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6. The Aarhus Convention: Standards for Access to Justice in Environmental Matters

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1. Introduction

The Aarhus Convention[1] (the Convention) is an international treaty under the auspices of the United Nations Economic Commission for Europe (UN ECE). It guarantees three interconnected procedural rights: the right to information; the right to participate in decision-making; and the right of access to justice in environmental matters. The Convention is ground-breaking in linking environmental rights and human rights. Its overarching objective is to contribute to the right of every person of present and future generations to live in an environment adequate to their health and well-being.[2] The Convention aims to strengthen environmental governance by providing opportunities for an informed public to express concerns about activities which may have a significant effect on the environment and insisting that public authorities take account of those concerns. Transparency and accountability in decision-making is advanced by improving public access to environmental information and providing accessible, affordable and effective review mechanisms to ensure

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[1] United Nations Economic Commission for Europe (UN ECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 28 June 1998, 2161 UNTS 447 (Aarhus Convention).

[2] ibid Preamble Article 1 and recitals 6 to 8.

that the law is applied correctly and enforced by the courts where necessary. The Convention places special emphasis on the role played by non-governmental organisations (NGOs) in environmental protection, in particular by enabling them to enforce the law in the public interest.

This chapter examines the development of standards within the context of the rights guaranteed under the Convention and the obligations undertaken by State Parties (i.e. States that have ratified, and are therefore bound by, the Convention as a matter of international law). It focuses on how the Aarhus Convention Compliance Committee (the Compliance Committee) and the Court of Justice of the European Union (CJEU) have developed these standards over time. Of course courts and tribunals at national level are also involved intensively in interpreting, applying and enforcing Convention obligations. In order to provide a detailed account, this chapter focuses exclusively on the role of the Compliance Committee and the CJEU in developing standards within the framework of the Convention.

As is common in international instruments, certain obligations articulated in the Convention are drafted in general terms and leave a measure of flexibility to the Parties. This can lead to genuine disputes as to the scope and meaning of these obligations and their practical implications. In drafting international instruments such as the Convention, the fundamental challenge is to create obligations, and set standards associated with those obligations, that provide clear, workable and enforceable benchmarks while, at the same time, leaving an appropriate measure of flexibility to Parties to accommodate the specific legal, administrative, social and cultural conditions operating in a particular State.

Sharp tensions can arise where obligations set at international level do not fit neatly with well-established law and practice at local level. Parties can be resistant to change in such circumstances, particularly when there may be significant resource implications associated with full implementation of Convention obligations. For example, delivering timely access to environmental information and affordable and timely access to justice in environmental matters may prove challenging in States where resources are limited and public authorities and the courts are under pressure due to heavy workloads. Where disputes arise over implementation, the Compliance Committee and the CJEU play a vital role in interpreting Convention obligations and identifying the standards that must be met to deliver compliance.

The chapter begins by introducing the Convention and explaining the institutional framework in which it operates, including its innovative compliance mechanism (section 2). It then traces how standards have evolved as the Compliance Committee and the CJEU have interpreted Convention provisions in the context of specific cases that have come before them (section 3). Based on the jurisprudence developed by the Compliance Committee and the CJEU to date, three particular areas emerge as potential case studies on the development of standards within the framework of the Convention: the interpretation of the concept of a 'reasonable' charge for the supply of environmental information (Article 4(8));[3] the obligation to deliver 'early' and 'effective' public participation (Article 6(3) and (4));[4] and the obligation to deliver access to justice in environmental matters that is not 'prohibitively expensive' (Article 9(4)).[5]

[3] See further UN ECE, *The Aarhus Convention: An Implementation Guide* (2nd ed, UN ECE 2014) 94.

[4] ibid 142-146.

[5] ibid 203-204.

This chapter selects the obligation in Article 9(4) to deliver affordable access to justice for detailed treatment. This sharp focus is necessary in order to provide a full account of the gradual evolution of standards and to explain the role of the Compliance Committee and the CJEU in promoting common standards for the enforcement of environmental rights across the UN ECE region and in the European Union (EU) respectively. This account is followed by a critical appraisal of the evolution of standards within the framework of the Convention (section 4). The chapter concludes by assessing the current position and considers likely future developments.

2. The Aarhus Convention

The Convention opened for signature in June 1998 and entered into force on 30 October 2001. There are now 47 Parties to the Convention including the EU and the 28 Member States.[6] NGOs played a very significant role in the negotiations that led to the Convention text as adopted.[7] The recitals in the Preamble recall the Convention's origins.[8] A series of well-known international declarations, resolutions and other instruments played a major role

[6] Notwithstanding the outcome of the referendum on EU membership held in the United Kingdom on 23 June 2016, where a majority voted to leave the EU ('Brexit'), the United Kingdom remains a Member State of the EU until the formal withdrawal process is completed in accordance with the EU Treaties. At the time of writing, it is anticipated that the United Kingdom will remain a Party to the Aarhus Convention post-Brexit.

[7] The reports of the sessions of the Ad Hoc Working Group for the preparation of a draft Convention on Access to Information and Public Participation in Environmental Decision-making (1996-1998) record the negotiations leading up to the adoption of the Convention. These reports are available at: <http://www.unece.org/env/pp/adwg.html> accessed 25 May 2018.

[8] Aarhus Convention (n 1) Recitals 1-4, 22 and 23.

in the creation of the Convention and influenced its content significantly.[9] Among the most important influences were: the Stockholm Declaration;[10] the World Charter for Nature;[11] the Environmental Impact Assessment (EIA) Directive;[12] the Brundtland Report;[13] the Directive on the Freedom of Access to Information on the Environment;[14] the Espoo Convention;[15] the Rio Declaration;[16] and the UN ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making.[17]

Reflecting principle 10 of the Rio Declaration,[18] the Convention is built around three core procedural environmental rights: the right to information; the right to participate in decision-

[9] For a concise overview of the origins and development of the Convention see *The Aarhus Convention: An Implementation Guide* (n 3) 16-17.

[10] Declaration of the United Nations Conference on the Human Environment, UN Doc. A/CONF 48/14/Rev 1 (New York, 1972) (Stockholm Declaration).

[11] World Charter for Nature, (28 October 1982) UN DOC A/RES/37/7.

[12] Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175/40.

[13] Report of the World Commission on Environment and Development, *Our Common Future*, 10 March 1987, Annex to UN DOC A/42/427 (Brundtland Report).

[14] Directive 90/313/EEC on the Freedom of Access to Information on the Environment [1990] OJ L 158/56.

[15] Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, 1989 UNTS 309 (Espoo Convention).

[16] Rio Declaration on Environment and Development UN Doc, (13 June 1992) A/CONF.151/26. Rev.1 (Rio Declaration).

[17] UN ECE 'UN ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making', Third Ministerial Conference, Environment for Europe, 25 October 1995.

[18] Rio Declaration (n 16) Principle 10 provides that:

making; and the right of access to justice in environmental matters. The overarching objective is articulated in Article 1 which adopts a rights-based approach and also echoes elements found in principle 1 of the Stockholm Declaration:[19]

> In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.

The three procedural rights are presented in Article 1 as underpinning the right to an environment 'adequate' to a person's health and well-being. Recital 6 in the Preamble recognises that 'adequate' environmental protection 'is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.' The Convention is ground-breaking in linking environmental rights and human rights and Article 1 has been described as 'one of the clearest statements in international law of a fundamental right to a

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

[19] Stockholm Declaration (n 10).

healthy environment'.[20] The following statement from the Aarhus Convention Implementation Guide is instructive as to the ambitious intention behind the Convention as articulated in Article 1:

> The Aarhus Convention provides a set of minimum standards to Parties to guide them on how to protect the right to a healthy environment. The obligations of the Convention must be considered in this light – not as commitments among nations for the promotion of good-neighbourly relations, but as important benchmarks for contributing to the basic welfare of the public.
>
> Authorities should not look to the Convention as a set of strict and burdensome obligations to be minimized – if not avoided altogether – but rather as a valuable tool to support them in discharging their responsibility to help the public to overcome the challenges of the times.[21]

The objective is to support the right to a healthy environment and to encourage Parties to push the boundaries and build on the minimum guarantees established in the Convention text. The next section explains the specific environmental rights guaranteed in the Convention and the institutional framework in which they reside.

2.1 Aarhus Convention: Structure, Content and Compliance Mechanism

[20] *The Aarhus Convention: An Implementation Guide* (n 3) 42.

[21] ibid 42-43.

As explained earlier, the Convention is structured around three procedural environmental rights. With a view to supporting the practical implementation of these rights, Article 3 establishes a set of overarching 'general provisions' which create the following obligations on Parties: to establish and maintain a clear, transparent and consistent framework to implement Convention provisions;[22] to endeavour to ensure that officials and authorities assist and provide guidance to the public on their Convention rights;[23] to promote environmental education and awareness among the public;[24] and to provide appropriate recognition of and support to environmental NGOs.[25] These obligations are essential to support the delivery of the Convention rights in practice. Article 3(5) confirms that the Convention sets a minimum standard; there is nothing to prevent Parties from providing broader access to information, more extensive participation and wider access to justice than that mandated by the terms of the Convention. A Party may decide, for example, not to include all of the exceptions to the right of access to environmental information provided for in Article 4(4) of the Convention in its domestic legal framework or a Party may opt to extend participation rights to a wider range of decisions than those specified in Article 6(1).

2.1.1 The Right of Access to Environmental Information

[22] Aarhus Convention (n 1) Article 3(1).

