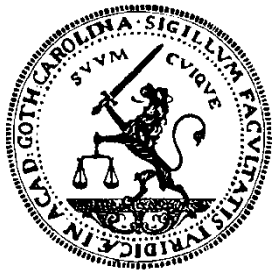

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Giving the Environment a Voice?

Access to Justice for NGOs in the EU post the Aarhus Convention

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Summary

In this thesis I will look at how access to justice for NGOs has changed in the EU after the Union became a party to the Aarhus Convention. The Aarhus Convention gives individuals and environmental NGOs access to justice regarding access to environmental information, public participation in decision-making, but also in regard to private persons or public authorities in breach of national environmental law. EU has implemented the Convention through directives and regulations and the ECJ has played an important role as gap filler in recent case law. NGOs have in these cases been given wider access to justice in environmental matters at national level. But when it comes to access to justice at EU level, the legal situation has not changed much from before the Aarhus Convention. It is still practically impossible for an NGO to be directly and individually concerned in environmental matters.

If the provisions on access to justice in the Aarhus Convention would be fully implemented at EU level and in its Member States, there would perhaps be a real possibility for the public to be involved in enforcing environmental law and protecting the environment. Then one could perhaps even say that the environment has been given a voice.

Sammanfattning

I denna uppsats kommer jag att titta på hur miljöorganisationers talerätt har förändrats i EU efter det att EU ratificerade Århuskonventionen. Århuskonventionen ger individer och miljöorganisationer talerätt gällande tillgång till information, rätt att delta i beslutsprocesser, men också gentemot privatpersoner eller myndigheter som strider mot den nationella miljölagstiftningen. EU har införlivat konventionen genom direktiv och förordningar. Även EU-domstolen har spelat en viktig roll i att skapa ny rättspraxis där miljörättsorganisationer tillgång till rättslig prövning i miljöfrågor på nationell nivå har vidgats. När det gäller miljöorganisationers talerätt på EU-nivå, har situationen inte förändrats mycket sedan innan Århuskonventionen. Det är fortfarande praktiskt taget omöjligt för en miljöorganisation för att uppfylla kravet på individualisering i miljöfrågor.

Om talerätten som Århuskonventionen ger miljöorganisationer införlivas fullt ut på EU-nivå och i medlemsstaterna, skulle det kanske finnas en reell möjlighet för allmänheten att se till så att miljölagstiftningen följs och på så sätt kunna skydda vår miljö. Då skulle man kanske till och med kunna säga att miljön har fått en röst.

Abbreviations

ACCC	Aarhus Convention Compliance Committee
CFI	Court of First Instance
COM	European Commission
EC	European Community
ECJ	European Court of Justice
EEB	European Environmental Bureau
EIA	Environmental Impacts Assessment
IPPC	integrated pollution prevention control
NGO	non-governmental organization
OJ	Official Journal of the European Union
RAC	Regional Advisory Council
SEA	strategic environmental assessment
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNECE	United Nation Economic Commission for Europe

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1 Introduction

The environment cannot vote, go to court or speak for itself. Therefore it needs someone else to be its voice. Environmental NGOs have shown great dedication to protecting the environment for decades, and have recently been given access to justice through the Aarhus Convention in the European Union. In this thesis I will look at how access to justice has changed in the EU after the Union became a party to the Aarhus Convention. I will look at the possibility for both direct access at EU level and indirect access at national level to see if the Aarhus Convention has changed the possibility for NGOs to access court, so that they can be the voice the environment so desperately needs.

1.1 Thesis, aim and delimitation

The aim of this thesis is to answer the question if the environment has been given a voice through the Aarhus Convention and its implementation into EU law. In answering this question, I will examine the legal situation prior to the Aarhus Convention, and how the situation has changed after the Convention has been implemented. Do the legal instruments give NGOs right to access to justice that actually gives them the capacity to be the voice for the environment? Have ECJ through its preliminary rulings given NGOs that capacity? I hope to answer these questions by looking at the legal framework that has been legislated after the EU signed the Aarhus Convention, and case law from the ECJ and the General Court. I will also look briefly at the situation in the Member States, the different approaches to standing and what access NGOs have to justice. Another question that I have looked at is if environmental NGOs can be the voice that the environment needs it to be.

In this thesis, I have chosen to look only at standing for NGOs and not at standing for individuals. However, the rules on standing are much alike and

the case law concerning individual standing can therefore be relevant for my analysis. Another delimitation that I have made is that I will only look at the Aarhus Convention as the EU courts and national courts interpret it. I will therefore not look at case law from the ACCC and what effects the Aarhus Convention has had internationally.

I have chosen not to look at Art 9 (4) of the Aarhus Convention when looking at access to justice, concerning reasonable conditions of access (i.e. fair and effective procedures in terms of time and costs). Access to justice would not mean much if there were no possibility to actually use it. However, there is already a lot of material and case law concerning the rules on access to justice under 9 (1) – (3) and I have chosen to look at this in more detail to be able to make a more in depth analysis. This is also why I have chosen to do a brief overview of the situation on access to justice in Member States. It would be interesting to look at the different approaches to implement the Aarhus Convention in the Member States by examining two or three countries more in depth, and this was initially my goal. But throughout the process I have realized how big this subject is and I have chosen to limit the scope to the implementation and interpretation of the Aarhus Convention at EU level, and only briefly look at different approaches in Member States.

There is a possibility for individuals and NGOs to challenge decisions taken by Member States contrary to environmental provisions put down in EU law, by rely on directives having direct effect. I have chosen not to look at this possibility, and instead focus on the rights of standing for NGOs through legislation on standing in treaties, directives and regulations, since the Aarhus Convention have not changed the direct effect doctrine.

When looking at the legal position prior to the Aarhus Convention, I have chosen to focus on the Maastricht Treaty and the Amsterdam Treaty, and what changes that can be seen during this period (1993 – 1997). In 1998, the EU signed the Aarhus Convention, and therefore I have chosen to look at

the development in rules governing access to court in the EU just shortly before this. After the EU signed the Aarhus Convention, new treaties have come into force, the Nice Treaty (2001) and the Lisbon Treaty (2009). The Nice Treaty did not change the legal situation on standing for NGOs, but the Lisbon Treaty has brought some changes that are discussed in the section 'standing for NGOs in the EU post the Aarhus Convention'.

1.2 Material

The starting point to this thesis has been the Aarhus Convention and Art 9 concerning access to justice. To be able to explain in what areas NGOs have right to access to justice, I have also looked at the other provisions of the Convention. To study the implementation of the Aarhus Convention at EU level I have looked at legislation, directives, regulations and proposals for new directives both prior and post to the signing of the Aarhus Convention.

I have also studied the scholarship on the Aarhus Convention and its implementation at EU level and at Member State level. I have looked at a number of studies carried out on access to justice in environmental matters after the EU became a party to the Aarhus Convention.

In studying case law, I have looked at preliminary rulings from the ECJ as well as General Court rulings and appeals to the ECJ. I have focused on recent cases concerning the implementation of the Aarhus Convention, but also on earlier rulings to be able to see where the EU stood on access to justice prior to becoming a party to the Aarhus Convention. Recently there have been many important rulings on access to justice, concerning both individuals and NGOs. Since this thesis focuses on access to justice for NGOs, I have chosen not to look at the case law on individual standing except for key cases that also has changed the case law on standing for NGOs. I have not looked at any case law from national courts. Instead, I have relied on studies made on the implementation of the Aarhus Convention at national level.

My main focus has been on recent case law from the ECJ, since it has had the most impact on the development of access to justice for NGOs since the area has not been fully legislated. In order to understand and analyse these cases better I have studied both scholarships and reports on access to justice.

1.3 Method

The method I have used in this thesis is the traditional legal theory, meaning that I have studied scholarships, case law and legislation in order to look at how the Aarhus Convention has been implemented in the EU. By studying the situation prior to the signing of the Convention and the situation after the EU became a party, I have been able to see how NGOs have been given stronger rights to standing, at least at Member State level. The ECJ has played an important role as gap filler, since the EU has n ot legislated fully in the area of access to justice. My focus has therefore been to study case law from the ECJ and the General Court, in order to analyse the way EU interprets the Aarhus Convention and the right of access to justice deriving from it, and how this has changed the possibilities for NGOs to access justice.

I have looked at both primary sources, such as directives and regulations, as well as scholarships examining these sources. I have also looked at speeches and propositions for changing the legal framework. In doing this, I hoped to gather different aspects and viewpoints on the possibility for NGOs to access the court, but also which changes are needed.

2 Giving the environment a voice?

Already in the 1970s Christopher D. Stone published the article 'Should Trees Have Standing'[1] with the bold idea of giving the environment rights of its own. Even though there has been a shift in the way we see nature, we have not yet given it a right of its own. Christopher D. Stone advocates that the environmental rights should be protected by guardians. He proposes that environmental organizations could be those guardians, since they have the expertise in the field and have shown a tireless dedication to protect the environment.[2]

Both at EU level and in the Member States the environmental protection has been placed in the hands of the administration. But the administration does not own the environment nor is best fit to defend it. The environment itself does not have a vice neither through voting nor through a strong group defending its interest. In times of economic need the administration is looking for solutions to its problems, even at the cost of the environment. According to Ludwig Krämer the economic interest therefore wins over the environmental interest in 999 out of 1 000 cases.[3] But since the environment does not have a voice there is a tendency to say that things are slowly getting better. However, the statement from the European Environment Agency of 2001 shows a slow progress but a poor picture over all. This appears to be the case twelve years later. The structure in the EU to deal with global and regional environmental challenges could be improved. And a public involvement is indispensable, if we want to see a result.[4] As the European Commissioner for Environment Janez Potočnik says in his speech

[1] Christopher D. Stone, 'Should Trees Have Standing – Towards giving legal rights to natural objects', 45 *S. Cal. L. Rev.* (1972) pp. 450 – 501.
[2] Christopher D. Stone, *Should Trees Have Standing? – Law, Morality, and the Environment*, 3rd Edition, pp. xi, 8 – 9, 23.
[3] Ludwig Krämer, *EU Environmental Law 7th Edition*, pp. v-vii.
[4] Ludwig Krämer, *EU Environmental Law 7th Edition*, pp. v-vii, 444. See also Ludwig Krämer, 'The environmental complaint in EU law', 6(1) *Journal for European Environmental & Planning Law* (2009), pp. 13 – 35.

‘The fish cannot go to Court’, the environment cannot protect itself; it is a public good and needs to be protected by a public voice. [5]

The Aarhus Convention[6] gives individuals and environmental NGOs access to justice regarding access to environmental information, public participation in decision-making but also in regard to private persons or public authorities in breach of national environmental law.[7] If these provisions would be fully implemented at EU level and in its Member States, there would perhaps be a real possibility for the public to be involved in enforcing environmental law and protecting the environment. Then one could perhaps even say that the environment has been given a voice.

