

## ***On the Bright Side (of the EU's Janus Face)***

### ***The EU Commission's Notice on access to justice in environmental matters***

#### **Abstract**

*In April 2017, the EU Commission published a “Notice on Access to Justice in Environmental Matters”, laying down the views of Brussels on this hot topic. The Notice takes stock of the dynamic development of the CJEU’s case law on the matter and draws cautious conclusions from this jurisprudence. This article is both an introductory and a short comment on the Notice. The main reasoning and conclusions drawn in the document are described, and then a couple of key issues are highlighted and discussed. All in all, evaluation of the Notice is positive, as it represents a rather big step forward compared with previous standpoints from Brussels. In this way, the Notice consolidates the impression that the EU is furnished with a Janus face concerning access to justice in environmental matters. It is very positive and affirming concerning legal challenges to administrative decision-making in national courts on the one hand, but very strict and of a rejecting nature when dealing with direct action to the CJEU on the other.*

#### **Keywords and phrases**

*Commission’s Notice on access to justice in environmental matters; environmental law; environmental procedure; access to justice; environmental information; public participation; CJEU’s case law; national implementation; environmental rights; environmental interests; effective justice; environmental democracy; costs in environmental proceedings; timeliness in environmental proceedings; scope of review; standard of review.*

### **1. Introduction**

#### ***1.1 Legal background***

As the reader is well aware, both the European Union and its Member States are parties to the UNECE’s Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the “Aarhus Convention”).<sup>1</sup> As is apparent from the title, the Convention builds on “three pillars”: access to information; participation in decision-making processes; and access to judicial and administrative proceedings. The “third pillar” of the Convention is contained in Article 9, which, in broad terms, is structured as follows: according to Article 9(1), any person whose request for environmental information has been refused shall have access to a review procedure in a court or tribunal. Article 9(2) stipulates that the public concerned shall enjoy the right of access to a similar procedure in order to challenge the substantive and procedural legality

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<sup>1</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, (UNECE, adopted 25 June 1998), 38 ILM 517.

of any decision, act or omission subject to permit decisions on activities that may have a significant impact on the environment. In addition, Article 9(3) requires that members of the public have the right of access to administrative or judicial procedures in order to challenge acts and omissions by private persons and public authorities that contravene provisions of national law relating to the environment. There is also a general requirement in Article 9(4) for the environmental procedure to be effective, fair, equitable, timely and not prohibitively expensive.

Article 9(2) of Aarhus has been implemented into EU law by various directives; most importantly directive 2003/35 on public participation (PPD), the EIA directive (2011/92) and the IPPC/IED directives (2008/1 and 2010/75). For decision-making by the institutions of the Union, implementation is done through Regulation 1367/2006.<sup>2</sup> With respect to Article 9(3), the picture is more complex. On the approval of the Convention, the EU has made a declaration on competence stating that *Member States are responsible for the performance of the obligations in accordance with Article 9(3) and will remain so unless and until the Union adopts provisions covering implementation*. However, such implementation measures are still scarce, as traces of Article 9(3) can only be found in some sector-specific laws, such as the Environmental Liability Directive (2004/35, ELD) and the Directive on major-accidents hazards involving dangerous substances (2012/18, Seveso). Initially, a proposal for a directive on access to justice was launched by the Commission in 2003, and deliberated on for more than a decade before finally being withdrawn in 2014 owing to resistance at Member State level.<sup>3</sup> Since then, the efforts of the Commission have instead concentrated on developing guidance on access to justice. A draft was discussed in late 2016 and the end result came in April this year, namely the *Commission Notice on Access to Justice in Environmental Matters*.<sup>4</sup>

This article is mainly an introductory to the Notice. First, the main reasoning and conclusions drawn in the document will be described (2.1-2.8). Thereafter in section 3, I will make some comments on a couple of issues that I find worth highlighting. The aim is not to provide an extensive analysis or to cover all controversial standpoints, but rather to point to some of the questions that need to be discussed further. However, to begin with a few words are required on another aspect crucial to an understanding of the background to the Commission's actions – that is, the dynamic development of case-law concerning access to justice in environmental matters at EU level.

### 1.2 The Court of Justice as a driver for access to justice

In describing the relationship between Aarhus and the EU since 2005, it could be said that implementation measures have been kept to a minimum. In the era of Better Regulation, environmental democracy has not been an issue close to the heart of the Commission. Instead, the focus has been on a lightening of administrative burdens for industry

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<sup>2</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 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 L 264.

<sup>3</sup> Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters (COM/2003/0624 final); withdrawal announced in OJ (2014) C153/3.

<sup>4</sup> Commission Notice on Access to Justice in Environmental Matters. Communication from the Commission (Brussels, 28.4.2017 C(2017) 2616 final), Official Journal 18/8-17; 2017/C 275/01.

and enterprises. This minimalistic approach and general indecisiveness towards international requirements for wider access to justice in environmental matters has also been shared by most Member States. However, this development has been counterbalanced by a very activist approach from the Court of Justice of the EU (CJEU).

Even before the ratification of the Aarhus Convention in 2005, important standpoints were taken by the Court on issues such as the direct effect of EU environmental directives and the principles of effectiveness and judicial protection under EU law. Landmark cases in this respect can be found from 1990 onwards.<sup>5</sup> Since 2005, the development of case-law on access to justice has been expansive.<sup>6</sup> A number of judgments have been delivered by the CJEU, covering all aspects of access to justice in environmental matters. Most of them have concerned standing for individuals and NGOs<sup>7</sup> or on the cost issue in environmental proceedings.<sup>8</sup> The CJEU has furthermore emphasized that environmental proceedings must be effective, in accord with Article 9(4) of the Aarhus Convention.<sup>9</sup> However, important positions have also been taken by the CJEU in other kinds of cases on the principles of direct effect, effectiveness and legal protection under EU law. Clearly, all these judgments need to be taken into account when discussing access to justice in environmental decision-making.

Most of the cases mentioned above concern Article 9(2) of the Aarhus Convention and its implementation into EU law. As noted, when it comes to Article 9(3) there is a limit to the impact of the Convention in EU law. This was elaborated on by the CJEU in C-240/09 *Slovak Brown Bear* (2011). The case started as a reference for a preliminary ruling concerning whether or not Article 9(3) of the Aarhus Convention had “self-executing effect” within an EU Member State’s legal order, the background being the EU’s declaration of competence upon approval of the Convention. In considering the questions, the CJEU first pointed out that the Aarhus Convention was signed and approved by the Community and that, according to settled case-law, the provisions of the Convention *formed an integral part of its legal order*.<sup>10</sup> The Court thus has jurisdiction to make preliminary rulings on the interpretation of provisions falling under that agreement, especially in situations that lie within the scope of both national and EU law and therefore requiring a uniform interpretation. The CJEU went on to state that, according to Article 216

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<sup>5</sup> C-361/88 *TA Luft I* (1991), C-59/89 *TA Luft II* (1991), C-431/92 *Commission v Germany (Grosskrotzenburg)* (1995), C-72/95 *Kraaijeveld* (1996), C-435/97 *WWF* (1999), C-287/98 *Linster* (2000) and C-201/02 *Delena Wells* (2004).

