophones et germanophone and Others*, in which the Belgian Constitutional Court (No. 165/2014, 13 Nov. 2014) requested the ECJ *inter alia* to assess the validity of Directive 2006/112/EC of 28 Nov. 2006 on the common system of value added tax, O.J. L 347/1 in the light of, amongst others, the Aarhus Convention, to the extent that it makes lawyers subject to the system of VAT, leading to an increase in

the loser pays principle in relation to cost liability, compulsory use of specific categories of counsel in court, expenses for expert witnesses, high securities for obtaining interim relief, and uncertainty as regards cost.[117]

As explored above, the Aarhus Convention itself includes the obligation for parties to ensure that the relevant national procedures should provide adequate and effective remedies, including injunctive relief as appropriate, and be "fair, equitable, timely and not prohibitively expensive",[118] and to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.[119] As *Edwards* illustrates, effective enforcement in the Member States' legal orders of those obligations has been significantly enhanced by EU law and by the ECJ in particular.

Finally, it must be borne in mind that the UK is a party to the Aarhus Convention in its own right, and that a withdrawal from the EU pursuant to Article 50 TEU would not affect the UK's obligation under international law to comply with the Convention, including the requirement under Article 9(4) Aarhus Convention that procedures ensuring access to justice in environmental matters "provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive". However, judicial protection under the Convention would have to be provided solely by the UK courts, as appropriate against the background of the non-binding guidance provided by the ACCC, but without the ECJ's role providing an EU-wide binding interpretation of the Convention.

Geert De Baere and Janek Tomasz Nowak*

lawyers' fees and therefore potentially affecting access to justice in environmental matters. The Opinion of A.G. Sharpston in the case concluded that examination of the questions referred disclosed nothing capable of affecting the validity of Directive 2006/112; see on the Aarhus Convention esp. paras. 89–93. The Court agreed.

117. Darpö, op. cit. *supra* note 115, p. 38.

118. Art. 9(4) Aarhus Convention.

119. Art. 9(5) Aarhus Convention.

* Geert De Baere is Legal Secretary at the CJEU and Associate Professor of EU Law and International Law at the Institute for European Law and the Leuven Centre for Global Governance Studies, University of Leuven. All views expressed herein are strictly personal and none can be ascribed to the CJEU. Janek Tomasz Nowak is a Research Fellow at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, an Affiliated Researcher at the Institute of European Law, University of Leuven, and a Visiting Lecturer at the MCI Innsbruck, Austria. He is preparing a PhD thesis on the impact of Union law on national procedural law. Many thanks to Kathleen Gutman and Isabelle Van Damme, and the anonymous reviewers, for their helpful remarks on earlier drafts.

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