

Pulling the trigger

ENGO standing rights and the enforcement of environmental obligations in EU law

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I. Introduction

This chapter discusses the relationship between the Aarhus Convention and EU law concerning access to justice in environmental decision-making. Focus lies on environmental rights from a procedural perspective and more precisely on the legal requirements for the public concerned to have access to justice in environmental decision-making. I will use standing for environmental non-governmental organisations (ENGOS) in cases concerning nature conservation and species protection as an illustrative example. This area of law is particularly interesting, as it contains clear obligations according to international law and EU law, while at the same time, the responsibility to implement those obligations in many Member States lies exclusively on the competent authorities and the public cannot challenge the administrative decision-making in court. In my analysis, I will discuss the relationship between the Aarhus Convention and the principle of judicial protection enshrined in EU law. My conclusions suggest that the principle of judicial protection goes beyond the Convention in requiring that members of the public – often represented by the ENGOS – shall be able to challenge administrative decisions and omissions made in this area of law by having the possibility to take legal action in court.

II. Principle 10, the Aarhus Convention and EU Law

The basic idea of “environmental democracy” is expressed in Principle 10 of the Rio Declaration of 1992:¹

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate **access to information** concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the **opportunity to participate in decision-making processes**. States shall facilitate and encourage public awareness and participation by making information widely available. **Effective access to judicial and administrative proceedings**, including redress and remedy, shall be provided.

Principle 10 thus contains “three pillars”: access to information; participation in decision-making processes; and access to judicial and administrative proceedings. These pillars were developed six years later in UNECE’s Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the

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¹ Rio Declaration on Environment and Development, (adopted 14 June 1992), 31 ILM 874

“Aarhus Convention”).² By then, in the preamble to that Convention, the close relationship between environmental rights and human rights was emphasised. It was also stressed that all three pillars were of decisive importance for sustainable development and that they were intertwined to form an entirety. 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 have the right of access to a similar procedure in order to challenge the substantive and procedural legality 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.

Both the European Union and its Member States are parties to the Aarhus Convention. Article 9(2) has been implemented by various directives; for example, Directive 2003/35 on public participation (PPD),³ the EIA directive (2011/92),⁴ the IPPC/IED directives (2008/1 and 2010/75)⁵ and the ELD (2004/35).⁶ For decision-making by the institutions of the Union, the implementation is done through Regulation 1367/2006.⁷ With respect to Article 9(3), the picture is more complex. On the approval of the Convention, the EU 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. A proposal for a directive on access to justice was launched by the Commission in 2003, and deliberated for more than a decade before finally being withdrawn in 2014 due to resistance at Member State level.⁸ Since then, the efforts of the Commission have instead concentrated on developing guidance on access to justice, resulting in a Notice in April 2017.⁹

² 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

³ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 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 Council Directives 85/337/EEC and 96/61/EC, OJ L 156

⁴ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26

⁵ Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, OJ L 24/8 and Directive 2010/75/EU of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334

⁶ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143

⁷ 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.

⁸ 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.

⁹ Commission Notice on Access to Justice in Environmental Matters. Communication from the Commission (Brussels, 28.4.2017 C(2017) 2616 final).

III. Court of Justice of the EU and Its Jurisprudence on Access to Justice

In describing the relationship between Aarhus and the EU since 2005, one may say that implementation measures have been kept to a minimum. In the era of Better Regulation environmental democracy has not been an issue closest to the heart of the Commission.¹⁰ Instead, the focus has been on a lightening of administrative burdens for industry and enterprises. This minimalistic approach and general indecisiveness towards the 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 and onwards.¹¹ Since 2005, the development of case-law on access to justice has been expansive.¹² A number of milestone cases 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 NGOs¹³ or the cost issue in environmental proceedings.¹⁴ The CJEU has furthermore emphasized that the environmental proceedings must be effective in line with Article 9(4) of the Aarhus Convention.¹⁵ However, important positions have also been taken by the CJEU on the princi-

¹⁰ The Better Regulation is an overall EU strategy aimed at streamlining regulations with the objective to reduce the administrative burdens for industry and enterprises. The guidelines set out the principles that the European Commission follows when preparing new initiatives and proposals and when managing and evaluating existing legislation. < https://ec.europa.eu/info/files/better-regulation-guidelines_en > accessed 30 May 2017

¹¹ C-361/88 *TA Luft I* [1991] ECR I-2567, C-59/89 *TA Luft II* [1991] ECLI:EU:C:1991:325, C-431/92 *Commission v Germany (Grosskrotzenburg)* [1995] ECR I-2189, C-72/95 *Kraaijeveld v Gedeputeerde Staten Van Zuid-Holland* [1996] ECR I-5403, *WWF v Autonome Provinz Bozen* [1999] ECR I-5613, C-287/98 *State of the Grand Duchy of Luxembourg v Berthe Linster* [2000] ECR-I 6917 and (C-201/02 *R (Delena Wells) v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723

¹² 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

¹³ C-237/07 *Dieter Janecek v Freistaat Bayern* [2008] ECR I-06221, C-240/09 *Lesoochranárske Zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Slovak Brown Bear)* [2011] ECR I-1255, C-75/08 *Mellor v Secretary of State for Communities and Local Government*, [2009] ECR I-03799, C-263/08 *Djurgården – Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, [2009] ECR I-9967, C-115/09 *Bund für Umwelt und Naturschutz v Arnstberg (Trianel)* [2011] ECR I-3673, C-128/09 *Antoine Boxus and Willy Roua v Region Wallonne*, [2011] ECR I-09711, C-182/10 *Solvay v Region wallone* [2012] 2 CMLR 19, C-570/13 *Karoline Gruber v Unabhängiger Verwaltungssenat für Karnten and Others* [2015] ECR I-nyr (CJEU 16 April 2015), C-72/12 *Gemeinde Altrip v Land Rheinland-Pfalz* [2014] PTSR 311, C-404/13 *ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 and C-243/15 *Lesoochranárske Zoskupenie VLK v Obvodny urad Trecin (LZ II)* ECLI:EU:C:2016, C-529/15 *Gert Folk v Landeshauptmann von Steiermark* [2017] ECLI:EU:C:2017:419.