<sup>6</sup> See Brakeland: *Access to justice in environmental matters – development at EU level*. The article is published in Japanese in *Gyoseiho-Kenkyu (Administrative Law Review)* 2014 / No 5, but also available in English at: <<http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2014/05/arten-brakelandup.pdf>> accessed 30 May 2017

<sup>7</sup> C-237/07 *Janecek* (2008), C-240/09 *LZ I Slovak Brown Bear* (2011), C-75/08 *Mellor* (2009), C-263/08 *Djurgården – Lilla Värtan* (2009), C-115/09 *Trianel* (2011), C-128/09 *Boxus* (2011), C-165-167/09 *Stichting Natuur en Milieu* (2011), C-182/10 *Solvay* (2012), C-570/13 *Gruber* (2015), C-72/12 *Altrip* (2013), C-404/13 *ClientEarth* (2015), C-137/14 *Commission v Germany* (2015) and C-243/15 *LZ II* (2016). A summary of the CJEU cases from *Djurgården* and onwards is published on the website of the Task Force on Access to Justice under the Aarhus Convention; see <<http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppatoj/jurisprudenceplatform.html>> accessed 30 May 2017

<sup>8</sup> C-427/07 *Commission v Ireland* (2009), C-260/11 *Edwards* (2013) and C-530/11 *Commission v. UK* (2014).

<sup>9</sup> C-416/10 *Križan* (2013).

<sup>10</sup> *Slovak Brown Bear*, para 30.

TFEU, a provision in an agreement concluded by the EU with a non-member country was directly applicable when it contained a clear and precise obligation, but this cannot be said about Article 9(3) of the Aarhus Convention, since only members of the public who meet certain criteria in national law are entitled to exercise the rights provided for in that respect. However, the CJEU stated that even so, the courts of the Member States have a Union law obligation to interpret, *to the fullest extent possible*, the procedural rules of environmental law in accordance with the objectives of Article 9(3) and the objective of effective judicial protection of the rights conferred by EU law, *so as to enable an environmental protection organisation to be able to challenge before a court an administrative decision liable to be contrary to EU environmental law*.<sup>11</sup>

This obligation for the Member States' courts, that they should to the fullest extent possible interpret the national procedural rules to make possible ENGO standing in environmental decision-making, can be described as the *so as to enable formula*. It requires national courts to adopt a new understanding to open formulated provisions on standing in order to align them to the Aarhus Convention and on modern ideas of access to justice in the environmental sphere. The formula has made an extensive impact on Member States, which can be explained by the fact that most legal systems use such provisions or mere jurisprudence when defining the public concerned. In many situations it is therefore possible for national courts to apply the formula in order to grant standing in environmental cases. Perhaps one of the most important judgments came in September 2013 from the German Bundesverwaltungsgericht (BVerwG) in the *Darmstadt* case.<sup>12</sup> Here, the BVerwG granted an ENGO standing to appeal a clean air plan, arguing that the German Code on Administrative Court Procedure needed to be interpreted in light of Article 23 of Directive 2008/50 and Article 9(3) of the Aarhus Convention.<sup>13</sup>

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<sup>11</sup> *Slovak Brown Bear*, para 51. For case commentaries, see Krämer, L: *Comment on case C-240/09 Lesoochránárske zoskupenie VLK: Access to justice in environmental matters: new perspectives*. JEEPL 2011 p. 445. More critical approaches can be found in Jans, JH: *Who is the Referee? Access to Justice in a Globalised Legal Order: A Case Analysis of ECJ Judgment C-240/09 Lesoochránárske Zoskupenie of 8 March 2011*. Review of European Administrative Law 2011/1, p. 85, also Oliver, P: *Access to information and to justice in EU environmental law: The Aarhus Convention*. Fordham International Law Journal 2013 p. 1423.

<sup>12</sup> Bundesverwaltungsgericht, judgment 2013-09-05 in the case of BVerwG 7 C 21.12. An English summary is posted on the website of the Task Force on Access to Justice under the Aarhus Convention; see footnote 7.

<sup>13</sup> In a series of judgments, the CJEU has found that the German Schutznormtheorie is not in line with the Aarhus Convention and EU law, see Wegener, B: *European Right of Action for Environmental NGOs*. JEEPL 2011, p. 315 and Eliantonio, M: *Enforcing EU Environmental Law Policy Effectively: International Influences, Current Barriers and Possible Solutions*. In *New Directions in the Effective Enforcement of EU Law and Policy*. Ed. Sara Drake, Melanie Smith. Edward Elgar Publishing, 2016, p. 175-201, also Eliantonio, M & Grashof, F: *Wir müssen reden! We need to have a serious talk!* JEEPL 2016 p. 325. The German legislature has reacted slowly to this criticism, but a major reform have now resulted in amendments to the Umwelt-Rechtsbehelfsgesetz (Environmental Appeals Act), which entered into force on 2 June 2017; see Decision V/9h of the Meeting of the Parties of the Aarhus Convention on compliance by Germany with its obligations under the Convention: <https://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppcc/envppccimplementation/fifth-meeting-of-the-parties-2014/germany-decision-v9h.html>

## **2. Commission Notice on Access to Justice in Environmental Matters**

Against this background, let us examine what is in the Notice. It is rather extensive; 65 pages divided into 11 sections with 212 paragraphs. To begin with, there is a general part, consisting of the introduction (A) and a section on the legal context (B). After that comes section C – “Guaranteeing environmental access to justice” – which contains most of the guidance (C1-6; paras 31-209). It deals with key concepts such as public interests and judicial protection, legal standing, the scope of judicial review, effective remedies, costs, and the requirements for timely and effective justice. The document concludes with a short section on the requirement to inform the public about access to justice rights (C7), a couple of conclusions (D) and a listing of the relevant case-law from the CJEU (Annex I) and cited legislation (Annex II). In the following, I shall try to catch the main lines of reasoning and conclusions drawn by the Commission in the Notice, section by section.

### 2.1 Aim and content of the Notice (A; paras 1-16)

According to the Introduction, the goal that the Notice has is somewhat limited – merely to bring together and draw some inferences from the CJEU’s case-law concerning access to justice in environmental matters, focusing on acts, decisions and omissions by public authorities in the province of EU environmental law. The aim is to provide a clear idea of what is necessary at national level in order to improve the implementation of EU law requirements on access to justice in this field of law, where the national legal systems show considerable differences. According to the Commission, an interpretative guidance is best suited for this purpose, taking into account that Member States have shown themselves not to be receptive to any legislative instruments on the subject. It is also emphasized that EU environmental law establishes a common framework of obligations for Member States and rights for the public concerned and that there is a need for improvement of the national application of those rules on important areas, such as waste, nature conservation, air quality and water management. Furthermore, it is stated that while access to justice requirements in this area of law reflect international obligations through the Aarhus Convention and have specific characteristics in that public interests are involved, they also meet the broader picture of strengthening the rule of law (para 14):

Effective justice systems play a crucial role in upholding the rule of law and the fundamental values of the European Union, as well as in ensuring effective application of EU law and mutual trust. That is why improving the effectiveness of national justice systems is one of the priorities of the European Semester, the EU’s annual cycle of economic policy coordination.