[23] ibid Article 3(2).

[24] ibid Article 3(3).

[25] ibid Article 3(4).

Article 4 provides for the right of access to environmental information held by public authorities, on request and without having to state an interest, subject to certain exceptions.[26] It sets out the formalities and procedures by which the right is to be delivered in practice, including time limits governing the release of information. Recital 17 in the Preamble to the Convention acknowledges explicitly that public authorities hold environmental information in the public interest. This provision is important when it comes to applying the exceptions to the right of access set out in Article 4(4). These exceptions must always be interpreted restrictively, taking into account the public interest served by disclosure. The Convention therefore creates a strong presumption in favour of information disclosure.

Article 4(2) sets a timeframe within which public authorities must respond to requests for access. It demands that, unless exempt from disclosure, the information must be released 'as soon as possible' and, at the latest, within one month after the request has been submitted by the applicant.[27] As regards the possibility of charges in the context of environmental information requests, Article 4(8) grants public authorities a discretion to levy a charge for supplying information, but any such charge must not exceed a 'reasonable' amount. Both the Compliance Committee and the CJEU have been called on to examine the concept of a 'reasonable' charge and have clarified how to interpret this standard and to employ it as a benchmark in particular cases.[28] The overarching principle that has emerged from the

[26] 'Public authority' and 'environmental information' are defined in broad terms in the Aarhus Convention (n 1) Article 2(2) and (3).

[27] Aarhus Convention (n 1). Article 4(2) makes provision for this period to be extended, up to a maximum period of two months after the request has been submitted, in circumstances where the volume and complexity of the information requested justify an extension. The applicant must be informed of any extension to the time period for the public authority's response and of the reasons justifying it.

[28] Consider for example ACCC/C/2008/24 Spain ECE/MP.PP/C.1/2009/8/Add.1 paras 75-79 where the Compliance Committee determined that the charge levied by the public authority in this case (€2.05 per one-sided

jurisprudence to date is that a charge cannot be set at such a level that it may deter individuals and NGOs wishing to obtain environmental information or restrict their right of access to such information;[29] in other words, a purposive approach is adopted to the concept of a 'reasonable' charge.

Article 5 governs the proactive collection and dissemination of environmental information by public authorities. Essentially, authorities must possess and update environmental information relevant to their functions and put practical arrangements in place to support the right of access.[30] There is a specific obligation to ensure that environmental information is made available progressively in easily accessible electronic databases.[31]

A close study of the text of Articles 4 and 5 of the Convention confirms the strong influence of Directive 90/313/EEC on the Freedom of Access to Information on the Environment.[32] However, the Convention provisions improve considerably on the relatively weak access regime created in that early directive. Whereas the 1990 directive merely provided for 'freedom' of access, Article 4 of the Convention guarantees a 'right' of access to environmental information and goes much further to restrict the situations in which a public authority may lawfully withhold information.[33] Prior to its ratification of the Convention in

page for a photocopy) was unreasonable. Spain had therefore failed to comply with the obligation in Article 4(8). For the most recent CJEU jurisprudence on this point see Case C-71/14 *East Sussex County Council v Information Commissioner, Property Search Group and Local Government Association* EU:C:2015:656 paras 27-45.

[29] Case C-71/14 ibid para 42.

[30] Aarhus Convention (n 1) Article 5(1) and (2).

[31] ibid Article 5(3).

[32] Directive 90/313/EEC on the freedom of access to information on the environment [1990] OJ L 158/56.

[33] Aarhus Convention (n 1) Articles 4(1), 4(3) and 4(4).

2005, the EU adopted a revised directive on public access to environmental information (Directive 2003/4/EC)[34] with the aim of implementing the Aarhus access to information obligations in the Member States.

2.1.2 The Right to Participate in Decision-making

Article 6 guarantees 'the public concerned'[35] the right to participate in decisions on whether to permit certain proposed activities. The 'public concerned' must be informed of specified matters at an early stage in the decision-making procedure and in an 'adequate, timely and effective manner'.[36] The procedures governing participation must include 'reasonable' time-frames for the different stages of the decision-making process, allowing sufficient time to inform the public and to enable them to prepare and participate effectively.[37] Parties must provide for 'early' public participation, when all options are open and 'effective' participation can take place.[38] The public is entitled to submit comments, information, analyses or opinions that it considers relevant to the proposed activity and the decision-maker must take 'due account' of the outcome of the public participation process.[39] The decision

[34] Directive 2003/4/EC on public access to environmental information [2003] OJ L 41/26.

[35] The 'public concerned' is defined in the Aarhus Convention (n 1) Article 2(5) as:

> [T]he public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition [NGOs] promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

[36] Aarhus Convention (n1) Article 6(2).

[37] ibid Article 6(3).

[38] ibid Article 6(4).

[39] ibid Article 6(7) and (8). See *The Aarhus Convention: An Implementation Guide* (n 3) 144-146 for selected examples of Compliance Committee jurisprudence on this point. See generally the *Maastricht Recommendations*

taken by the public authority, together with the reasons and considerations on which it is based, must be accessible to the public.[40]

A close reading of Article 6 reveals the strong influence of the original EIA Directive which was adopted in 1985.[41] The Convention provisions build on the participation obligations found in that early directive and are more specific as regards the quality of participation that must be delivered. In particular, Article 6(4) of the Convention obliges Parties to provide for early public participation when all options are still open[42] and effective participation can take place. Prior to its ratification of the Convention, the EU adopted significant amendments to the EIA Directive, and a number of other environmental directives, to give effect to the enhanced public participation rights mandated by the Convention.[43]

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on Promoting Effective Public Participation in Decision-making in Environmental Matters (prepared under the Aarhus Convention) (UN ECE, 2014). On the 'early' and 'effective' opportunities for participation point in the context of the Strategic Environmental Assessment (SEA) Directive (Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/30) see the CJEU judgment in Case C-474/10 *Department of the Environment for Northern Ireland v Seaport Investments (NI) Ltd & Others* EU:C:2011:681 paras 44-50.

[40] Aarhus Convention (n 1) Article 6(9).

[41] Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment [1985] OJ L 175/40.

[42] Essentially, this means that 'the public authority must still be in the information gathering and processing stage and must be open to persuasion by members of the public to change its position or opinion': *The Aarhus Convention: An Implementation Guide* (n 3) 144.

[43] Directive 2003/35/EC 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 [2003] OJ L 156/17.

Article 7 of the Convention governs public participation during the preparation of plans, programmes and policies relating to the environment, while Article 8 obliges Parties to strive to promote effective participation during the preparation of executive regulations and other generally applicable legally binding normative instruments. The specific participation obligations arising under Articles 7 and 8 are significant, although less onerous on Parties than those mandated in the case of specific activities falling within the scope of Article 6.

2.1.3 The Right of Access to Justice

A very specific concept of justice lies at the heart of the Convention. It centres around the goal of effective enforcement of environmental law. This goal is to be achieved by guaranteeing a right of access to robust review procedures, either before a court or another independent tribunal established by law, that may be invoked by the public and NGOs. The rights guaranteed in the Convention, and environmental protection laws generally, are at risk of being undermined in practice in the absence of accessible, affordable and effective enforcement mechanisms.[44]

Article 9(1) governs remedies where a public authority fails to deal with a request for access to information in accordance with Article 4 of the Convention. Essentially, in this situation, Parties must provide for review of a public authority's decision before a court of law or another independent body.[45] As regards enforcement of the right to participate in decision-

[44] Aarhus Convention (n 1) Recital 18 in the Preamble to the Convention confirms that 'effective judicial mechanisms' must be available to ensure that the law is enforced.

[45] ibid Article 9(1) insists that where a Party opts for review before a court, it must ensure that there is also access to an expeditious, non-judicial procedure that is either free of charge or inexpensive.

making, Article 9(2) provides that qualified members of 'the public concerned'[46] must have access to a review procedure to challenge the substantive and procedural legality of any decision, act or omission that is subject to the participation obligations in Article 6. At a minimum, the Convention requires that members of 'the public concerned' who can establish either 'a sufficient interest' or impairment of a right (where national administrative law or procedural rules set this as a requirement) have standing to invoke the review procedure. National standing rules must deliver 'wide' access to justice in this context. This is an important benchmark which limits Parties' discretion to set restrictive standing rules.

Under Article 9(2), it is clear that NGOs that: (1) promote environmental protection and (2) meet any criteria set in national law[47] enjoy standing to invoke the review procedure.[48] In other words, NGOs that satisfy these two requirements do not have to demonstrate a 'sufficient interest' or impairment of a right; their interest is, to use the wording of Article 9(2), 'deemed' to be sufficient and they are also 'deemed' to have rights capable of being impaired. This generous approach to standing for environmental NGOs confirms the importance the Convention attaches to such organisations and the significant role that they play in enforcing environmental law in the public interest.[49]

[46] Defined in ibid Article 2(5).

[47] There is no requirement in the Convention that Parties must actually set such criteria. Should they choose to do so, the criteria that Parties could potentially consider putting in place in this context might include, for example, a requirement that an NGO has been active for a minimum period of time and that it operates on a 'not for profit' basis.

[48] On the narrow scope of the discretion vested in Parties under Article 2(5) of the Convention to set criteria at the national level that NGOs must meet see *The Aarhus Convention: An Implementation Guide* (n 3) 57-58.

[49] See further on this point *The Aarhus Convention: An Implementation Guide* (n 3) 58.

