'NOT PROHIBITIVELY EXPENSIVE' UNDER THE AARHUS CONVENTION ARTICLE 9(4)

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This article explores the obligation of State Parties to the Aarhus Convention, under Article 9(4), to ensure that costs for accessing justice are 'not prohibitively expensive'. The analysis reveals that this criterion has two sides. Firstly, the level of costs must not be excessive, both in relation to the dispute and object at hand and in relation to the financial resources and what is at stake for a complainant. Secondly, the rules and framework for imposing legal costs must not be unforeseeable. The threshold for costs being prohibitive is when the costs are so excessive or unforeseeable that they will be dissuasive for environmental defenders seeking access to justice. In practice, problems have particularly arisen in regard to 'loser pays' systems, which combine high potential costs with low foreseeability. Such systems are permissible but should have limits on the level of imposable costs and on the judicial discretion that can be exercised.

1 INTRODUCTION

Access to justice is a central and necessary feature of the modern *rechtsstaat*. For human rights to be upheld, and for the judicial branch of government to act as an effective check on the legislative and executive branch, there must be broad and effective access to justice. This is recognised in most modern human rights instruments,[1] and is a reflection of the role of the judiciary in a modern doctrine of separation of powers. The judiciary is firstly a tool to ensure and check that laws are upheld and applied, and secondly, often plays a counter-majoritarian role in protecting interests that struggle to win majoritarian support in a democracy – typically individuals or minority groups.

For the environment, and damages to the environment, the role of the judiciary and effective access to justice is even more pressing. The environment has no democratic voice, and the consequences of environmental damage will largely be felt by groups with no democratic voice, including future generations and people in other countries – even though we all rely on our common environment for our ability to survive and thrive.

Furthermore, environmental law grants rights that primarily protect the environment itself, as a public interest or common good available to all. This makes it different from many

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[1] European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953), 213 UNTS 221 (ECHR), Articles 6 and 13; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Articles 2(3) and 14; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR), Article 8 and 25; African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (Banjul Charter), Article 7; Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (EU Charter, CFR), Article 47.

other sectors of law where individuals or groups have clear economic or personal incentives to seek access to justice to uphold their own rights. The direct beneficiary of many environmental rules – the environment itself – cannot access justice, and individuals or groups have fewer personal incentives to uphold collective or public environmental interests. This makes it particularly important to remove barriers to accessing effective justice in environmental matters. Otherwise, there is a risk that environmental rules exist solely on paper, with few having the incentives, means and possibilities of upholding them.

This is the problem that Article 9(4) of the Aarhus Convention[2] seeks to rectify. In order to protect the right set out in Article 1 of the Convention, to a healthy, clean and sustainable environment, the Aarhus Convention sets out its pillar of ensuring access to justice in Article 9. Article 9(4) specifically tries to solve the cost- and incentive-barriers to accessing justice, by requiring that procedures be 'not prohibitively expensive'.

This article will answer the question of when, exactly, costs are 'prohibitively expensive'. To do so, Section 2 will first cover some general points on interpreting the Aarhus Convention. Section 3 will then thoroughly analyse the 'not prohibitively expensive'-requirement. Section 3.1 takes a closer look at the text, context and purpose of Article 9(4), finding that costs can be 'prohibitively expensive' both where the level is excessive and where the rules lack foreseeability. Sections 3.2 and 3.3 build on that by diving deeper into when costs are, respectively, prohibitive on account of the level of costs and on account of lacking foreseeability, based on the practice of the Aarhus Committee and the CJEU.

The article adds to the growing literature and use of the Aarhus Convention. Article 9(4) has seen consistent and increasing use both by academics and by legal practitioners, including by NHRIs.[3] That said, most literature on the 'not prohibitively expensive'-requirement has analysed specific cases,[4] or commented on it as part of a broader point on access to justice.[5] This article expands on that literature by more comprehensively analysing when costs are 'prohibitively expensive', in light of the now extensive practice of both the Aarhus Committee and CJEU.

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[2] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001), 2161 UNTS 447 (Aarhus Convention).

[3] See for example the reports of the Swedish Institute for Human Rights and of the Norwegian Human Rights institution (from which this article derives) to the 2025 reporting cycle of the Aarhus Convention, commenting on how Article 9(4) has been implemented in Sweden and Norway respectively. Both reports are available here <https://unece.org/environmental-policy/public-participation/2025-reporting-cycle/organisations> accessed 4 October 2025.

[4] See for example; Gayatri Sarathy, 'Costs in Environmental Litigation: Venn v Secretary of the State for Communities and Local Government' (2015) 27(2) Journal of Environmental Law 313; Geert De Baere and Janek Tomasz Nowak, 'The right to not prohibitively expensive judicial proceedings under the Aarhus Convention and the ECJ as an international (environmental) law court: *Edwards and Pallikaropoulos*' (2016) 53(6) Common Market Law Review 1727; Christoph Sobotta, 'New Cases on Article 9 of the Aarhus Convention' (2018) 15(2) Journal of European Environmental & Planning Law 241.