### 2.2 The legal context (B; paras 17-30)

According to the Notice, the access to justice requirements contribute to the pursuit of the objectives of EU policy on the environment as expressed in Article 191 TFEU. The common legislation created under this policy creates a wide range of obligations that Member States’ competent authorities must discharge, which are applied in a variety of administrative acts, decisions and omissions. At the same time, the CJEU has developed general principles of law that are relevant in this context, while respecting the procedural autonomy of Member States. Basic to such concepts are the principles of equivalence and effectiveness and the rule of law, the latter being expressed in Article 19(1) TEU and Ar-

Article 47 of the European Charter of Fundamental Rights (CFREU), reflecting Articles 6 and 13 of the European Convention on Human Rights (ECHR). Furthermore, both the European Union and all its Member States are Parties to the Aarhus Convention, which is therefore an integral part of EU law and binding on Member States in accordance with Article 216(2) TFEU. The aim of that Convention is to “*contribute to the protection of the rights of every person of present and future generations to live in an environment adequate to his or her health and well-being*” (Article 1). One way of realizing this mission is to provide the public with the means of challenging environmental decision-making by way of access to courts, as expressed in Article 9. It is thus for the national courts to ensure effective judicial protection in the fields covered by EU environmental law by interpreting its procedural laws in ways that, to the fullest possible extent, are consistent with the objectives laid down in the Aarhus Convention. The reason for this, according to the Notice, is that while the legislative framework is created at EU level, it is at Member State level – especially through the national courts – that the access to justice provisions acquire practical reality and meaning. Here, as in any area of law, those are the “ordinary courts” for the implementation of EU law within the legal systems of Member States.

### 2.3 Public interests. Obligations and rights relevant to the exercise of judicial protection (C1; paras 31-57)

It is made clear from the beginning in the Notice that the requirements for access to justice in environmental matters serve double aims: first, to enable the public concerned to exercise their rights under EU law, and second, to help to ensure that the aims and obligations of EU environmental legislation are attained. This dual approach is upheld throughout the document. It is stated that EU law protects general public interests and contains instruments to secure them, such as binding quality objectives, monitoring obligations, plans and programmes, permit requirements, as well as environmental impact assessments of a certain quality of substance and procedure. Decisions, acts or omissions represent the ways that public authorities fulfil – or take a position on – duties placed on them under EU environmental law – for example, to ensure that waste facilities and industrial operations operate under a permit. EU law also recognizes that the public should be allowed to play an active role in order to preserve, protect and improve the environment. The Commission holds that the interests protected through environmental law give rise to procedural and substantive rights for individuals and their associations, which need to be protected in national courts. In the case-law of the CJEU, yet another aspect has been highlighted, namely that those who are affected by an administrative act or omission concerning obligations under EU environmental law should have the possibility open to them for challenging such decision-making in court in order to ensure that such obligations are met. The Commission concludes therefore that access to justice for the public concerned does not only aim to protect rights and interests, but is also an instrument for ensuring accountability in respect of such decisions, acts or omissions.

### 2.4 Standing for individuals and ENGOs (C1, paras 44-57, C2; paras 58-107)

In section C2.2 of the Notice, “legal standing” is defined as “*the entitlement to bring a legal challenge to a court of law or other independent and impartial body in order to protect a right or interest of the claimant regarding the legality of a decision, act or omission of a public authority*”. According to the Commission, standing can vary depend-

ing on the subject-matter of the contested decision, act or omission, and also depending on whether the claimant is an individual or a recognised ENGO.

As for information cases, standing to challenge administrative decisions or omissions belongs to “any natural and legal person”, which follows directly from Article 9(1) Aarhus Convention and its implementation into EU law through the Access to Environmental Information Directive (2003/4, EID).

EU environmental legislation generally obliges the competent authorities of Member States to make decisions on specific activities. Quite often, public consultation is mandatory. Such requirements confer procedural rights to those who are entitled to participation, which – according to the case-law of the CJEU – must be protected in court. The Commission argues that the recent judgement in the *LZII case* made clear that these demands for access to justice come into play as soon as there is a demand for public participation in accordance with Article 6 Aarhus Convention, even when this is not clearly expressed in EU secondary legislation. Article 9(2) of that Convention, read in conjunction with Article 47 CFREU, means specifically that whenever a decision-making procedure concerns an activity that might have a significant effect on the environment – for example, on nature conservation, waste and water management – the public concerned must have a possibility to request judicial review of the administrative position taken.

Standing rights, according to Article 9(2), belong to the “public concerned”, as defined in Article 2(5) Aarhus Convention and 1(2)(d) EIA Directive: “*the public affected or likely to be affected by, or having an interest in, the environmental decision-making*”. According to the Notice, both the Convention and EU law allow for a differentiation of standing and do not require *actio popularis*. As for individuals, EU environmental law confers procedural and substantive rights on them. Procedural rights relate in particular to participation requirements, whereas substantive rights mainly concern provisions aimed at protecting human health and property in a wide sense. Member States can confine standing to those who have “sufficient interest” or are affected by the “impairment of a right”, though the latter doctrine poses challenges. While the CJEU has stated that Member States can decide on what constitutes such rights, this discretion is qualified by the need to respect the objective of ensuring a wide access to justice. The CJEU has upheld such rights concerning air quality plans, emission reduction programmes and derogations from nature protection. The Commission contends that this case-law therefore underlines the need for Member States and national courts to ensure legal standing to challenge very broad categories of decisions, acts or omissions on the basis of an extensive set of substantive rights. Examples of such provisions can be found in the directives on waste (2008/98), water (2000/60) and atmospheric pollutants (2016/2284). In the Notice, property rights are understood broadly in this context, including the right to enjoy the environment for specific purposes, such as fishing, recreation, hunting, research and education.

According to the Notice, recognized NGOs enjoy a legal *standing de lege*,<sup>14</sup> which is of importance not only for the admissibility of a claim, but also for the scope of judicial review. Member States are permitted to use criteria for the recognition of these organizations, but they must still be in line with the objectives of the Aarhus Convention. ENGO

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<sup>14</sup> Different terms are used in the literature for the legal construct that ENGOs have standing to protect environmental interests: “privileged standing”, “standing per se” and here “standing de lege”. In my view, “standing in their own capacity” is the expression that best catches the concept.

standing cannot be restricted to the existence of certain individual interests. However, a requirement for a certain activity in the field of environmental law can be used as a criterion. If a numeric criterion is set for the number of members required, this must not run counter to the objective of providing wide access to justice and must also recognize the importance of small and local ENGOs. Member States may have other criteria, such as independence, non-profit, distinct legal personality, solid financial base and duration of time of existence of the organization, but these must be made in parallel with the CJEU's reasoning in the *Djurgården* case. Non-discrimination towards foreign ENGOs follows from Article 3(9) Aarhus Convention and is evidently a part of EU law. Here it can be noted that when the Collective Redress Recommendation (2013/396) is applicable, then Member States can apply the mutual recognition criteria therein. Finally, prior participation cannot be required as a precondition for standing, as the administrative procedure is separate and has a different purpose from judicial review.

Concerning access to justice in relation to decision-making under the ELD, those who are affected by such damage can make a request to the competent authority to take a certain action and are also entitled to challenge in court the procedural and substantive legality of the authority's decision, act or omission. As these provisions in the ELD draw closely to the EIA Directive, individuals and ENGOs should enjoy standing along the lines of the case-law under that directive.

As for environmental legislation outside the scope of the above-mentioned areas – such as national implementation legislation, general regulatory acts, plans and programmes and derogations – it is stated in the Notice that Article 9(3) Aarhus Convention applies. Thus national law on standing applies here, but must be consistent with Article 19(1) TFEU and Article 47 CFREU. In Article 9(3), standing is given to the “public”, a concept which may include ENGOs. Even though the organizations are not given standing *de lege*, the CJEU made clear in *LZI* that Article 9(3) is intended to ensure effective environmental protection and that a uniform application and interpretation of EU law is needed. The Commission concludes that this line of reasoning necessitates access to national courts or independent tribunals according to Article 267. Therefore, Member States are obliged to provide for legal standing to ensure access to an effective remedy for the protection of procedural and substantive rights conferred by EU environmental law even if the EU environmental legislation at stake does not contain specific provisions on the matter.

