

Effective Justice?

Costs in the Environmental Procedure

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Results of synthesis report prepared by

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Introduction

- Studies undertaken in 17 out of 29 MS plus Croatia
- Articles 9(3) and (4) Aarhus Convention
- Article 9(4)
 - *“In addition and without prejudice to paragraph [1] above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide **adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible**”.*
- Results available at:
<http://ec.europa.eu/environment/aarhus/studies.htm>



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Costs in the Environmental Procedure - I

- **Court Fees**

- Generally no fees for participation or for launching an administrative appeal (exceptions DK, EI, MT)
- Court fees widespread (except SE)
- Average around 100-200€, 500€ at appeal
- NGOs occasionally exempt (HU, LT, PT, SK)
- Highest is the UK Supreme Court (<6000€)
- “Streitwert” (fee based on economic value of the case) applies in DE, EI and PT (e.g. average between 4,000 to 8,000€ in DE)

Costs in the Environmental Procedure - II

- **Legal representation**

- Mandatory in many countries (e.g. ES, FR, HU, LU, MT, PT, SK and UK)
- Not required in first instance proceedings in CZ, DE, FR, NL, PL
- Lawyers' fees vary – average between 2,000-10,000€ (excluding expert fees)

- **Expert Fees**

- Borne by the Parties and can be considerable (e.g. FR typically around 15,000€)

Costs in the Environmental Procedure - III

- **Loser Pays Principle I**

- Widely applicable in the Courts (with numerous exceptions, e.g. Finland and Sweden)
- Does not contravene Convention in principle
 - ACCC (C/2008/24 – Spain)
 - *Edwards* (C-260/11) – the need to ensure costs of judicial proceedings are not prohibitively expensive does not prevent the national courts from making an order for costs (para 25, recalling *Commission v Ireland* (C-427/07, para 92))
- Mixed system in IE for EIA/ IPPC and SEA cases

Costs in the Environmental Procedure - IV

- **Loser Pays Principle II**

- Some countries have devised mechanisms of capping costs (e.g. UK and PCOs)
- LPP applies in CZ, EI, NL, PL and SK but the public body cannot recover legal costs (so essentially One-Way Costs Shifting)

- **Injunctive Relief**

- Bond/ Security/ Cross-undertakings in damages often required to secure injunctive relief (CY, BE, IE, IT, ES and the UK)

- **Legal aid**

- Almost all countries have legal aid schemes but problems persist
 - Under-funded (IE and CY)
 - Generally unavailable for NGOs (exceptions DK. ES(?) and HU)

Costs as a barrier in review procedures

Country	Adm Fees	Court Fees	ML	LPP	PCO etc.	OCS	LA	FU	Barrier to A2J?
Belgium	6,20€	82-350€	(X)	(X)	X		X	(X)	Possibly
Cyprus				X					Yes
Denmark	500 DKK (60€)	67-10,000 €		(X)			X		Yes (in courts)
Estonia		X	(X)	X		X	X		Yes
France		35-150€	X	(X)			X	(X)	Yes
Germany		SW: 5,000€	X	X	(X)			X	Possibly (eNGOs yes)
Ireland		200-350€		(X)		(X)	(X)	(X)	Yes
Italy		60-1,500€	X	(X)					Yes
Lux			X	(X)			X		Yes
Malta	X	X	X			X			Yes
Romania		X		X			X		Yes
Spain		50-200 / 300-600€	X	X			X	X	Frequently ...
UK		60-60,000€		X	X		(X)		Yes

Injunctive Relief

Country	Bond for Injunctive Relief	Comments
Belgium	X	Only in exceptional circumstances
Croatia	X	
Cyprus	X	
Czech Republic	X	
Denmark	(X)	
Hungary	(X)	
Ireland	X	
Italy	X	
Poland	(X)	Construction permits only
Spain	X	
UK	X	

The Loser Pays Principle and EU Law – according to *Edwards*



The LPP and EU Law – according to *Edwards*

Evaluation as to what is prohibitively expensive for the claimant (paras 40-41 of the judgment):

- Cannot be based on the average applicant
- Cannot be purely subjective, but must be based on an objective analysis in light of the role of the citizen/ group/ NGO in protecting the environment
- **Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable**

So, what does “objectively unreasonable look like?”

UK

- current caps of £5,000 for individuals and £10,000 for groups
- Average UK family income = £144 p/w
- 5k = 35 weeks disposable income
- Scope to argue caps down but not up



Recommendations for a draft A2J Directive - I

- **General provision on costs**
 - Ensure broad access to justice and early engagement
- **Fees**
 - None to participate
 - Reasonable court and appeal fees (preferably flat rate)
- **Costs**
 - Application of both objective and subjective tests
 - what is PE for the ordinary citizen/group eNGO in relation to cost of living in that country *but* financial position of the claimant may not constitute an obstacle to challenge
 - Consider public interest in proceedings
 - Ideally public authorities should not be able to recover costs (one-way costs shifting)
 - Schedules for cost capping

Recommendations for a draft A2J Directive - II

- **Cross-cap**
 - Prevent claimant lawyers from recovering full costs and impacts on the ability of claimant lawyers to survive
- **Legal Aid**
 - General requirement to consider public interest at stake
 - Available for eNGOs in certain conditions
- **Injunctive Relief**
 - express provision prohibiting bonds or cross-undertakings in damages in order to secure Injunctive Relief
- **Draft A2J Directive**
 - Shall not impose on Member States the obligation to introduce a costs regime where it does not already exist



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