[5] See for example: Vasiliki Karageorgou, 'Access to Justice in Environmental Matters: The Current Situation in the Light of the Recent Developments at the International and Regional Level and the Implications at the National Level with Emphasis on the UNECE Region and the EU MS' (2018) 27(6) European Environmental Law Review 251; Jerzy Jendrośka, 'Access to Justice in the Aarhus Convention – Genesis, Legislative History and Overview of the Main Interpretation Dilemmas' (2020) 17(4) Journal of European Environmental & Planning Law 372.

2 INTERPRETING THE AARHUS CONVENTION

As a treaty, the Aarhus Convention must be interpreted in line with standard methodology as expressed in the Vienna Convention on the Law of Treaties,[6] according to which a treaty shall be interpreted according to its 'ordinary meaning […] in their context and in the light of its object and purpose', see Article 31(1).

When interpreting the Aarhus Convention, account must therefore be taken of the specific context of that Convention, and its object and purpose. In that regard, the Convention sets out its own – and a very broad – purpose in Article 1, 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 wellbeing'.

This is a recognition of the existence of a right – including for future generations – to a clean, healthy and sustainable environment.[7] This general purpose and right is operationalised through the three different pillars of the Aarhus Convention: (i) the right to environmental information; (ii) the right to participation; and (iii) the right to effective remedies and access to justice. These pillars, and thus the specific provisions and rights enshrined in the treaty, must be interpreted in light of the broader right and purpose in Article 1.[8] This general purpose can lead to a dynamic interpretation where the rights of the Convention can evolve, in the sense that the interpretation of the three pillars might change over time depending on what is necessary to best uphold the right to a clean, healthy and sustainable environment.[9]

Article 15 of the Aarhus Convention, as implemented by the Meeting of the Parties, established the Aarhus Convention Compliance Committee (the Aarhus Committee) for 'reviewing compliance with the provisions of this Convention'. In pursuit of this task, it was given competence to review individual complaints.[10]As the expert body established by the Parties to monitor compliance, its decisions are not legally binding but can still give important guidance on the interpretation of the Convention.[11] Furthermore, where the Aarhus

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[6] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331 (Vienna Convention).

[7] Also confirmed in recital 7.

[8] As confirmed in recital 8. Cf. for a similar interpretation of provisions in light of a general provisions setting out an objective: *Obligations of States in Respect of Climate Change*, ICJ Advisory Opinion of 23 July 2025, General List No. 187, paras 197, 225 and 231.

[9] See for such an argument: Emily Barritt, 'The Aarhus Convention and the Latent Right to a Healthy Environment' (2024) 36(1) Journal of Environmental Law 67, 74. Such a view has also been advocated by the Aarhus Committee, stating that 'concomitant implementation of the rights under the Convention, in general, should be strengthened over time', see *Communication ACCC/C/2011/57, Denmark,* ECE/MP.PP/C.1/2012/7 para 46.

[10] Article 15 obliges the Meeting of the Parties to adopt a review mechanism, and this was done in Decision I/7, *Review of Compliance*, ECE/MP.PP/2/Add.8 which established the Aarhus Committee, with the annex setting out its structure and the functions.

[11] See the Opinion of AG Kokott in Case C-43/21 *FCC Česká republika* EU:C:2022:425 point 45: 'The decision-making practice of the Aarhus Convention Compliance Committee […] provides important guidance on the interpretation of that provision'. Cf. also the statements of the ICJ on the Human Rights Committee, where 'it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty', see *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Report 2010, p. 369, para 66. However, as the ICJ clarified in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgement, ICJ Reports 2021, p. 71, in regards to the CERD Committee, it will not follow the pronouncements of such bodies where

Convention Meeting of the Parties has endorsed or made decisions in accordance with the views of the Committee, this could be considered subsequent agreements or practice under the Vienna Convention, which shall always be taken into account.[12]

Finally, the EU is a party to the Convention and has adopted legislation implementing it, including specifically the obligation to ensure that costs are 'not prohibitively expensive'.[13] This means that there is extensive case-law from the Court of Justice of the European Union (CJEU) which directly and/or indirectly interprets the Aarhus Convention. While that court does not as such have any authoritative role in interpreting the Convention, it could be considered a supplementary means of interpretation.[14] Despite these limitations, CJEU case-law is practically important due to the lack of other decisions or authoritative interpretations of the Aarhus Convention, and because the EU and its Member States make up over half of the State Parties.

3 WHEN ARE COSTS 'PROHIBITIVELY EXPENSIVE'?

3.1 COSTS ARE PROHIBITIVE IF THEY DISSUADE APPLICANTS

Article 9(4) has the following wording (emphasis added):

> 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.

For State Parties, this imposes an obligation of result ('not prohibitively expensive') and not one of conduct. States will likely have a large margin to decide how to ensure that costs are

applying 'the relevant customary rules on treaty interpretation' leads to a different conclusion, see para 101. Under the Vienna Convention (n 6), the Committee decisions would likely be considered a 'supplementary means of interpretation' under Article 32.

[12] See the Vienna Convention (n 6) Article 31(3)(a) and (b). Compare the statements of the ICJ on the decisions of similar governing bodies under the climate change treaty framework in *Obligations of States in Respect of Climate Change*, ICJ Advisory Opinion of 23 July 2025, General List No. 187 para 184.