Furthermore, much of environmental legislation requires a mandatory public participation, which is also made clear by Article 7 Aarhus Convention. On this basis, according to the Notice, mandatory plans and programmes under EU law for which no explicit public participation provisions are designed may still need to include public consultation. This in turn might create access to justice rights along the lines of *Kraaijeveld*, where the CJEU said that beneficiaries of participation rights are entitled to ask for a review by a court of whether the required course of conduct was respected.

### 2.5 Scope of judicial review (C3; paras 108-154)

According to the Notice, the scope of review determines how national judges should assess the legality of contested decisions, acts and omissions. There are two aspects to this. The first concerns the possible grounds of judicial review; that is, the areas of law and legal arguments that may be raised. The second concerns the intensity of scrutiny, also

called the standard of review. Provisions about the intensity of review exist in some environmental legislation, such as the EID, ELD and IED, but are commonly lacking and are therefore developed in the case-law of the CJEU.

The Commission contends that the first aspect on this issue, it is mostly relevant for those Member States that apply a rights-based approach to standing in environmental cases. The CJEU has made clear that national courts are allowed to confine their reviews to the provisions that entitle an individual to bring his or her claim. However, this does not apply to ENGOs, which must be able to rely on any EU law provisions with direct effect when they take legal action. Concerning Article 9(3) activities, where ENGOs lack *standing de lege*, they are at a minimum entitled to a judicial review in respect of those provisions of law that give rise to actionable rights and interests. Moreover, the CJEU has made plain that Member States cannot preclude the arguments on judicial review from those that were raised in the participation phase of the decision-making, though it is permissible for the national court to dismiss those that are submitted abusively or in bad faith.

It is furthermore said in the Notice that the requirements for the standard of review depend upon the kind of EU legislation at stake. On a general level, it should include both procedural and substantive legality, even when EU secondary law does not contain any clear guidance. On access to information, the national review procedure *must cover the relevant principles and rules of EU law*. The latter includes specific conditions that a public authority must fulfil in accordance with the EID.<sup>15</sup>

Concerning environmental activities, express provisions on the standard of review exist only in the ELD. However, according to the Commission, *East Sussex* and *Janecek* indicate that the EU law principle of judicial review covering substantive and procedural legality applies to acts and omissions under both Article 9(2) and Article 9(3) Aarhus Convention, which means that the two aspects of legality must be controlled by national courts. As for procedural legality, those obligations commonly relate to public consultation provisions and other kinds of mandatory requirements, which are not at the discretion of the competent authorities to discharge.

On substantive legality, the Notice holds that the first aspect concerns the facts of the case. National courts are generally not required to carry out information-gathering or factual investigation of their own, but a minimum standard has to be applied to the examination. A limited review does not *per se* make it excessively difficult to exercise the rights conferred by EU law, but the judicial review must at a minimum enable the court to apply effectively the relevant principles and rules of EU law. The Notice summarizes that this means that the standard of review applied has to ensure that the objectives and the scope of the EU law in question are safeguarded. It also has to take into account the extent of the decision-maker's discretion in evaluating the facts and drawing conclusions from them. This conclusion is illustrated with examples from the case-law of the CJEU. As to the EIA Directive, it is clear that the review proceedings must cover the reasons for the contested screening decision, and also the quality of the EIA. According to *Waddenzee*,<sup>16</sup> an authorization for a plan or project that might have a significant impact on a Natura 2000 site can only be given on condition that no reasonable scientific doubt remains as to such effect. This means that the national judge must determine whether or not the scien-

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<sup>15</sup> C-71/14 *East Sussex* para 53, 56 and 58.

<sup>16</sup> C-127/02 *Waddenzee*, para 59.

tific evidence relied upon by the competent authority leaves such doubt. Moreover, cases concerning air quality show that it must be possible for the national courts to evaluate the adequacy of the measures included in action plans in accord with Directive 2008/50 (*Janecek* and *ClientEarth*), a requirement which is similarly valid for programmes in accordance with the National Emissions Ceiling (NEC) Directive 2016/2284. A similar vein of reasoning can be applied in cases concerning the substantive legality of plans consistent with EU legislation on waste and water.

#### 2.6 Effective remedies, timeliness and efficiency of environmental procedures (C4; paras 155-173 and C6; paras 196-201)

In short, Article 9(4) Aarhus Convention stipulates that environmental procedures shall be effective. In addition, there is a general EU law requirement for national courts to nullify the unlawful consequences of breaches of that law when confronted with such a case, deriving from Article 4(3) TEU and Article 47(1) CFREU. According to the Notice, this means that even when Article 9(4) Aarhus Convention is not implemented in secondary legislation of EU law, the effectiveness standard still applies, which was illustrated in *Križan*. Here, the CJEU stated that a general requirement of EU law was that interim measures could be ordered by the national court in order to stop the contested activities while a review of the decision-making was ongoing.

Furthermore, the Notice contends that in a number of cases, the CJEU has taken a stand on what can be demanded from the competent authorities if a certain activity has been permitted without the necessary EIA being in place. In *Delena Wells*, the Court stated that the national administration was obliged to undertake all general and particular measures for remedying the failure to carry out an EIA, including considering the revocation or suspension of the permit. However, minor procedural defects do not necessarily require to be rectified, provided that it can be established without placing the burden on the applicant for judicial review that they did not affect the contested decision as such (*Commission v Germany*). Furthermore, it must also be possible for the national court to order the competent authority to undertake certain measures, such as adopting a plan required by EU law, or to address deficiencies in order to revise such a plan (*Janecek, ClientEarth* and *Altrip*).

Another situation occurs when an unlawful activity has already caused damage to the environment. As also was shown in *Delena Wells*, financial compensation to those persons whose rights have been affected might be an option. In *Leth*, the CJEU made it unequivocal that breaches of environmental law may give rise to claims for property damage under the doctrine of state liability. According to the Notice, this rationale applies to other breaches of EU environmental law, such as access to justice rights. As can be seen from C-399/14 *Grüne Lige Sachsen* (2016), the possibility of financial redress also extends to the environment itself, especially if compliance with the legal requirements would have entailed avoiding compensation for environmental damage.

On time issues, the Notice has two approaches. To begin with, Member States are entitled to require that environmental claims are made within a certain time limit, which will contribute to legal certainty. On the timeliness criterion in Article 9(4) Aarhus Convention, it is emphasized that it is in the interests of all actors not to pursue prolonged proceedings. Business, administration and the public are similarly interested in resolutions of environmental conflicts without undue delay, not least for the sake of clarity and in order

to avoid high costs. Such a requirement can also be understood from Art 47(2) CFREU, which corresponds to Art 6 ECHR and the case-law of the European Court of Human Rights (ECtHR).

### 2.7 Costs (C5; paras 170-195)

Costs in the environmental procedure include participation or administrative appeal fees, court fees and other court costs, lawyers' fees, expert and witness fees and bonds for obtaining injunctive relief (also called securities or cross-undertakings in damages).