Article 9(3) supplements Article 9(1) and (2) by providing the public with a general right of access to justice to enforce environmental law.[50] It envisages that members of the public, who meet the requirements (if any) set down in national law, may take action to enforce environmental law directly, such as by initiating a case before a court to have the law enforced, or in an indirect manner, for example by triggering enforcement action by the relevant national authorities.[51]

Article 9(4) sets down minimum standards for the review procedures required under Article 9(1), (2) and (3).[52] These review procedures must provide 'adequate and effective remedies', including injunctive relief as appropriate, and must be 'fair, equitable, timely and not prohibitively expensive'.[53] Decisions taken under Article 9 must be given or recorded in writing and decisions of courts must be publicly accessible.[54]

Article 9(5) creates a number of important practical obligations aimed at furthering the effectiveness of the access to justice provisions in the Convention. It requires Parties to 'consider' establishing 'appropriate assistance mechanisms to remove or reduce financial and

[50] The obligation in Article 9(3) is stated expressly to be '[i]n addition and without prejudice to' the review procedures referred to in Article 9(1) and (2).

[51] See further *The Aarhus Convention: An Implementation Guide* (n 3) 197-199.

[52] The requirements in Article 9(4) are stated expressly to be additional requirements and operate without prejudice to Article 9(1).

[53] Aarhus Convention (n 1) Article 9(4).

[54] Decisions of bodies other than courts are required to be publicly accessible only 'whenever possible'.

other barriers to access to justice'[55] and to provide information to the public on access to administrative and judicial review procedures.[56]

Overall, Article 9 addresses a wide range of important practical matters concerning access to justice. It limits Parties' discretion to set restrictive standing requirements. It requires timely review procedures that deliver appropriate and effective remedies, including injunctive relief. It demands that the costs involved in engaging and participating in the review procedure must be affordable ('not prohibitively expensive'), although courts may still award 'reasonable costs'.[57]

On a first reading, therefore, Article 9 impresses as a strong provision that sets a high standard for Parties as regards access to justice in environmental matters. On closer examination, however, it becomes clear that the general nature of the language used in Article 9, and indeed in other provisions of the Convention, creates problems for implementation and enforcement. Important elements of the obligations created in Article 9, such as 'wide' access to justice, 'timely' review procedures and costs that are 'not prohibitively expensive', do not articulate specifically the precise standards that Parties must meet. Authoritative interpretation of Convention obligations is needed to distil their meaning and impact in practice. Even more significantly, the text of Article 9 makes multiple references to 'national legislation' and 'national law'. This explicit deference to national arrangements means that

[55] Examples of potential assistance mechanisms include legal aid, cost capping arrangements and arrangements for protective (or pre-emptive) costs orders.

[56] See further *The Aarhus Convention: An Implementation Guide* (n 3) 205-207.

[57] Aarhus Convention (n 1) Article 3(8) confirms that national courts retain the power to award 'reasonable costs' in judicial proceedings.

practical implementation of the access to justice obligations will be influenced, to a considerable extent, by the existing national legal frameworks. The deliberate reference to national legal systems also results in an inevitable diversity of approaches to implementation of Convention obligations across the 47 State Parties.

Section 3, below, examines the process by which the standards inherent in particular aspects of Article 9 of the Convention have emerged and crystallised over time through decisions of the Compliance Committee and the CJEU. Before moving to that analysis, it is necessary to introduce the specific compliance mechanism provided for under the Convention and to explain how the Convention interacts with EU law.

2.1.4 Aarhus Convention Compliance Committee

Article 15 requires the Meeting of the Parties (MoP) to the Convention to establish, on a consensual basis, 'optional arrangements of a non-confrontational, non-judicial and consultative nature' for reviewing compliance with Convention obligations. Such arrangements must allow for public involvement, and may include the option of considering communications from the public on matters relating to the Convention. In October 2002, pursuant to Article 15, the MoP adopted Decision I/7 on Review of Compliance and established the Compliance Committee.[58] Together with the MoP, this committee (which

[58] Decision I/7 Review of Compliance ECE/MP.PP/2/Add.8 para 1, <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf> accessed 28 May 2018. For a fascinating account of the Compliance Committee's work in its early years see Fiona Marshall, 'Two Years in the Life: The Pioneering Aarhus Convention Compliance Committee 2004-2006' (2006) 8 International Community Law Review 123.

comprises nine members made up of practising lawyers and academics with recognised expertise in environmental law),[59] oversees how Parties implement their Convention obligations. Its core functions involve: considering submissions by Parties;[60] referrals by the Secretariat;[61] or communications from the public concerning compliance; and monitoring, assessing and facilitating the implementation of the Parties' reporting obligations.[62] It may also examine compliance issues of its own initiative and make recommendations if and as appropriate.[63] Having considered a submission, referral or communication (as the case may be), the Compliance Committee proceeds to makes findings. In the cases where it finds non-compliance with Convention obligations it will normally also make recommendations as to what the Party in question should do in order to address the non-compliance.[64]

The Compliance Committee reports on its activities directly to the MoP and makes such recommendations to the MoP as it considers appropriate.[65] Having considered a report and any recommendations from the Compliance Committee, the MoP may decide on 'appropriate

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[59] Compliance Committee members are elected by the MoP by consensus or, failing consensus, by secret ballot: Decision I/7 ibid para 7. The members serve in their personal capacity and do not represent the States of which they are nationals: Decision I/7 ibid para 1.

[60] The Compliance Committee has received three submissions from Parties to date: ACCC/S/2004/1 from Romania concerning compliance by Ukraine; ACCC/S/2015/2 from Lithuania concerning compliance by Belarus; and ACCC/S/2016/3 from Albania concerning its own compliance with the Convention.

[61] No referrals have been made to the Compliance Committee by the Secretariat to date.

[62] Decision I/7 (n 58) para 13.

[63] ibid para 14.

[64] ibid para 35.

[65] ibid para 36 for the Compliance Committee's limited powers to address compliance issues during the intersessional period (i.e. pending consideration of its report by the MoP).

measures' to bring about full compliance by a Party. Such measures may include, for example: issuing a declaration of non-compliance; providing advice regarding implementation of the Convention; making recommendations to the Party on specific measures to address the non-compliance at issue; issuing a caution; and suspending a Party's special rights and privileges under the Convention.[66]

Communications from the public, including NGOs, alleging non-compliance with Convention obligations by a particular Party are the mainstay of the Compliance Committee's work. Since its establishment in 2002, it has received over 150 communications from the public, including a significant number from NGOs.[67] It has delivered significant findings and recommendations across a wide range of issues, including access to justice to enforce the rights guaranteed under the Convention. The Compliance Committee's approach to its mandate is geared primarily towards assisting Parties to comply with their obligations. As Koester (a former Chair of the Compliance Committee) has observed, the compliance mechanism under the Aarhus Convention 'is a forward-looking mechanism, not a redress mechanism'.[68] As such, the Compliance Committee does not provide a formal legal remedy in a particular case.

[66] ibid para 37.

[67] Details of communications from the public are published on the Compliance Committee's website <http://www.unece.org/env/pp/cc/com.html> accessed 28 May 2018.

[68] Veit Koester, 'The Aarhus Convention Compliance Mechanism and Proceedings before its Compliance Committee' in Charles Banner (ed), *The Aarhus Convention: A Guide for UK Lawyers* (Hart/Bloomsbury 2015) 204.

In practice, the normative force of the Compliance Committee's findings and recommendations is considerable and the vast majority of Parties do strive diligently to implement its recommendations. Moving into a position of full compliance tends to occur gradually, and can sometimes take a considerable amount of time depending on the cause and degree of non-compliance and whether the situation can be remedied easily. It can involve substantial, and often resource intensive, efforts by Parties - which usually go far beyond simply introducing new legislative measures or amending existing measures with a view to compliance.

While Decision I/7 does not explicitly mandate the Compliance Committee to provide authoritative interpretations of the Convention, it is clear that in order to fulfil its role in reviewing compliance the committee must 'justify its findings by a correct understanding of what is required of the parties'.[69] Notwithstanding the fundamental 'non-confrontational, non-judicial and consultative nature' of the compliance mechanism, the consistent view presented in the literature is that when the Compliance Committee's findings are endorsed by the MoP, the normative value of its interpretations of the Convention's provisions increases in accordance with Article 31(3) of the Vienna Convention on the Law of Treaties.[70]

[69] Jonas Ebbesson, 'Access to Justice at the National Level: Impact of the Aarhus Convention and European Union Law' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011) 251.

[70] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331. See further on this point: Veit Koester, 'The Aarhus Convention Compliance Mechanism and Proceedings before its Compliance Committee' in Banner (ed) (n 68) 205; Jonas Ebbesson, ibid 251 and Attila Tanzi and Cesare Pieta, 'The Interplay between EU Law and International Law Procedures in Controlling Compliance with the Aarhus Convention by the EU Member States' 380, both contributions ibid Marc Pallemaerts (ed), *The Aarhus Convention at Ten.*

The MoP has endorsed all but one of the Compliance Committee's findings of non-compliance by individual Parties to date. This state of affairs confirms the high esteem in which the Compliance Committee is held. At the most recent (sixth) MoP held in Budva, Montenegro in September 2017, the Parties failed to reach consensus on the adoption of draft decision VI/8f concerning compliance by the EU with its obligations under the Convention.[71] Prior to the sixth MoP, the Compliance Committee, in a particularly complex and long-running case (ACCC/C/2008/32 EU), had determined that the EU was in breach of Article 9(3) and (4) of the Convention.[72] The essential basis for this finding was that neither Regulation 1367/2006 (which applies the Aarhus Convention to the EU's own institutions and bodies),[73] nor the jurisprudence of the EU Courts, ensured that the public and NGOs had access to justice in environmental matters at EU level (i.e. in the context of direct actions before the EU Courts).[74] The main issue here is the restrictive standing requirements that apply to natural or legal persons who seek to bring a direct action before the EU Courts under Article 263(4) of the Treaty on the Functioning of the European Union (TFEU).[75] It fell to the MoP, to whom the Compliance Committee had reported, to endorse the committee's finding of non-compliance in respect of the EU. However, in an unprecedented development,

[71] Draft decision VI/8f concerning compliance by the European Union with its obligations under the Convention ECE/MP.PP/2017/25.