[13] See Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17 Article 25(4); Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) [2012] OJ L26/1 Article 11(4); Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L2024/1760 Article 29(3)(b) and recital 82; Directive (EU) 2024/2881 of the European Parliament and of the Council of 23 October 2024 on ambient air quality and cleaner air for Europe [2024] OJ L2024/2881 Article 27(2); Directive (EU) 2024/3019 of the European Parliament and of the Council of 27 November 2024 concerning urban wastewater treatment [2024] OJ L2024/3019 Article 25(1).

[14] See the Vienna Convention (n 6) Article 32 on 'supplementary means of interpretation'. Cf. also the Statute of the International Court of Justice (24 October 1945), XV UNCIO 355, article 38(1)(d), on 'judicial decisions' as a 'subsidiary means for the determination of rules of law'.

not prohibitively expensive, but a more limited margin for deciding when that threshold is reached.[15]

The wording of Article 9(4) does not make it clear what is meant by, or when costs are, 'prohibitively expensive'. The use of 'prohibitive' implies a focus, not on the costs themselves, but on the consequences of the costs for the relevant parties. In other words, whether the costs prevent (prohibit) relevant parties (environmental defenders) from having access to justice. This is even clearer in the French wording, which omits the word 'expensive' and just says *'sans que leur coût soit prohibitif'*. The wording itself therefore supports a reading where the central question concerns the consequences of the costs – a consequence-oriented analysis.

The requirement that costs be not prohibitively expensive in Article 9(4) is set out in the context of a broader obligation to 'provide adequate and effective remedies'. When read in combination, costs would likely be considered prohibitive where access to justice is no longer an effective remedy for environmental defenders.

The wording of Article 9(4) must also be read in light of its purpose in achieving the right enshrined in Article 1. The environment cannot, by itself, claim rights or have access to justice. It relies on individuals or NGOs to advocate on its behalf in the interests of the broader public.[16] As acknowledged by the CJEU in several cases, individuals or NGOs act in the public interest when seeking to uphold environmental rules.[17] Read in light of this purpose, the 'not prohibitively expensive' rule recognises that environmental cases differ from other cases where applicants act in their own interest.[18] Individuals and NGOs that act in the public interest should not be dissuaded to seek access to justice by an excessive personal economic risk.

Taken together, both the wording and objective support a broad reading of Article 9(4) where it is focused on the dissuasive effect (the chilling effect) of high costs if they render access to justice an ineffective remedy for ensuring that environmental rules are upheld. This supports a reading of 'prohibitively' as referring to all the ways in which legal costs, and the framework for imposing costs, can have a dissuasive effect on upholding environmental rules

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[15] See for such a viewpoint, United Nations Economic Commission for Europe, 'The Aarhus Convention – An Implementation Guide, second edition' (2014) 204. This guide can likely be taken as supplementary means of interpretation under the Vienna Convention (n 6) Article 32. The CJEU has clarified that it is an 'explanatory document, capable of being taken into consideration', but noting that 'the observations in the guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention', see Case C-279/12 *Fish Legal and Shirley* EU:C:2013:853 para 38.

[16] See similarly by AG Kokott in her Opinion in Case C-260/11 *Edwards and Pallikaropoulos* EU:C:2012:645 point 41: 'the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations'. See also the recognition of the right of organisations and the public in the Convention, recital 8 and 18, and Article 2(5).

[17] See Case C-873/19 *Deutsche Umwelthilfe (Réception des véhicules à moteur)* EU:C:2022:857 para 68, stating that 'Imposing those criteria must not deprive environmental associations in particular of the possibility of verifying that the rules of EU environmental law are being complied with, given also that such rules are usually in the public interest, rather than simply in the interests of certain individuals, and that the objective of those associations is to defend the public interest', and Case C-252/22 *Societatea Civilă Profesională de Avocați Plopeanu & Ionescu* EU:C:2024:13 para 74, stating that 'members of the public and associations are naturally required to play an active role in defending the environment'. See also Case C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114 para 34.

[18] This has also been emphasised by the Aarhus Committee, see *Communication ACCC/C/2014/111*, *Belgium*, ECE/MP.PP/C.1/2017/20 paras 69 and 75, emphasising the 'contribution made by appeals by NGOs to improving environmental protection and […] implementation' and the 'public interest nature of the environmental claims'.

and therefore negatively affect the right to a clean, healthy and sustainable environment as set out in Article 1.

As for the threshold for costs being prohibitive, the wording can on the one hand indicate a high threshold. On the other hand, the context (assuring an effective remedy) and the broader objective in achieving the right set out in Article 1 speak in favour of a lower threshold. A level of costs which is such as to dissuade individuals or NGOs from upholding public interests and environmental rules in court would be detrimental to achieving the objective in Article 1.

Account must also be had of whether the rules regulating legal costs are prohibitive on account of their lack of foreseeability. Support for such a reading of Article 9(4) can be found by reading it in conjunction with the general obligation in Article 3(1), requiring each party to 'establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention'.[19] Such an interpretation implies that costs can be prohibitive if the provisions regulating them and their imposition are not 'clear, transparent and consistent'. Essentially, the lack of legal and economic foreseeability could be dissuasive and have a chilling effect for potential applicants, reducing their effective access to justice.