[5] *SPEECH/12/856***,** Speech by Janez Potočnik, European Commissioner for Environment, “The fish cannot go to Court” – the environment is a public good that must be supported by a public voice, Brussels 2012.
[6] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, (Aarhus Convention) 1998.
[7] Aarhus Convention, Art 9 (1) – (3).

2.1 The Aarhus Convention

The Aarhus Convention was launched in 1998 under the UNECE. EU and its, at that time, 15 Member States signed the convention in April 1998 and ratified it in 2005 through Council Decision 2005/370[8]. The Convention entered into force in 2001 after the required 16 ratifications had been achieved.[9]

It is the UNECE that administrates the Convention and the compliance by the parties is reviewed by ACCC. Since the EU and its member states both are party to the convention the ECJ constitutes as a review body for the compliance of the convention and the EU environmental law referring to it. The ACCC interprets the Convention to find if the party is in compliance with it or not. The ACCC cannot examine what national law should say, but what it cannot say, in order for the provisions of the Aarhus Convention not to be undermined. Under EU law on the other hand, Member States should report their implementation if EU legislation adopted to meet requirements from the Aarhus Convention and they can use the preliminary ruling system. If the member states have not fulfilled the implementation required the commission may bring the matter to the ECJ (Art 258 TFEU). [10]

A significant part of the Aarhus Convention is the fact that environmental groups are considered to be a part of the public or the public concerned as defined in Art 2(5) in the Aarhus Convention. NGOs are considered the public concerned if they promote an environmental protection and meet any requirements under national law.[11] Industries have had a significant impact on regulations so far, and giving NGOs this status could constitute as leveling the playing field. A concern is that interest groups do not at all

[8] Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L 124/I.
[9] *How far has the EU applied the Aarhus Convention?*, European Environmental Bureau, 2007.
[10] Jerzy Jendroska, 'Public Participation in Environmental Decision-Making', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 147 – 152.
[11] Aarhus Convention, Art 2(5).

times represent the public interest since there are many public interests in contrast to environmental interests. Another concern is that some environmental interests have different effect on different groups, and NGOs can therefore not represent them all.[12]

The Aarhus Convention is divided up into three pillars; Right of access to environmental information, Public participation in environmental decision-making and Access to environmental justice.[13]

Access to information is one of the basic elements in a democracy. The state has an obligation to inform the public of its right to access information as well as to publish environmental information. In regard to environmental information it gives the public a possibility to control how the government regulates and how polluters behave. In return the public regulators and polluters know they are being watched. It also helps to increase the public awareness and helps to increase environmental oriented choices of individuals.[14] EU Directive 90/313 on access to environmental information was an inspiration to the rule in the first pillar.[15] Access to information is the most detailed pillar of the Convention. The definition of what constitutes as environmental information is broad and there is no need to state an interest to have a right to this information. [16] Though the right to information only relates to public authorities and there is no right to access information from private parties.[17]

The second pillar refers to public participation in decision-making and there are three different stages that provide for public participation: 'decisions on

[12] Maria Lee, *EU Environmental Law: Challenges, Change and Decision-making*, pp. 126 – 139.
[13] Aarhus Convention, Art 4 – 9.
[14] Maria Lee, *EU Environmental Law: Challenges, Change and Decision-making*, pp. 127 – 133, 152 – 158.
[15] Ralph Hallo, 'Access to Environmental Information. The Reciprocal Influences of EU Law and the Aarhus Convention', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, p. 57.
[16] Aarhus Convention, Art 4.
[17] Aarhus Convention, Art 5 (6).

specific activities'[18], 'plans, programs and policies relation to the environment'[19] and 'the preparation of executive regulations and/or generally applicable legally binding normative instruments'[20]. Under the provision laid out in Art 6 of the Aarhus Convention, there should be reasonable time frames, as well as an effective and early public participation. Another requirement is to take due account to the outcome of this participation. In regard to the provisions in Art 7 of the Aarhus Convention, the requirements are less strict and only involve the obligation to provide for opportunities to participate to the extent appropriate. Under Art 8 of the Aarhus Convention there is a requirement to strive for a public participation at an appropriate stage when there are still options available.[21] It is clear that the Aarhus Convention aims at increasing the participation of the public in areas which would otherwise be closed and to make this participation have a genuine influence on the outcome of those decisions.[22]

The third pillar governs rules on standing, and who has the right to invoke a judicial process in regard to the rights set out in the Convention.[23] Regarding the right to access environmental information, the rules on standing in this respect are set out in Art 9 (1) of the Aarhus Convention. This access must be granted to any person that considers this right has been refused. There is no need to show an interest or an impairment of right, nor is there a need to live near the area or state a reason for wanting the information.[24] Art 9 (2) of the Aarhus Convention sets out the rules on standing regarding public participation of decisions, acts and omissions by public authorities. The review procedure must only be provided to members of the public concerned who has either a "sufficient interest" or whose

[18] Aarhus Convention, Art 6.
[19] Aarhus Convention, Art 7.
[20] Aarhus Convention, Art 8.
[21] Maria Lee, *EU Environmental Law: Challenges, Change and Decision-making*, pp. 133 – 139.
[22] Maria Lee, *EU Environmental Law: Challenges, Change and Decision-making*, pp. 158 – 159.
[23] *DG ENV.A.2/ETU/2012/0009rl*, Final Report, 'Possible Initiatives to Access to Justice in Environmental Matters and their socio-economic implications', pp. 3 – 4.
[24] Aarhus Convention, Art 9 (1).

"right has been impaired".[25] This distinction is due to the different legal systems in parties' national legislation. In France for instance, standing is determined through showing an interest, whereas in Germany an impairment of right is a precondition to bringing an action. What constitutes as a sufficient interest or an impairment of a right should be decided according to national law and with the objectives to give the public concerned a wide access to justice in environmental matters. All NGOs that meet the requirements in Art 2(5) of the Aarhus Convention should be deemed to have standing.[26]

In Art 9 (3) of the Aarhus Convention it is set out that all other kinds of acts and omissions by private persons or by public authorities that go against national environmental law can give the right to standing.[27] Since EU law forms a part of a Member States national legal system EU environmental law is applicable just as well as national environmental law. It is up to the parties to delimit the scope for standing as long as it is 'transparent, clear and consistent'. However, it still has to be in line with the purpose of the Aarhus Convention. [28]

[25] Aarhus Convention, Art 9 (2).
[26] Bilun Müller, *Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law*. Journal of Environmental Law 23:3 (2011), pp. 505 – 516
[27] Aarhus Convention, Art 9 (3).
[28] Jonas Ebbesson, 'Access to Justice at the National Level. Impact of the Aarhus Convention and European Union', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 262 – 267.

2.2 The legal position in EU prior to the Aarhus Convention

Only the 'victim' or an 'aggravated party' could seek remedy for an environmental wrong that he or she suffered from in most Member States prior to the Aarhus Convention. Without a direct link to the environmental damage, one could not access any judicial remedy.[29] In this section, I will look at what legal framework existed in the area of access to justice in environmental matters, what possibilities there was to have access to courts in environmental matters, and what role the ECJ had on widening access to justice for NGOs.

2.2.1 Access to justice

The only legal provision on standing for individuals and NGOs provided in EC law prior to the Aarhus Convention is Art 173 of the Maastricht Treaty, which provides for access to ECJ or Court of First Instance concerning the legality of actions of EC institutions. Any natural or legal person may initiate proceedings, if a decision or regulation is directed to them or if they are individually and directly concerned.[30] Both the ECJ and the Court of First Instance have been restrictive when interpreting what constitutes as a direct and individual concern.[31] In the key case *Plaumann*[32] from 1963, the restrictive approach on individual concern was launched. The so-called 'Plaumann-Test' requires that 'it affects them by reasons of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons by virtue of these factors distinguish them individually'[33]. This test is shaped according to traditional individual rights and personal interests, which is something that

[29] *DG ENV.A.2/ETU/2012/0009rl,* Final Report, 'Possible Initiatives to Access to Justice in Environmental Matters and their socio-economic implications', p. 90.
[30] EC Treaty, Art 173.
[31] Ludwig Krämer, 'Public Interest Litigation in Environmental Matters before European Courts', 8 *Journal of Environmental Law,* 1, 1996, pp. 11 – 12.
[32] Case C-25/62 *Plaumann v Commission* [1963] ECR 95.
[33] Case C-25/62 *Plaumann v Commission* [1963] ECR 95, p. 107.

environmental cases do not fit into, since NGOs have a public interest to protect a public good.

2.2.2 Propositions for greening the Treaty

When the Union was established there was no public concern on protecting the environment, instead the idea of the Union was to defend individual interest of producers, traders and competitors and hence promote the general interest of the Union.[34] However, the legal system in the Union has been changed drastically before, for example when the direct effect doctrine was introduced. In addition, the interests of the Union have changed. Art 130r of the EC Treaty states that the Union should improve the quality of the environment, and aim for a high level of protection of the environment. Ludwig Krämer means that introducing a right for individuals to access court concerning a public interest in environmental matters is no obstacle, neither in member states nor in challenging acts from EC institutions.[35]

A proposal to amend the EC Treaty was made by a number of environmental organizations in the paper '*Greening the Treaty II*'[36]. They proposed a new provision, Art 8d, saying: "*Every citizen of the Union shall have the right to a clean and healthy environment, access to the decision-making process, information, and justice as part of a general right to human development*"[37].