[72] ACCC/C/2008/32 (Part II) EU ECE/MP.PP/C.1/2017/7.

[73] Regulation 1367/2006/EC 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 [2006] OJ L 264/13. For an overview see Suzanne Kingston, Veerle Heyvaert and Aleksandra Čavoški, *European Environmental Law* (Cambridge University Press 2017) 251-254.

[74] ACCC/C/2008/32 (Part II) EU, ECE/MP.PP/C.1/2017/7 paras 121-122.

[75] On this point see *European Environmental Law* (n 73) 246-251 and Ludwig Krämer, 'The Aarhus Convention and the European Union' in Charles Banner (ed), (n 68) 93-95.

the MoP failed to reach consensus on this matter. Following intense discussion, the MoP agreed eventually, as an exceptional measure, to postpone the discussion on this particular matter until the next MoP in 2021.[76]

It is of course extremely disappointing that the MoP could not reach consensus in this important case involving the EU and that the MoP's well-established practice of endorsing the Compliance Committee's findings has come to an abrupt end. However, it is heartening in terms of the Compliance Committee's authority that the MoP succeeded in reaching a compromise solution by agreeing to postpone its decision in this particular case until its next meeting. Meanwhile, it will be interesting to see how the EU proceeds to address the Compliance Committee's findings and recommendations in ACCC/C/2008/32 (Part II) EU and when and how this long-running controversy over direct access to the EU Courts for individuals and NGOs to enforce environmental law will ultimately be resolved.

2.1.5 Interaction between the Aarhus Convention and EU law

The Aarhus Convention is a mixed agreement to which the EU itself and the 28 Member States are Parties. The Convention is therefore an integral part of the EU legal order.[77] In the specific context of the EU and its Member States, implementation of Convention obligations is overseen not only by the Compliance Committee (as a matter of international law) but also by the CJEU (which is tasked specifically with the enforcement of EU law, which includes the Convention) and by the national courts (in their capacity as 'EU courts' operating at local

[76] Report of the Sixth Session of the Meeting of the Parties ECE/MP.PP/2017/2 para. 62.

[77] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125 para. 30.

level). The existence of multiple legal avenues by which to enforce Convention obligations creates an obvious challenge for the coherent development of standards for effective environmental governance. A multi-level compliance / enforcement system, involving the Compliance Committee, the CJEU and the national courts, leads (inevitably) to a situation where it is difficult to keep track of rapid, parallel developments in the jurisprudence. This state of affairs creates a risk of fragmentation in the evolution of principles, a problem which is considered in section 4 below. With this complex, multi-layered legal milieu in mind, section 3 considers how the Compliance Committee and the CJEU have developed the standards that must be met in order to comply with particular aspects of the access to justice obligations in Article 9 of the Convention.

3. The Development of Standards governing Access to Justice in Environmental Matters

Article 9 specifies the minimum qualitative standards that administrative and judicial review procedures must meet in order to comply with the Convention. It will be recalled from section 2 of this chapter that Article 9(4) demands that review procedures must provide 'adequate' and 'effective' remedies (including injunctive relief, where appropriate) and must be 'fair, equitable, timely and not prohibitively expensive'. The main focus in this section of the chapter is to explore how the Compliance Committee and the CJEU have interpreted and clarified what is required in order to comply with the ban on prohibitive costs. This particular aspect is selected as a case study for a number of reasons. First, affordable access to justice is fundamental to the rule of law and to environmental law enforcement; the rights guaranteed in the Convention are at serious risk of being undermined if the public and NGOs cannot afford to bring review proceedings to enforce their rights. Second, access to judicial

review is essential if Convention provisions are to be interpreted authoritatively so as to enable the law to develop and to provide legal certainty. Third, the ban on prohibitive costs has generated an interesting body of jurisprudence from the Compliance Committee and the CJEU that merits examination. It is useful to begin by introducing an important official source of guidance on the standards that apply under the Convention.

3.1 Aarhus Convention Implementation Guide

The UN ECE publication, *The Aarhus Convention: An Implementation Guide,*[78] now in its second edition, is intended to provide 'a convenient non-legally binding and user-friendly reference tool to assist policymakers, legislators and public authorities in their daily work of implementing the Convention and of realizing [Rio] Principle 10 in practice'.[79] It is also intended to assist the public and NGOs to exercise their Convention rights. The guide is acknowledged widely as an important reference point and it provides helpful, practical insights into the standards that apply in the context of implementation of specific Convention obligations. In the case of the obligation in Article 9(4) to provide 'adequate' and 'effective' remedies, the guide explains that 'adequacy' requires that the remedy provided by the administrative or judicial review procedure 'must ensure the intended effect of the review procedure'.[80] This may, for example, involve compensation for past damage, the prevention of future damage and / or providing for restoration. As regards the 'effectiveness'

[78] *The Aarhus Convention: An Implementation Guide* (n 3).

[79] ibid 9.

[80] ibid 200.

requirement, the guide states that the remedies available 'should be capable of real and efficient enforcement.'[81]

Turning to the ban on prohibitive costs, the guide explains that:

> The cost of bringing a challenge under the Convention or to enforce national environmental law must not be so expensive that it prevents the public, whether individuals or NGOs, from doing so.[82]

This clear explanation captures the essence of the ban on prohibitive costs and serves to clarify the essential meaning of this aspect of Article 9(4) for Parties, the public and NGOs. The guide is therefore an invaluable resource in demystifying the Convention provisions and relating them to practice. In *Solvay*,[83] the CJEU clarified that the guide may be regarded as 'an explanatory document' which can be taken into consideration when interpreting the Convention.[84] However, the observations presented in the guide 'have no binding force and do not have the normative effective of the provisions of the Aarhus Convention.'[85] As will be seen below, the CJEU has, on occasion, drawn on the guide when called on to interpret Article 9(4) and (5) of the Convention.

Before turning to an analysis of the jurisprudence of the Compliance Committee and of the CJEU concerning the ban on prohibitive costs, it is necessary to provide a brief account of the

[81] ibid.

[82] ibid 203.

[83] Case C-182/10 *Solvay v Région wallonne* EU:C:2012:82.

[84] ibid para. 27.

[85] ibid.

measures that the EU, as a Party to the Convention, has adopted in order to give effect to the access to justice obligations in the Member States. This is important because the CJEU interprets not only the provisions of the Convention (which, as explained earlier, are an integral part of the EU legal order), but also, of course, the EU legislative measures adopted to give effect to Convention obligations.

3.2 EU Measures Aimed at Giving Effect to the Aarhus Convention Access to Justice Obligations in the Member States

Prior to its ratification of the Convention in 2005, the EU adopted secondary legislation to implement the Convention in the Member States, including the Article 9 access to justice obligations.[86] Directive 2003/4/EC[87] governs the right of access to environmental information. Article 6 of this directive provides for 'access to justice' and is based on Article 9(1) of the Convention. As regards the participation rights guaranteed in Article 6 of the

[86] In addition to the secondary legislation adopted to implement Aarhus obligations in the Member States, Regulation 1367/2006/EC (n 73) was adopted with the aim of giving effect to Aarhus obligations in the specific context of the EU institutions and bodies. (n 73). An analysis of the provisions of Regulation 1367/2006/EC lies beyond the scope of this particular chapter. See generally Suzanne Kingston, Veerle Heyvaert and Aleksandra Čavoški, *European Environmental Law* (Cambridge University Press 2017) 246-251; Ludwig Krämer, 'The Aarhus Convention and the European Union' in Charles Banner (ed), (n 68) 93-95; also Martin Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2nd edn, Routledge 2015) 459-69.

[87] Directive 2003/4/EC on public access to environmental information [2003] OJ L 41/26.

Convention, Directive 2003/35/EC[88] (known as 'the public participation directive') amended a number of existing directives to take account of the participation and access to justice obligations mandated by the Convention. Of particular significance here are the amendments made to the EIA directive[89] and the integrated pollution prevention and control (IPPC) directive[90] - now repealed and replaced by the industrial emissions directive.[91] Directive 2003/35/EC inserted explicit access to justice provisions into the text of the EIA directive and the IPPC directive in order to implement Article 9(2) and (4) of the Convention. These access to justice provisions are modelled on the text of Article 9(2) and (4) and include the obligation to ensure that the cost of review procedures 'is not prohibitively expensive'. Prior to these amendments, both directives were silent on enforcement. As will be seen in the analysis presented below, the access to justice provisions in the EIA directive have featured prominently in the CJEU jurisprudence on matters relating to implementation of the Aarhus Convention. This is not surprising given the frequency with which the EIA directive is invoked by the public and NGOs to challenge environmental decisions in their Member States.