In summary, 'prohibitively expensive' encompasses all the ways in which legal costs can be dissuasive for an environmental defender, including both the level of costs and the foreseeability of the legal framework,[20] in so far as either can have a dissuasive effect – the threshold for which should not be set too high. Costs could likely have dissuasive effects both if they are disproportionate to the dispute, if they are excessive in relation to the resources available to an applicant, and if they are difficult to foresee, both regarding their imposition and the amount imposed.

That interpretation is supported by the practice of the Aarhus Committee and of the CJEU, which both take a comprehensive view of the cost systems of the Party concerned where they consider all the costs arising from the proceedings.[21] In doing so, they consider both the proportionality or excessiveness of the costs[22] and the foreseeability of the costs.[23] The overarching focus seems to be on whether the level of cost is such as to decrease the

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[19] Such a *systemic* reading is also supported by the practice of the Aarhus Committee, see: Communication *ACCC/C/2008/33, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2010/6/Add.3, para 140 and Decision IV/9i, ECE/MP.PP/2011/2/Add.1 of the Meeting of the Parties paras 3(a) and (d); *Communication ACCC/C/2015/130, Italy*, ECE/MP.PP/C.1/2021/22, paras 118–121 and Decision VII/8j, ECE/MP.PP/2021/2/Add.1, of the Meeting of the Parties, paras 1(f) and (g) and 2(e) and (f).

[20] See similarly: De Baere and Nowak (n 4); Eline Sandnes Fosse, 'Er det "prohibitively expensive" å ta miljøsaker til retten? – Om sakskostnadar som hinder for reell tilgang til domstolsprøving av miljøsakar etter Århuskonvensjonen artikkel 9' (2024, Master Thesis, University of Bergen) section 3.

[21] *Communication ACCC/C/2011/57, Denmark,* ECE/MP.PP/C.1/2012/7, para 45; *Communication ACCC/C/2014/111*, *Belgium*, ECE/MP.PP/C.1/2017/20, para 65; Case C-260/11 *Edwards and Pallikaropoulos* EU:C:2013:221 paras 27–28.

[22] *Communication ACCC/C/2012/77, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2015/3, paras 72–75; *Communication ACCC/C/2014/111*, *Belgium*, ECE/MP.PP/C.1/2017/20, paras 66–84; Case C-260/11 *Edwards and Pallikaropoulos* EU:C:2013:221 paras 38–48.

[23] *Communication ACCC/C/2008/33, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2010/6/Add.3, paras 135 and 140; *Communications ACCC/C/2013/85 and ACCC/C/2013/86, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2016/10, paras 108–112; Case C-427/07 *Commission v Ireland* EU:C:2009:457 paras 93–94; Case C-530/11 *Commission v United Kingdom* EU:C:2014:67 para 35.

number of environmental appeals (i.e. whether the costs are dissuasive).[24]

It must be noted that none of these requirements categorically prevent a court from imposing costs. Article 9(4) must here be read in conjunction with article 3(8), which specifies that 'reasonable costs' may be awarded in judicial proceedings.[25]

The following sections will analyse more closely when costs are, and have been found to be, 'prohibitive'. As stated, costs can be prohibitive both in terms of their level and their foreseeability, and these will be considered separately. Section 3.2 will consider when costs are 'prohibitive' on account of their amount or excessiveness and Section 3.3 will consider when costs are 'prohibitive' on the account of being unforeseeable.

3.2 DISSUASION BY AN EXCESSIVE LEVEL OF COSTS

As stated above, one of the clear requirements of Article 9(4) was that costs would be considered prohibitive if they were excessive or unreasonable to a level which could be dissuasive. The practice of both the Aarhus Committee and the CJEU indicates that this requirement has both objective and subjective components,[26] even if neither of them distinguish between them in a clear or consistent manner. Rather, it seems more like the question of whether costs are prohibitive is considered concretely in that specific case, taking account of both objective and subjective elements where relevant.

Objectively, the Convention requires that the level of costs is not dissuasive. In evaluating this, costs cannot be viewed completely in isolation – but have to be considered in relation to the form and object of a dispute. It is clear from the practice of the Committee that even very small costs can be considered objectively 'prohibitive'. In a complaint against Denmark, the Committee found that 3000 DKK (roughly 400 EUR), which was payable as a fee for complaining to an environmental tribunal, was prohibitive.[27] Small costs have also been found to be prohibitive in another case against Italy, regarding a 650 and 975 EUR filing fee for access to administrative courts.[28]

Obviously, not all costs of roughly 400 EUR (or 975 EUR) would be in breach of Article 9(4). The point seems to be that the fee in that complaint was excessive in relation to the form and objective of disputes in such a tribunal, which was precisely meant as a low-cost alternative where environmental rules can be upheld even in smaller disputes. These complaints indicate that analysis of costs must consider the object of dispute, the form

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[24] Se *Communication ACCC/C/2011/57, Denmark,* ECE/MP.PP/C.1/2012/7, paras 50–52; *Communication ACCC/C/2015/130 concerning compliance by Italy*, ECE/MP.PP/C.1/2021/22, paras 79, 96 and 104, talking about 'deterrent effect'. This, however, cannot be taken to mean that because the specific applicant has *not* been deterred, the costs are therefore *not* of a level dissuasive or prohibitively expensive to applicants more generally, see Case C-260/11 *Edwards and Pallikaropoulos* EU:C:2013:221 paras 43 and 47.

