



Access to Justice and the Preliminary Reference Procedure

Anne Friel

Lawyer, Environmental Democracy Lead

ClientEarth



Agenda



1. The role of the preliminary reference procedure in guaranteeing access to justice in environmental matters
2. The preliminary reference procedure: what is it and how it works
3. The preliminary reference procedure from a practitioner's perspective



Article 267 TFEU

The jewel in the crown of the CJEU's jurisdiction

- 2 types of preliminary references:
 - Questions regarding the interpretation of the EU Treaties/acts of the EU institutions
 - Questions regarding the validity of EU acts
- Crucial for the development of EU law:
 - National courts as enforcers of EU law
 - EU law principles of primacy, direct effect, effectiveness, etc
 - Shaped all areas of EU law (e.g. environmental protection, free movement, consumer rights, social policy, taxation, freedom, security and justice, asylum and immigration)



Access to justice: challenging national measures that breach environmental law

Interpretation references

- Absence of access to justice provisions:
 - CJEU establishes right of concerned persons to invoke directly effective provisions of EU environmental law in national courts, e.g. case C-72/95 Kraaijeveld and Others (EIA Directive), C-127/02 Waddenzee (Habitats Directive), C-237/07 Janecek + C-404/13 ClientEarth (Air Quality Directive)
 - CJEU relies on Article 9 AC + Article 47 CFR, e.g. C-240/09 Slovak Bears I, C-243/15 Slovak Bears II (Habitats Directive), C-664/15 Protect (Water Framework Directive), Case C-197/18 Wasserleitungsverband Nördliches Burgenland (Nitrates Directive)
- CJEU clarifies scope of **access to justice provisions** inserted into EIA Directive and IE Directive, e.g. C-570/13 Gruber, C-115/09 Trianel, C-72/12 Gemeinde Altrip, C-263/08 Djurgarden



Access to Justice: Challenging national measures that breach environmental law

- Strong and detailed EU legal framework on access to justice in environmental matters despite the lack of horizontal EU Directive implementing Article 9(3) Aarhus Convention
- BUT problems remain:
 - Complicated patchwork of case law that is not mastered by all national judges
 - Access to justice barriers mean that necessary preliminary references cannot be made
 - Many national judges are still reluctant to refer questions to the CJEU



Access to justice: challenging EU acts that breach environmental law

Validity references

1. No direct access to the CJEU for NGOs and individuals to enforce EU environmental law: Article 263 TFEU does not work!
2. “Internal Review” does not work! (...watch this space for amendment of Regulation 1367/2006
3. Preliminary references on the validity of acts of EU institutions and bodies is the only route

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Access to justice: challenging EU acts that breach environmental law

Validity references

- Problems associated with validity references:
 - Legal standing and other access to justice barriers in Member States (e.g. prohibitive costs)
 - Reluctance of national judges to refer questions on validity to CJEU;
 - Delays and associated environmental damage and legal uncertainty.
- Aarhus Convention Compliance Committee: EU is in breach of Articles 9(3) and 9(4) of the Aarhus Convention



The preliminary references procedure

What it is and how it works?

Leonor Caldeira
EU Litigation Lawyer
icaldeira@clientearth.org

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Preliminary references – A dialogue between Courts

1. National courts have **questions or doubts** regarding the correct **interpretation** or **validity** of a **EU law act** necessary to their decision
2. The preliminary questions procedure **allows/obliges national courts to refer their question** to the CJEU
3. CJEU will answer the national court's question and issue **a reference judgement, to guide the national court** with the correct interpretation / validity judgement
4. Following the CJEU's judgement, the **national court will apply the interpretation / validity judgement to the facts of the case** and issue the final decision.



01

Legal Framework and Case Law

Article 267 TFEU and landmark judgements

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Article 267 TFEU

The **Court of Justice of the European Union** shall have jurisdiction to give preliminary rulings concerning:

(a) the **interpretation** of the **Treaties**;

(b) the **validity** and **interpretation** of acts of the institutions, bodies, offices or agencies of the **Union**;

Where such a question is raised before **any court or tribunal of a Member State**, that court or tribunal **may**, if it considers that a decision on the question is necessary to enable it to give judgment, **request the Court to give a ruling thereon**.

Where any such question is raised in a case pending before **a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law**, that court or tribunal **shall** bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.



1. Validity References

*“the **validity** (...) of acts of the institutions, bodies, offices or agencies of the Union”*

- Preliminary rulings regarding the **validity of an act in response to a national court** is **different** from the **decision to annul** an act (Article 263 TFEU)
- **The Court takes into consideration:** primary and secondary EU legislation, general principles of EU law, agreements in which the EU is a part of, principles of international law.
- The **grounds for a validity reference:** the lack of competence; infringement of an essential procedural requirement, infringement of the law related to their application, misuse of powers.



2. Interpretation References

*“the (...) **interpretation** of acts of the institutions, bodies, offices or agencies of the Union”*

Acts that can be interpreted by the CJEU –

- EU primary legislation - EU Treaties
- EU secondary legislation - legal acts of EU institutions and bodies
- International agreements binding on the EU
- National legal provisions with an explicit reference to EU law

To interpret a legal act is to define its –

- Material scope of application
- Recipients
- Effects and consequences
- ... and also: its **primacy** over other acts or its **direct effect**.