In the Notice, the cost issue is introduced by the statement that Article 9(4) – even though the CJEU's case-law relates to the EIA Directive and the IED – applies to all kinds of environmental proceedings. In *Edwards*, the CJEU pointed to Article 47 CFREU and the principle of effectiveness and made clear that a cost regime must be shaped in a way to guarantee that the rights conferred by the EU can be effectively exercised. In *Commission v Ireland*, the CJEU concluded that Article 9(4), read in conjunction with Article 3(8) Aarhus Convention, means that national courts can make cost orders, but the interpretation of the “prohibitively expensive” criterion must be given an autonomous and uniform understanding in the EU. Moreover, environmental proceedings often concern public interests with little personal gain for the applicant, which needs to be taken into account when decisions on costs are made. First, the public concerned must not be prevented from bringing an environmental claim for financial reasons. Second, there is also a need for reasonable predictability on costs. All costs in all phases of the proceedings must be included when considering what is prohibitively expensive. Though a system that requires the applicant to pay a security or bond for the obtaining of interim measures cannot immediately be precluded, those costs must also be taken into account in the overall picture. If the loser pays principle is utilized, both subjective and objective considerations are relevant. This subjectively concerns the personal circumstances of the applicant, both its personal importance and that of the environment, and the prospect of success in the case. In addition to this, the losing party's costs of the proceedings must not appear to be objectively unreasonable (*Commission v UK*). A system of cost-capping by way of a decision by the court at the beginning of the proceedings (“protective cost order”) might prove useful, since it brings greater predictability for those involved. If reciprocal cost-capping is applied, the decision also shows how much the claimant may gain if winning the case. One-way cost shifting might also present features that address the shortcomings of a strict cost regime; for example, by requiring the authorities to cover their own costs irrespective of the outcome of the case, or the State paying part of an unsuccessful claimant's costs if the action concerns strong public interests. In any event, the criteria used must be predictable for the public concerned, and not granting too much discretion to the national courts, considering the high costs often involved in environmental cases.

Finally on legal aid, it is noted in the Notice that EU secondary law is silent. But Article 47(3) CFREU states that legal aid shall be made available to those who lack sufficient resources insofar that it is necessary to ensure effective access to justice. According to the Notice, Member States can decide the forms for such assistance: pre-litigation advice, legal assistance and representation in court, exemption from costs in the proceedings, and so on. Though legal aid is not absolute and may be subject to restrictions, the conditions

therefore “shall not deprive individuals of the practical and effective access to court to which they are entitled” (195<sup>17</sup>).

### 3. Reflections on some key issues and discussion points

#### 3.1 General points on the Notice

From the ENGO community, criticism has been strong over the fact that there will be no access to justice directive since the withdrawal of the 2003 proposal in 2014. Against this backdrop, a soft guidance document from the Commission is clearly a disappointment, especially since a directive would have been a great advantage in times where many Member States’ governments are less enthusiastic about the strengthening of the possibilities available to the public to have a say in environmental decision-making. My own country can be used as an illustrative example, where anti-Aarhus sentiments among organisations for farmers and hunters, as well as politicians have gained in force over recent years: introducing a ban on hunting decisions on strictly protected species (which was declared invalid by the courts);<sup>18</sup> failure to pass legislation in Parliament that adapts the rules on standing to the case-law of the CJEU; a governmental commission where it is openly argued that the Aarhus Convention does not apply to forestry, or, alternatively, that Sweden does not have to abide by international obligations, since there is no EU law requirements covering such activities. On the other hand, as the attitude of Swedish politicians only reflects a common position in many Member States, the chances of passing a directive on access to justice at EU level would be slim or non-existent today. I therefore share the Commission’s position that a soft guidance is better than nothing, at least for now. But I also think it is worth pointing out that the Notice is not just any soft instrument from a lower level of administration within the DG Environment. Instead, it has a certain status as it has been processed among the different DGs of the Commission and officially approved by the College of Commissioners at its meeting in April. In this way, it is a special communication that interprets existing EU law requirements, which is – if I am correctly informed – a legal instrument that is used extensively in the area of internal market and competition.<sup>19</sup>

The stated point of departure for the Notice is to clarify and draw careful inferences from the case-law of the CJEU. However, this is not a simple task, as the development of this jurisprudence has been very dynamic with regard to access to justice in environmental matters. Still, my impression is that the Notice reflects the CJEU’s position honestly and when the arguments go beyond this, it still follows the Court’s lines of reasoning. On points where EU law is inexplicit, this is obviously also mirrored in the Notice. As for shortcomings, the structure of the document could have been made clearer as there are some overlaps between the different sections. I suspect this is a consequence of the doc-

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<sup>17</sup> With reference to Explanations relating to the Charter of Fundamental Rights (OJ 2007-12-14, C 303/17), Article 47(3) CFREU.

<sup>18</sup> See Darpö, J: *The Commission: a sheep in wolf’s clothing? On infringement proceedings as a legal device for the enforcement of EU law on the environment, using Swedish wolf management as an example.* JEEPL 2016 p. 270.

<sup>19</sup> Thus I do not share the criticism from the ENGO community (Justice & Environment, see footnote 41) that the Notice was not issued as a Recommendation according to Article 288 TFEU. Both these guidances are published in the C Series of Official Journal and their status is equal.

ument's being a joint venture between different authors and the result of negotiations within the Commission. This is probably also why there is a certain imbalance between the different sections of the document; whereas some are quite elaborate and detailed, others are more superficial. The latter is especially apparent towards the end of the document, where some of the sections are rather sketchy. To use European stereotypes, the document gives the impression that the sections on systematic issues and standing were made by a German, the one on the scope of trial was written by someone from France, the costs were discussed by a Brit and the section on effectiveness being composed by someone wanting to get home from the office for the evening.

### 3.2 Environmental obligations and the role of the ENGOs

In my view, a clear step forward lies in the fact that the Notice emphasizes the dual approach when discussing access to justice possibilities according to EU law on the environment. This may be the first time that the Commission in an official document recognizes that the idea of direct effect of EU law does not only relate to the existence of the individual's *rights*, but also to provisions that express unconditional and sufficiently precise *obligations* for the national authorities in their decision-making in this field of law. This was not a day too soon, as the CJEU had many years ago clarified that environmental provisions in EU law can have direct effect. The first of these cases dealt with the EIA Directive, long before the EU ratification of the Aarhus Convention. Others concerned Natura 2000 and species protection. Many of these cases were brought to court by ENGOs.<sup>20</sup> Moreover, already in these cases the CJEU seems to focus not on "rights", but rather on "obligations". In the *Kraaijeveld* case from 1996, the Court had stressed the available possibilities for those concerned to be able to rely on the provisions in the directive in order to challenge an administrative decision in court, especially in relation to the obligation of Member States "*to pursue a particular course of conduct*".<sup>21</sup> Thereafter, this statement has been repeated in a series of environmental cases, where the CJEU has made clear that it would be incompatible with the binding effect attributed to a directive to exclude the possibility that the *obligation which it imposes* may be relied on by those concerned. The emphasis on obligations is particularly relevant where it is difficult to argue that administrative decisions affect the specific rights of individuals, such as EU nature conservation law. In more recent case-law, the CJEU has emphasised that, concerning provisions with direct effect, "*natural and legal persons directly concerned must be able to require the competent authorities, if necessary by bringing the matter before the national courts, to observe and implement such rules*".<sup>22</sup> Evidently, the underlying reason for the jurisprudence of the CJEU is that Member States shall not have the advantage of being able to escape from their obligations under EU law on the environment by simply avoiding implementing them. This approach clearly reflects the principle of "rule of law", which becomes especially relevant in environmental cases.