[25] See for such a reading: Case C-470/16 *North East Pylon Pressure Campaign and Sheehy* EU:C:2018:185 para 60; Case C-252/22 *Societatea Civilă Profesională de Avocați Plopeanu & Ionescu* EU:C:2024:13 para 72.

[26] *Communication ACCC/C/2012/77, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2015/3, para 72: 'Moreover, such an assessment should involve both objective and subjective elements'; Case C-252/22 *Societatea Civilă Profesională de Avocați Plopeanu & Ionescu* EU:C:2024:13 para 74: '[…] the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable'.

[27] See *Communication ACCC/C/2011/57, Denmark,* ECE/MP.PP/C.1/2012/7, paras 43–52.

[28] See *Communication ACCC/C/2015/130, Italy*, ECE/MP.PP/C.1/2021/22, paras 72–80, endorsed by the Meeting of the Parties in Decision VII/8j, ECE/MP.PP/2021/2/Add.1, para 1(a) and (b).

of the proceedings and the type of costs imposed,[29] and that even small costs can be prohibitive if they are not justified by any of these factors.

Such an interpretation is in line with the general wording and purpose of Article 9(4). If 'prohibitively' was interpreted as setting a general norm, level or cap that is prohibitive, applicable to all cases, it would be ineffective for small-scale comparatively cheap proceedings dealing with local environmental issues, which are less costly than say large-scale litigation over constitutional principles. Those small cases, due to their potentially large number, are still very important for ensuring compliance and implementation. Precisely because those cases are rarely matters of principle, even moderate costs can be very dissuasive.

Article 9(4) should therefore be interpreted to require an analysis of whether costs are dissuasive which includes comparing the costs to the form and object of the dispute at hand. For a local or low-complexity dispute, even smaller costs can have a clear dissuasive effect. Such an interpretation ensures that effective access to justice can be ensured for all types of environmental rules and cases.

The relative sense of that conclusion makes it hard to say anything generally on when legal costs will be considered, objectively, of a too high level and therefore prohibitively expensive. It will require a comprehensive consideration of several factors, including the level of income and costs in that country, the costs in the specific case, the form and object of the dispute, and an evaluation of whether costs like that are likely to be – or have been – dissuasive. It will also be relevant to consider how large the public interest in the case is,[30] in line with the broader objective of the Convention in Article 1. For example, a large environmental and public interest could be proven by reference to similar appeals often leading to the repeal of illegal decisions.[31]

The Committee has dealt with some complaints that can give guidance on when costs are likely to be prohibitively expensive. Most complaints deal with costs being imposed on the losing party. In a case against the UK, the Committee considered costs of 8 000 GBP (not inflation adjusted) imposed on the losing party, Greenpeace, as causing the proceedings to be 'prohibitively expensive', despite the Court having lowered the costs compared to the original amount of 11 813 GBP. In arriving at that conclusion, the Committee emphasised the importance of the object of dispute, the importance of the public interests and lack of other avenues to defend them and the costs incurred by Greenpeace for its own lawyers.[32]

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[29] See also, for such a view, *Communication ACCC/C/2016/142, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2021/27, para 101, where the Committee points out that the type and form of procedure being considered is 'a significantly less complex matter than a judicial review procedure in the vast majority of cases' which should 'be an efficient and accessible mechanism'. The less complex and accessible nature of the proceedings was an argument in favour of the costs being prohibitive.

[30] Case C-252/22 *Societatea Civilă Profesională de Avocați Plopeanu & Ionescu* EU:C:2024:13 paras 74–75. This includes being able to consider, to the detriment of an applicant, whether the claims are potentially frivolous. For the latter, see also Case C-470/16 *North East Pylon Pressure Campaign and Sheehy* EU:C:2018:185 paras 59–65.

[31] As the Committee emphasised in *Communication ACCC/C/2011/57, Denmark,* ECE/MP.PP/C.1/2012/7, para 49.

[32] *Communication ACCC/C/2012/77, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2015/3, paras 72–77. The conclusion was endorsed by the Meeting of the Parties in Decision VI/8k, ECE/MP.PP/2017/2/Add.1, para 3.

The UK amended its regulatory framework by introducing a system of 'Aarhus claims', with a cap for the imposition of legal costs amounting to 5 000 GBP for individuals and 10 000 GBP for organisations. This was evaluated by the Committee, which was 'not convinced' that this would not be prohibitively expensive, noting that applicants would have to cover their own cost in addition to these.[33] In another complaint, against Italy, the Committee also expressed similar scepticism towards a level of imposed costs ranging from 2 000 EUR to 5 000 EUR imposable per defendant, which could come in addition to other costs or fees.[34] However, in an earlier case, the Committee expressed, in relation to a cost order of 5 130 GBP (not inflation adjusted), that the 'quantum of the order' was not prohibitively expensive by itself.[35]

The cases illustrate that it is difficult to set a clear level where the cost will typically be prohibitive, even on the higher end. All these cases concerned costs imposed on the losing party, and ranges like the ones in these cases will likely create a risk of costs being considered prohibitive in at least some cases, but it has to be analysed specifically and individually in relation to the case at hand.