2. Interpretation References

“the (...) **interpretation** of acts of the institutions, bodies, offices or agencies of the Union”

- Balance between a **too abstract decision** and a decision **too specific for the underlying dispute**
- CJEU has to **respect the national court’s authority to decide on the facts of the case**. It is the national court’s sole duty to apply the reference judgement to the facts of the case.
- ... As such, the preliminary references of interpretation are a mechanism of true **judicial cooperation between national courts and the CJEU**



3. Mandatory References

*“Where any such question is raised in a case pending before a court or tribunal of a Member State **against whose decisions there is no judicial remedy under national law**, that court or tribunal **shall** bring the matter before the Court.”*

- **Abstract vs concrete** theory: only the highest court *must* refer or does this apply also to intermediary courts if the case is not subject to appeal?
 - **Costa v. ENEL [1964] Case 6/64**
Intermediary court in Italy was the last court to be able to decide on that *specific* case because the amount of money in question was rather low.
- **Fotofrost [1987] Case 314/85** – Only the CJEU has jurisdiction to declare validity/invalidity of EU law acts, it is mandatory for the first instance



3.1. Consequences of not referring to the CJEU when it is mandatory

- **Infringement proceedings** –
Case COM 2003/2161 against Sweden
Case C-416/17 Commission v France
- **State liability**
Case C-224/01 against Austria
- **Obligation to review past administrative decisions**
Case C-2/06 (Germany) and Case C-453/00 (The Netherlands)



4. Voluntary References

*“Where such a question is raised before any court or tribunal of a Member State, **that court or tribunal may**, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.”*

- Question must be crucial to the national court’s decision
- Need for consistency of interpretation / application of EU law
- Advantage of CJEU in analysing EU law

Gasparini [2006] Case C467/04 - Question must be concrete, not hypothetical.



5. When **not** to refer (with caution)

1. **Cilfit [1982] Case 283/81** – “Clear act” principle

2. **Da Costa [1963] Case C-28/62** – No need to refer if the CJEU has issued a previous judgement on the same question

... however, be careful: ***R v Henn & Darby* [1978] - Case 34/79**, intermediary court thought it was “obvious” but a higher court referred the question to the CJEU and the outcome was contrary to what the intermediary court adopted.

When **in doubt, refer it** to the CJEU.

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02

CJEU Reference Judgements

And their legal value



Reference Judgements: Legal effects

- Binding from the moment of their publication (Article 65 RoP) and in principle **with retroactive force**, unless the Court provides otherwise.
- Binding on the national court that submitted the question, as well as on **other courts in the same domestic procedure** – if the CJEU decides an EU law is invalid or interprets it in a certain way, **no national court may find to the contrary**.
- The reference judgement **becomes a part of the EU law act** in question, to ensure uniform interpretation and application of EU law



Reference Judgements: Legal effects

- **Not subject to appeal**, but requests to clarify and/or to bring new perspectives are possible
- CJEU can issue new judgements on the same question and **change their position – evolution of legal integration through case law**
e.g. evolution of the theory of primacy of EU law through *Costa/Enel*, *Simenthal*, *Wachauf* and *Factortame*, **all preliminary references of interpretation of the EU Treaties**