The Commissioner seemed to approve this formulation when she in a speech to the European Environmental Bureau 1 December in 1995 stated that they should consider an inclusion in the Treaty of every citizen's right

[34] Ludwig Krämer, 'Public Interest Litigation in Environmental Matters before European Courts', 8 *Journal of Environmental Law,* 1, 1996, p. 12.
[35] Ludwig Krämer, 'Public Interest Litigation in Environmental Matters before European Courts', 8 *Journal of Environmental Law,* 1, 1996, p. 12.
[36] Climate Action Network, European Environmental Bureau, European Federation for Transport and Environment, Friends of the Earth, Greenpeace, WWF: *Greening the Treaty II*. May 1995.
[37] Ludwig Krämer, 'Public Interest Litigation in Environmental Matters before European Courts', 8 *Journal of Environmental Law,* 1, 1996, pp. 12 – 13.

to information, access to decision-making and justices in relation to the environment in order to strengthen the democratic process in the Union. [38]

Greening the Treaty II also proposed that both organizations and individuals should have access to court under Art 169, 170, 173 and 175 of the EC Treaty. This is basically an *actio popularis*. The proposed changes of these articles constitute to give natural or legal persons a general right to challenge decisions under all sectors, policy, trade, competition, consumers etc. The proposed change is that natural or legal persons that have an interest in the matter should have the opportunity to bring a matter to the ECJ if the commission fails to do so under Art 169 EC Treaty. Art 170 EC Treaty was proposed to be changed so that natural or legal persons would have the same opportunity as a member state to bring an action against a member state failing to imply an EC environmental legislation.[39]

The Amsterdam Treaty was however not amended in regard to enhance the democratic dimension of the Treaty as proposed in *Greening the Treaty II*. There was not even a discussion on amending Art 169, 173 and 175 of the EC Treaty. This is not so surprising since most of the rules regarding standing for individuals and NGOs have been developed by the ECJ through preliminary rulings. Even though democratisation of the Union was one of the aims with the Amsterdam Treaty, there was no enhanced right to access to information in the legislating process either.[40] However, the directive on environmental information 90/313 was an inspiration to the Aarhus Convention when setting down the rules on access to information. [41]

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[38] Banny Poostchi, 'The 1997 Treaty of Amsterdam – Implications for EU Environmental Law and Policy-making', *Reciel* Vol. 7, Issue 1, 1998, pp. 85 – 92.
[39] Ludwig Krämer, 'Public Interest Litigation in Environmental Matters before European Courts', 8 *Journal of Environmental Law*, 1, 1996, p. 14.
[40] Banny Poostchi, 'The 1997 Treaty of Amsterdam – Implications for EU Environmental Law and Policy-making', *Reciel* Vol. 7, Issue 1, 1998, pp. 85 – 92.
[41] Ralph Hallo, 'Access to Environmental Information. The Reciprocal Influences of EU Law and the Aarhus Convention', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, p. 57.

2.2.3 Case law on access to justice

A still important case on access to justice to EU institutions is *Stichting Greenpeace*[42]. This case has two parts: the first ruling from the Court of First Instance in 1995 and a ruling on the appealed to the ECJ was delivered in 1998. Spain was granted a large financial assistance form the Union to construct two power stations on the Canary Islands. Spain started the building process without the EIA fully carried out. Several proceedings were brought before the Spanish court against the authorisation of the two power stations. These applicants also brought an action of annulment to the Court of First Instance seeking an annulment of the decision to grant financial assistance. The Court of First Instance did not consider the appellants having standing and declared the action inadmissible.[43]

The Court of First Instance held that the applicant must be able to show that he is affected in a way that differentiates him from all other persons to be considered individually and directly concerned. This is the case even though it is a question of environmental harm. The mere fact that the applicant will suffer harm is not considered enough, since this might be the case for a large number of persons who cannot be determined beforehand.[44] The Court of First Instance did not find that the applicants have any attribute peculiar to them to differentiate them from all other persons that might be affected by environmental harm, thus they were not considered to have standing.[45] As for the NGOs that also brought an action of annulment to the Court of First Instance, they were neither considered to have standing. The Court held that an association for the protection of a general interest could not be considered to have standing under Art 173 EC Treaty if its members do not have standing individually.[46]

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[42] T-585/93 *Stichting Greenpeace Council (Greenpeace International) and 18 other applicants v Commission of the European Communities, supported by Spain* [1995] ECR II-2205, and Case C-321/95 P *Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities, supported by Spain* [1998] ECR I-1651.
[43] Ludwig Krämer, *Casebook on EU Environmental Law*, pp. 403 – 412.
[44] T-585/93 *Stichting Greenpeace Council*, paras. 48 – 51.
[45] T-585/93 *Stichting Greenpeace Council*, paras. 53 – 55.
[46] T-585/93 *Stichting Greenpeace Council*, paras. 59 – 65.

An appeal to this ruling was brought to the ECJ who had a slightly different stand on the case. They emphasized that it was the building of the two power stations that the applicants wanted to evoke on the legal ground of the EIA Directive 85/337. Therefore, the contested decision on financial assistance by the Community can only affect the applicant indirectly and thus not give them standing. The applicants will still have an effective judicial remedy since their rights are fully protected by national law, and national courts have the possibility to refer a question to the Court under Art 177 EC Treaty.[47]

It is noteworthy that the ECJ takes a different stand than that of the Court of First Instance. They conclude that the appellants are only indirectly affected and therefore they have the same conclusion as the Court of First Instance; both the NGOs and the individuals lack standing.[48] Ludwig Krämer means that this conclusion is wrong, since the community decision to give financial assistance was crucial for the actual building of the power stations. He continues that it is the lawfulness of the Community decision on financial assistance that is contested by the appellants, not the decision by the Spanish authorities to build the power stations. Hence, the appellants are directly affected and should be considered to have standing.[49]

Another key case is *Danielsson and others*[50] regarding a decision concerning France nuclear testing in the French Polynesia where the Commission did not consider the testing being 'a perceptible risk of significant exposure for workers or the general public' and Art 34 of EAEC Treaty did not apply.[51] This decision was contested, on the basis that Danielsson and others where individually affected by the harmful activities of the nuclear testing. However, the Court ruled that the fact that the persons might suffer personal damage linked to the nuclear test is not sufficient to

[47] C-321/95P *Stichting Greenpeace Council*, paras. 27 – 34.
[48] Ludwig Krämer, *Casebook on EU Environmental Law*, pp. 403 – 412.
[49] Ludwig Krämer, *Casebook on EU Environmental Law*, p. 410.
[50] Case T-219/95 R, *Danielsson and Others v Commission*, ECR II – 3052, CFI.
[51] Case T-219/95 R, *Danielsson and Others v Commission*, paras. 3, 13.

distinguish them individually. They have not been able to show any fact that the contested decision 'affects them by reason of certain attributes peculiar to them'.[52] Therefore they are not considered individually concerned, and do not have standing.[53]

Danielsson and others confirmed the strict interpretation of direct and individual concern from the case Stichting Greenpeace. From these two cases, it is clear that it is practically impossible for NGOs to be granted standing before the ECJ. Even though Danielsson might suffer personal damage due to the nuclear testing, this was not considered to be enough to be individually concerned, since others living in the area would be affected in the same way. In Stichting Greenpeace, the Court of First Instance makes it clear that an NGO must show that its members are individually concerned to have standing. Even though many scholars have criticized these rulings, the case law has still not changed. Both cases are still relevant today, and as discussed later on in this thesis, these rulings still apply.

[52] Case T-219/95 R, *Danielsson and Others v Commission*, paras. 71, 72.
[53] Case T-219/95 R, *Danielsson and Others v Commission*, para. 76.

2.3 The legal position in EU post the Aarhus Convention

Art 3 (1) of the Aarhus Convention provides for implementation of the Convention through legislation.[54] When EU legislates in an area, they must follow fundamental principles of the Union. The principle of subsidiarity is one of them, which sets out the rule that the Union only have the competence to legislate in the areas where it has been given power to do so by the Member States.[55] In this section I will look at the implementation of the Aarhus Convention that has been made through legislation.

2.3.1 EU directives and regulations

Directive 2003/04[56] on access to environmental information replaced Directive 90/313[57] to implement the first pillar in the Aarhus Convention. Directive 2003/35[58] on Public participation implements the second pillar of the Aarhus Convention. It contains two parts, one part on a general public participation procedure, and one part amending the EIA and IPPC Directives[59], improving public participation in those procedures. The obligation to allow for public participation only applies to natural and legal persons. The general provisions are basically the same as Art 6 in the Aarhus Convention. The public should be informed of the possibility to participate, have a possibility to affect the decision-making, and be informed of the final decision. The provisions in the EIA and IPPC process are quite

[54] Jerzy Jendroska, 'Public Participation in Environmental Decision-Making', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 112 – 114.
[55] Art 5 (3) – (4) TEU and P Craig and G de Búrca, *EU Law: Text, Cases and* Materials, 5th Edition, pp. 94 – 96.
[56] Directive 2003/04 on public access to environmental information and repealing Directive 90/313, OJ 2003 L 41/26.
[57] Directive 90/313 on the freedom of access to information on the environment, OJ 1990 L 156/58.
[58] Directive 2003/35 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 Directives 85/337 and 96/61, OJ 2003 L 56/17.
[59] Directive 2001/42 on the assessment of the effects of certain public and private projects on the environment, OJ 2001 L 197/30 and Directive 2008/1 on integrated pollution prevention and control, OJ 2008 L 24/8.

similar, but have a wider scope than the Convention since they also provide for cross border participation and contain provisions on access to justice.[60] The provisions on access to justice under the EIA and the IPPC Directive are identical and require Member States to grant access to justice for the public concerned if they have a sufficient interest or maintaining the impairment of a right. NGOs are considered the public concerned if they promote environmental protection and meet any requirements under national law. It is the Member State that determines what should be considered a sufficient interest or an impairment of a right, but in doing so, they must act under the objective to give the public 'a wide access to justice'.[61]

The public participation Directive 2003/35 concerns only existing legislation, but the Council have made it clear that it is the intention to include provisions on public participation in decision-making in future legislation on environmental plans and programs.[62] As a consequence any impairment of the environment that falls outside the scope of the EIA and the IPPC Directives will not be covered by the rules on access to justice under the public participation Directive. This means for example that if there is a breach to the SEA Directive 2001/42[63] or in the Habitat Directive 92/43[64] that is not caused by an EIA or an IPPC project, there is no right to access to justice.[65]

Directive 2004/35[66] on environmental liability contains provisions giving a possibility for citizens to submit requests to a public authority concerning

[60] J Jans and H Vedder, *European Environmental Law – After Lisbon* 4th Edition, pp.374 – 375.
[61] J Jans and H Vedder, *European Environmental Law – After Lisbon* 4th Edition, pp.376 – 377.
[62] Jerzy Jendroska, 'Public Participation in Environmental Decision-Making', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 101 – 105.
[63] Directive 2001/42 on the assessment of the effects of certain public and private projects on the environment, OJ 2001 L 197/30.
[64] Directive 92/43 on the protection of natural habitats and wild flora and fauna, OJ 1992 L 206/7.
[65] Sadeleer, Roller and Dross, *Access to Justice in Environmental Matters and the Role of NGOs*, pp. 203 – 205.
[66] Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2004 L 143/56.

environmental damage caused. The administrative decision can then be contested.[67] Also NGOs that meet requirements under national law should be able to challenge administrative actions and omission not only referring to environmental information and public participation in decision-making.[68]

It took EU nine years to adopt a regulation, the so-called Aarhus Regulation[69] , applying the provisions of the Aarhus Convention to its own institutions and bodies.[70] The Aarhus Regulation contains provisions on every citizen's right to access information held by the EU institutions, public participation and access to justice.[71] The regulation applies to all bodies, except the ECJ. Before this regulation only the Commission, the Council and the Parliament had to give out environmental information.[72] The Member States have more responsibilities for giving NGOs an adequate participation in decision-making than the European institutions and bodies. There are obligations for Member States to both inform and to consult NGOs for those responsibilities to be considered met, but no such obligations exists in the Aarhus Regulation. It only requires the European institutions and bodies to inform the public and give an opportunity for the public to participate. There is no obligation to consult the public. This goes against the Sixth Environmental Action Programme, stating that "*a real effort is to be made to ensure that the full range of interested groups is given*

[67] Charles Poncelet, 'Access to Justice in Environmental Matters - Does the European Union Comply with its Obligations?', *Journal of Environmental Law* 24:2, 2012, pp. 287 – 309.
[68] Bilun Müller, 'Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law'. *Journal of Environmental Law* 23:3, 2011, pp. 505 – 516.
[69] Regulation 1367/2006 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, OJ 2006 L 264/13.
[70] Ralph Hallo, 'Access to Environmental Information', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law* Ten, pp. 63 – 64.
[71] J Jans and H Vedder, *European Environmental Law – After Lisbon* 4th Edition, pp.373 – 374.
[72] Ralph Hallo, 'Access to Environmental Information', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 63 – 64.

the opportunity to influence decision-making"[73]. In addition, it also contravenes Art 7 of the Aarhus Convention, setting out an obligation to undertake all measures necessary to involve members of the public in the decision-making.[74] The provisions on access to justice for NGOs laid down in the Aarhus Regulation will be examined more in detail in the next section on access to justice for NGOs at EU level.