¹⁴ C-427/07 *Commission v Ireland* [2009] ECR I-6277, C-260/11 *David Edwards v Environment Agency* [2013] 1 WLR 2914 and C-530/11 *Commission v. UK* [2014] 3 WLR 853.

¹⁵ C-416/10 [2013] ECR I-0000. 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/envpptoj/jurisprudenceplatform.html> > accessed 30 May 2017

ples of direct effect, effectiveness and legal protection under EU law in other kinds of cases. 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).¹⁶ The case started as a reference for a preliminary ruling concerning whether 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 answering 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*.¹⁷ The Court therefore has jurisdiction to give preliminary rulings on the interpretation of provisions falling under that agreement, especially in a situation that lies within the scope of both national law and EU law and thus requires a uniform interpretation. The CJEU went on to say that, according to Article 216 TFEU, a provision in an agreement concluded by the EU with a non-member country is directly applicable when it contains a clear and precise obligation which is not subject to the adoption of any subsequent measure.¹⁸ 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 therein. 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*.¹⁹

This obligation for the courts that 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 give a new understanding to open formulated provisions on standing in order to align them to Principle 10 and the modern ideas of access to justice in the environmental area. Since 2011, the formula has had an extensive impact in the Member States, which can be explained from the fact that most legal systems use “open provisions” or mere jurisprudence when defining the public concerned. In many situations, it is therefore possible for the national courts to use the formula in order to grant standing. Perhaps one of the most important judgments came in September 2013 from the German Bundesverwaltungsgericht (BVerwG) in the *Darmstadt* case.²⁰ 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

¹⁶ See n 13.

¹⁷ *Slovak Brown Bear* (n 13), para 30.

¹⁸ On the “self-executing effect” of international law in EU and Member State law, the CJEU made a reference to a great number of cases, among them C-213/03 *Étang de Berre v EDF* [2004] ECR I-7357

¹⁹ *Slovak Brown Bear* (n 13), para 51.

²⁰ Bundesverwaltungsgericht, judgement 2013-09-05 in case 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 n 15.

Aarhus Convention.²¹ In Sweden, the case-law on standing in environmental matters has also developed strongly in the same vein, as will be discussed in the following section.

IV. Swedish Case-law on Access to Justice in Environmental Decision-Making

Similarly to many Member States, the Swedish legislature has been reluctant to expand access to justice for ENGOs in environmental decision-making. A minimalist approach has been taken, reacting only when the legal situation has been made untenable due to case-law from the CJEU or the national courts. In some, politically more sensitive areas of law – such as wolf hunts and city development – the government has even tried to restrict ENGO standing. In contrast, Swedish courts (the Supreme Administrative Court, the Supreme Court and the Land and Environmental Court of Appeals) have been quite progressive in their approach and very sensitive to the development of the case-law at EU level.

A. Standing According to the Environmental Code

The traditional concept of standing in administrative cases in Sweden is “interest-based”. If the provisions in an Act are meant to protect certain interests, the representatives of those interests can challenge the decision by way of appeal. Standing is generally defined as belonging to the “person to whom the decision concerns”. This means that the decision affects him or her adversely and that it is appealable, which it always is as long as the decision entails factual or legal consequences in a broad sense. To gain a clearer picture of that scope of persons, one must study the case-law that has been established in each administrative area or even under specific pieces of legislation. Under the Environmental Code (1998:808), the courts have applied a generous attitude, stating that in principle, every person who may be harmed or exposed to more than a minor inconvenience by the environmentally harmful activity at stake is considered to be a party with interest. Thus everyone who may be harmed by an activity or exposed to risks – for example, neighbours, people affected by emissions or other disturbances from the activity – should have the right to appeal the decision in question.²²

In contrast to this case-law-created state of affairs, standing for ENGOs is decided by criteria in express legislation, at least as a starting point. In Chapter 16 section 13 of the Environmental Code, standing is given to certain organisations in order to appeal decisions on *permits, approvals or exemptions* in environmental matters, the criteria being that it is a non-profit association whose purpose according to its statutes is to promote nature conservation, environmental protection or outdoor recreation interests. Additional criteria are that the organisation has been active for at least three years in Sweden and has

²¹ In a series of judgements, the CJEU has found that the German Schutznormtheorie is not in line with the Aarhus Convention and EU law. The German legislature has reacted slowly on this, but a major reform seems now to be on its way; see Entwurf eines Gesetzes zur Anpassung des Umwelt-Rechtsbehelfsgesetzes und anderer Vorschriften an europa- und völkerrechtliche Vorgaben; BR 5 September 2016, Drucksache 18/9526.