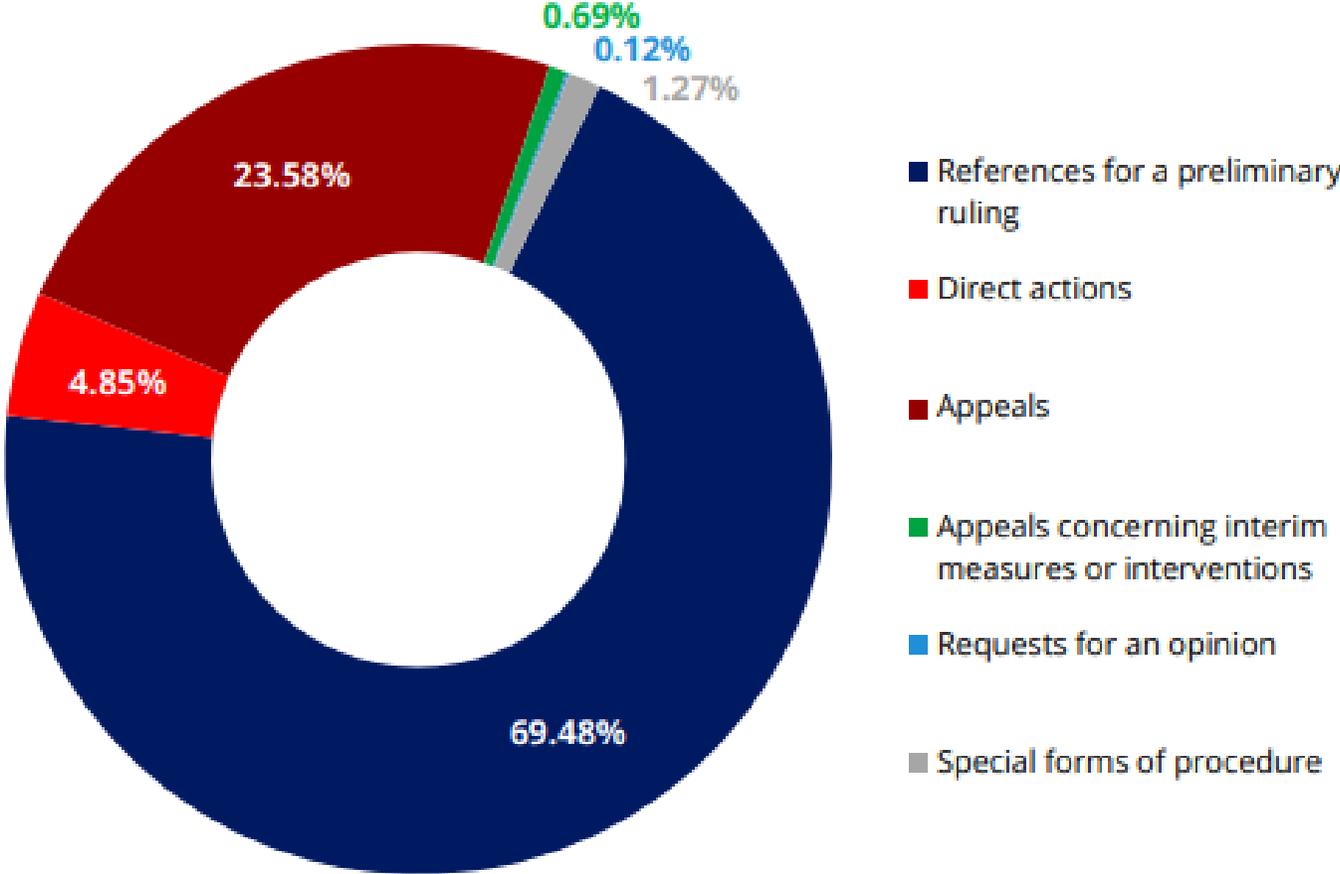
Preliminary References: **Access to Justice**

- The procedure is a **tool** for individuals and NGOs to enforce their **EU rights** before **national courts**, even if indirectly
- National legal systems must ensure access to the preliminary references procedure by individuals and NGOs, especially in **mandatory references**
- Violation to grant access to the Preliminary References procedure weakens the **right to effective judicial protection** – Article 47 of the Charter of Fundamental Rights of the European Union and Article 19 paragraph 1 of the TEU