2.3.2 Proposal for a directive on access to justice

The third pillar of the Aarhus Convention has not yet been fully implemented in EU law. A proposal on access to justice was made in 2004, *COM (2003) 624 Final*[75]. The proposal suggested that NGOs would be given standing in cases where national environmental law was breached, also implementing Art 9 (3) of the Aarhus Convention. Even though the proposal suggested that there would only be limited costs to put this proposal into practice and that a lot of benefits (both better compliance to environmental legislation and less pollution) the Member States was hard to convince.[76] Some of the Member States contested this proposal, saying that the proposal was against the subsidiarity principle, and the proposal did not pass. Since then not much have been made to implement Art 9 (3) of the Aarhus Convention into EU law.[77] However, Janez Potočnik expresses in his speech 'The fish cannot go to Court' that it is time to renew the proposal on a directive on access to justice in environmental matters. In his view the

[73] *COM (2001) 31 Final*, Environment 2010: Our future, our choice, 6th Environmental Action Programme, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions.
[74] Daniela Obradovic, 'EU Rules on Public Participation in Environmental Decision-Making at the European and National Levels', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 161 – 165.
[75] *COM (2003) 624 Final*, 'Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters', Brussels 2003.
[76] *DG ENV.A.2/ETU/2012/0009rl*, Final Report, 'Possible Initiatives to Access to Justice in Environmental Matters and their socio-economic implications', pp. 6 – 8.
[77] Charles Poncelet, 'Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?', *Journal of Environmental Law* 24:2, 2012, pp. 287 – 309.

need for a directive is indispensable. [78] There have also recently been signs from the Commission, the Council and the Parliament that they want to provide for a full access to justice in environmental matters. Once again a directive on access to justice is on the political agenda in EU, this time due to the progressive rulings from ECJ on access to justice.[79]

2.3.3 Direct effect of the Aarhus Convention

The question of the direct effect of the Aarhus Conventions has recently been tested by the ECJ in the case C-240/09 *Slovak Brown Bear*[80]. This case will be further discussed in the chapter on ECJs stand on indirect effect of EU law, and I will only look at the aspects of direct effect in this section. The ECJ stated that since Decision 2005/370 ratified the Aarhus Convention the provisions in the Convention form an integral part of the legal order of the Union. Therefore the ECJ has jurisdiction to give preliminary rulings on the interpretation of the meaning of the Aarhus Convention.[81] From the case, it is clear that the Aarhus Convention is capable of having direct effect if its provisions meet the general criteria of direct effect, and the criteria for direct effect on international agreements, but Art 9 (3) of the Convention is not considered to meet the criterion and does not have direct effect.[82]

When looking at direct effect of the Aarhus Convention in Member States the issue is much more complicated and the area not to well researched. In some of the Member States, precise opinion on direct effect of certain provisions has been made, and in others, the courts have been hesitant to accept the Aarhus Convention having direct effect at all. Most Member

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[78] *SPEECH/12/856***,** Speech by Janez Potočnik, European Commissioner for Environment, "The fish cannot go to Court" – the environment is a public good that must be supported by a public voice, Brussels 2012.
[79] *DG ENV.A.2/ETU/2012/0009rl,* Final Report, 'Possible Initiatives to Access to Justice in Environmental Matters and their socio-economic implications', pp. 8 – 10.
[80] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo zivotného prostredia Slovenskej republiky*, judgement of March 8, 2011.
[81] Case C-240/09 *Lesoochranárske zoskupenie*, para. 30.
[82] Jerzy Jendroska, 'Public Participation in Environmental Decision-Making', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 107 – 111.

States seems to have a rather restrictive approach towards giving the Aarhus Convention direct effect. Instead, they interpret the obligations streaming from secondary Community legislation. This also seems to be the case when Member States legislate to implement the Aarhus Convention.[83] This in turn enforced by the ECJ that only examine the compliance of Member States to the directives implementing the Convention and not to the Convention itself. Meaning that if a directive is not correctly implementing a provision from the Convention a Member State is likely to do the same mistake.[84]

[83] Jerzy Jendroska, 'Public Participation in Environmental Decision-Making', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 107 – 111.
[84] Jerzy Jendroska, 'Public Participation in Environmental Decision-Making', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, p. 146.

2.4 Access to justice for NGOs at EU level post the Aarhus Convention

The EU is the only party of its kind, as it is the only party that is not a nation. The fact that the Member States already were a party to the Aarhus Convention was not enough for the Union, that wanted to be a party in its own right as well. Meaning that, the Aarhus Convention would not only affect the EU through its Member States, but that the Convention would apply to the institutions and bodies of the Union as well. When the EU became a party to the Convention, it had already adopted legislation implementing areas of the Aarhus Convention with binding effect to its Member States. However, the Union wanted to subscribe the values and principles embodied in the Convention to its own institutions and bodies.[85] If this has actually been done will be examined next.

2.4.1 The Aarhus Regulation

As explained earlier the Aarhus Regulation, adopted in 2006, implements the Aarhus Convention at EU level. It contains provision on access to environmental information, public participation in decision-making and access to justice. In this section, I will look at the actual level of access to justice that is given to NGOs at EU level. In order to implement Art 9 of the Aarhus Convention on access to justice a two-step approach is provided for in the Aarhus Regulation. This is done through an internal review of administrative acts adopted by EU institutions and through allowing environmental organizations to initiate proceeding before the ECJ in accordance with the relevant provisions of the Treaty.[86]

[85] Marc Pallemaerts, 'Access to Environmental Justice at EU Level', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, p. 173.
[86] Charles Poncelet, 'Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?', *Journal of Environmental Law* 24:2, 2012, pp. 287 – 309.

2.4.1.1 Internal review

Art 10 of the Aarhus Regulation set out the criteria for NGOs to be able to request an internal review of an institution or body that adopted an 'administrative act' or should have adopted an 'administrative act'. For an NGO to be considered a qualified entity it shall be non-profit, an independent legal person, its primary stated objective should be to promote the protection of the environment in the context of environmental law, have existed for more than two years, and last the subject matter to be reviewed should be covered by the NGOs objective and prior activities.[87] The Commission looks at if these criteria are met on a case-by-case basis. However, the fact that NGOs are not considered to be a qualified entity is not the main obstacle, it is the term 'administrative act'. Art 2(1) (g) of the Aarhus Regulation defines what is considered an 'administrative act' as any measure of individual scope under environmental law, taken by a Community institution or body, and having an external legally binding effect. This means that legally binding acts with no external effect and normative acts of a general scope are not to be susceptible to the internal review process. Meaning that, a review process on internal instructions and guidelines, as well as regulations and directives will be considered inadmissible.[88] Another exemption to what is considered an 'administrative act' is in Art 2(2) of the Aarhus Regulation, stating that administrative acts or omissions should not include measures taken by a Community institution or body in its capacity as an administrative body. That excludes acts under competition rules, and infringement proceedings against Member States.[89] There is no legal base for this latter exemption in the Aarhus Convention.

The Commission tends to favor a restrictive interpretation of what constitutes as an 'administrative act' as defined in the Aarhus Regulation.

[87] Aarhus Regulation 1367/2006, Art 10 – 11.
[88] Daniela Obradovic, 'EU Rules on Public Participation in Environmental Decision-Making at the European and National Levels', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 169 – 172.
[89] Charles Poncelet, 'Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?', *Journal of Environmental Law* 24:2, 2012, pp. 287 – 309.

Thus far, the Commission has considered seven out of eight applications for internal review inadmissible because they are not considered 'administrative acts'. The eighth application was declared unfounded. The Commission seems willing to stretch the notion of measures of general application as far as possible in order not to recognize an act as individual in scope.[90]

The fact that the threshold of admissibility in internal review procedures constitute as a serious obstacle can be due to the two-stage procedure used by the Commission. First, the decision on admissibility is delegated to the Director-General or the head of the department responsible for the challenged act. It is only if the request is found admissible at this first step the Collage of Commissioners will take a decision on the merits, which rarely happens. The actual impact of the provisions of access to justice as laid down in the Aarhus Regulation will therefore largely be determined by the possibility of judicial review at the end of the process.[91]

2.4.1.2 Judicial Review

Art 12 of the Aarhus Regulation sets out the possibility for a judicial review by the ECJ. The formulation of the provision was a result of a political discussion and a compromise between the Council bodies. It was watered down, and whether the provision will result in a wider access to justice or just confirm the *status quo* is still unsure since no judgment have been made by the ECJ or by the General Court.[92] Art 12 of the Aarhus Regulation provides for NGOs that have made a request for an internal review to institute proceedings before the ECJ in accordance with the relevant provisions of the Treaty. These provisions are Art 263 TFEU (action of annulment) and Art 265 TFEU (action for failure to act). Even though these

[90] Marc Pallemaerts, 'Access to Environmental Justice at EU Level', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 280 – 283.
[91] Marc Pallemaerts, 'Access to Environmental Justice at EU Level', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 285 – 286.
[92] Marc Pallemaerts, 'Access to Environmental Justice at EU Level', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 287 – 291.

provisions are not identical, the case law has evolved in parallel and tends to apply the same criteria for standing.[93] This regulation could provide for an administrative review, but since the criterion for standing under Art 263 (4) TFEU have not changed there seem to be little chance of an actual judicial review.[94] In order to assess whether NGOs have a possibility get a judicial review, I will look at access to justice under Art 263 TFEU.

