

# **Access to Justice : the European Community dimension**

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## General Considerations on EC law and national judicial procedures

- Early case-law establishes that in the absence of harmonization, and provided there is equivalence between EC and national rights there is a principle of national procedural autonomy

e.g. limitation periods : *“The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which national courts are obliged to protect.”*

Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland Case 33/76  
[1976] ECR 1989

## 1980's-1990's ECJ STRENGTHENS ITS APPROACH

- Cases now emphasise the need to EC rights are given adequate and effective protection under national law

e.g. *Von Colson* (1984) national sanctions must be effective

*Factortame I* (1990) overruling national rule preventing interim relief in face of national law

*Emmott* (1991) national time-limits incompatible

*Marshall II* (1993) national maximum compensation provisions incompatible

## ECJ now shows rather greater sensitivity to national discretion

- More recent case-law indicates some retreat from the Court's interventionist approach, and respect for national court's role in assessment
- *Steenhorst-Neerings* (1992) - time-limits upheld and Emmott distinguished
- *Van Schijndel* (1995) - Court may raise own issues but also respect national civil procedures rules
- *Commission v Ireland* (2006) – Fees for public to participate in planning consultations – within Member State discretion

## **Aarhus Convention - ratified by both European Community and Member States (excluding Ireland)**

- Mixed agreement based on shared competences
- Community participation largely based on access to environmental information requirements
- Council Decision 17 February 2005 formally ratifies Convention by European Community

## Member States' duty under International Convention: *Commission v France Case* 239/03 ECJ 7 October 2004

- Barcelona Convention and Protocol on marine pollution from land-based sources ratified as mixed agreement by Community and Member States
- Discharges of fresh-water and alluvia into marine water not covered by EC Directives but field of scope of Convention (water pollution) is filed in large measure covered by Community legislation
- There is thus a Community interest in compliance by both Community and Member States with these international commitments
- *“In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfill, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement”*

## Council Decision 17 February 2005

- Annex to Decision formally declared competence
- Notes general objectives of Community environmental policy and that has already adopted some laws implementing Aarhus

## Article 9(3) and Community Competence

- Acknowledges that Community legal instruments do not cover fully obligations under Art 9(3) of Convention relating to access to justice
- *“Consequently, its Member States are responsible for the performance of those obligations at the time of approval of the Convention by the European Community and will remain unless and until the Community, in the exercise of its powers under the Treaty, adopts provisions of Community law covering the implementation of those obligations.”*

## Lisbon Treaty Chap 3 Title V Judicial Cooperation in Civil Matters

Art 81.1 The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

- Such measures include the aim of securing “...(e) effective access to justice”

## Directive 2003/35/EC of 26 May 2003 amends two key Environmental Directives

Directive 85/337 (Environmental Assessment) (new Art 10a)

Directive 96/61 (IPPC) - new Article 15a

Members of the public with sufficient interest must have access to review procedure before court or independent body to challenge substantive or procedural illegality of decisions, acts or omissions subject to the public participation provisions of the Directives

“Any such procedure shall be fair, equitable, timely and not prohibitively expensive”.

## Friends of the Curragh Environment v An Bord Pleanala [2006] IEHC 243

- Application for Protective Costs Order
- Ireland has not transposed new Art 10a of Environmental Assessment Directive
- Applicants argue that provisions have direct effect
- Kelly J holds that not sufficiently clear, precise and unconditional to have direct effect

## Sweetman v An Bord Pleanala [2007] IEHC 153

- Judicial review by third parties against planning permission
- Sweetman J agrees with previous decision that Art 10a does not have direct effect
- In any event, the '*not prohibitively expensive*' requirement was not intended to cover exposure of parties to reasonable costs
- Court notes that Art 3.8 Aarhus specific states that Aarhus not intended to affect the powers of courts to award reasonable costs in judicial proceedings
- Courts have discretion as to costs, and level of exposure to costs in judicial review not unreasonable.

## Commission infringement action

- Infringement actions not dependent on whether provisions of EC law have direct effect
- Commission currently has open file (Complaint 2006/4033) on UK complaint based on Article 10a Environmental Assessment Directive – response of UK Government to Sullivan report will be significant