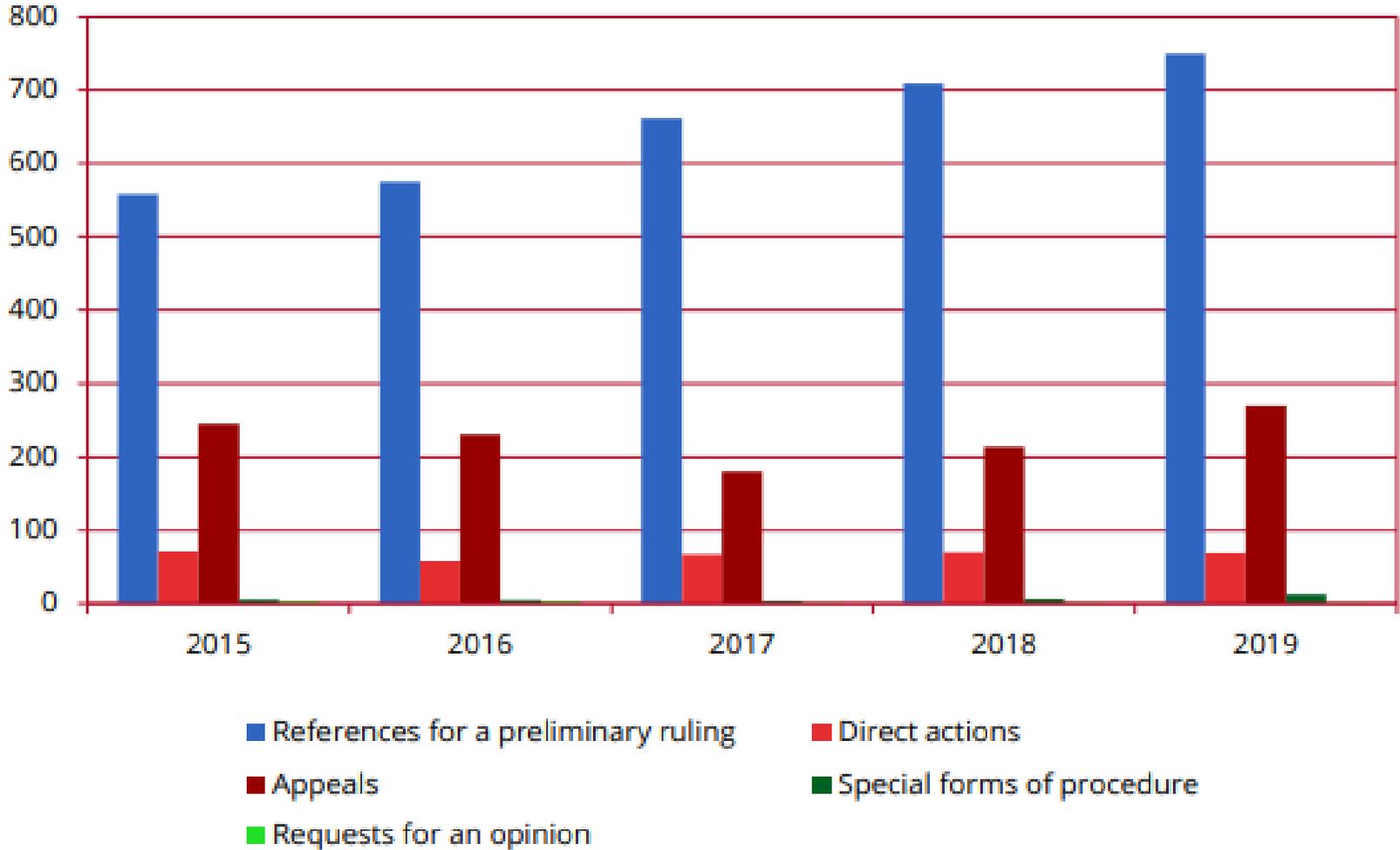


03 Preliminary Reference Statistics and what they tell us

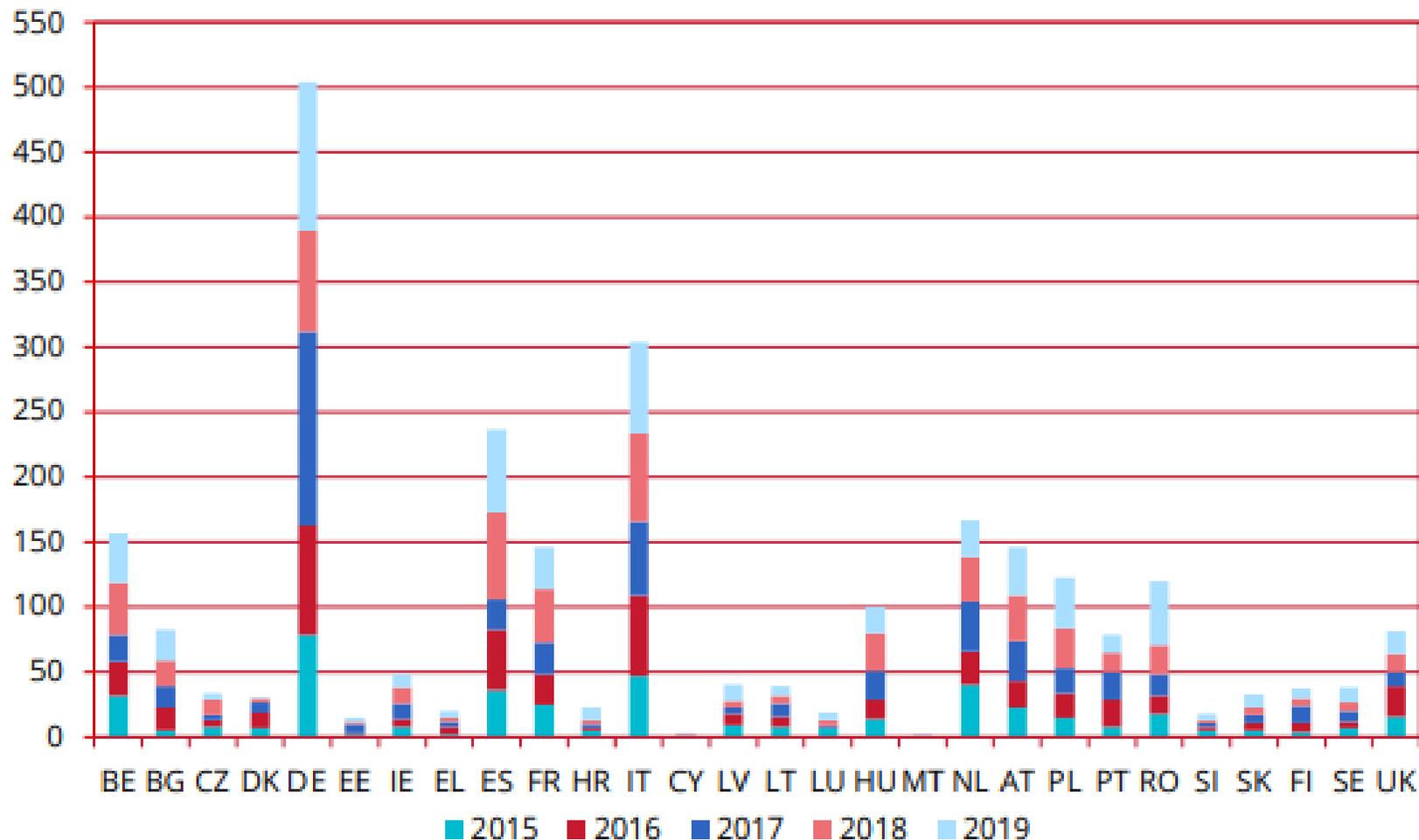
Roughly 70% of the completed cases in the CJEU between 2015 and 2019 were preliminary references procedures



There are more preliminary reference procedures every year!