2.4.2 Access to justice under Art 263 (4) TFEU

The action of annulment was initially created in order for Member States to challenge acts adopted by the supranational institutions of the Union and where these institutions could challenge each other's acts. Member States and Institutions are 'privileged applicants' since their standing cannot be questioned. However, natural and legal persons were also giving standing as 'non-privileged applicants'. Their standing is never presumed and has to be established in every individual case. Any claimant that establishes standing can seek full judicial review of the substantive and procedural legality. [95] The Union was in the beginning aimed at market integration and the standing rules where intended to protect an importer, exporter or other market participants that was affected in his or her particular private interests. Therefore it is still the case today that there are often no problems for market participant to show an individual and direct concern. This is different when it concerns matters of a more general and normative character (decisions on environmental plans or compulsory emission trading) that is contested by a market participant. When it comes to the possibility for NGOs to object to an act on environmental grounds, they cannot, almost by definition, fulfill a distinguishing function. Hence, the more serious the

[93] Marc Pallemaerts, 'Access to Environmental Justice at EU Level', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 291 – 293.
[94] J Jans and H Vedder, *European Environmental Law – After Lisbon* 4th Edition, pp. 246 – 250.
[95] Marc Pallemaerts, 'Access to Environmental Justice at EU Level', in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, pp. 291 – 293.

environmental harm is, the wider the group likely to be affected, and the harder it is to meet the criterion for direct effect.[96]

The early criteria for standing for 'non-privileged applicants' were to be addressed directly by a decision or a decision or regulation directed to another person that are of direct and individual concern to the former.[97] The well-known case *Plaumann*[98] from 1963 sets the restrictive interpretation of standing for natural and legal persons. This test is shaped according to traditional individual rights and personal interests, which is something environmental cases do not fit into. Environmental matters are by its very nature the opposite of this, a public interest protecting the common good.[99]

This rigid doctrine was challenged in the cases *Jégo-Quéré*[100] and *UPA*[101].[102] Advocate General Jacobs argued in *UPA* that the meaning of 'individual concern' should be altered so that a person challenging a general measure should be able to have an 'individual concern' if the measure by peculiar circumstances to him have, or is liable to have, a substantial adverse effect on his interests.[103] The Court of First Instance in the case *Jégo-Quéré* referred to the Advocate General Opinion in UPA, since the case was still pending.[104] CFI held that it was it necessary to derive form the set case law in order to ensure effective judicial protection for individuals. The court ruled that "*a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in*

[96] J Jans and H Vedder, *European Environmental Law – After Lisbon* 4th Edition, pp. 237 – 241.
[97] EC Treaty, Art 230 (4).
[98] Case C-25/62 *Plaumann v Commission* [1963] ECR 95.
[99] Charles Poncelet, 'Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?', *Journal of Environmental Law* 24:2, 2012, pp. 287 – 309.
[100] Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365.
[101] Opinion of A-G Jacobs of 22 March 2002 in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.
[102] Report on Compliance of EU to Aarhus, 2009, p. 31.
[103] Opinion of A-G Jacobs of 22 March 2002 in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paras. 59 – 60.
[104] Case T-177/01 *Jégo-Quéré v Commission*, paras. 45, 49.

a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him"[105].

However, the established doctrine was strongly reaffirmed by the EJC in the appeal.[106] In *UPA* the ECJ ruled against the Advocate General Opinion, and stated that such an interpretation of Art 230 (4) EC Treaty goes beyond the jurisdiction of the Community Courts. If necessary, such an interpretation could only be introduced by an amendment of the Treaty made by the Member States.[107] A similar explicit ruling was made in the case *Jégo-Quéré.*[108]

Even though these two cases concern individual standing and not standing for NGOs, they are important cases on the interpretation on 'individual and direct concern', which applies the same to individuals as it does to NGOs.

With the Lisbon Treaty a change was made to the forth section of Art 263 TFEU, so that 'non-privileged applicants' do not have to show an individual concern against a regulatory act that does not entail implementing measures.[109] The term regulatory act is not defined or used anywhere else in the Treaty, but it is often assumed that it refers to a normative act of general application. But according to Poncelet it must be interpreted to mean the opposite of the construction of a 'legislative act'. It is uncertain how this is actually interpreted by the Court, and needs clarification.[110] In the so-called *Inuit case*[111] the General Court ruled on the interpretation of 'regulatory act' under Art 263 (4) TFEU. Looking at the wording and the intention of the

[105] Case T-177/01 *Jégo-Quéré v Commission*, para. 51.
[106] Report on Compliance of EU to Aarhus, 2009, p. 31.
[107] Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paras. 37, 44.
[108] Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-3425.
[109] Art 263 (4) TFEU, and P Craig and G de Búrca, *EU Law: Text, Cases and* Materials, 5th Edition, pp. 491 – 493.
[110] Charles Poncelet, 'Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?', *Journal of Environmental Law* 24:2, 2012, pp. 287 – 309.
[111] Case T-18/10 *Inuit Tapiriit Kanatami and others v the European Parliament, the Council of the European Union and the European Commission*, General Court.

Treaty, the General Court ruled that a regulatory act cannot be a legislative act. The regulation on a ban of seal products that was contested in this case was considered to be a legislative act and the 4th indent is therefore not applicable. Instead the 'direct and individual concern' criterion is at hand. This narrow interpretation of 'regulatory act' was recently confirmed in the Opinion of Advocate General Kokott[112]. She means that the intention of adding a 4th indent to Art 263 TFEU was to widen the access for individuals. However, there was also a change to Art 19 (1) TEU giving wider access for individuals in national courts. This means that the legal remedies available to individuals do not necessarily have to be met through a direct remedy before European Union Courts. [113] It seems that the General Court so far has subscribed to a narrow interpretation to 'regulatory act'. Regarding the question of further implementation measures, this narrows down the application of the provision even more since most EU environmental rules need further implementation.[114] One can come to the conclusion that the changes to direct effect by the Lisbon Treaty will not be significant, and will not change much of the existing case law.

2.4.3 Case law on direct access for NGOs

2.4.3.1 Case law on internal review

Two recent cases, T-338/08 *Stichting Natuur v Commission*[115] and T-396/09 *Vereniging Milieudefensie*[116] from the General Court, question the strict interpretation of 'administrative act' in the internal review procedure under the Aarhus Regulation. In both cases the General Court comes to the

[112] Opinion of A-G Kokott of 17 January 2013 in Case C-583/11P *Inuit Tapiriit Kanatami and others v the European Parliament, the Council of the European Union.*
[113] Opinion of A-G Kokott of 17 January 2013 in Case C-583/11P *Inuit Tapiriit Kanatami and others v the European Parliament, the Council of the European Union,* paras. 2, 33 – 35.
[114] Charles Poncelet, 'Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?', *Journal of Environmental Law* 24:2, 2012, pp. 287 – 309.
[115] Case T-338/08 *Stichting Natuur v Commission*¸ General Court.
[116] Case T-396/09 *Vereniging Milieudefensie v Commission of the European Union*, General Court.

conclusion that the interpretation of 'administrative act' under Aarhus Regulation is contrary to Art 9 (3) of the Aarhus Convention.[117] Since Art 9 (3) of the Aarhus Convention was implemented through Art 10 (1) together with Art 2(1) (g) of the Aarhus Regulation, the General Court found itself to have jurisdiction to review the validity of those provisions.[118] The Commission held in *Stichting Natuur v Commission* that Art 9 (3) of the Aarhus Convention did not apply since it acted in a legislative capacity. The General Court replied that it is true that Art 9 (3) of the Aarhus Convention does not apply to institution bodies acting in its legislative capacity. However, in the present case, the Commission acted with its implementing powers and Art 9 (3) of the Aarhus Convention is applicable.[119]

The General Court examines the meaning of 'act' in Art 9 (3) of the Aarhus Convention. Since 'act' is not defined in the Aarhus Convention, the General Court looks at the objectives of the Convention to determine the meaning of 'act', and comes to the conclusion that:

> "It must be held that an internal review procedure which covered only measures of individual scope would be very limited, since acts adopted in the field of the environment are mostly acts of general application. In the light of the objectives and purpose of the Aarhus Convention, such limitation is not justified."[120]

There is no possibility to limit the scope of 'acts' in the light of the conditions set out in Art 263 (4) TFEU. The possibility for judicial remedy under the Aarhus Regulation is separate from the possibility to internal review and the conditions set out in Art 263 (4) TFEU and must still be met in order to access the Court under judicial review.[121]

In a press release from EEB and ClientEarth Today, they condemn the decision of the Commission to appeal against these two rulings, saying that

[117] Case T-338/08 *Stichting Natuur v Commission* and Case T-396/09 *Vereniging Milieudefensie.*
[118] Case T-338/08 *Stichting Natuur v Commission,* paras. 53 – 59, Case T-396/09 *Vereniging Milieudefensie* paras. 53 – 59.
[119] Case T-338/08 *Stichting Natuur v Commission,* paras. 61 – 70.
[120] Case T-338/08 *Stichting Natuur v Commission,* para. 76, Case T-396/09 *Vereniging Milieudefensie* para. 65.
[121] Case T-338/08 *Stichting Natuur v Commission,* paras. 80 – 82, Case T-396/09 *Vereniging Milieudefensie* paras. 71 – 73.

the taxpayers' money goes to limit the democratic right of the people. They also mean that the Commission fails in its role as guardian of the Treaty, as the Commission first fails to implement the international agreement correctly and then appeals the Court ruling without any sound legal arguments.[122]

The conclusion one can draw from these two cases are that the General Court finally makes a clear statement towards relaxing the strict interpretation of an 'administrative act' as defined in the Aarhus Regulation. This means that NGOs should have a wider access to the internal review process. The cases do however not seem to relax the interpretation of Art 263 (4) TFEU, but rather keep the rigid interpretation in existing case-law. This matter is however rather political as one can see from the press release commented on above, and the fact that the Commission appeals both the decisions. To see what impact this ruling will actually have on access to internal review one simply will have to wait for the judgment of the ECJ. The cases *Júego Quéré* and *UPA* where the CFI previously have tried to relax the rules on standing, the existing case law have been strongly reaffirmed by the ECJ.[123]

2.4.3.2 Case law on judicial review

As for the case law on access to justice under 263 (4) TFEU three important cases are *Stichting Natuur*[124], *Região autónoma dos Açores*[125] and *WWF-UK*[126].