²² Darpö, J: *Access to Justice in Environmental Decision-making in Sweden. Standing for the public concerned, the scope of review on appeal and costs*. Study 2015 for the German research institute Ufu on behalf of the Ministry of the Environment, published on www.jandarpo.se /In English

at least 100 members²³ or else can show that it has “support from the public”. Thus ENGOs meeting those criteria are able to defend the public interest according to their statutes, without any further qualification. In other words, they have standing in their own capacity.²⁴

These criteria for ENGO standing have been utilized very generously by the Swedish courts, which may be illustrated by a couple of landmark cases. The first is from the Supreme Court (HD) and concerned a permit for a coastal wind park in the south of the country (*NJA 2012 s. 912*).²⁵ Here, the HD started by citing the CJEU in the *Djurgården case*, where that court accepted numeric criteria, but only to the extent that they were necessary to decide whether the organisation still existed and was active. The standing criteria furthermore must not be set at a level that conflicts with the aim of providing the public concerned with a wide access to justice. Furthermore, local associations must be able to use legal means to protect their interests according to the environmental legislation. It was therefore necessary, said the HD, that one utilized a generous attitude in such matters, and that fixed criteria in law were applied only as a starting point for decisions on standing to appeal. One must also consider the overall picture – especially in those cases where no individuals have standing rights – and take into account that someone must be able to challenge the decision.

This case was followed up by a judgement from the Land and Environmental Court of Appeal (MÖD), where a local bird watching association with only 37 members was allowed to appeal a municipal decision relating to the development of wind turbines. MÖD reasoned that even though the number of members in the organisation did not meet the numeric criterion in the Environmental Code, it had been regularly active for a long period of time. The organisation had arranged annual exhibitions with as many as 500 visitors and it also had taken part in public hearings in cases concerning nature protection (*MÖD 2015:17*). Thus, the organisation was found to have “support from the public”.

Next two cases from MÖD concerned the kind of decisions that could be appealed (*MÖD 2012:47* and *MÖD 2012:48*). According to old case-law, the meaning of “permits, approvals or exemptions” was read narrowly, restricting the types of decision which could be subject to appeal. In 2012, MÖD distinguished itself from this old jurisprudence and clarified that the application of fixed standing criteria must comply with the Aarhus Convention and EU law. In both cases, the Swedish Society for Nature Conservation (SNF) appealed a decision from the County Administrative Board to accept that certain activities were undertaken without a formal decision. The first (*MÖD 2012:47*) concerned the necessity of having an exemption from the species protection regime, and the second (*MÖD 2012:48*) a permit according to the legislation on Natura 2000. In both judgements, MÖD referred to the *Slovak Brown Bear*, where the CJEU emphasised the necessity of giving the public concerned wide access to justice in environmental matters.

²³ In the beginning, the numeric criterion was set at 2,000 members, which effectively barred all but two ENGOs from having standing. After the CJEU found that this criterion was in breach of EU law in the *Djurgården case* (n 13), the number was set at 100.

²⁴ Different terms are used in the literature for the legal construct that ENGOs have standing to protect environmental interests: “privileged standing”, “standing per se”, “standing de lege” (Commission Notice (2017), see n 9). In my view, “standing in their own capacity” is the expression that best catches the concept.

²⁵ Summaries on the Swedish cases can also be found at the website of the Task Force on Access to Justice under the Aarhus Convention; see n 15.

The County Boards' decisions were also closely connected to "exemptions and permits", as they related to the legislation on species protection and Natura 2000. The challenged decisions were without any doubt also covered by Article 9(3) of the Aarhus Convention. Given this context, the provision in the Environmental Code should be read in order to fulfil the international obligations and thus be understood as also relating to a decision on whether or not an exemption and a permit was needed. SNF was therefore granted standing in both cases.

B. Standing in Cases outside the Scope of the Environmental Code

The criteria in the Environmental Code on ENGO standing are also used in some other pieces of environmental legislation concerning plans and permits for developments, mines, quarries, highways, railroads and other large scale activities. In addition to this, ENGO standing rights have expanded in recent years by way of the courts applying the "so as to enable" formula according to the *Slovak Brown Bear* case. The most important judgement in this respect is from the Supreme Administrative Court (HFD) concerning standing for SNF to challenge a decision according to the Forestry Act on a clear-cutting operation in the mountains (HFD 2014:8 *Änok*). The HFD noted that there was no standing rule in this piece of legislation, and that was why the issue must be decided using general administrative law principles. In previous jurisprudence, the standing provisions never applied to ENGOs in their own capacity. However, the HFD pointed to the fact that Article 9(3) of the Aarhus Convention covered all kinds of decisions that related to the environment. As nature conservation and environmental protection must be taken into account in the decision-making under the Forestry Act, the permit in question was clearly covered by the obligations in Article 9(3). Furthermore, though the legal basis for the decision was national law, the situation was closely related to those to which EU law on the environment applies. The HFD also stated that there was, on a more general level, a need for a common understanding of the standing rules, irrespective of whether national or EU law was applied. In sum, in order to secure effective legal remedies for the public concerned, SNF should be able to appeal such a decision according to the Forestry Act.

C. Ban on Appeals before the HFD

As seen above, it has been possible for the Swedish courts to use the "so as to enable" formula enunciated in the *Slovak Brown Bear* case in order to grant ENGO standing. However, in some situations, such an approach does not suffice, as was illustrated in the court proceedings concerning the wolf hunt.