References for a preliminary rulings by Member States between 2015 and 2019



Preliminary References in the EU legal system



Key to **uniform interpretation and application** of EU law across Member States

Form of **access to justice** by individuals and NGOs

Fundamental to the **legal integration** in the EU

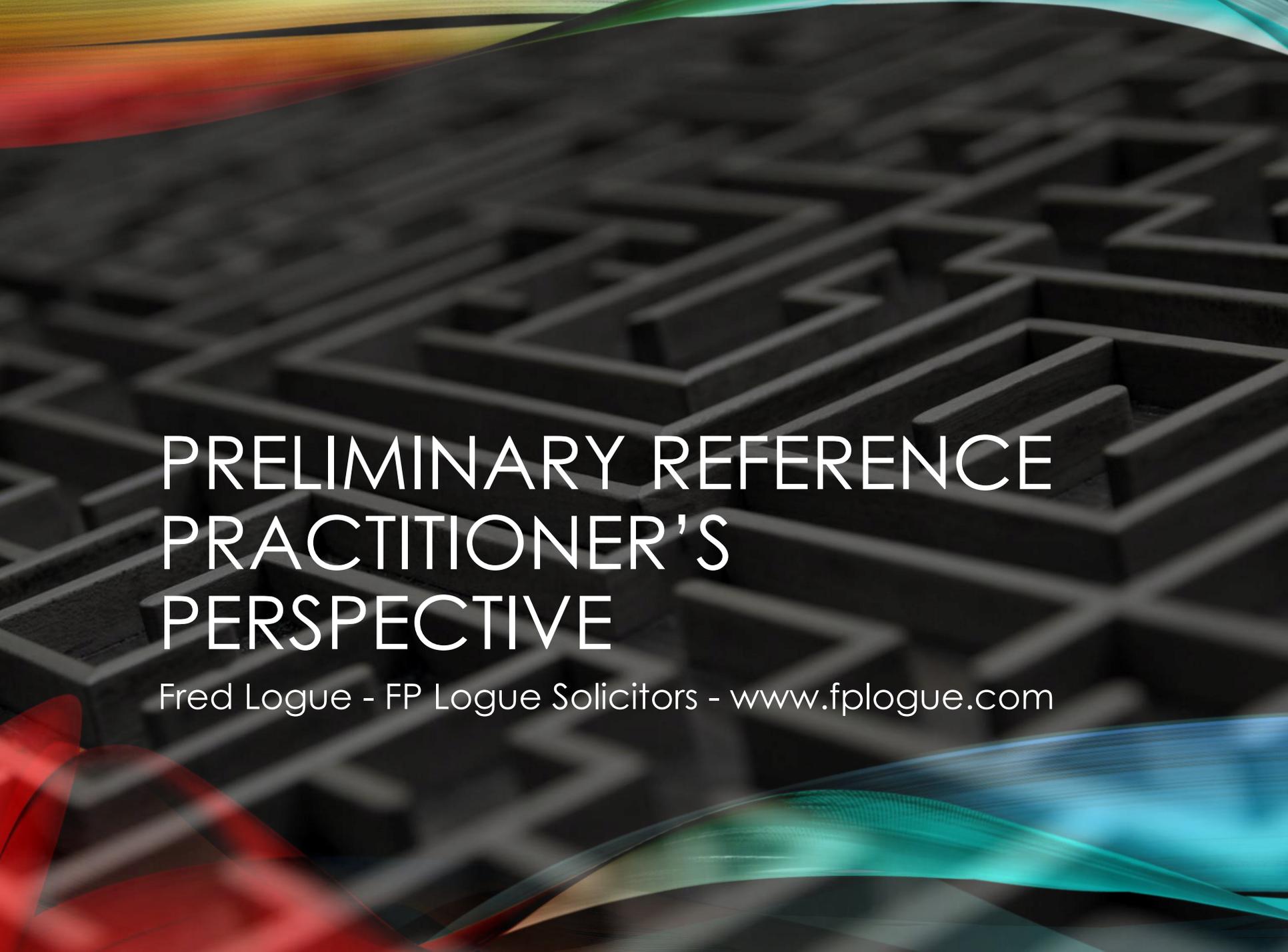
Mechanism of **judicial cooperation** between national courts and the CJEU



Thank you!