While most cases deal with costs being imposed on the losing party, the Committee has also dealt with the level of total costs, including what an applicant has to pay for their own lawyers. The Committee found, in a case against the UK, that a general level of costs for 'private nuisance claims' which typically exceeded 100 000 GBP, without any adequate alternative procedures, was prohibitively expensive.[36] This makes clear that a very high level of costs can be prohibitive even in the absence of being held liable for the opponents legal costs, and that high own legal fees are also relevant for considering whether the level of costs is objectively prohibitive.

Subjectively, legal costs can be prohibitively expensive in relation to a specific applicant and their economic situation,[37] in light of the importance of the case for that applicant.

A subjective evaluation can include considering all aspects of the applicant's economic situation. For NGOs, the Committee has mentioned factors like the number of members, the membership fee and the resource allocation of the NGO to judicial activities as compared to other activities.[38] The CJEU has clarified that this can include the importance of what is at stake for the claimant.[39] A subjective evaluation can also likely include the degree to which the applicant is to blame for the costs incurred or not.[40]

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[33] *Compliance by the United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/2014/23, para 47. The Committees general findings were endorsed by the Meeting of the Parties in Decision V/9n, ECE/MP.PP/2014/2/Add.1, para 2.

[34] *Communication ACCC/C/2015/130, Italy*, ECE/MP.PP/C.1/2021/22, paras 89–98. The Committee's conclusion was endorsed by the Meeting of the Parties in Decision VII/8j, ECE/MP.PP/2021/2/Add.1), para 1(c).

[35] *Communication ACCC/C/2008/23, United Kingdom of Great Britain and Northern Ireland*, para 49.

[36] *Communications ACCC/C/2013/85 and ACCC/C/2013/86, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2016/10, paras 105–114, endorsed by the Meeting of the Parties in Decision VI/8k, ECE/MP.PP/2017/2/Add.1, para 5, see also the recommendation in para 6.

[37] See above n 26.

[38] *Communication ACCC/C/2011/57, Denmark,* ECE/MP.PP/C.1/2012/7, para 47.

[39] Case C-260/11 *Edwards and Pallikaropoulos* EU:C:2013:221 para 42.

[40] Cf. *Communication ACCC/C/2008/23, United Kingdom of Great Britain and Northern Ireland*, para 52, where the Committee emphasised that the applicants had initiated cheaper methods of resolution, which had been declined.

The fact that the applicant actually has asserted a claim and therefore has not, in practice, been deterred from accessing justice cannot by itself establish that the proceedings are not prohibitively expensive for them.[41]

Given that a subjective evaluation will vary widely from case to case, there is not much guidance from the Committee or the CJEU in terms of amounts. However, in a case against Belgium the Committee did view costs of 3700 EUR (not inflation adjusted) as imposing 'a considerable financial burden on the communicants' and that 'costs of this level could effectively prevent small environmental NGOs from challenging decisions, acts and omissions', but found that the specific applicants had not supplied sufficient evidence as to their economic situation.[42] This at least provides an indication of sums that might typically be prohibitive for smaller applicants.

Some types of cases are naturally more expensive than others, due to the complexity or object of the case. It seems unlikely that the Aarhus Convention would require that the level of costs in the most complex cases not exceed the financial resources of the smallest applicants. The purpose of the Convention in Article 1 can be upheld as long as there is a sufficient group of NGOs or individuals that can act as applicants in all types of cases. The Aarhus Convention also, most likely, does not intend to encourage the formation of smaller NGOs with less economic resources for use in strategic litigation as a means to avoid legal costs. In evaluating how important the case is for the applicant at hand, recourse may therefore likely be had to how the object of the dispute relates to the work of the NGO, its representativeness, members and the reasons for its establishment. For other groups and individuals, account can likely also be had of whether they are directly and individually affected and have a lot at stake, in a way that makes them the most natural representative of the affected interests even if they might lack the resources of larger groups or NGOs.

In total, costs can have a dissuasive effect by being high compared to the form and object of the dispute and by being high compared to the importance for, and resources available to, the applicants.

A last point to note in relation to both categories is that the costs of an applicant are not just affected by their own incurred costs but also by expenses they themselves can seek covered or recovered. In this sense a loser pays system will, in some cases, make costs less dissuasive because a successful applicants can have their costs covered. If State Parties consider systems that cap the liability for costs, a system capping it only one way ('one-way cost-shifting') would be less dissuasive for applicants,[43] whereas a system that caps also the costs that applicants can recover risks making cases 'too expensive to win'.[44]

A one-way cost-shifting system could also involve the state taking the cost for successful applicants. That would be based on a recognition that the successful applicants

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[41] Case C-260/11 *Edwards and Pallikaropoulos*, EU:C:2013:221 para 47; Case C-530/11 *Commission v United Kingdom* EU:C:2014:67 para 50.