The wolf is a species that is strictly protected under the provisions of the Habitats Directive (92/43). The Swedish Environmental Protection Agency (SEPA) permitted hunting seasons for wolves in 2010 and 2011. The decisions were decried by ENGOs, but their legal challenges were dismissed for lack of standing. Following legal developments at EU level and further legal challenges by Swedish ENGOs, standing was granted and injunctions issued against the 2013 and 2014 hunting seasons, and the decisions were eventually declared invalid by the Swedish administrative courts. Determined to permit licensed hunting, the Government changed the procedure for decision-making in order to disallow appeals to a court. In 2014, the hunting decisions were taken by the regional County Administrative Boards (CABs) instead and appeals could be made to SEPA, but

no further. Despite the appeals ban, the ENGO Nordulv appealed this decision to the administrative courts, and the case went all the way to the HFD (HFD 2015 ref. 79 *Appeals ban*).

To begin with, the HFD stated that the relevant provision in Article 12 of the Habitats Directive was unconditional and clear, requiring strict protection of the wolf. The case-law of the CJEU has created general principles of law, among them the principle of judicial protection. To a certain extent, these principles are today expressed in the Treaty of the European Union (Articles 4(3) and 19(1) para 2) and the Charter of Fundamental Rights of EU (Article 47).²⁶ Thereafter, the HFD stated that according to established case-law of the CJEU under Article 288 TFEU, *clear provisions in directives create “rights” that shall enjoy legal protection*. If Union legislation is silent on this matter, it is for each Member State to lay down the detailed procedural rules governing actions for safeguarding those rights. However, this “procedural autonomy” must respect the principle of equivalence and the principle of effectiveness. Furthermore, the principle of useful effect (*effet utile*) of Union law does not only require the Member States’ courts to interpret national law in a manner that is faithful to EU law, but also implies that they shall disregard those procedural rules that are in conflict with clear provisions of EU law. The HFD also referred to the *Waddenzee* case,²⁷ in which the CJEU made clear that the public concerned must be able to rely on obligations expressed in the Habitats Directive, meaning that the ENGOs action must enjoy effective protection in court.

In sum, the HFD made clear that Union law requires that the question as to whether clear and unconditional provisions in the Habitats Directive have been implemented correctly in national law can be tried in a national court. The fact that the appeals ban also excluded the possibility to refer such a question to the CJEU by way of a request for preliminary ruling according to Article 267 reinforces the impression that such a provision is in breach of EU law. Thus the appeals ban in the Swedish Hunting ordinance was disregarded.²⁸

V. The Aarhus Convention in Union law

As illustrated by Swedish case-law on ENGO standing in environmental cases, the interaction between the Aarhus Convention and Union law is complex. In some situations, Aarhus goes further than EU law in requiring wide access to justice, whereas the position is the opposite in others. Therefore, before going further into the discussion of “environmental rights” from an EU perspective, I think it necessary to make certain clarifications of some key issues and questions from a more general perspective, concentrating on Articles 9(2)-9(4) of the Aarhus Convention and their implementation of EU law.

²⁶ Charter of Fundamental Rights of the European Union; [2012] OJ C326/02.

²⁷ C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Waddenzee)* [2004] ECR I-7405, para 66.

²⁸ A more detailed summary of the case is given in 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*. *Journal of European Environmental and Planning Law (JEEPL)* 2016 p. 270, see also the website of the Task Force on Access to Justice under the Aarhus Convention, above n 15.

A. Article 9(2) of the Aarhus Convention

Article 9(2) stipulates that the public concerned shall gain “access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6”. That provision covers permit decisions on activities listed in Annex I (Article 6(1)(a), as well as decisions concerning other activities “which may have a significant effect on the environment” (Article 6(1)(b)). In consequence of that, Article 9(2) covers two kinds of decision. The first category concerns permit procedures for activities listed in Annex I, including large scale operations such as energy installations and industries, mines, waste management and waste water treatment plants, and so on. The enumeration in the Annex is concluded by a point, covering “(a)ny activity not covered by paragraphs (...) above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation”. In addition, Article 9(2) also covers decisions concerning other activities “which may have a significant effect on the environment”. As previously mentioned, Article 9(2) of the Convention has been implemented by various directives in EU law, most importantly the EIA directive (2011/92) and the IPPC/IED directives (2008/1 and 2010/75). However, Article 6(1)b of Aarhus applies to all kinds of other activities that may have a significant effect on the environment, even those that are not listed in the directives of EU law. As this provision includes the wording “in accordance with its national law”, different interpretations are possible. Some have argued that it gives the Parties absolute discretion to decide on which activities are covered for the requirement of an EIA, whereas others take the view that the Convention obliges the Parties to apply the test to every activity that might have a significant effect on the environment.²⁹ Forestry activities can be used as such an example. Clear-cutting may cover hundreds of hectares and have an immense effect on the environment. Nevertheless, those activities are not covered either by Annex I to the Convention, or by Annex I or II to the EIA Directive. Still, the Swedish courts have adopted the position that clear-cutting operations are covered by Article 9(2) of Aarhus in those instances where they may have a significant impact on the environment. This stance was also confirmed by the CJEU in the *LZ II* case. Accordingly, the statement in Article 6(1)(b) that the provision applies in accordance with national legislation relates solely to the manner in which public participation is carried out, and cannot be taken to call into question the right to participate.³⁰

Furthermore, it is important to note the wide area of application for Article 9(2), namely that the public concerned shall be able to challenge the *substantive and procedural legality of any decision, act or omission* subject to the provisions of Article 6. This means that all kinds of decisions and omissions in relation to those activities are covered by the access to justice requirement. For example, many permit regimes – such as those under IED – include an obligation for the administration to reconsider and update permit conditions on an ongoing basis. In my understanding, this means that the public concerned shall have the possibility open to them to challenge in court any decision in such a reconsideration procedure, irrespective of whether or not the authority decides to update

²⁹ See Jendroska, J: *Public Participation under Article 6 of the Aarhus Convention. Role in Tiered Decision-Making and Scope of Application*. In *Environmental Democracy and Law - Public Participation in Europe* (ed. G. Bandi), Europa Law Publishing 2014, p. 134.