Leonor Caldeira
EU Litigation Lawyer
lcaldeira@clientearth.org

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PRELIMINARY REFERENCE PRACTITIONER'S PERSPECTIVE

Fred Logue - FP Logue Solicitors - www.fplogue.com

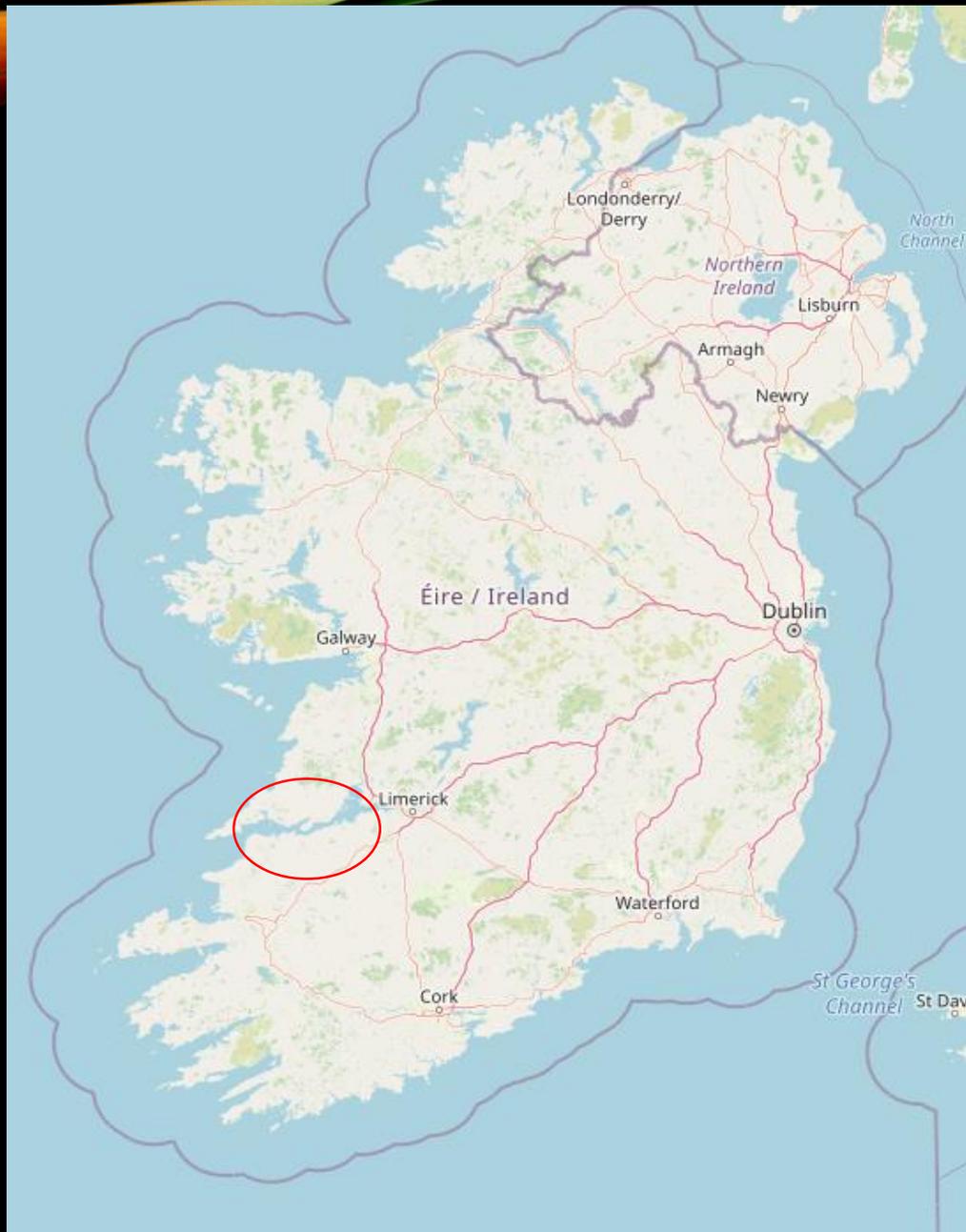


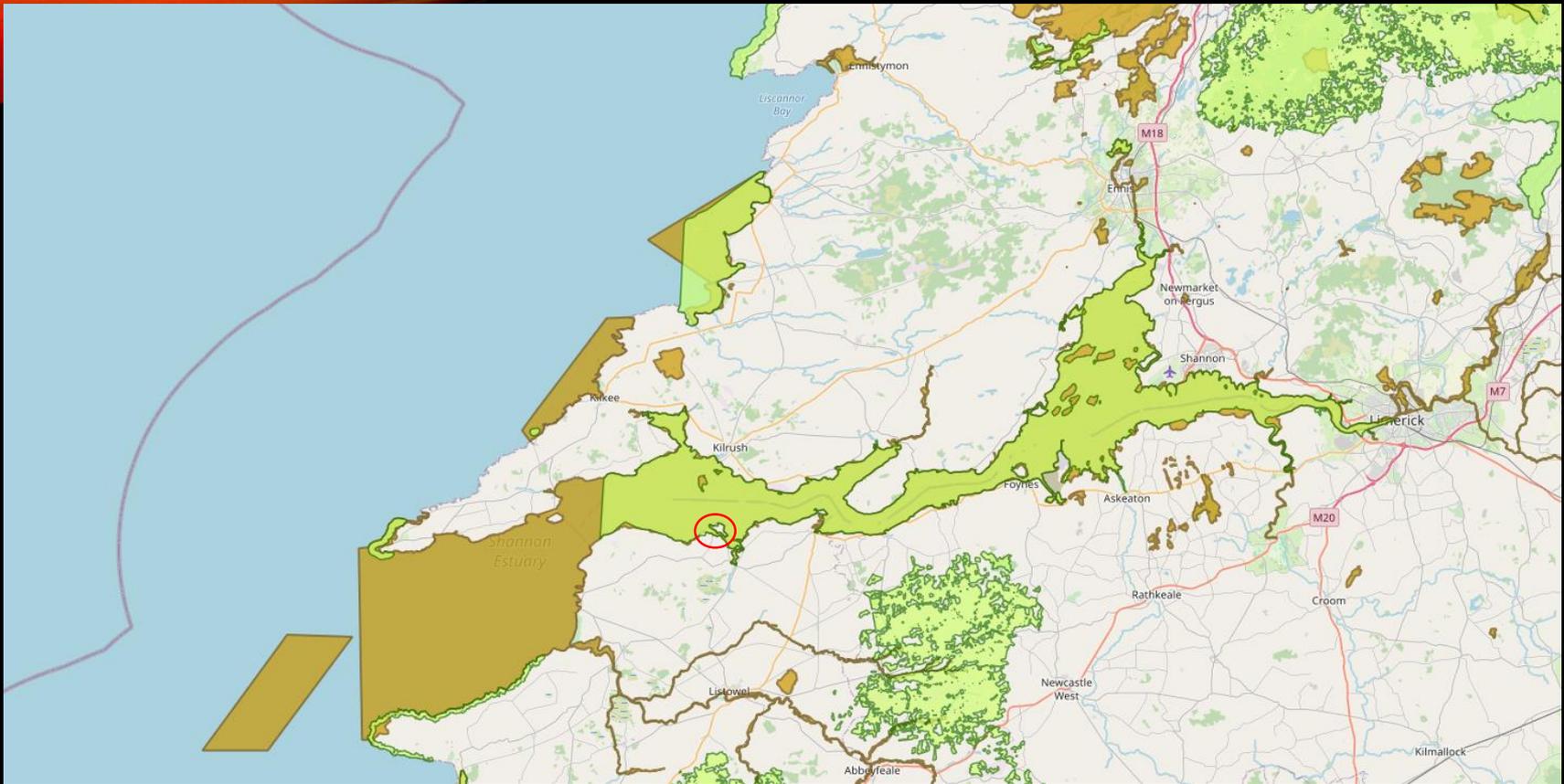
INTRODUCTION

- Background
- Preliminary ruling on:
 - Interpretation
 - Validity

BACKGROUND – SHANNON LNG







Lower River Shannon SAC (site code 002165)

River Shannon and River Fergus Estuaries SPA (site code 004077)

FRIENDS OF THE IRISH ENVIRONMENT

- Environmental non-governmental organisation (eNGO)
- Established >20 years
- Campaigning on implementation of EU Environmental law to protect built and natural environment
- Main areas
 - Peat
 - Climate
 - Air quality
 - Aquaculture
 - Agriculture
 - Fishing
 - Forestry

CHRONOLOGY

- 24 September 2007 – Application for planning permission for a liquified Natural Gas Terminal on the Shannon Estuary in SW of Ireland
- 13 December 2007 – Judgment in Case C-418/04 finding Ireland had not implemented Article 6(3) of the Habitats Directive
- 31 March 2008 – Permit for construction of project granted – Special procedure for “Strategic Infrastructure” - Condition #2 complete within 10 year period – No Appropriate Assessment conducted
- 4 March 2013 – modification to project approved
- 14 October 2013 Project entered on list of Projects of Common Interest (PCI) for gas under Reg 347/2013 (TEN-E) Regulation
- 22 September 2017 developer applies to vary condition #2 from 10 years to 15 years
- 30 March 2018 permit expires – not commenced, no work done
- 13 July 2018 – variation granted – not a material alteration no EIA/Stg 2 AA required
 - Decision based on conclusion that the proposed alteration in and of itself would not change the physical extent of the project and therefore could be screened out for EIA and AA.
- 6 September 2018 Judicial Review initiated – Respondents were An Bord Pleanála (competent authority) and developer

GROUNDNS

- Incorrect screening for Appropriate Assessment under Habitats Directive
 - Extent of nearby SPA had been altered since 2008
 - Specific conservation objectives adopted including updated Dolphin surveys
 - Relied on Mitigation Measures at screening stage (note Case 323/17 - People over Wind decided on 12 April 2018)
- No jurisdiction to extend period of expired planning permission

RESPONSE

- Indirect attack on original permit and 2013 extension – so out of time
- No screening for AA needed for extension of appropriate period – does not alter the project – not “agreement” for purpose of Habitats Directive – screening that was done was “ad hoc” non-statutory so not open to challenge
- No legal requirement to reassess overall project
- Unfair and disproportionate to refuse to extend time due to delay of competent authority in making a decision after permit had expired.