Another rationale of CJEU case-law that is reflected in the Notice is that the public plays a crucial role as the guardian of the correct application of EU law, something al-

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<sup>20</sup> For example: *C-44/95 Lappel Bank* (1996) and *C-435/97 WWF* (1999).

<sup>21</sup> *Kraaijeveld*, para 56.

<sup>22</sup> *C-165-167/09 Stichting Natuur en Milieu*, para. 100, see also *Janecek*, para 38 and *C-41/11 Inter-Environnement Wallonie*, para 42.

ready stressed in *Van Gend en Loos*.<sup>23</sup> This is even truer when it comes to EU environmental law and has been emphasized in a number of cases concerning the Aarhus Convention and its implementation into the EIA Directive.<sup>24</sup> That the ENGOS play a key part in that respect as bearers of EU law on the environment was finally confirmed in *Trianel*, where the CJEU stated that the rights that the ENGOS by definition enjoy, and which they must be able to defend in court, include national implementation law and provisions of EU environmental law having direct effect.<sup>25</sup> Thus it follows from this case that ENGOS represent the environmental interest, not only where the EU law provisions have been implemented in national legislation, but also where they have direct effect by way of being sufficiently precise and unconditional. A reasonable conclusion to be drawn from this judgment in combination with the CJEU's reasoning in *Slovak Brown Bear*<sup>26</sup> and the principle of judicial protection in Article 19 TEU is that this role of the ENGOS is generally applicable in all areas of EU environmental law. The prerequisites for when and how this role can be played by the ENGOS might, however, vary, depending upon whether Article 9(2) or Article 9(3) of Aarhus is applicable.

### 3.3 Article 9(2) and 9(3)

The relationship between these two Articles of the Aarhus Convention and EU law is complicated, which of course affects the findings in the Notice. On the face of it, it is rather simple: Article 9(2) is implemented in EU law through PPD concerning permit decisions on activities that are listed in Annex I to Aarhus. These requirements were mostly included in the EIA Directive and the IPPC/IED Directives. Moreover, Article 9(2) is directly applicable in Member States law on decisions concerning all other kinds of activity that might have a significant effect on the environment.<sup>27</sup> One such an example may be a clear-cutting operation in a sensitive area in the forest, as these activities are not listed in either Annex I to Aarhus or the Annexes to the EIA Directive. Article 9(3), on the other hand, is not implemented in EU law – except for a legal construct in the ELD on the possibilities open to the public concerned to ask the administration to take remedial action<sup>28</sup> and a similar provision in the Seveso Directive.<sup>29</sup> Moreover, Article 9(3) does not have “self-executing” effect in Member State law.<sup>30</sup>

From representatives from industry and some governments, the conclusion to be drawn about the legal situation is that it is for Member States to decide whether or not Article 9(3) should be implemented in national law. In their view, Member States have no obligation according to Union law to give standing to the public outside the scope of Article 9(2). That such a position would be in breach of our international obligations is rarely mentioned. Still, even if one assumes that international law is too soft to be taken seriously, I think this attitude treats too lightly the obligations that Union law places on Member States. First of all, in the *Slovak Brown Bear* the CJEU – at the same time as

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<sup>23</sup> C-26/62 *Van Gend en Loos v Netherlands* (1963), the second last paragraphs (not numbered) above “The second question”, see Brakeland 2014 (footnote 6), p. 6.

<sup>24</sup> C-260/11 *Edwards* (2013), para. 40, C-530/11 *Commission v. UK* (2014), para. 47.

<sup>25</sup> C-115/09 *Trianel* (2011) para 48 and 58.

<sup>26</sup> C-240/09 *Slovak Brown Bear* (2011), para 51.

<sup>27</sup> C-243/15 *LZ II* (2016), paras 46-49.

<sup>28</sup> Articles 12 and 13 of Directive 2004/35.

<sup>29</sup> Article 23 of Directive 2012/18.

<sup>30</sup> C-240/09 *LZ I Slovak Brown Bear* (2011), paras 43-45.

pronouncing that Article 9(3) does not have self-executing effect in Member State law – stated that this provision was an integrated part of EU law and therefore binding upon Member States. Also, it is important to note that the principle of judicial protection in EU law is a general concept that is independent of any implementation of Aarhus and goes in some situations even further in requiring access to courts. Any restriction on standing for the public concerned in environmental matters must not render it impossible to challenge administrative decision-making (principle of effectiveness), but instead be made in accordance with the aim of granting a wide access to justice. Moreover, where Article 9(3) of Aarhus might be satisfied with a fair and effective “administrative appeal”, EU law requires that the case can be brought to the CJEU by way of an Article 267 request from a national “court or tribunal”. This was the reason why the Supreme Administrative Court in Sweden quashed the appeals ban provision in hunting law, a stand that I think many Member States’ courts would find reasonable. It is also noteworthy that the CJEU in the *LZII* case referred to both Article 19(1) TEU and Article 47 CFREU when it found ENGO standing rights in a case concerning the building of an enclosure for deer in a nature reserve.<sup>31</sup> It is reasonable to believe that such a broad understanding of “rights” in an environmental context will also have implications in Article 9(3) cases.

The Notice draws cautiously on these factors in several ways. First, it expands *Janecek* and *ClientEarth* to EU law provisions on water and waste. Second, it emphasizes that the public concerned must be able to defend its interest and points to the key role that ENGOs play in this respect. Third, the Notice concludes that Member States are obliged to provide the public concerned with legal standing to ensure effective justice in relation to EU environmental law, even when that legislation does not contain specific provisions on the matter. In my view, these are important standpoints that should be used by national lawmakers and courts when deciding access to justice issues in this field of law.

### 3.4 Standing for individuals and organizations

In the Notice, the Commission states that standing can vary depending on the subject-matter of the contested decision, act or omission, and also depending on whether the claimant is an individual or a recognized ENGO. Concerning criteria for such standing, the Notice refers to the case-law of the CJEU and arrives at some careful conclusions therefrom. This is especially true about criteria for when ENGOs should have access to courts and the text reveals awareness that this issue has undergone a dynamic development in recent years and that more is to come. The most exciting statement is perhaps that because the standing provision in ELD is phrased in a similar way to that in the EIA Directive, the same criteria for ENGO standing would apply. In this way it is argued that Article 9(2) impacts on the understanding of Article 9(3), which is logical. Though other parts of the reasoning seem to be a bit restricted, I cannot find any major flaws or controversies in the reasoning about ENGO standing.

In my view, however, the Notice makes an important clarification about standing criteria for individuals belonging to the public concerned. As was determined in the decision-making of the Compliance Committee early on, the Aarhus Convention does not require *actio popularis*, that is, a system that allows for anyone to challenge breaches of

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<sup>31</sup> C-243/15 *LZ II* (2016), paras 63-73.

environmental law.<sup>32</sup> Quite the opposite, the Convention is open for both “right-based” and “interest-based” systems, while at the same time emphasizing that standing criteria for individuals must be construed generously in order to allow for a wide access to justice in environmental matters. In other words, there must be an available possibility for someone to challenge an administrative decision, act or omission.<sup>33</sup> This latter statement has sometimes been interpreted as requiring that at least *one individual* in each and every situation shall have standing according to national law.<sup>34</sup> I do not share this position, which I find hard to reconcile with the recognition of different systems for allowing individuals to have a say in environmental matters, while at the same time stating the importance of ENGO standing in this field of law. In fact, such a loosening up of criteria for individuals’ standing would render the distinction to *actio popularis* without any real meaning.