[88] Directive 2003/35/EC 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 [2003] OJ L 156/17.

[89] The current EU EIA rules are found in Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (codification) [2011] OJ L 26/1 as amended by Directive 2014/52/EU [2014] OJ L 124/1.

[90] Directive 96/61/EC concerning integrated pollution prevention and control [1996] OJ L 257/26.

[91] Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) (Recast) [2010] OJ L 334/17.

As regards the general right of access to justice in Article 9(3), the Commission had proposed a directive on access to justice in environmental matters as far back as 2003.[92] This proposal failed to progress due to resistance from certain Member States and it was ultimately withdrawn in 2014 with the expectation that the Commission would bring forward a fresh proposal.

As it transpired, however, rather than bringing forward a new legislative proposal the Commission developed and, in April 2017, adopted a *Notice on Access to Justice in Environmental Matters*.[93] Essentially, this notice summarises the dynamic body of CJEU jurisprudence on access to justice in environmental matters before the national courts. The notice, described as an 'Interpretative Communication'[94] aims to communicate the Commission's view of the minimum requirements that it expects the Member States to deliver in the context of access to justice at national level.[95] The Commission's decision to proceed by way of a 'soft law' measure, in the form of the 'Interpretative Communication', rather than legislation as anticipated, is considered a significant disappointment by NGOs and others who have long campaigned for a directive on access to environmental justice.

[92] European Commission, *Proposal for a Directive on Access to Justice in Environmental Matters* COM (2003) 624 final, 24 October 2003.

[93] European Commission, *Notice on Access to Justice in Environmental Matters* [2017] OJ C 275/1.

[94] ibid para. 9.

[95] For commentary on the Commission Notice see Jan Darpö, 'On the Bright Side (of the EU's Janus Face): The EU Commission's Notice on Access to Justice in Environmental Matters' (2017) 14 Journal for European Environmental and Planning Law 373.

In the absence of a legislative measure implementing Article 9(3) of the Convention in the Member States, the CJEU has been called on to consider the impact of Article 9(3) in the national legal orders and whether it has direct effect. In *Lesoochranárske zoskupenie*,[96] the CJEU determined that the provisions of Article 9(3) 'do not contain any clear and precise obligation capable of directly regulating the legal position of individuals'.[97] Only members of the public who meet the criteria (if any) set down in national law would have standing to invoke the review procedure. It followed, in the CJEU's view, that implementation of Article 9(3) depends on the adoption of a subsequent (national) measure and so Article 9(3) does not have direct effect in EU law.[98] The CJEU went on to emphasise, however, that Article 9(3), although drafted in broad terms, is intended to ensure effective environmental protection.[99] It is the Member States' responsibility to ensure that EU rights (in this particular case the rights arising under the Habitats Directive[100]) are protected effectively.[101] The CJEU insisted that if the 'effective protection' of EU environmental law is to be delivered, Article 9(3) could not be interpreted by a national court in such a way as to make it impossible in practice or excessively difficult to exercise rights conferred by EU law.[102] Where, as in this case, a species protected under the Habitats Directive was at issue, the principle of effective judicial protection demanded that the national court interpret domestic law, 'to the fullest extent

[96] Case C-240/09 (n 77).

[97] ibid para. 45.

[98] ibid.

[99] ibid para. 46.

[100] Directive 92/43/EEC on the Conservation of Natural Habitats and Wild Fauna and Flora [1992] OJ L 206/7 (Habitats Directive).

[101] Case C-240/09 (n 77) paras 47-48.

[102] ibid paras 48-49.

possible', consistently with the objectives in Article 9(3) of the Aarhus Convention[103] to enable an NGO to challenge a decision likely to be contrary to EU environmental law.[104]

This powerful ruling demonstrates the significant role played by the doctrine of consistent interpretation in aligning national law with Convention and EU requirements. It also serves to confirm the CJEU's unwavering commitment to ensuring effective access to justice in environmental matters in the Member States. This overarching goal permeates the jurisprudence, including the cases, considered below, where the CJEU has been called on to consider the ban on prohibitive costs.

3.3 Jurisprudence of the Compliance Committee and of the CJEU on the Requirement that Costs Must Not Be 'Prohibitively Expensive'

The Compliance Committee and the CJEU operate autonomously in parallel. The following sections examine how both have interpreted and clarified what is required in order to comply with the ban on prohibitive costs. It is helpful in the first instance to explain briefly the different mechanisms by which issues concerning access to justice come before the Compliance Committee and the CJEU.

Members of the public and NGOs bring access to justice issues before the Compliance Committee in situations where they consider that the relevant domestic legal framework fails to comply with any of the requirements of Article 9 of the Convention, either generally, in the systemic sense, and / or in relation to a specific case. It may be alleged before the

[103] ibid para. 50.

[104] ibid para. 51.

Compliance Committee, for example, that arrangements for access to justice at local level are too slow or otherwise ineffective, or are inaccessible due to allegedly unreasonable standing requirements or prohibitive costs.[105]

There are two avenues by which issues relating to access to justice may come before the CJEU. The first is by way of infringement proceedings under Article 258 TFEU where the EU Commission brings a Member State before the Court alleging breach of EU law.[106] Such infringement proceedings might allege a failure to transpose and / or to implement correctly the Aarhus-inspired access to justice obligations set down in EU environmental legislation, for example, the EIA Directive[107] or Directive 2003/4/EC on public access to environmental information.[108] The second avenue arises under the preliminary ruling procedure.[109] Essentially, Article 267 TFEU provides that a national court or tribunal may request the CJEU to give a preliminary ruling concerning the correct interpretation of the Treaties or the validity and interpretation of acts of the EU institutions including, for example, EU environmental directives. In *Lesoochranárske zoskupenie* the CJEU confirmed that, because

[105] On the important practical question of exhaustion of domestic remedies in the context of admissibility of communications from the public, Decision I/7 (n 58) para 21 states that the Compliance Committee should take into account any available domestic remedy, unless the remedy in question 'is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress.'

[106] For an overview of the infringement procedure under Article 258 TFEU see Kingston, Heyvaert and Čavoški, (n 86) 186-200; and Hedemann-Robinson, (n 86) 40-50.

[107] Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (codification) [2011] OJ L 26/1 as amended by Directive 2014/52/EU [2014] OJ L 124/1.

[108] Directive 2003/4/EC on public access to environmental information [2003] OJ L 41/26.

[109] For an overview of the preliminary ruling mechanism see Kingston, Heyvaert and Čavoški (n 86) 446-50.

the Aarhus Convention is an integral part of the EU legal order, it has jurisdiction to give preliminary rulings concerning the interpretation of the Convention.[110]

Before turning to consider the relevant jurisprudence, it is important to recall that there is a clear link between the obligation in Article 9(4) that the review procedures must not be 'prohibitively expensive' and the obligation imposed on Parties under Article 9(5) to consider the establishment of appropriate assistance mechanisms (for example legal aid) to remove or reduce financial and other barriers to access to justice. Both provisions will therefore be examined in tandem. The sharp focus on Article 9(4) and (5) adopted here facilitates analysis of the processes by which the standards articulated in those provisions are developed and refined over time by the Compliance Committee and the CJEU. The Compliance Committee's jurisprudence on Article 9(4) and (5) is considered first. This is followed by an analysis of the judgments where the CJEU has interpreted these particular Convention provisions and the equivalent provisions in EU secondary legislation designed to implement Article 9 (4) and (5) in the Member States.

3.3.1 Minimum Standards for Review Procedures: the Compliance Committee's Approach to the Requirement that Costs Must Not Be 'Prohibitively Expensive'

As explained in section 2.1.4, the Compliance Committee operates on 'a non-confrontational, non-judicial and consultative' basis. It reviews Parties' compliance with Convention obligations and makes findings and recommendations to the MoP. The Compliance Committee has been called on to consider the ban on prohibitive costs in Article 9(4) on a

[110] Case C-240/09 (n 77) para. 30.

number of occasions. Its analysis and findings clarify the scope of the obligation created here and set useful benchmarks to determine whether it has been met in a particular case.

In ACCC/C/2008/27 United Kingdom,[111] a costs order for £39,454 was (not surprisingly) found to be prohibitive. A similar conclusion was reached - in the specific circumstances of the case - in ACCC/C/2012/77 United Kingdom[112] as regards an order for costs of £8,000 against an NGO.[113] In ACCC/C/2011/57 Denmark,[114] the Compliance Committee concluded that a fee of DKK3,000 (€400 approx.) for NGOs to bring an appeal before the Danish Nature and Environmental Appeal Board was prohibitive within the meaning of Article 9(4). Whether or not a particular sum of costs or a particular fee is compatible with Article 9(4) will depend, of course, on the facts of each case and must also be assessed in context by reference to the particular characteristics of the domestic legal system.

Beyond the cases where specific amounts of cost have been examined against the standard set in Article 9(4), a number of principles governing the cost of review proceedings have emerged from the Compliance Committee's jurisprudence that clarify how the 'not

[111] ECE/MP.PP/C.1/2010/6/Add.2

[112] ECE/MP.PP/C.1/2015/3.

[113] Greenpeace Ltd had sought judicial review of the designation by the Secretary of State for Energy and Climate of a National Nuclear Policy. The application for judicial review was unsuccessful and Greenpeace Ltd was ordered to pay the respondent's (the State Party) costs of £11,813, which were reduced subsequently to £8,000. In ACCC/C/2008/23 (United Kingdom), the committee found that a costs order in the sum of £5,130, plus interest, was not prohibitively expensive. It is important to note, however, that in this case the communicant accepted that the costs were not prohibitive: ECE/MP.PP/C.1/2010/6/Add.1.