Stichting Natuur concerns the chemicals atrazine and simazine not being included in Annex I in Council Directive 91/414/EEC.[127] EEB and Stichting

[122]http://www.eeb.org/index.cfm/news-events/news/ngos-condemn-anti-democratic-move-by-european-commission/, Last visited 2013-03-26.
[123] Case C-50/00 P *Unión de Pequeños Agricultores v Council* and Case C-263/02 P *Commission v Jégo-Quéré*.
[124] Joined Cases T-236/04 and T-241/04, *EEB and Stichting Natuur en Milieu v Commission* [2005] ECR II – 4948.
[125] Case C-444/08P *Região autónoma dos Açores v Council of the European Union* [2008] ECR II-103.
[126] Case C-355/08P *WWF-UK v Council,* order of 5 May 2009.

Natuur en Milieu, which are bringing the action are not considered to be individually concerned, and the rigid interpretation of Art 263 (4) TFEU from *Plaumann* and *Stichting Greenpeace* is once again confirmed. The fact that the provisions 'affect the applicants in their objective capacity as entities protecting the environment, in the same manner as any other person in the same situation' is not considered enough for an individual concern.[128] The case also confirmed the case law concerning effective judicial protection set down in *UPA*.[129] A question of the interpretation of the Aarhus Regulation is raised by EEB and Stichting Natuur en Milieu. Since they fulfill all the requirements laid down in the Aarhus Regulation for an NGO, they mean that they should be considered to have standing under Art 263 (4) TFEU. The Court does not share this interpretation and refers to the norm hierarchy, and that secondary legislation cannot override a primary legislation source like Art 263 (4) TFEU.[130]

In the case *Região autónoma dos Açores* the settled case law on the interpretation of 'individual concern' in *Plaumann* and the question of effective remedies in *UPA* are confirmed.[131] In *Região autónoma dos Açores* the CFI looks at the compatibility of Art 263 (4) TFEU with Art 9 (3) Aarhus Convention, concluding that the Aarhus Regulation was legislated to implement this provision and grants some NGOs right to access. However, the NGOs in the present case do not fulfill the requirements laid down in the Aarhus Regulation.[132] The CFI does not answer the question of what would have happened if the NGO fulfilled these requirements. This question was however answered in *Stichting Natuur*, where the EJC made it clear that such an interpretation of the Aarhus Regulation goes against the norm hierarchy.

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[127] Joined Cases T-236/04 and T-241/04, *EEB and Stichting Natuur en Milieu v Commission*, paras. 13 – 14, 19 – 20.
[128] Joined Cases T-236/04 and T-241/04, *EEB and Stichting Natuur en Milieu v Commission*, para. 56.
[129] [129] Joined Cases T-236/04 and T-241/04, *EEB and Stichting Natuur en Milieu v Commission*, paras. 65 – 66.
[130] Joined Cases T-236/04 and T-241/04, *EEB and Stichting Natuur en Milieu v Commission*, paras. 70 – 71.
[131] Case C-444/08P *Região autónoma dos Açores*, paras. 36, 70 – 72.
[132] Case T 37/04 *Região autónoma dos Açores* para. 93.

The case *WWF-UK* concerns the WWF's right as a party of a fishery regulation NO 41/2007, setting up the total allowable catches of cod. WWF-UK is a member of the RAC (Regional Advisory Council) which according to the contested regulation has a right to be heard before an adoption of a measure. It is not certain if the WWF-UK has the same right as the entity (RAC). However, the court came to the conclusion that there is no right for the entity or its members to challenge the validity of this regulation in terms of its substantial content.[133]

It is clear from these cases on access to justice under Art 263 (4) TFEU that rigid interpretation of 'individual concern' from early case law still applies. The implementation of the Aarhus Convention in the Aarhus Regulation has not changed the settled case law under Art 263 (4) TFEU. This means that it is still virtually impossible for NGOs to be considered to have standing. It could therefore be questioned if the EU complies with the Aarhus Convention. The EU itself seems to think that it is enough to grant wide access to justice in the Member States since there is a possibility for a preliminary ruling in the ECJ. The ECJ has been much more willing to relax the rules on standing in preliminary rulings concerning access to justice in Member States, which the next section will tackle.

[133] Case C-355/08P *WWF-UK v Council*, paras. 43 – 44, 46, 48.

2.5 Access to justice for NGOs at Member State level post the Aarhus Covention

According to Art 19 (1) TEU, Member States must provide for remedies sufficient to ensure effective legal protection in the fields covered by the Union. How this is done is up to the legal order of each Member State to designate, the so-called 'national procedural autonomy'. The ECJ has introduced two important requirements that must be satisfied, the principle of equivalence (that a Union dispute may not be less favored than a domestic action), and the principle of effectiveness (national rules may not render impossible, or excessively difficult to exercise the rights conferred by the Union legal order).[134] Individuals and NGOs are dependent on the national legal procedural law to have access to court, which varies in the Member States.[135]

From the EU institutions there is a clear interest to improve access to justice on a national level.[136] This has been done not only though directives but also by the ECJ through preliminary rulings. I will start to look at some of the recent case law from the ECJ to see the view that the EU has on giving access to NGOs in the Member States. I will thereafter look at the different approaches on access to justice, and rules governing standing for NGOs in Member States.

2.5.1 Case-law on indirect access for NGOs

In recent years a number of important cases have clarified rules on access to justice in Member States. The cases *Djurgaarden*[137] and *Trianel*[138] concern under what circumstances NGOs should be considered to have access to

[134] Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtshaftskammer für das Saarland* [1976] ECR 1989 and Case C-309/85 *Barra v Belgium* [1988] ECR 355.
[135] J Jans and H Vedder, *European Environmental Law – After Lisbon* 4th Edition, pp. 228 – 231.
[136] *SPEECH/12/856*, Speech by Janez Potočnik, European Commissioner for Environment, "The fish cannot go to Court" – the environment is a public good that must be supported by a public voice, Brussels 2012.
[137] Case C-263/08 *Commission of the European Communities v Djurgaarden*, judgement of October 15, 2009.
[138] Case C-115/09 *Trianel*, judgement of 12 May, 2011.

court in regard to public participation in decision-making. *Boxus and others*[139] and *Solvay and others*[140] clarify the conditions for a legislation giving permit to construction, and what rights individuals have to review this legislation. Hence they also concern public participation in decision-making. The case *Slovak Brown Bear*[141] concerns enforcement of environmental law, other than access to information and public participation.

2.5.1.1 Djurgaarden

Djurgaarden is the first important case on the application of the Aarhus Convention at Member State level. The Municipality of Stockholm wanted to construct a tunnel for electronic cables. An EIA was carried out and the construction was allowed by Miljödomstolen. Miljöskyddsföreningen however appealed the decision, but the appeal was considered inadmissible since they did not fulfill the condition of having at least 2000 members to be considered having standing.[142] The main questions before the ECJ concern whether members of the public should have access to challenge a decision even though they had the opportunity to participate in the court hearing, and whether the requirements on NGOs set by the Swedish legislation was too restrictive.[143]

The answer to the first question is that the party should have the right to access a review process regardless of the role they might have played in the previous process, because the two different processes serve different purposes.[144] Regarding the second question it is up to the national legislators to set the requirements for non-governmental organizations, but the legislation should ensure "wide access to justice" and render the rules under

[139] Joined cases C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and C-135/09 *Boxus and others v Commission of the European Union*, order of 18 October, 2011.
[140] Case C-182/10 *Solvay and others v Commission of the European Union*, order of 16 February, 2012.
[141] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo zivotného prostredia Slovenskej republiky*, judgement of March 8, 2011.
[142] Case C-263/08 *Djurgaarden*, paras. 15 – 20.
[143] Case C-263/08 *Djurgaarden*, para. 21.
[144] Case C-263/08 *Djurgaarden*, paras. 38 – 39.

Directive 85/337 effective.[145] This means that the 'useful effect doctrine' is applied to the case, a great example of when the ECJ applies general principles of EU law to enhance environmental protection.[146] A minimal number of members might be effective to know if an organization exists and is active, but a number cannot be fixed so that it goes against the objectives of the Directive. In the present case only two NGOs have over 2000 members in Sweden, and local associations were deprived of any judicial remedy. The number was therefore set too high.[147]

Advocate General Sharpston shares the view of the ECJ, but clarifies the two questions some. Regarding the first question, Sweden gives wide access during the administrative process, and therefore has stricter rules when implementing 10a of Directive 85/337.[148] This is however not considered to be reason enough to allow higher requirements for an appealing NGO.

2.5.1.2 Trianel

In the case *Trianel* the German coal-fired power station Trianel received a preliminary permit to construct and operate a coal-fired power station in Lünen, close to a special area for conservation within the meaning of the Habitats Directive. Friends of the Earth initiated proceedings of an annulment of this decision. [149] In German law there has to be an impaired right to be able to evoke standing. In this case the special areas for conservation are considered a general public interest and individuals are therefore not considered to be able to have an impaired right. This means that NGOs cannot either, since they have to rely on an individual's impaired right.[150] Friends of the Earth was not considered to have standing according to German law, but the court thought this might go against Directive 85/337

[145] Case C-263/08 *Djurgaarden*, paras. 44 – 45, 47, 51 – 52.
[146] Charles Poncelet, 'Access to Justice in Environmental Matters - Does the European Union Comply with its Obligations?', *Journal of Environmental Law* 24:2, 2012, pp. 287 – 309.
[147] Case C-263/08 *Djurgaarden*, para 44 – 45, 47, 51 – 52.
[148] Opinion of A-G Sharpston of 2 July 2009 in Case C-263/08 *Commission of the European Communities v Djurgaarden*, judgement of October 15, 2009, para. 47.
[149] Case C-115/09 *Trianel*, paras. 24 – 26, 33 – 34.
[150] Case C-115/09 *Trianel*, paras. 45 – 46.

(as amended by 2003/35/EC), and a preliminary reference was sent to the ECJ.[151]

There are two ways for Member States to implement access to justice under Directive 85/337, either through a "sufficient interest in bringing the action" or through "the impairment of a right". What this means is to be determined by the Member State, but has to be in line with "giving a wide access to justice". This means that NGOs should have either a sufficient interest or an impaired right, depending on which alternative is implemented.[152] The concept of "impaired rights" cannot depend on conditions that only physical or legal persons can fulfill, such as being a close neighbor or suffering in another way. These rights must further be interpreted to include national law implementing EU environmental law, and the rules of EU environmental law having direct effect. Consequently the national law flowing from the Habitat Directive must be capable to be relied on by an NGO.[153] The last question concerns if Art 6 in the Habitat Directive can be relied upon directly by an NGO in a national court. Art 10a Directive 85/337 is considered to be clear and unconditional, and therefore has direct effect. An NGO is therefore able to rely on Art 6 in the Habitat Directive, under the judicial proceeding pursuant to Art 10a Directive 85/337, even where national law prohibits this.[154]

The impact of this case will be big in Germany, even if it will only apply to areas within the scope of EU environmental law. From now on, environmental NGOs will be able to rely on a general public interest before an administrative court, and do not have to show an impairment of an individual right.[155]

[151] Case C-115/09 *Trianel*, paras. 24 – 26, 33 – 34.
[152] Case C-115/09 *Trianel*, paras. 38 – 40.
[153] Case C-115/09 *Trianel*, paras. 47 – 49.
[154] Case C-115/09 *Trianel*, paras. 51, 57, 59.
[155] Bilun Müller, 'Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law'. *Journal of Environmental Law* 23:3, 2011, pp. 505 – 516.