³⁰ C-243/15 *Lesoochrannárske Zoskupenie VLK v Obvodny urad Trencin* ECLI:EU:C:2016:838 para 48.

the permit condition. Thus the possibility of challenging the authority's omission in that respect belongs to Article 9(2). To be understood otherwise, the word "omission" would lose all meaning. This is also how I interpret the CJEU's reasoning in *Mellor*, which concerned the requirements according to the EIA Directive when an authority finds that an EIA is *not needed* for an activity.³¹ Similar reasoning can be found in the *Boxus* case, where the national courts were called upon to check the legality of a measure undertaken in a Member State, whereby certain projects *were exempted* from the requirements of the EIA Directive.³² To conclude, if an authority chooses not to update a permit condition covered by Article 9(2) and its implementation in Union law, this decision/omission falls under Article 9(2), and not under Article 9(3).³³

B. Article 9(3) of the Aarhus Convention

Other situations clearly fall outside the scope of Article 9(2) of the Aarhus Convention and this is where Article 9(3) comes into play. As already mentioned, this access to justice provision has been left to the Member States to implement in their procedural systems. Nevertheless, all Member States of the EU are signatories to the Aarhus Convention and it is an international environmental law obligation to fulfil the requirements therein. Even if the European Commission and the CJEU cannot act as watchdogs over the implementation of Aarhus on areas of "pure" national environmental legislation – which today is only a minor portion of this field of law – the Convention is nevertheless equipped with a different kind of surveillance mechanism that is somewhat unusual: the Aarhus Compliance Committee. This is an independent committee whose members are judges and legal scholars and who sit in their personal capacities. There is also a "public trigger", meaning that the public can communicate complaints about breaches against the provisions of Aarhus to the Committee. All communications and meetings among the Committee, the complainant and the Party are open to the public.³⁴ Furthermore, one must not underestimate the importance of Committee decisions. Though its statements are not binding, they play an important part in the understanding of the Convention and – when endorsed by the Meeting of Parties – work as "interpretive factors" in the building of international norms in the field of Principle 10 and environmental democracy.

Article 9(3) of Aarhus requires that members of the public "have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment". A first issue to address when contemplating whether the provision is applicable is how to define that field of law. Whereas Article 9(2) is confined to permit decisions for activities having a "significant effect on the environment", Article 9(3) has a much wider scope. It covers national laws "relating to the environment", even if that specific piece of legislation is not labelled as "environmental law". In a case against the Czech Republic, the

³¹ C-75/08 *Mellor v Secretary of State for Communities and Local Government*, [2009] ECR I-03799, para 66.

³² Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Antoine Boxus and Willy Roua v Region Wallonne*, [2011] ECR I-09711, para 57.

³³ For a similar reasoning, see the Compliance Committee in case *ACCC/C/2010/50 Czech Republic*, para 82.

³⁴ All documents are published on the Aarhus Convention's web site <<http://www.unece.org/env/pp/>> accessed 5 June 2017.

Compliance Committee stated that members of the public should have the possibility made available to them to challenge “an alleged violation of any legislation in some way relating to the environment”.³⁵ In other cases, the Committee has found that Article 9(3) covers different kinds of plans, health issues, noise and a wide range of environmental legislation.³⁶ It is also noteworthy that the European Commission’s 2003 proposal for an access to justice directive applied a very broad definition of “environmental law”, including planning law and health issues. Against this backdrop, it is safe to say that Article 9(3) covers all other areas of law on activities that have an effect on the environment, not least planning and building, environmental taxes, water operations, infrastructural projects, nature conservation and species protection.³⁷

As for standing, Article 9(3) gives more room for the signatories to decide on *who* belongs to the public concerned and *what* they should have access to. The Convention does not require “*actio popularis*” – that is, a system that allows for anyone to challenge breaches of environmental law – but there must be the possibility open for someone to do so.³⁸ A system which bars almost all ENGOs from taking legal action to protect the environment is not consistent with the Convention.³⁹ Neither does Aarhus require that individuals and NGOs have the possibility open to them to take *direct action in court*. The Convention asks for access to justice, but is silent on the matter of how the Parties arrive at different solutions.⁴⁰

Article 9(3) focuses on the enforcement of environmental law. It does not, however, say *what kind of case* the public concerned can bring to court. In many legal systems, the courts’ control of the administration is mainly triggered in relation to specific acts or decisions. In others, the public concerned also has access to “abstract norm control”.⁴¹ However, the Convention does not require such a procedural order, a position which is shared with the European Court of Human Rights (ECtHR), for that matter.⁴² Even so, the national system must provide *some effective legal remedy* in similar situations.⁴³ This can be provided for with different legal instruments: indirect action, that is, appeals of decisions or omissions by the authorities; direct action in court to challenge an environmentally damaging activity; the possibility available to instigate or at least take part in criminal proceedings; and the right to ask for damages on behalf of the environment.⁴⁴

Many countries have an Ombudsman institution, usually selected by the legislative bodies of the states. The Ombudsmen are generally independent review institutions that

³⁵ ACCC/C/2010/50 *Czech Republic*, para 84.