However, this is not the view conveyed in the Notice. With reference to *Trianel* and *Gruber*,<sup>35</sup> the text confirms that Member States can confine standing to those individuals who have “sufficient interest” or are affected by the “impairment of a right”, while at the same time, arguing that the right-based system poses challenges in that the criteria used must still ensure a wide access to justice. The conclusion therefore is that Member States and national courts must ensure legal standing for individuals to challenge very broad categories of decisions, acts or omissions on the basis of an extensive set of substantive rights. This approach has been further strengthened after the publication of the Notice through the judgment in *C-529/15 Gert Folk* (2017), which concerned the notion the “public concerned” in Article 12 of ELD. Here, the CJEU clarified that all three categories belonging to that group – those who are affected, those with an interest in the decision-making and those who allege impairment of a right – have standing, alternatively and independently from one another. As this categorization also exist in the EIA directive (Articles 1.2(e) and 11), it is reasonable to believe that this approach will have wider implications. However, this is not the same as saying that in each and every situation there should be an individual who has standing. On the other hand, the criteria used for individual standing may exclude all such persons from taking legal action, this standpoint also highlights the crucial role played by the ENGOs in protecting the environment. Furthermore, it is reasonable to believe that the jurisprudence of the CJEU will develop towards a wider standing also for individuals in environmental cases. For example, it would be consistent with that trend that individuals will be afforded greater opportunities to invoke public interests in cases where they have been granted standing. There are two rea-

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<sup>32</sup> See, for example, ACCC/C/2005/11 *Belgium*, paras 35–37, ACCC/C/2006/18 *Denmark*, paras 29–31, ACCC/C/2011/63 *Austria*, para 51.

<sup>33</sup> On the encounter between the German Schutznormtheorie and Aarhus, see Lohse, EJ: *Surprise? Surprise! – Case C-115/09 (Kohlekraftwerk Lunen) – A victory for the Environment and a loss for procedural autonomy of the Member States?* European Public Law 2012, p. 249 and Müller, B: *Access to the courts of the Member States for NGOs in environmental matters under European Union law.* Journal of Environmental Law 2011, p. 505.

<sup>34</sup> See Justice & Environment 2017 (footnote 41), paras A 19–20. I am also informed (by the author) that this is the position of Jerzy Jendrośka, professor at the Faculty of Laws, Opole University and long-standing member of the Compliance Committee. His opinion is based on the Committee’s findings in *C/2006/18 Denmark* (para 29) and is expressed in Beck’s Commentary to Polish environmental law, however in Polish, see Magdalena Bar and Jerzy Jendrośka to article 185 of the Environmental Protection Act in: M. Górski/M. Pchałek/W. Radecki/J. Jerzmański/M. Bar/S. Urban/J. Jendrośka: *Prawo ochrony środowiska. Komentarz*, CH Beck, Warszawa 2014, p 574- 577.

<sup>35</sup> *C-115/09 Trianel*, paras 45 and 55, *C-570/13 Gruber*, para 40.

sons for this. First, it is often difficult to distinguish public interests from private, which can be illustrated with cases concerning air quality. Second, in line with *Janecek* and *ClientEarth*, it would not be surprising if the CJEU further strengthened the rule of law reasoning in environmental cases, meaning that the obligations expressed in environmental directives must be complied with by the national authorities, regardless of who is driving the case.

### 3.5 Scope of review

Another clear advancement in the Notice is the discussion about the scope of review. The obvious starting point is that Article 9(2) of the Aarhus Convention requires that the public concerned shall have standing to challenge both procedural and *substantive legality* in administrative decisions, acts and omissions in environmental matters. To begin with, the Notice argues that this also applies to administrative decision-making covered by Article 9(3), meaning that both aspects of legality must also be controlled by the national courts in these cases. Thereafter, the reasoning in the Notice takes stock of the repeated statement by the CJEU that the effectiveness of environmental provisions in EU law would be weakened if the public concerned was prevented from relying on it before its national courts, and if the latter were prevented from *taking it into consideration* as an element of EU law in order to rule whether the national legislature had kept within the limits of its discretion set by the directive.<sup>36</sup> According to the Notice, the latter means that the Member State's courts should make an evaluation of their own of the case to see whether the administration had decided in accordance with those provisions. Drawing from *Waddenzee*, *Janecek* and *East Sussex*, it is argued that the national legal systems must allow for the courts to effectively review the relevant principles and rules of EU law; for example, by evaluating scientific evidence required in EU law, or the adequacy in compulsory plans relating to air quality, water and waste. I do agree that this follows logically from the CJEU's case-law, and statements to this effect can be found in many more cases.<sup>37</sup> Or as Advocate General Sharpston expresses in the ongoing *Einsiedelbach*-case in Austria:<sup>38</sup> *The procedural autonomy of the Member States is not absolute. It must be exercised in keeping with the aims and the objectives of the Aarhus Convention and of the Water Framework Directive.* However, this is not the place to delve deeper into this very interesting discussion on the scope of the trial when national courts review administrative decision-making in environmental matters. Suffice it to say that it is very satisfactory that the Commission confirms that access to justice does not only concern the question of how the public concerned can get to court, but also what may come out of such proceedings when they are allowed through the Pearly Gates. In my view, this issue is equally important as standing criteria and it is high time to discuss it further.

### 3.6 Other issues

There are a number of other interesting issues that I cannot further elaborate on in this article. I will have to contain myself with dealing with just a few of them. For example, the Notice mentions the possibility of damages for the public concerned in environmental

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<sup>36</sup> WWF para 69 and C-287/98 *Linster* (2000) para 32; see also, *Waddenzee*, para 66 and C-41/11 *Inter-Environnement Wallonie and Terre Wallonne ASBL v Region Wallonne* (2012), para 42.

<sup>37</sup> See for example in C-243/15 *LZ II* (2016), para 56.

<sup>38</sup> C-665/15, AGs Opinion, para 67.

cases according to the *Francovich* doctrine<sup>39</sup> on Member State liability. The reasoning is interesting and brings a new light to the issue, as it shows that there is at least some room for the application of that doctrine to the benefit of the public concerned. Such examples may include damages to property or prohibitively high costs in environmental proceedings. However, as was illustrated in C-420/11 *Leth* (2013), there are also limits to the application of the doctrine on behalf of the public concerned, even when individuals have suffered damage from an activity that has been approved without a preceding EIA in breach of the EIA Directive.

Furthermore, the Notice discusses effectiveness in environmental cases and the possibilities open for the public concerned to obtain a halt in the execution of controversial projects when they are challenged in court. This is obviously crucial for public trust in legal systems, as we can see from the many environmental cases in Europe that are “won in court, but lost on the ground”, meaning that the challenged decision or activity had already been undertaken when the court decided that it was illegal.<sup>40</sup> Here, the Notice discusses the issue using the CJEU’s case-law from infringement cases, which I find too narrow. I would say that the Court’s criteria for intervening by way of serving an injunction in an ongoing activity in a Member State is far stricter than the national courts’ willingness to do so. One must not forget that in many legal systems, an appeal has suspensive effect, meaning that the decision at stake cannot be utilized until final judgment on the case has been delivered. In other situations, it is for members of the public to apply for an injunction to pause an environmentally damaging decision or activity while other remedies are being pursued. The criteria for obtaining an injunction vary, but they fall into four basic categories: *periculum in mora* (danger in delay), *prima facie* case (likelihood of success on its merits), personal harm and the weighing of interests.<sup>41</sup> This could have been better reflected in the Notice. Also the timeliness criterion could have been more elaborated on in the text. Though the CJEU’s case-law is almost silent on the matter, the European Court of Human Rights has developed an extensive jurisprudence under the fair trial concept in Article 6 ECHR.<sup>42</sup> Obviously, these judgments are valid in the Member States of the Union.