LEGAL BACKGROUND

- *Merriman v. Fingal County Council* [2018] IEHC 65 (Dublin Airport runway) – no requirement for AA for extension of time
- C 411/17 *Inter Environnement Wallonie* (extension of time for operating permit)
- Legislative regime in 2008 had been condemned in *Case C-418/04 Commission v. Ireland* (13 December 2007)
 - Ireland's reliance on EIA and SEA to implement AA was found to be unlawful
- “[T]he 2008 planning permission was granted pursuant to a national legislative regime which did not properly transpose the Habitats Directive”

JUDGMENT

- Judge found that wrong procedure had been used under national law, but there was an objection from the developer that this had not been pleaded.
- Judge proceeded to examine other grounds and made preliminary reference on interpretation of Habitats Directive (Case C-254/19)
 - Is decision to extend time an “agreement” for Habitats Directive
 - If yes, what considerations need to be taken into account?

PRELIMINARY REFERENCE

- AG Opinion
- No hearing
- Judgment
 - Extension of time is an “agreement”
 - Extension of lapsed permit is a new consent under EIA Directive and therefore also an agreement under Habitats Directive
 - Can take into account earlier consents if they contain complete, precise and definitive conclusions capable of removing scientific doubt and provided there are no changes in relevant environmental and scientific data, no changes to the project and no other plans or projects that must be taken into account
 - Full assessment needed where no assessment done at original permitting stage.

CONCLUSION

- An Bord Pleanála conceded and the planning permission will be quashed

VALIDITY REFERENCE – PCI LIST

- Second line of attack
- Challenge to validity of inclusion of Shannon LNG on Union List of Projects of Common Interest
- Regulation 347/2013
- Cost benefit analysis didn't include sustainability under article 4(1)(b) read with article 4(2)(b)(iv)
- Inclusion on list subject to Member State approval under article 3(3)(a) and article 172(4) TFEU
- List renewed every two years by Commission adopting a delegated act which enters into force if no objection from Parliament and Council.
- 4th list adopted on 31 October 2019
- Judicial Review initiated on 30 January 2020 (three month national limitation period)

SIGNIFICANCE OF PCI DESIGNATION

- Priority status – most rapid treatment legally possible for permitting
- Single competent authority for facilitating and coordinating permitting procedure
- PCIs should be considered by competent authorities as being in the public interest – also in relation to Habitats Directive and WFD
- Possibility of Union finance

VALIDITY REFERENCE - CONTEXT

- Access to Court of Justice by eNGOs major bone of contention
- Aarhus Regulation administrative review not satisfactory – limited scope of review by GC
- Narrow standing grounds under article 263(4)
- Uncertainty over how to request a preliminary reference on validity with no implementation measures in place
- Was administrative review a better alternative?

PRACTICAL ISSUES

- Article 263(4) – no eNGO standing
- Article 267(1)(b) – how to access national judicial review – what national measure to challenge? When to challenge
- When there are two ways of bringing a challenge you are automatically criticised for picking the wrong one.
- “Premature and out of time”
- Access to information concerning internal decision making at EU level.
- No formal written interim decisions of Member State.
- No real guidance in Irish case law – limited guidance from CJEU/Commission

PCI CHALLENGE

- *Friends of the Irish Environment v Minister for Communications, Climate Action and the Environment, Ireland and the AG and Shannon LNG Limited 2020/76 JR*
- Primary relief – preliminary reference to CJEU to determine validity of Commission delegated act insofar as it included the Shannon LNG Terminal and connecting pipeline on the 4th Union list of PCI.
- Secondary relief – quashing Ireland's approval of the project based on duty of sincere cooperation and compliance with national climate change law

KEY ISSUES

- The “gap” between 263 and 267
- Does two month limit in Art 263 apply to Art 267
- “Implementing measures”
 - Are the member state decisions leading up to the delegated act subject to judicial review and/or can they be used to launch a validity challenge?
 - Could possible future implementing measures be sufficient to ground a validity challenge now?
- “Standalone” validity reference
- Case C-491/01 *British American Tobacco*, Case C-308/06 *Intertanko* – implementing measures not yet adopted.

OUTCOME

- Judgment of 14 September - [2020] IEHC 383
- Court refused to make preliminary reference
 - There must be a national implementing measure
 - No implementing measure will ever be required – therefore *BAT* and *Intertanko* don't apply
 - Ireland's action as member of regional group under TEN-E regulation not amenable to judicial review under national law independently from the delegated act
- National law points still before the court to be determined in next month
- Appeal likely

ClientEarth® JUSTICE AND ENVIRONMENT

Access to justice for a Greener Europe

Building expertise, sharing good practises, improving access to justice in environmental matters



Official page of the ATOJ EARL project, funded by the European commission LIFE programme



About

Access to justice is a fundamental means through which citizens and NGOs can support the implementation and enforcement of laws and policies to protect the environment. Access to Justice for a Greener Europe focuses on raising awareness about the legal possibilities available for citizens and NGOs to help protect the

Thank you!

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Access to Justice in European Union Law

A Legal guide on
Access to Justice
in environmental
matters

Have a look at **our legal publications** :

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<https://www.documents.clientearth.org/library/download-info/16209/>

* **Country-specific legal toolkits on access to justice at national level:**

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