[42] *Communication ACCC/C/2014/111*, *Belgium*, ECE/MP.PP/C.1/2017/20, para 77, more generally paras 78–84.

[43] This is a solution recommended by the EU Commission, 'Notice on access to justice in environmental matters' [2017] OJ C275/1 para 192.

[44] See similarly, Carol Day et al, 'A Pillar of Justice II; The continuing impact of legislative reform on access to justice in England and Wales under the Aarhus Convention' (2023) p. 35 ('there is a clear risk that the reciprocal cap, particularly when set at the level that it is, can make cases too expensive to win') <https://elflaw.org/wp-content/uploads/2023/06/A-Pillar-of-Justice_Report.pdf> accessed 4 October 2025.

contributed to upholding rules that are in the public interest and the broader objective of the Aarhus Convention in Article 1, and therefore that it would be fair for the public to cover costs.

States can also use legal aid as a means to ensure that costs are not so excessive as to be dissuasive.[45] This might, particularly, be suitable to ensure that costs are not excessive subjectively. However, legal aid systems typically only apply to individuals – thus not helping to ensure that the costs for NGOs are not prohibitive.

3.3 DISSUASION BY UNFORSEEABLE COSTS

The lack of foreseeability of imposed costs is at the core of the criticism from both the Committee and the CJEU in several cases. As mentioned above, Article 9(4) of the Convention must be read in conjunction with Article 3(1), requiring the states to establish a 'clear, transparent and consistent' framework for implementing the Convention.

If access to justice and effective remedies are to help attain the objective in Article 1, the rules regulating them must be as clear as possible. In particular, lack of clear rules when it comes to the imposition of costs on the losing party could be very dissuasive for environmental defenders, often not having extensive resources, nor any economic incentive or reward themselves in the complaints and cases they pursue. While environmental defenders can control and ensure foreseeability of their own legal costs, the risk of being held liable for the legal costs of the other party makes it very difficult to plan, budget and evaluate whether it is worth accessing justice in any specific case.

The Committee has extensively considered the UK system for imposing legal costs, which employs a principle of 'loser pays' while also leaving a lot of discretion to the judge in regards to whether and which costs are actually imposed. The Committee found this system to be problematic, pointing to the lack of clarity in the criteria, the lacking consideration of public interest in the environmental issues at hand and the lack of adequate legal aid or protective costs orders.[46] It found that the UK was in violation of Article 9(4), because

> the considerable discretion of the courts of England and Wales in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest.[47]

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[45] This is a proposed solution by the EU Commission, see the Notice on access to justice in environmental matters (n 43) paras 194–195. Cf. also the IACtHR Advisory Opinion AO-32/25 of May 29, 2025, *Climate Emergency and Human Rights*, para 542, requiring states to provide legal assistance where people cannot afford costs, and citing the Escazú Agreement Article 8, which contains a parallel requirement of 'not prohibitively expensive' costs.

[46] Communication *ACCC/C/2008/33, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2010/6/Add.3, paras 129–135.

[47] Communication *ACCC/C/2008/33, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2010/6/Add.3, para 135, see also 141, endorsed by the Meeting of the Parties in Decision IV/9i, ECE/MP.PP/2011/2/Add.1, para 3(a). The Committee concluded similarly in *Communications ACCC/C/2013/85 and ACCC/C/2013/86, United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2016/10, paras 108–112, followed up by the recommendations of the Meeting of the Parties in Decision VI/8k, ECE/MP.PP/2017/2/Add.1, para 6.

The Committee has also pointed to the discretion of courts being a problem in a complaint against Italy: 'the wide discretion conferred on the courts when deciding litigation costs leads to a lack of certainty and clarity regarding the costs that claimants will face when exercising their right to access to justice in environmental matters'.[48]

The CJEU has considered similar discretion in both the Irish and British judicial systems, and has stated that:

> [a]lthough it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts.
> That mere practice which cannot, by definition, be certain, […] cannot be regarded as valid implementation of the obligations […].[49]

In a later case against the UK, the CJEU stated that:

> [i]t is also apparent from the foregoing that that regime laid down by case-law does not ensure the claimant reasonable predictability as regards both whether the costs of the judicial proceedings in which he becomes involved are payable by him and their amount, although such predictability appears particularly necessary because, as the United Kingdom acknowledges, judicial proceedings in the United Kingdom entail high lawyers' fees.[50]

That said, the CJEU has clarified that Article 9(4) does not prevent courts from exercising some discretion in determining costs,[51] nor does it require a detailed determination of costs in national legislation.[52]

One way of ensuring increased foreseeability and control over costs in 'loser pays' systems is by using a cap-system, where liability is capped at certain sums.[53] This presents the obvious problem, discussed in Section 3.2 in relation to the UK cap, that the cap will likely have to be set rather high to account for complex cases, meaning costs near the cap might be prohibitively expensive for less complex cases.