[114] ECE/MP.PP/C.1/2012/7.

prohibitively expensive' standard is to be measured. In ACCC/C/2008/24 Spain,[115] the Compliance Committee confirmed that Article 9(4) extends to situations where a member of the public seeks to appeal an unfavourable court decision on a matter that falls within the scope of the Convention.[116] It insisted that Parties must ensure that Article 9(4) is implemented in such a way as to prevent unfair, inequitable or prohibitively expensive costs orders against members of the public who bring such appeals.[117] In order to achieve this requirement, judicial decisions concerning the costs of an appeal must take full account of the minimum requirements set down in Article 9(4).[118]

In ACCC/C/2008/27[119] United Kingdom, the Compliance Committee emphasised that the 'fairness' requirement in Article 9(4) refers to what is fair for the claimant and not the respondent (a public authority).[120] It insisted that where a member of the public is litigating environmental matters in the public interest, and is unsuccessful in the proceedings, the allocation of liability for costs must take account of the public interest at stake.[121] It found that the manner in which costs of £39,454 were allocated in this particular case was unfair within the meaning of Article 9(4) and therefore amounted to non-compliance.[122]

[115] ECE/MP.PP/C.1/2009/8/Add.1.

[116] ibid para. 108.

[117] ibid.

[118] ibid para. 110.

[119] ECE/MP.PP/C.1/2010/6/Add.2.

[120] ibid para. 45.

[121] ibid. See also ACCC/C/2014/111 Belgium ECE/MP.PP/C.1/2017/20 para 75.

[122] ACCC/C/2008/27 United Kingdom ECE/MP.PP/C.1/2010/6/Add.2. On the facts here, the applicant, a resident's association, had been ordered to pay the full costs of the respondent (the Department of the Environment

In ACCC/C/2008/33 United Kingdom,[123] the Compliance Committee explained that when it is assessing costs in light of the standard set in Article 9(4), it considers the Party's cost system as a whole and in a systemic manner.[124] It took the view that the 'costs follow the event rule' was 'not inherently objectionable' under the Convention.[125] However, the rule's compatibility with Article 9(4) depended on the outcome in each specific case and 'the existence of a clear rule that prevents prohibitively expensive procedures.'[126] The Compliance Committee considered that the impact of the 'costs follow the event rule' could be modified by other aspects of the domestic legal system such as legal aid, conditional fee agreements and protective costs orders.[127] However, it identified a number of problems with the rules governing protective costs orders that applied at that particular point in time in England and Wales. For example, when determining the allocation of costs in a specific case, the public interest nature of environmental litigation was not given sufficient consideration by the national courts.[128] The Compliance Committee also insisted that it is essential that there is 'equality of arms' between the parties to litigation where costs are concerned.[129] Furthermore, there would be non-compliance with Article 9(4) in a situation where the requirement for a cross-undertaking in damages, as a condition to injunctive relief, entails a

for Northern Ireland) following the dismissal of its application for judicial review challenging the decision-making process relating to the proposed expansion of Belfast City airport.

[123] ECE/MP.PP/C.1/2010/6/Add.3.

[124] ibid para. 128. See also ACCC/C/2014/111 Belgium ECE/MP.PP/C.1/2017/20 para 65.

[125] ACCC/C/2008/33 United Kingdom ECE/MP.PP/C.1/2010/6/Add.3. para 129.

[126] ibid.

[127] ibid.

[128] ibid and also para 134.

[129] ibid para. 132.

risk of high costs in a case where a litigant is legitimately pursuing environmental concerns that involve the public interest.[130] The Compliance Committee concluded that, notwithstanding the availability of certain measures with the potential to address prohibitive costs (i.e. legal aid, protective costs orders etc.), taken as a whole they did not ensure that costs remained at a level that met the standard set in Article 9(4).[131] More specifically, it found that the degree of judicial discretion concerning costs, and the absence of a clear, legally binding direction from the legislature or judiciary to ensure that costs are not prohibitive, resulted in considerable uncertainty for people legitimately pursuing environmental concerns in the public interest.[132] It followed that the United Kingdom had not adequately implemented its obligations under Article 9(4) to ensure that costs were not prohibitive.[133] The Compliance Committee also determined that the system as a whole operating in the United Kingdom was not such as to remove or reduce financial barriers to access to justice as required under Article 9(5).[134]

In ACCC/C/2012/77 United Kingdom[135], the Compliance Committee explained that in determining whether the cost of judicial review proceedings is prohibitively expensive the costs borne by the claimant 'as a whole' must be assessed[136] and that this assessment 'should involve both objective and subjective elements'.[137] It took the opportunity to reiterate that,

[130] ibid para. 133.

[131] ibid.

[132] ibid para. 135.

[133] ibid para. 136.

[134] ibid.

[135] ECE.MP.PP/C.1/2015/3.

[136] ibid para. 72.

[137] ibid.

with respect to costs, 'fairness' in Article 9(4) refers to what is fair for the claimant, not the respondent.[138]

In ACCC/C/2013/85 and ACCC/C/2013/86 United Kingdom,[139] the Compliance Committee confirmed the general principles it had established in ACCC/C/2008/33 United Kingdom[140] (considered above) and found, on the facts here, that there was an absence of any clear, legally binding directions from the legislature or judiciary to ensure that the cost of actions for private nuisance were not prohibitively expensive.[141]

In ACCC/C/2014/111 Belgium,[142] the Compliance Committee explained that when assessing whether the costs associated with a review procedure are prohibitively expensive in a particular case, it first evaluates whether, taking account of the claimant's financial situation, the total amount of costs would prevent them from invoking the review procedure.[143]

Pulling together the various threads in the Compliance Committee's jurisprudence on costs to date, the essential elements that must be considered when assessing compliance with Article 9(4) and (5) are: whether a clear, legally binding direction from the legislature or judiciary is in place to ensure costs are not prohibitively expensive; taking account of the claimant's financial situation, whether the amount of costs involved would prevent them from invoking

[138] ibid.

[139] ECE.MP.PP/C.1/2016/10.

[140] ECE/MP.PP/C.1/2010/6/Add.3 paras 106-107.

[141] ACCC/C/2013/85 and ACCC/C/2013/86 United Kingdom ECE.MP.PP/C.1/2016/10 para 108.

[142] ECE/MP.PP/C.1/2017/20.

[143] ibid para. 74.

the relevant review procedure; whether there is 'equality of arms' between the parties to the litigation concerning costs; whether the public interest nature of environmental litigation is taken into account when determining costs liability; the costs borne by the claimant 'as a whole' must be assessed and this should involve objective and subjective elements; and, finally, the overarching requirement that when assessing costs in light of the standards set in Article 9(4) and (5), the cost system of the Party as a whole must be taken into consideration. It is interesting to find that broadly similar principles have emerged in the jurisprudence of the CJEU concerning the requirement that the cost of review procedures must not be prohibitively expensive. This jurisprudence is considered in the next section.

3.3.2 Minimum Standards for Review Procedures: the CJEU Jurisprudence on the Requirement that Costs must not be 'Prohibitively Expensive'

This section begins by setting out a number of overarching principles in order to place the analysis of the CJEU jurisprudence in context. First, as explained earlier in this chapter, the Aarhus Convention is an integral part of the EU legal order.[144] Second, the CJEU has ruled that the access to justice provisions in EU environmental directives which give effect to Article 9 of the Convention must be interpreted in the light of, and having regard to, the objectives of the Convention.[145] It is also important to recall that long before the Convention ever formed part of EU law the CJEU had championed the right to invoke EU (environmental) law before the national courts and developed the principle of effective

[144] Case C-240/09 (n 77) para. 30.

[145] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG* EU:C:2011:289 para 41.

judicial protection.[146] This principle is now enshrined in Article 19 of the Treaty on European Union and Article 47 of the Charter of Fundamental Rights of the EU (the EU Charter) guarantees the right to an effective remedy for breach of EU law rights, including the right to legal aid where necessary to ensure effective access to justice.

When implementing Article 9 of the Convention, and the related access to justice obligations in the EU directives, Member States enjoy a significant measure of discretion under the principle of national procedural autonomy. More specifically, it is for the Member States to determine which court (or other independent body established by law, as appropriate) has jurisdiction to provide the review procedure and to set the applicable procedural rules. However, the Member States' discretion in this regard is subject to compliance with the well-established EU principles of equivalence and effectiveness.[147] The extent to which Member States can lawfully restrict access to justice under its local procedural rules is a significant theme in the CJEU jurisprudence concerning the Aarhus Convention. In light of the fact that the access to justice provisions in the Convention and the implementing EU directives are drafted in broad terms, it is not surprising to find that the CJEU has been called on regularly

[146] Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206 paras 18-19. On the evolution of this principle in the post-*Johnston* jurisprudence, see Áine Ryall, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland* (Hart Publishing 2009) 82-91 and Anthony Arnull, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' (2011) 36 European Law Review 51.