2.5.1.3 Boxus and others and Solvay and others

In the two linked cases *Boxus and others* and *Solvay and others*, six actions have been brought against the Walloon state regarding airports and railway lines. But during this process, new legislation (a Decree) has been passed allowing the constructions. The applicants mean that this Decree was not compatible with either Aarhus Convention or the EIA directive. In *Boxus and others* Conseil d'Etat has stopped the proceedings and asked for a preliminary ruling both before the Constitutional Court and the ECJ. In *Solvay and others*, the Constitutional court has in their turn asked for a preliminary ruling regarding the same case.[156]

The ECJ essentially comes to the conclusion that the Decree needs to fulfill two conditions for Directive 85/337 not to be applicable. The project must have been allowed through a specific legislative act, and the objectives of Directive 85/337 have been achieved by the legislative process. It is up to the national court to determine whether these conditions should be considered met.[157] The second question refers to whether there has to be a possibility for the public to review the Decree. If the previous conditions are met, the rules in the Aarhus Convention and Directive 85/337 do not apply. But if those conditions are not considered met, there Member States must provide for a review procedure. There must, therefore be a possibility to review whether a legislator act fulfills these conditions or not. If the national court in the present case finds that the legislation does not fulfill the conditions and that there is no court of law that can review the substantial or procedural validity of that legislation it must be disapplied.[158] This means essentially that a national legislation cannot be passed without fulfilling the requirements of the EIA Directive, or it can be appealed by an NGO. The ECJ gives NGOs wide access since there must be a possibility to review if the conditions are met.

[156] Joined cases C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and C-135/09 *Boxus and others*, paras. 15 – 19, and case C 182/10 *Solvay and others*, paras. 20 – 24.
[157] Joined cases C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and C-135/09 *Boxus and others*, paras. 47 - 48, and case C 182/10 *Solvay and others*, para. 43.
[158] Joined cases C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and C-135/09 *Boxus and others*, paras. 49 – 54, 56, and case C 182/10 *Solvay and others*, paras. 44 – 46, 51.

2.5.1.4 Slovak Brown Bear

The case *Slovak Brown Bear* concerns an NGO wanting to become a party to a dispute about the habitat of the brown bear, covered by the Habitat Directive. The main question referred to the ECJ is whether an NGO can rely directly on Art 9 (3) of the Aarhus Convention, as a part of EU environmental law.[159] Since the Aarhus Convention was approved by the community in Directive 2005/307, it now forms an integral part of the Union, and ECJ therefore has jurisdiction to interpret such an agreement. For the Aarhus Convention to be able to have direct effect under EU law, the EU must have exercised its powers and legislated in the field, otherwise it is up to the national court to determine if the Convention has direct effect according to national law.[160] In the present case, the brown bear is subject to a system of strict protection under the Habitat Directive, and specific derogation rules apply. Therefore the ECJ considered the dispute to fall within the scope of EU law.[161]

For an agreement between the EU and a non-member country to have direct effect, the provision must contain a clear and precise obligation, which is not subject to further implementation.[162] Art 9 (3) of the Aarhus Convention cannot be considered to have direct effect, since it does '*not contain any clear and precise obligation capable of directly regulating the legal position of individuals*'.[163] However, Art 9 (3) of the Aarhus Convention has the intention to ensure effective environmental protection, and it is up to the national courts to interpret national law in line with the objectives of this article, '*to the fullest extent possible*'. That means to enable NGOs to challenge an administrative decision contrary to EU environmental law.[164] Even if Art 9 (3) is not considered clear and precise enough to have direct

[159] C-240/09 *Lesoochranárske zoskupenie*, paras. 20 – 24.
[160] C-240/09 *Lesoochranárske zoskupenie*, paras. 30 – 33.
[161] C-240/09 *Lesoochranárske zoskupenie*, paras. 36 – 38.
[162] C-240/09 *Lesoochranárske zoskupenie*, para. 44.
[163] C-240/09 *Lesoochranárske zoskupenie*, para. 45.
[164] C-240/09 *Lesoochranárske zoskupenie*, paras. 46 – 51.

effect, it is still clear enough to enable an NGO to challenge the Slovak ministry's decisions.[165]

This means that even though Art 9 (3) of the Aarhus Convention is not considered to have direct effect, national court must interpret domestic procedural rules in a way that NGOs are able to challenge administrative decisions. This is significant since it applies to all areas of EU environmental law, not only to access to information and public participation in decision-making. Art 9 (3) of the Aarhus Convention was previously considered only to create obligations on EU Member States as international law, and not from EU law. [166]

2.5.1.5 Conclusions

The ECJ have through these rulings given NGOs a wider access to justice in environmental matters in Member States. Member States must grant wide access to justice when determining the limitations on NGOs regarded to have right to standing. If the national legislation does not meet the requirements for access to justice it must be set aside, and EU environmental provisions with direct effect can instead be relied upon by individuals or NGOs. Even outside the scope of access to environmental information and public participation in decision-making, NGOs should have access to justice under the scope of EU law. However, it is still up to the national courts to determine when EU environmental law is at hand and if the national legislation should be set aside. Outside the scope of EU environmental law, the national provisions still stand. Not only does this reaffirm the need to protect the environment, but it also strengthens the role for NGOs to enforce environmental protection. This has mainly been done by preliminary rulings from the ECJ, but also by the national courts referring the questions. The European Union might not have the capacity to

[165] J Jans and H Vedder, *European Environmental Law – After Lisbon* 4th Edition, pp. 235 – 237.
[166] Bilun Müller, 'Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law'. *Journal of Environmental Law* 23:3, 2011, pp. 505 – 516.

legislate on wider access to national courts. Instead the ECJ goes through the back door and interprets existing legislation to grant wide access to justice. Giving wide access to justice in Member States is not only a way for the EU to enhance environmental protection but also a way to grant legal remedies for individuals and NGOs without changing the rigid doctrine on direct access to EU Courts.

Even though these rulings have strengthened the legal protection system in Member states, there is still a pressing need for a more comprehensive regime. To do this is not up to the Courts, but to the legislators. The lack of a harmonized framework has led to a variation of the accessibility to courts in Member States in environmental matters. And many barriers still stand in the way for an effective judicial remedy for NGOs in environmental matters.[167]

2.5.2 Access to justice in Member States

It is theoretically possible in most Member States for NGOs to access administrative courts to review an administrative act concerning the environment. There are three main approaches on standing for NGOs in administrative courts, an extensive approach, a restrictive approach and an intermediate approach.

The extensive approach is in the form of an *actio popularis*, which gives a broad right of standing and have been met by a strong resistance in most Member States. There is a worry that unrestricted access to court would result in the judicial system crashing. Portugal and Latvia gives this broad access to NGOs. The Netherlands have had a form of an *actio popularis* before, but have recently changed this to a more restrictive approach. In the UK, case law has recently given wider access to justice for NGOs and does

[167] Charles Poncelet, 'Access to Justice in Environmental Matters - Does the European Union Comply with its Obligations?', *Journal of Environmental Law* 24:2, 2012, pp. 287 – 309.

give broad standing even though one cannot call it an *actio popularis* since it is within a common law system. [168]

The restrictive approach focuses on individual rights, and standing is only granted if there has been a violation of a right that is intended to protect the plaintiff and not a general interest. For an NGO to be granted standing it must demonstrate a breach of its own rights (a direct injury to its financial assets or its property). In addition the scope of the review is narrow, and general issues on environmental protection are considered to be outside this scope. In Germany and Italy NGOs do not have standing to defend general environmental interests in administrative court, unless they have been specifically granted this right through legislation.[169] This has however been challenged by the recent case *Trianel* from the ECJ, where an NGO should be considered to have standing even though it could not demonstrate a breach of an individual right. This case is from 2009 and it is still unclear how this changes the legal framework for national law in Germany and Italy. It is clear from the case, that the national law must be set aside when EU law is at hand.[170]

The intermediate approach has been adopted in most Member States and avoids *actio popularis* by demanding an 'interest' in the subject matter of the action. This interest is broader than the requirement of a subjective right, as demanded in the restrictive approach, but still ensures a connection between the plaintiff and the cause of action. This interest can be defined by the courts as quite wide, or rather narrow. In France and Belgium an NGO have to show that their interest is sufficiently individualized and distinct from a right that any citizen would have to be granted standing. The scope of the review is also broader than in the restrictive approach and any

[168] *ENV.A.3/ETU/2002/0030*, Final Report, 'Access to Justice in Environmental Matters', De Sadeleer, Roller and Dross, pp. 21 – 24, and *2012-11-11/Final*, 'Effective Justice?´, Jan Darpö, pp. 11 – 14.
[169] *ENV.A.3/ETU/2002/0030*, Final Report, 'Access to Justice in Environmental Matters', De Sadeleer, Roller and Dross, pp. 21 – 24, and *2012-11-11/Final*, 'Effective Justice?´, Jan Darpö, pp. 11 – 14.
[170] Case C-115/09 *Trianel*, judgment of 12 May, 2011.

argument can be forwarded in court, including general compliances with environmental law.[171]

All Member States have additional requirements on NGOs to be considered qualified entities that have standing, either through legislation or conditions introduced by the courts. For example, there should be a connection between the issue in question and the statute of the organization, a certain geographical reach, a form of legal personality, a minimum time period of existence, or a minimum number of members.[172] In the case *Djurgaarden* the Swedish legislation, setting a minimum number of 2000 members for an NGO to be considered qualified, was too restrictive. The court however thought that a minimum number of members could be an efficient way to know that an organization is active. It is clear from the case that it is up to the Member States to legislate on what should be considered as a qualified entity, but the restrictions cannot go against the object to give wide access to justice.[173]

Some Member States grant access for NGOs in civil courts (e.g. France, Italy, Portugal and Netherlands) and in other countries NGOs are not considered to have standing. Where NGOs are considered to be able to have standing there are two different approaches to this. The first one allows direct access for NGOs and the second approach only gives access to NGOs as an intervening part in an ongoing proceeding. In some Member States there is even a possibility for access to criminal court (e.g. France, Portugal and Italy). In France and Italy NGOs can only intervene in an ongoing prosecution on environmental damage. However, in Portugal NGOs can act as an assistant to the prosecution relating to environmental crimes. In addition to this there are differences in the costs of the proceedings, the

[171] *ENV.A.3/ETU/2002/0030*, Final Report, 'Access to Justice in Environmental Matters', De Sadeleer, Roller and Dross, pp. 21 – 24, and *2012-11-11/Final*, 'Effective Justice?', Jan Darpö, pp. 11 – 14.
[172] *ENV.A.3/ETU/2002/0030*, Final Report, 'Access to Justice in Environmental Matters', De Sadeleer, Roller and Dross, pp. 24 – 29, and *2012-11-11/Final*, 'Effective Justice?', Jan Darpö, pp. 11 – 14.
[173] Case C-263/08 *Commission of the European Communities v Djurgaarden*, judgement of October 15, 2009.

scope of the review and the length of the proceedings, among other things. This together with the fact that there are different legal cultures and systems makes it difficult to compare the quality of access to justice in different Member States.[174] It is thus clear that access to justice in Member States is not harmonized. One can find differences in giving a broad access to court or a more restrictive approach, the number of cases brought by NGOs, to what courts environmental complaints are brought and what socio-cultural conditions there are in the different Member States. I do think that there would be value in a more harmonized legislation on access to justice in the EU, which would not only make it easier for NGOs to access court, but also provide for a more leveled playing field.