The Committee approved of a 'loser pays' system that solved some of these issues in a case concerning Belgium. The system employed a modified cap (a cap-range), where the losing party was held liable for a flat contribution to the successful party's costs and legal fees, with a basic amount of 1 320 EUR, a minimum amount of 82.50 EUR and a maximum amount of 11 000 EUR (not inflation adjusted). The basic amount was applied in most cases, but the judge had discretion to modify it within the given range on request, taking account of the nature of the case, the importance of the litigation, its complexity, the unreasonable

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[48] *Communication ACCC/C/2015/130, Italy*, ECE/MP.PP/C.1/2021/22, para 118. The general point of the framework being unclear and untransparent was endorsed by the Meeting of the Parties in Decision VII/8j, ECE/MP.PP/2021/2/Add.1, para 1(f) and the recommendation in para 2(e).
[49] Case C-427/07 *Commission v Ireland* EU:C:2009:457 paras 93–94. Reiterated in Case C-530/11 *Commission v United Kingdom* EU:C:2014:67 para 35.
[50] Case C-530/11 *Commission v United Kingdom* EU:C:2014:67 para 58.
[51] ibid para 54.
[52] Case C-252/22 *Societatea Civilă Profesională de Avocați Plopeanu & Ionescu* EU:C:2024:13 para 81.
[53] The European Commission recommends a cap-system as one way of ensuring predictability and control over costs, see the Notice on access to justice in environmental matters (n 43) para 189.

nature of the situation and the unsuccessful party's financial capacity. The Committee found this system to provide more foreseeability and therefore distinguished it from their previous considerations of the UK system.[54]

In total, therefore, 'prohibitively expensive' in Article 9(4) of the Convention must be interpreted as meaning that the lack of foreseeability in relation to the costs of legal proceedings, including the costs being imposed, and the dissuasive effects caused by that, can be considered prohibitive and thus in breach of the Convention. Based on the practice of the Committee and the CJEU, it is particularly the combination of high legal fees, the use of a 'loser pays' system, and the use of high judicial discretion both as to the imposition of costs and as to their amount, which is liable to be dissuasive and therefore prohibitive. A 'loser pays' system might be more acceptable in terms of foreseeability if the amounts imposable and clear criteria to guide the use of judicial discretion are set out in legislation.

Legal aid or assistance-systems can also be a solution where costs are not foreseeable,[55] but as noted above they typically only cover individuals, and so they might not be a solution for NGOs seeking access to justice.

4 CONCLUSION

Article 9(4) of the Aarhus Convention seeks to ensure that it is possible for individuals, groups and NGOs, acting as environmental defenders, to uphold environmental law and therefore the public interest without incurring costs that make it prohibitive for them.

This article sought to answer exactly when costs are 'prohibitively expensive'. As the analysis has shown, the relevant metric is whether costs are dissuasive for a sufficient number of applicants, undermining the achievement of the overarching objective in Article 1 of an environment adequate to health and wellbeing.

The analysis further demonstrated that states, to prevent such a dissuasive effect from legal costs, must have rules regulating both the level of costs and their foreseeability. Whether the level of costs is too high must be considered on the basis of all the costs incurred in the proceedings, including own costs, opponent's costs, and applicable fees. The level of costs can be dissuasive both objectively, in relation to the form, object and importance of a dispute and how it contributes to upholding public interests, and subjectively, in relation to the financial situation of the applicant and what is at stake for them.

Lacking foreseeability can have a dissuasive effect regardless of the level of costs. This is particularly true for the type of costs most of the cases from the Aarhus Committee and the CJEU deal with, which is the risk of being held liable for the opponents' costs ('loser pays'). While Article 9(4) does not preclude such liability inherently, it does preclude them where it is left entirely to judicial discretion without clear criteria, and where there is no foreseeability as to the level of costs that might be and usually are imposed.

A typical solution to the 'loser pays' systems is to introduce a sort of a cap system. As illustrated by some of the complaints against the UK, a universal cap applicable in all cases might be unsuited because it doesn't take account of the objective and subjective elements required. If the cap is set to a high amount, suitable for the more complex cases, it could be

[54] *Communication ACCC/C/2014/111*, *Belgium*, ECE/MP.PP/C.1/2017/2, paras 66–71.
[55] See above n 45.

prohibitively expensive for smaller cases or certain applicants. A better approach is the use of a cap range, like the Belgian system discussed above,[56] with a basic amount and a range limit, with some judicial discretion as to the imposition. That discretion should be delimited by clear and foreseeable criteria, in line with the objective and subjective elements that determine whether costs are prohibitive. It is important to avoid undue judicial discretion, which could undermine the foreseeability the system seeks to ensure.[57]

In general, State Parties will have a wide discretion and range of possibilities for how to ensure that costs remain non-prohibitive, as long as it sufficiently addresses both the level of costs and foreseeability of their imposition. This can include everything from (and a mix of) a cap system, cap-ranges, the state covering certain costs, legal aid- and assistance systems, use of alternative dispute resolution mechanisms and/or tribunals to lower costs, and many other systems. This article has broadly set out the requirements for such systems and given some indications as to what level of costs and which types of rules risk being prohibitive for applicants.

[56] See Section 3.3.

[57] As recommended by the EU Commission in the Notice on access to justice in environmental matters (n 43) para 193 'a discretion which is too wide may undermine cost predictability'.

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