[147] Case C-240/09 (n 77) paras 47-48. Under the principle of equivalence, claims based on EU law may not be treated less favourably than those based on national law. The principle of effectiveness demands that national procedural rules must not make it impossible in practice or excessively difficult to enforce EU law before the national courts. See Koen Lenaerts, 'National Remedies for Private Parties in the Light of the EU Principles of Equivalence and Effectiveness' (2011) 46 *Irish Jurist* 13.

to determine their meaning and to provide guidance to the national courts on a range of issues, including the scope and meaning of the ban on prohibitive costs.[148] As explained earlier in this chapter, the ban on prohibitive costs, and how the CJEU has interpreted this obligation in its jurisprudence to date, is selected as the specific focus of analysis in this section. Four judgments are relevant here: two involved infringement proceedings under Article 258 TFEU and two were references for preliminary rulings under Article 267 TFEU.

In infringement proceedings brought against Ireland by the Commission, the CJEU confirmed that the prohibition on excessive costs did not prevent national courts from making an order for costs, provided the amount of costs involved complied with the 'not prohibitively expensive' standard.[149] The Court determined, however, that a mere 'discretionary practice', whereby the Irish courts could decline to order an unsuccessful litigant to pay the other side's costs, could not be regarded as adequate transposition.[150] Such a practice did not satisfy the requirement for legal certainty.[151] This approach is similar to that adopted by the Compliance Committee in its jurisprudence on Article 9(4) considered earlier. It will be recalled that the Compliance Committee insists that Parties put in place a clear, legally

[148] For detailed analysis of the CJEU jurisprudence on the impact of the Aarhus Convention in the Member States see Áine Ryall, 'Access to Justice in Environmental Matters in the Member States of the EU: the Impact of the Aarhus Convention' Jean Monnet Working Paper 5/16, New York University School of Law (2016).

[149] Case C-427/07 *Commission v Ireland* EU:C:2009:457 para. 92.

[150] ibid paras 93-94.

[151] ibid para. 94. In infringement proceedings in Case C-530/11 *Commission v United Kingdom* EU:C:2014:67, which also concerned implementation of the ban on prohibitive costs, the CJEU clarified that not every judicial practice is uncertain and inherently incapable of meeting the requirements of clarity and precision necessary in order to be regarded as valid implementation of obligations arising under a directive (para 36).

binding rule that prevents prohibitively expensive procedures.[152] As the infringement proceedings in *Commission v Ireland* were concerned solely with alleged failure in transposition, the Court did not engage in any analysis of the substance of the concept of 'prohibitive' costs on this occasion.

In *Edwards*,[153] a reference for a preliminary ruling from the Supreme Court of the United Kingdom, the CJEU was presented with a series of questions on how a national court should approach the ban on prohibitive costs in the EIA and IPPC directives. As explained above, the access to justice provisions in these directives are modelled closely on Article 9 of the Convention, and include the requirement in Article 9(4) that costs must not be prohibitively expensive. The CJEU began by observing that the overarching objective of delivering 'wide access to justice' for 'the public concerned' reflected the desire of the EU legislature 'to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role'.[154] It linked the ban on prohibitive costs with the observance of the right to an effective remedy guaranteed under Article 47 of the EU Charter and to the principle of effectiveness of EU law.[155] Drawing on the Aarhus Convention Implementation Guide,[156] the CJEU concluded that the ban on prohibitive costs means that 'the public concerned' should not be prevented from seeking a review by the courts 'by reason of the

[152] ACCC/C/2008/33 United Kingdom ECE/MP.PP/C.1/2010/6/Add.3 para 135.

[153] Case C-260/11 *R (Edwards) v Environment Agency* EU:C:2013:221.

[154] ibid paras 31-32.

[155] ibid para. 33.

[156] In *Edwards*, the CJEU referred to the original (1st) edition of the implementation guide published by the UN ECE in 2010.

financial burden that might arise as a result'.[157] This approach is similar to that adopted by the Compliance Committee in ACCC/C/2014/111 Belgium.[158] It follows from this line of reasoning that where a national court is asked to make an order for costs against a member of the public who has been unsuccessful in judicial proceedings or, where it is required to make a protective costs order, it must be satisfied that the costs are not prohibitively expensive.[159] In determining this issue, the national court must take into account both the interest of the person wishing to defend his/her rights and 'the public interest in environmental protection'.[160] Here, again, the CJEU's approach resonates with the Compliance Committee's insistence that the public interest in environmental protection must be taken into consideration when assessing whether costs are prohibitive.

As to the assessment criteria to be applied in order to ensure compliance with the ban on prohibitive costs, the United Kingdom Supreme Court had enquired whether this assessment was objective or subjective in nature and the extent to which national law must be taken into account. The CJEU recalled the well-established principle that where EU law lacks precision, it is for the Member States to ensure that it is transposed effectively, although they retain a broad discretion as to the choice of methods that may be used to implement the obligation in question.[161] It then considered the methods likely to secure the objective of

[157] Case C-260/11 *R (Edwards) v Environment Agency* EU:C:2013:221 para 35.

[158] ECE/MP.PP/C.1/2017/20 para. 74.

[159] Case C-260/11 *R (Edwards) v Environment Agency* EU:C:2013:221 para 35.

[160] ibid. See also Advocate General Kokott's Opinion in *Edwards* EU:C:2012:645 paras 39-47 for detailed analysis of the importance of the public interest in environmental protection when examining whether costs are prohibitively expensive.

[161] Case C-260/11 *R (Edwards) v Environment Agency* EU:C:2013:221 para 37.

ensuring effective judicial protection without excessive cost in the field of environmental law. It confirmed that all the relevant provisions of national law and, in particular, any national legal aid scheme and / or costs protection regime must be taken into consideration.[162] It is also necessary to take account of the 'significant differences' which exist between national laws in this area.[163] The CJEU concluded that the assessment of whether costs are prohibitive or not cannot be carried out solely on the basis of the litigant's specific financial situation. It must also be based on an objective analysis of the amount of costs involved. This is because members of the public and NGOs 'are naturally required to play an active role in defending the environment'.[164] Overall, the cost of proceedings 'must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.'[165]

As regards the analysis of the financial situation of the claimant, the assessment undertaken by the national court cannot be based exclusively on the estimated financial resources of the 'average' claimant.[166] This is because that information may have little connection with the actual situation of the claimant. An objective analysis of the amount of the costs must be made in every case. The national court may also take the following factors into account: the claimant's financial situation; 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

[162] ibid para. 38.

[163] ibid.

[164] ibid para. 40.

[165] ibid.

[166] ibid para. 41.

claim at its various stages.[167] Furthermore, the fact that a claimant has not, in practice, been deterred from bringing proceedings is not, in itself, sufficient to establish that the proceedings are not prohibitively expensive in so far as that particular claimant is concerned.[168] The CJEU clarified that the requirement that judicial proceedings must 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.[169] No such distinction is envisaged in the access to justice provisions in the EIA and IPPC directives and such an interpretation would be unlikely to comply fully with the EU legislature's objective to ensure 'wide' access to justice and to contribute to the improvement of environmental protection.[170]

In subsequent infringement proceedings in *Commission v United Kingdom*,[171] where it was alleged that the United Kingdom had failed to transpose correctly the requirement that judicial proceedings must not be prohibitively expensive, the CJEU followed the approach it had adopted in *Edwards*.[172] It clarified on this occasion that when assessing costs the national court may take account of any costs already incurred at earlier levels in the same dispute.[173] The Commission had also alleged that the system of cross undertakings in damages in respect of the grant of interim relief also infringed the ban on prohibitive costs.

[167] ibid para. 42.

[168] ibid para. 43.

[169] ibid para. 45.

[170] ibid para. 44.

[171] Case C-530/11 *Commission v United Kingdom* EU:C:2014:67.

[172] Case C-260/11 *R (Edwards) v Environment Agency* EU:C:2013:221.

[173] Case C-530/11 *Commission v United Kingdom* EU:C:2014:67 para 49.

The CJEU took the view that the requirement that proceedings must not be prohibitively expensive is not to be interpreted as *automatically* precluding an undertaking in damages as a condition to the grant of interim relief where this is provided for under national law.[174] The situation is the same as regards any financial consequences which might arise under national law where an action is found to be an abuse of the process of the court.[175] However, the national court must ensure that the resulting financial risk for the claimant is also included among the various costs generated by the case when it assesses whether or not the proceedings are prohibitively expensive.[176] On the basis of the documents submitted to the CJEU, it was not clear that the requirement that proceedings are not prohibitively expensive was imposed on the national courts in the United Kingdom 'with all the requisite clarity and precision'.[177] Consequently, the CJEU upheld the Commission's argument that the system of cross undertakings in damages in respect of the grant of interim relief constituted an additional element of uncertainty and imprecision in the national measures aimed at ensuring compliance with the ban on prohibitive costs.[178]

Most recently, in *North East Pylon Pressure Campaign Ltd v An Bord Pleanála*[179], a reference for a preliminary ruling from the High Court of Ireland, the CJEU was required to consider *inter alia* whether a Member State could derogate from the ban on prohibitive costs in circumstances where a court determines that a challenge is frivolous or vexatious or where

[174] ibid para. 67.

[175] ibid.

[176] ibid para. 68.

[177] ibid para. 69.

[178] ibid para. 71.