³⁶ See ACCC/C/2008/11 *Belgium*, ACCC/C/2011/58 *Bulgaria*.

³⁷ See *The Aarhus Convention – An implementation Guide* (2nd ed., UNECE/United Nations, 2014), pp. 197-199.

³⁸ 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.

³⁹ ACCC/C/2005/11 *Belgium*.

⁴⁰ ACCC/C/2004/06 and ACCC/C/2007/20 *Kazakhstan*.

⁴¹ For a European example, see the French case in CJEU C-381/07 *Association nationale pour la protection des eaux et rivières – TOS v Ministère de l’Ecologie du Développement*, [2008], EUECJ 58.

⁴² ECtHRs judgements in the cases *Klass v. Germany*, [1978] ECHR 4, *Norris v. Ireland*, [1988] ECHR 22, and *Västberga taxi AB v. Sweden* [2002] ECHR 36985/97.

⁴³ *Implementation Guide 2014*, p. 199.

⁴⁴ See Fasoli, E: *Study on the possibilities for non-governmental organisations promoting environmental protection to claim damages in relation to the environment in four selected countries; France, Italy, The Netherlands and Portugal*. (UNECE, Aarhus Convention/Task Force on Access to Justice, Geneva 2015)

aid individuals and entities in disputes with administrative bodies. Commonly, an Ombudsman can investigate complaints and report on its findings. The institution tends to be quite flexible, inexpensive, and simple to gain access. Due to the fact that the Ombudsman's powers are usually limited to non-legally binding activities such as investigating, reporting, mediating and recommending, they are commonly disqualified from being considered to be an effective remedy in accordance with Article 9.4.⁴⁵ In practice they are often nevertheless very useful and therefore considered to be a complementary safeguard of environmental rights. Political pressure to follow the recommendations of the Ombudsman generally leads to compliance.

VI. The Principle of Judicial Protection in an Environmental Context

Up to now, the discussion has mostly concerned the implementation of the Aarhus Convention in the European Union. As noted, certain provisions in Aarhus are not implemented in EU law, either in part or in full. Thus the analysis so far has dealt with situations where Aarhus, so to speak, requires more access to justice for the public concerned than EU law does. In the following, I will reverse the perspective and discuss access to justice in environmental matters from a Union law perspective to see what emerges. Focus lies on the principle of judicial protection, primacy and direct effect and the meaning of “environmental rights” in a European context. The conclusion is – not very surprisingly – that the Aarhus Convention and general principles of EU law cross-fertilise each other in the environmental area in a way that is quite positive from a Principle 10 point of view.

The *Appeals ban* case in the Swedish HFD can be used as a starting point for an analysis of situations where EU law and principles require “more” than Aarhus, that is, a wider access to justice for the public concerned in order to protect environmental rights and interests. The instrumental issue in that case was that the national procedural order for challenging decisions concerning a species that requires strict protection according to EU law only allowed for administrative appeals, not judicial review in court. As the appeals body – the Swedish Environmental Protection Agency – is constitutionally independent of the Government and is able to stop the decisions at stake, this procedural order is probably acceptable from an Article 9(3) point of view. However, the HFD set aside the appeals ban provision and allowed for the ENGOs to come to court, basing its reasoning solely on the *effet utile* and the principle of judicial protection in EU law. Another situation where EU law is said to require “more” than Aarhus which has been debated in the literature concerns the possibilities available to appeal plans and programmes. Whereas some authors argue that plans and programmes cannot be challenged by legal means according to Aarhus, others mean that such a possibility follows from general principles of EU law, despite the fact that the directives that require the setting up of plans and programmes do not contain any access to justice provisions.⁴⁶ However, before entering into the discussion on the relationship between Aarhus and the principle of judicial protection,

⁴⁵ See e.g. Compliance Committee, ACCC/C/2011/63 *Austria*, paras 58-61; also *Implementation Guide 2014*, p. 189, 191.

⁴⁶ Squintani, L & Plambeck, EJH: *Judicial protection against plans and programmes affecting the environment*. *Journal for European Environmental and Planning Law (JEEPL)* 2016, p. 294, with references to the literature on the matter.

a few words are required on the general debate on primacy and direct effect according to EU law.

A. Primacy and Direct Effect according to EU Law

For a considerable time there have been controversies in the legal literature on the distinction between primacy and direct effect of EU law. Even though the discussion is mostly relevant concerning the issue of whether provisions in directives may have horizontal effects between private subjects, the different attitudes also have important implications for the possibilities to enforce EU law in vertical relationships between individuals and the administration in the Member State, not least in the environmental area.