Finally concerning costs, the reasoning in the Notice reflects what the CJEU has said in its English cases, mainly *Edwards* and *Commission v UK*. In my view, the discussion therefore is too much coloured by a common law perspective. The controversies over costs in environmental proceedings have proved to be lively in many other Member States, such as Denmark, Germany, Hungary and Bulgaria, why the reasoning on this issue in the Notice ought to have been broader. Furthermore, it would have been fruitful if the reflections made had been in comparison with other attitudes and other solutions, covering legal regimes where the authorities are never reimbursed for their costs in the proceedings, where actions for cross-undertakings in damages do not exist, where the

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<sup>39</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* (1991).

<sup>40</sup> See Darpö, J: *Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union*. European Commission 2013-10-11, at p. 23 (European Commission 2013-10-11)/Scandinavian Studies of Law Volume 59: Environmental Law, p. 351. [http://ec.europa.eu/environment/aarhus/access\\_studies.htm](http://ec.europa.eu/environment/aarhus/access_studies.htm),

<sup>41</sup> For more information on suspensive effect and injunctive relief, see Epstein, Y: *Access to Justice: Remedies* p. 86ff. Study 2011-03-09 for the Task Force on access to justice under the Aarhus Convention; [https://www.unece.org/env/pp/tfaj/analytical\\_studies.html](https://www.unece.org/env/pp/tfaj/analytical_studies.html)

<sup>42</sup> See, for example, *Matti Eurén v. Finland* (ECtHR 2010-01-19, case 26654/08).

courts have a duty to find the facts of the case on their own motion (*ex officio*) and where the courts have access to in-house experts or technical judges.

#### 4. Concluding remarks

All in all, I think the Commission's Notice is an interesting document that highlights a number of key issues on access to justice in environmental matters. In my view, the document represents three rather big steps forward in comparison with previous standpoints from Brussels: first, in the emphasizing of obligations instead of rights when discussing direct effect of provisions with sufficient clarity, thus highlighting the crucial role that the principle of judicial protection plays in environmental law; second, in extending the field of application for Article 9(3) in EU law and opening up for that the case-law of the CJEU under Article 9(2) has importance for an understanding of that former mentioned provision, thus bringing together the two articles; and third, by initiating a discussion on the scope of review and thereby the requirements for the review of substantive legality in EU law on the environment.

The ENGO community on the Notice has so far also been rather positive.<sup>43</sup> Naturally, these actors are critical of the fact that the proposal for an access to justice directive was withdrawn, something which colours the evaluation of the Notice. They also ask for clearer standpoints and sharper guidance to bar attempts on the part of many Member States to weaken access to justice possibilities that are open to the public and on issues such as protection for environmental defenders, costs, and the requirement that environmental proceedings are fair and equitable. Still, from what I have read so far, some ENGO commentators also note the positive sides and the progress made in the Notice. Against this backdrop, the Notice might serve as a starting point for a wider discussion on access to justice in this field of law. The pros and cons with wider and more effective access to justice for the public in environmental matters can be further elaborated on, not least to meet the arguments from those who voices concerns.<sup>44</sup> There is also a need to further develop the discussion on access to justice within the EU, especially concerning the question on the difference between direct action to the CJEU, according to Article 263 TFEU, as compared with indirect action by way of requests for preliminary rulings, according to Article 267. On the one hand, I share the critical view on the "double standard" – or the "Janus face" – of the CJEU on this issue; most affirming on access to na-

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<sup>43</sup> ClientEarth 2017-05-27, comment by Anne Fried; <https://www.clientearth.org/commission-publishes-guidance-access-justice-member-states/> and Position paper from Justice & Environment 2017-09-08; [http://www.justiceandenvironment.org/news/?no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=298&cHash=25824d383bb791b2e13889b2bb139daa](http://www.justiceandenvironment.org/news/?no_cache=1&tx_ttnews%5Btt_news%5D=298&cHash=25824d383bb791b2e13889b2bb139daa)

<sup>44</sup> The literature on Aarhus is impressive. A swift search in the last three years' issues of this journal results in articles by Fasoli (JEEPL 2016 p. 64), Squintani & Plambeck (JEEPL 2016 p. 294), Eliantonio & Grashof (JEEPL 2016 p. 325), Berthier (JEEPL 2015 p. 207), Benvenuti (JEEPL 2014 p. 163), Epinau & Birker (JEEPL 2014 p. 348), Darpö (JEEPL 2014 p. 367). Obviously, hundreds of articles have been published in other journals, reports and anthologies. In my experience, however, most of these pieces are more or less positive towards wider access to justice possibilities for the public concerned. Those who are concerned about or even opposing this development are mainly active in national journals in languages other than English, one such example being Germany where the debate has been quite lively. Others are just quiet, perhaps aware that they have the ear of the decision-makers in Europe today. But of course, there are also exemptions such as Scannell, Y: *Public participation in environmental decision-making in Ireland. The good, the bad and the ugly*. In *Environmental Democracy and law*. Ed. Báandi (Europa Publishing 2014).

tional courts, but over restrictive on the available possibilities for the public concerned to challenge decisions by EU institutions through direct action to the Court.<sup>45</sup> The indignation of the ENGO community after the Commission's remarkable behaviour before and during the 6<sup>th</sup> Meetings of the Parties to the Aarhus Convention concerning the Compliance Committee's case C/2008/32 Part II is fully understandable.<sup>46</sup> But I also share the view of the Compliance Committee in C/2014/123. In this case, it was argued that the EU had failed to implement properly Article 9(3) of Aarhus by not having adopted the access to justice directive. The Committee, however, did not find non-compliance as the Union's obligations towards the Convention – by virtue of the declaration at the ratification – only cover provisions of EU law in force. The Committee, moreover, held that the political desirability of a general access to justice directive or the failure of many Member States to properly implement Article 9(3) did not go to the matter of compliance of the EU with the Convention. In my view, this standpoint is correct and can be used as a starting point for a wider discussion where we could debate who shall have direct access to the CJEU and who shall have access to the national courts, thus enabling them to initiate Article 267 proceedings. Flaws in the legal systems of Member States with regard to access to justice possibilities for the public concerned cannot reasonably be put right by wider direct access to the CJEU. Instead, that discussion on how to open up the Plaumann doctrine in environmental cases should focus on those decisions at EU level that cannot be brought to the national courts, such as the Commission's derogations from bans according to Reach to market certain chemicals or substances, regional fishing quotas or EU subsidies to controversial projects that may harm the environment.

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<sup>45</sup> See Krämer, L: Access to Environmental Justice: the Double Standards of the ECJ. JEEPL 2017, p. 159.

<sup>46</sup> See [http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-57/ACCC\\_statement\\_on\\_Commission\\_proposal\\_on\\_C32\\_30.06.2017.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-57/ACCC_statement_on_Commission_proposal_on_C32_30.06.2017.pdf)