[179] Case C-470/16 *North East Pylon Pressure Campaign Ltd v An Bord Pleanála* EU:C:2018:18.

there is no link between the alleged breach of national environmental law and damage to the environment. The CJEU began by recalling that Article 9(4) of the Aarhus Convention 'in no way prevents' a national court from ordering a claimant to pay costs (Article 3(8) expressly provides that the power of national courts to award 'reasonable' costs is not impacted by the 'not prohibitively expensive' costs rule under Article 9(4)).[180] It is therefore open to a national court to take account of factors 'such as, in particular, whether the challenge has a reasonable chance of success, or whether it is frivolous or vexatious'.[181] However, the amount of costs actually imposed on the claimant cannot be 'unreasonably high'.[182] It followed, therefore, that there was no scope for a derogation from the ban on prohibitive costs in these particular circumstances.[183]

Having examined the wording of Article 9(3) and (4) of the Convention, the CJEU concluded that Member States are not permitted to insist on a link between the alleged breach of national environmental law and damage to the environment as a precondition for protection from prohibitive costs.[184] It is clear from the relevant provisions of the Convention that the State Parties had sought to apply the ban on prohibitive costs 'to challenges aimed at enforcing environmental law in the abstract', without any requirement to demonstrate a link with existing or potential damage to the environment.[185] The CJEU's ruling on these two points provides welcome and important clarifications on how the ban on prohibitive costs is

[180] ibid para. 60.

[181] ibid para. 61.

[182] ibid.

[183] ibid para. 65.

[184] ibid.

[185] ibid para. 64.

to be applied in practice. It is not surprising to see the CJEU adopting an expansive approach here given the fundamental importance of access to the courts to enable law enforcement in the interests of environmental protection.

In *Commission v Ireland,*[186] and again in *Edwards,*[187] Advocate General Kokott engaged in an interesting analysis of the role of legal aid and the impact of Article 9(5) of the Convention on the obligation to provide affordable review procedures. In the Irish case, the Advocate General noted that, although it is not reflected explicitly in the text of Directive 2003/35/EC, Article 9(5) must be taken into account when interpreting Article 9(4) and the corresponding access to justice provisions in the EIA and IPPC directives.[188] She observed that Article 9(5) demonstrates that the Parties to the Convention had the need for assistance mechanisms 'entirely in mind' when they determined that review procedures must not be 'prohibitively expensive'.[189] The Advocate General also referred to Article 47(3) of the EU Charter which requires legal aid to be granted in so far as such aid is necessary to ensure effective access to justice.[190]

As regards the role of legal aid, in *Edwards,* the Advocate General recalled the principle of effective judicial protection under Article 47 of the EU Charter and, in particular, Article 47(3) which demands that legal aid must be made available to those who lack sufficient

[186] Case C-427/07 *Commission v Ireland* EU:C:2009:457.

[187] Case C-260/11 *R (Edwards) v Environment Agency* EU:C:2013:221.

[188] Case C-427/07 *Commission v Ireland* EU:C:2009:9 para 91 of the Opinion.

[189] ibid.

[190] ibid para. 92 of the Opinion.

resources where such aid is necessary to ensure effective access to justice.[191] Acknowledging that Article 9(5) 'does not absolutely require' the introduction of assistance mechanisms such as legal aid, the Advocate General highlighted that 'legal aid makes it possible to prevent risks in terms of prohibitive costs in certain cases.'[192] She went on to argue that:

> In so far as the enforcement of provisions of EU law is concerned, legal aid may even be absolutely necessary if the risks in terms of costs, which are acceptable in principle, constitute an insurmountable obstacle to access to justice on account of the limited capacity to pay of the person concerned.[193]

The CJEU has not, as yet, considered in any detail whether legal aid may be necessary in particular circumstances in order to ensure that costs are affordable.

4. Analysis of Development of Standards for Affordable Access to Justice in Environmental Matters

Article 9(4) of the Convention sets minimum standards governing the review procedures that Parties must provide to ensure effective access to environmental justice. These minimum standards include a requirement that the cost of accessing and participating in the review procedure must not be 'prohibitively expensive'. The Convention text does not set out any criteria by which to determine whether costs are prohibitive in a particular case. The award of 'reasonable costs' is permissible under Article 3(8), but the text does not elaborate on the

[191] Case C-260/11 *R (Edwards) v Environment Agency* EU:C:2012:645 para 38 of the Opinion.

[192] ibid.

[193] ibid footnote omitted.

meaning of 'reasonable' or how it is to be measured. The access to justice provisions in the EU environmental directives designed to implement Article 9 replicate the 'not prohibitively expensive' requirement without further elaboration.

The question therefore arises: what precisely does this standard demand in practical terms? The analysis presented in section 3 of this chapter traced how the Compliance Committee and the CJEU have gradually developed a number of general principles governing the obligation to provide affordable access to justice, including a requirement to take account of the public interest in environmental protection. It also explained how, in *Edwards*[194] and *Commission v United Kingdom*[195], the CJEU developed a set of criteria that national courts must apply in assessing whether costs are prohibitive in a specific case. Neither Article 9(4) of the Convention nor the access to justice provisions in the EIA and the Industrial Emissions Directive (ex IPPC directive) contain any such criteria. The elaboration of criteria is therefore an important step in facilitating a consistent approach to Article 9(4) across the Member States of the EU. In setting these criteria the CJEU is alert to the significant differences that exist between the 28 national legal systems operating in the EU. It is not surprising therefore to find that these criteria are pitched at a fairly general level and leave Member States with an important measure of flexibility to design an Aarhus-compliant costs regime in light of their particular legal system. However, this flexibility, and the lack of more specific guidance, inevitably leaves scope for further disputes as to the precise implications of the ban on prohibitive costs for national legal systems.

[194] Case C-260/11 (n 187).

[195] Case C-530/11 *Commission v United Kingdom* EU:C:2014:67.

The jurisprudence will, no doubt, continue to develop and mature as new disputes bring new issues before the Compliance Committee and the CJEU for resolution. A number of communications are currently pending before the Compliance Committee in which it is alleged that certain State Parties are non-compliant as regards the ban on prohibitive costs under Article 9(4).[196] These cases may provide the committee with an opportunity to provide further clarification on its understanding of what affordable access to justice entails in practice. In a similar vein, more references for preliminary rulings are likely to arise as national courts seek further guidance on the interpretation of the 'not prohibitively expensive' standard and its impact on local costs rules.

It is important to appreciate fully that the process by which more precise requirements in relation to affordable access to justice are articulated is *ad hoc* and gradual. The development of authoritative principles depends on cases coming before the Compliance Committee and the CJEU and, ultimately, the national courts. Precise requirements will emerge only as and when new cases are decided and published. This state of affairs is not conducive to legal certainty, but it is the direct consequence of the general manner in which the access to justice obligations are articulated in the Convention and in the related EU implementing measures.

A further issue to be considered in the context of legal certainty is the fact that the Compliance Committee, the CJEU and the national courts are all involved in interpreting and applying the access to justice obligations within their own particular jurisdictional remit. The parallel operation of three dispute resolution processes creates a risk of fragmentation – and potential conflict – in the development of principle. It also complicates the overarching legal

[196] For example, ACCC/C/2014/112 (Ireland), ACCC/C/2014/113 (Ireland) and ACCC/C/2016/142 (United Kingdom).

framework because it is necessary to consider the three sources of legal authority (Aarhus Convention, EU law and national law) in tandem in order to form a complete picture of the relevant legal principles. Thus far, it appears that the Compliance Committee and the CJEU adopt a broadly similar approach to the standard set in Article 9(4), although the Court has gone further than the committee by setting down general criteria by which to assess whether costs are prohibitive. The availability of the preliminary ruling procedure should eliminate, or at least reduce, the scope for divergent interpretations by the CJEU and the national courts. In any event, we are likely to see interesting future developments as new issues arise for consideration before the Compliance Committee, the CJEU and the national courts.

As regards the development of standards, and their refinement over time, it is vital that effective access to justice is available to the public and NGOs to ensure that any disputes over interpretation and implementation of those standards can be addressed definitively. This confirms the importance and the urgency of precise standards governing access to justice being settled authoritatively so that these standards can then be applied in practice and come to be recognised widely as the norm. It is incumbent on the judiciary at national level to fold international and EU standards into the national system. To this end, it is vital that national judges engage proactively with arguments based on international and EU law and take care when crafting their judgments to provide the degree of clarity needed to embed international and EU principles into the local legal and administrative system.

5. Conclusion

The analysis presented in this chapter demonstrates the practical difficulties involved in developing precise standards when environmental obligations are articulated in vague terms in international environmental instruments. In the case of the Aarhus Convention, we have

seen how the Compliance Committee and the CJEU each play a vital role in interpreting the content of environmental obligations and articulating criteria by which to assess compliance. The process by which standards are clarified by means of jurisprudence unfolds gradually as new cases bring new issues that must be resolved authoritatively. This process can be frustrating for the public and NGOs when it takes a significant period of time for cases to work through the system and for clear principles to emerge.

In the absence of clear principles and specific assessment criteria, some governments may be inclined to take a minimalist approach to Convention obligations, particularly when a more proactive stance would involve significant investment of resources. Lack of political will to deliver fully the procedural rights guaranteed in the Convention is the main obstacle to timely implementation. This state of affairs confirms the importance of accessible and effective enforcement mechanisms to address any uncertainty over the scope of Convention obligations and to ensure that the law is applied correctly and in a timely fashion. Informing the public and NGOs of their rights under the Convention, and educating them on how to use those rights – including the potentially powerful role of public interest litigation – is essential if standards are to evolve progressively and become embedded more deeply in local legal and administrative systems.

The Aarhus Convention aims to improve environmental governance by empowering the public and NGOs to participate more effectively in decision-making and to enforce the law in the public interest. The analysis presented in this chapter confirms that the Convention continues to gain momentum and to have a sharper legal impact at national level as the jurisprudence interpreting and applying its provisions matures.