This is however easier said than done. It is hard to harmonize the European legal systems since the EU consists of Member States with different legal systems, and legal cultures. Another hurdle is the complexity of shared competence between the Union and its Member States. Member States have been reluctant towards a new directive on access to justice in environmental matter, and the main argument was the subsidiarity principle, meaning that the Member States are better suited to legislate in the area of access to justice. According to the principle of national procedural autonomy, Art 19 (1) TEU, it is up to the Member State to determine the procedural conditions in the absence of Union rules. Another principle is the principle of sincere cooperation under Art 4 (3) TEU, that widens the principle of effectiveness and equivalence even more. There national courts are obliged to take procedural right under Union law, or from case law, under consideration when ruling on matters falling under EU law. This means that even if the EU is not considered to have the competence to legislate fully in the area of access to justice in environmental matters, they can still influence the procedural rules in national courts through preliminary rulings. This is also how the EU lately has tried to widen the scope of access to justice for NGOs in cases such as *Trianel*, *Djurgaarden* and *Slovak Brown Bear*.

[174] *ENV.A.3/ETU/2002/0030*, Final Report, 'Access to Justice in Environmental Matters', De Sadeleer, Roller and Dross, pp. 21 – 24.

2.6 Reflections on NGOs as a Voice for the Environment

As Janez Potočnik says in his speech 'The fish cannot go to Court', the environment cannot protect itself; it is a public good and needs to be protected by a public voice.[175] But are Environmental NGOs that voice? They do not represent 'the public', since a range of public interests often go against the interest of environmental protection, and environmental protection on a European scale sometimes goes against the objectives of a local environmental organization.[176] However, the administration that today should protect our environment is perhaps not better at protecting it. In times of economic needs the administration seeks solutions to its problems, even at the cost of the environment. That explains why economic interest wins over environmental interest in most cases.[177] I hope, and think, that environmental NGOs have the capacity to put the interest of the environment at large over the interest of the local community, or one's personal beliefs. NGOs could then serve as a guardian of our environment and ensure that national administrations give the environment the protection it needs.

2.6.1 The impact of giving NGOs broad standing

There is a general fear that broad standing for NGOs in environmental matters would make the judicial systems in EU overflow with environmental complaints. But in Member States that give wide access to justice for NGOs this have not been a problem. Even in the Member States that have the most cases they still only make out a small number of the cases brought to court.[178] Advocate General Sharpston instead argues that giving NGOs a wide access to justice would gather individual complaints, and

[175] *SPEECH/12/856***,** Speech by Janez Potočnik, European Commissioner for Environment, "The fish cannot go to Court" – the environment is a public good that must be supported by a public voice, Brussels 2012.
[176] Maria Lee, *EU Environmental Law: Challenges, Change and Decision – making*, p. 137.
[177] Ludwig Krämer, *EU Environmental Law* 7th Edition, pp. v – vii.
[178] Sadeleer, Roller and Dross, *Access to Justice in Environmental Matters and the Role of NGOs, Empirical Findings and Legal Appraisal*, pp. 165 – 168.

would rather help not to clog the court systems with private litigations. In her Opinion in the case *Djurgaarden,* she also holds that NGOs have lots of expertise in environmental matters and would be able to share its expertise with the court.[179]

It has also been seen that the actions brought by NGOs have a high success rate, which indicates that they do help to enforce environmental law in an important way, and that they are brought for legally sound reasons.[180]

Another benefit of giving wide access to justice for NGOs is to enhance public participation, which is a way to express green values or an environmental movement that enhance the legitimacy of EU environmental legislation through national application of EU environmental law. It is also a way to create an awareness and debate amongst the public, and to educate the public towards making environmentally conscious decisions.[181]

The European Commissioner for Environment Janez Potočnik has made implementation of Environmental law one of his key priorities. He thinks that better implementation is indispensable if we want to benefit from the current environmental legislation. Potočnik see a possibility for NGOs to fill the existing gap in enforcement of environmental law, through giving them wider access to court.[182]

[179] Opinion of A-G Sharpston of 2 July 2009 in Case C-263/08 *Commission of the European Communities v Djurgaarden,* judgement of October 15, 2009.
[180] *ENV.A.3/ETU/2002/0030,* Final Report, 'Access to Justice in Environmental Matters', p. 8.
[181] Maria Lee, *EU Environmental Law: Challenges, Change and Decision – making,* pp. 122, 126.
[182] *SPEECH/12/856***,** Speech by Janez Potočnik, European Commissioner for Environment, "The fish cannot go to Court" – the environment is a public good that must be supported by a public voice, Brussels 2012.

3 Analysis

Environmental NGOs have been given wider access to justice since the Aarhus Convention has been implemented in the EU both through directives and regulations, but most of all through progressive case law from the ECJ. But if this is this is enough to be considered to give the environment a voice, I am not sure.

The legal framework that has been put into place does not implement all aspects of the Aarhus Convention. Access to justice in respect to public participation in decision-making only applies to EIAs and IPPC. Art 9 (3) has not been implemented, and it is up to each Member State to legislate on the matter, and at EU level there is still no actual possibility for judicial remedy for NGOs. Even though ECJ has taken steps in widening the scope of access to court, this does not mean that all Member States will follow this new approach. What is more likely to happen is that there will be different legal systems in the different Member States, and different interpretations and rulings on access to justice. This is not surprising since even the legal scholars argue about how to interpret for example the scope of Art 9 (3) from the case *Slovak Brown Bear*.

It can be questioned whether the EU has succeeded to implement the Aarhus Convention to its own institutions and bodies, since there is a reluctance to give access to review environmental decisions at EU level. The Aarhus Regulation does give a right to internal review and judicial review, but it does not change the stringent rules on direct access to court under 263 TFEU. In practice this means that NGOs still have no possibility to be considered to have standing. The old case law from *Jégo Quéré* and *UPA* still applies. A step in the right direction is the two recent cases concerning internal review from the General Court, saying that the strict interpretation of ‘administrative act’ is not in line with the Aarhus Convention. These cases have however been appealed by the Commission and we have to wait

for the judgment from the ECJ and see if the doctrine will change. In both the cases *Jégo Quéré* and *UPA* the ECJ overruled the progressive rulings from the General Court trying to change the doctrine on standing for individuals and NGOs under Art 263 TFEU.

If the EU would be willing to widen the scope for access to court in its own sphere, there might also be less reluctance from the Member States to do the same. But the idea of implementing the Aarhus Convention from the EUs point of view seem to be to give wide access to court in Member States and that this will be enough, since there is a possibility to refer questions to the ECJ through a preliminary ruling. This approach has been reaffirmed in several rulings from the ECJ, such as *UPA* and *Jégo Quéré*. But I do not necessarily think that that is enough to comply with the Aarhus Convention and it is definitely not enough if the EU wants to give the environment a voice.

In my opinion there is a need for EU to legislate on a new directive on access to justice, similar to the proposal *COM (2003)624 Final*. This would clarify the interpretation of the rulings form the ECJ and harmonize the legislation in Member States. This might however be easier said than done, since the Member States opposed a directive on access to justice, with regard to the subsidiarity principle, the last time the EU tried to legislate on the matter. Access to justice is a matter that for a long time was in the sphere in which only the Member States could legislate. Therefore this is a sensitive question of the autonomy of the Member States. A difference is that this time the ECJ have already made pretty clear that the Member States must grant access to justice if EU environmental law is breached. So the actual autonomy of the Member States has already been challenged, which was not the case when the proposal *COM (2003)624 Final* was turned down. There have also been some signs from the Commission, the Council and the Parliament that they see the need for a new directive on the matter. Whether the Member States are willing to agree on this is however not clear.

Another question is if NGOs really can be the voice the environment needs. NGOs have many times shown their dedication to protect the environment, and they have the knowledge and expertise to do so. However, there can be conflicting interests or the environmental NGO might be specialized in a specific field, and if there is another kind of problem they might not have the same incentive to act. Environmental NGOs should not be given the sole responsibility to be the guardian of the environment, but rather have the possibility to review the protection the administration gives to the environment. The authorities should still have the same responsibility to protect the environment, but there should be a wider access to review by external parties. This is what the Aarhus Convention aims at achieving, and the possibility to access information, participate in decision-making and access justice in environmental matters have increased since the EU became a party. It is a big step forward that NGOs have been accepted as 'the public concerned' and are given rights under the Aarhus Convention. However, I think the most progressive article with the best possibility to give the environment the voice it needs is Art 9 (3) that not only grant access to justice in respect to environmental information or public participation in decision-making, but when national (or EU) environmental law is breached by a private or a public person. This provision has not yet been implemented in EU through legislation and the interpretation differs in Member States.

Today there is a lack of enforcement when it comes to EU environmental law, and the cost of environmental damage is often externalized. If there would be wider access to justice for NGOs in Art 9 (3) situations, it would not only help to enforce EU and national environmental law, but also internalize the costs of environmental damage, as NGOs would then have the possibility to bring polluters to court. For this to become a reality and not only a theoretical possibility there is a need for a clear legal base that would force Member States to implement that legislation. The case *Slovak Brown Bear* is important, but the actual change in access to justice for NGOs in these cases will not come that easy. Some Member States will

interpret the case law strictly and other less so, but if we want to give the environment the protection it needs, the rules need to be clear.

If the environmental NGOs are not given access to court as intended by the Aarhus Convention they cannot be the voice the environment so desperately needs. The EU has come a long way towards giving NGOs access to justice, but there is still some way to go before they have the means they need to be the guardian of the environment. I think that the environment needs many voices and that environmental NGOs can be an important one of these, if given the chance.

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