In the general discussion two (at least) schools of thought can be distinguished: the supremacy model and the trigger model. The most prominent representatives for the first mentioned model are Koen Lenaerts and his co-authors.⁴⁷ According to their view, primacy of EU law always exists as the normal state of affairs concerning norms of different levels, meaning that EU law is always supreme to Member State law. The supremacy of EU law is mainly utilised through consistent interpretation, the duty of sincere cooperation and state liability, but may in some situations also entail that a Member State court is required to disapply national rules inconsistent with the higher norms of EU law (“exclusion”). Direct effect, however, is only connected to individual subjective rights, guaranteed exclusively by EU law. If such a right is expressed in a directive provision that is unconditional and sufficiently precise, it is for the Member State court not only to disapply the inconsistent national law, but to replace it with the EU norm expressing that individual right (“substitution”). In other words, in the latter situations, the court must fill in the gap in the national law:

Then it does matter whether the norm relied upon was intended to confer rights upon individuals and whether it is sufficiently clear, precise and unconditional because, on the one hand, the norm identifies the object of the benefit claimed and the person who must provide that benefit and, on the other hand, the norm indicates when and under what conditions this right can be deemed to be created in the legal order allowing for the right to be claimed.⁴⁸

To conclude, primacy according to these authors is a *general conflict rule between norms of different hierarchic value, whereas direct effect is a tool for the implantation of individuals’ subjective rights according to EU law in the national systems.*

Michael Dougan is an outspoken representative for the trigger model.⁴⁹ In contrast to Lenaerts and others, he argues that direct effect is not only relevant for the enforcement of individuals’ subjective rights, but encompasses any situation where the norms of EU law produce independent effects within the national legal systems. In his view, all kinds

⁴⁷ Lenaerts, K & Corthaut, T: *Of Birds and Hedges. The Role of Primacy in Invoking Norms of EU Law.* European Law Review, 2006, p. 287-315; Lenaerts, K & Van Nuffel, P: *European Union Law.* Sweet and Maxwell, 3rd ed. 2011; Lenaerts, K & Maselis, I; Gutman, K: *EU Procedural Law.* Oxford UP, 2014.

⁴⁸ Lenaerts & Corthaut at p. 291.

⁴⁹ Dougan, M: *When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy.* Common Market Review 2007, p. 931-963 and *Wyatt and Dashwood’s European Union Law.* Hart Publishing 2011, where Dougan is the author of Chapter 8; The Direct effect and supremacy of EU law.

of directive provision that are unconditional and sufficiently precise can be invoked as grounds for judicial review in the national system by those who are protected by that provision. Thus:

In other words, direct effect is perfectly capable of accommodating the needs for an administrative law doctrine of standing to enforce Community measures intended to protect the public or general interest.⁵⁰

He also criticises the supremacy model for trying to create a clear distinction between exclusion and substitution. However, such a distinction is not easy to find or establish, why this model becomes random and inconsistent. He also argues that the principle of direct effect becomes blurred if one emphasises supremacy as a general concept, as this model is built upon the idea that EU law is always superior in the national systems. In contrast, the trigger model is built upon the notion that *primacy is a consequence of direct effect*, namely the disapplying of those national rules that are inconsistent with EU norms that are unconditional and sufficiently precise.⁵¹

As often in legal scholarship, the differences in views are not that clear and mostly relate to specific areas of law. As for the debate on primacy and direct effect of EU law, one must also take into account that the case-law of the CJEU has developed rapidly over the past 10 years and that accordingly the positions have developed over time. This is clearly illustrated in one of the leading commentaries on general EU law in English – that is, Craig & de Búrca.⁵² In the earlier editions, direct effect was described as something that was connected to the existence of individual subjective rights in a narrow sense. Later on, the authors recognised that this position was problematic when it came to areas of law dealing with general or diffuse interests, such as environmental law. In the latest 2015 edition, Craig & de Búrca point to the differences in understanding of direct effect; a narrower view where the concept confers individual rights and a broader scope where precise and unconditional directive provisions can be used as a means for judicial review in order to determine whether the national administration has remained within the parameters set in Union law.⁵³ A decisive issue here is how to define “individual rights” and who are the bearers of those rights. Even though the authors find the CJEU’s case-law ambiguous on the issue, they refer to *Janecek* and *ClientEarth*, arguing that the Court has given strong rules on the requirement of access to court to enforce particular obligations on national authorities in the context of environmental directives. Even so, they conclude:

While certain strands of case law – mainly those in which the CJEU focuses on a particular substantive EU law right, often an EU legislative right – require specific national remedies to be made available, and particularly in certain sectors such as competition, consumer, and environmental law, many other cases continue to em-

⁵⁰ Dougan, M: *When Worlds Collide!*, p. 934.

⁵¹ Further on supremacy and direct effect, see Engström, J: *The Principle of Effective Judicial Protection after the Lisbon Treaty*. Review of European Administrative Law, 2011 pp. 53-68 and Prechal, S & Widderhoven, R: *Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection*. Review of European Administrative Law, 2011 pp. 31-50.

⁵² Craig, P & de Búrca, G: *EU Law – Text, Cases and Materials*. Oxford UP, 1998-2015.

⁵³ Craig & de Búrca. Oxford UP, 6th ed. 2015, Chapter 7 on p. 203 with reference to C-165-167/09 *Stichting Natuur en Milieu* (2011).

phasize the primary responsibility of the national legal system, subject only to the principle of equivalence and effectiveness.⁵⁴

B. Reflections on Direct Effect in the Environmental Area

In the legal scholarship of today's environmental law the broader understanding of direct effect is dominant. To most authors of this area of law, direct effect is about the possibilities open to the public concerned, and the ways and means available, to challenge decisions by authorities in relation to demands for a certain environmental quality in accordance with clear indications under EU law.⁵⁵ The direct effect of EU law has also been described as the duty of the court or another authority to apply the relevant provision *ex officio*, either as a norm governing the case, or as a standard for legal review.⁵⁶ In this way, they argue, provisions with direct effect could be used by all concerned parties, regardless of whether or not they provide individual rights.⁵⁷ An often-cited passage in this direction is from *Prechal & Hanchen 2001*, where they classify the idea that the existence of individual subjective rights is a decisive prerequisite for direct effect as “conceptual pollution”.⁵⁸

For my own part, I agree with this general position, as I find it impossible to reconcile the narrow attitude towards direct effect as a means for safeguarding only individual subjective rights to the development of the jurisprudence of the CJEU in recent years in the area of environmental law. As will be shown below, the CJEU instead emphasises *both rights and duties* expressed in directive provisions with direct effect. In this way, this case-law expresses two aims of direct effect - a dual approach.⁵⁹ First, the protection of rights, and second, to secure that EU legislation in the environmental sphere is complied with at Member State level. The latter approach, reflecting the principle of “rule of law”, is especially relevant in environmental cases. What obviously complicates the discussion is how one defines “rights” in an environmental law context, since this is an area of law dominated by the public interest. My point of departure for the analysis is that all provisions of EU law with sufficient clarity and precision have direct effect – meaning the substitutional effect on incompatible rules of national law – and that those who are qualified as bearers of the interests expressed in these provisions should be able to challenge the national decision-making in court in line with the principle of judicial protection. Another starting point is that the Union legal system law cannot discriminate between different areas of law concerning the enforcement of common obligations, although the doctrine of

⁵⁴ Craig & de Búrca 2015, pp. 246 and 251.

⁵⁵ Jans, J H & Vedder, H H B: *European Environmental Law*. Europa Law Publishing, 4th ed. 2011, Chapter 5 (pp. 222-231), see also Fisher, E & Lange, B & Scotford, E: *Environmental law – Text, cases and materials*. Oxford University Press 2013, p XX.

⁵⁶ Prechal, S: *Directives in EC law*. Oxford University Press, 2nd ed. 2005, p. 241.

⁵⁷ Langlet, D; Mahmoudi, S: *EU Environmental Law and Policy*. Oxford UP, 2016, p. 21. See also 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, with references to Hedemann-Robinson, M: *Enforcement of European Union Environmental Law: Legal Issues and Challenges*. Routledge Cavendish 2007 and Wennerås, P: *The Enforcing of EC Environmental Law*. Oxford UP 2007.

⁵⁸ Prechal, S & Hanchen, L: *Individual Environmental Rights; Conceptual Pollution in EU Environmental Law*. YEEL 2002, p. 85-115, at p. 98.

⁵⁹ Commission Notice (2017, above n 9) section C (paras 31-57).

direct effect must be adapted to the legal context in which it functions. As traditional individual subjective rights belong to areas where there are distinct bearers of the rights that are expressed in EU law – such as free movements of goods and services, labour law, social security, migration, and so on – the legal system would be biased if the public interests (such as clean air, sound water resources and a rich biodiversity) were to be prevented from exercising the possibility of going to court in order to achieve a balance against the interests of developers and enterprises. In my view, such an attitude would not be in line with either the high ambitions of environmental protection within the Union – expressed in Article 3(3) TEU, Articles 11 and 191 TFEU and Article 37 of the European Charter – or the fundamental principles of judicial protection according to Article 19 TEU and Article 47 of the Charter.

C. The Development of CJEU's case-law on direct effect

To begin with, it should be noted that some years ago the CJEU had already clarified that environmental provisions in EU law can also have direct effect. The first of these cases dealt with the EIA Directive, long before the EU ratification of the Aarhus Convention.⁶⁰ Others concerned Natura 2000 and species protection. Many of these cases were brought to court by ENGOs.⁶¹ It is reasonable to believe that this influences the concept of “rights” in environmental matters. Moreover, in these cases the CJEU seems to focus not on “rights”, but on “obligations”. In the *Kraaijeveld* case in 1996, the Court had stressed the 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*”.⁶² Thereafter, this statement has been repeated in a series of environmental cases, where the CJEU has said 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 CJEU has furthermore stated that the effectiveness of such an act would be weakened if individuals were prevented from *relying on it* before their 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.⁶³ 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*”.⁶⁴ Furthermore, in the *Janecek* case, the CJEU made clear that “*whenever the failure to observe the measures required by the directives which relate to air quality and drinking water, and which are designed to pro-*

⁶⁰ See Darpö, J: *Article 9.2 of the Aarhus Convention and EU law. Some remarks on CJEU's case-law on access to justice in environmental decision-making*. JEEPL 2014 p. 367.

⁶¹ For example: *C-44/95 Regina v Secretary of State for the Environment, ex p: Royal Society for the Protection of Birds (Lappel Bank)* [1996] ECR I-3805, *C-435/97 WWF v Autonhome Provinz Bozen and others* [1999] ECR I-5613, *C-165-167/09 Stichting Natuur en Milieu v College van Gedeputeerde Staten van Groningen* [2011] ECR I-4599.

⁶² *Kraaijeveld* (n 11) para 56.

⁶³ *WWF* para 69 (n 61) and *C-287/98 Linster* (2000) para 32, see also *Waddenzee* (n 28) para 66 and *C-41/11 Inter-Environnement Wallonie and Terre Wallonne ASBL v Region Wallonne* [2012] ECR I-0000 para 42.

⁶⁴ *Stichting Natuur en Milieu* (n 61) para. 100, see also *Inter-Environnement Wallonie* (n 61) para 42.

tect public health, could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives". In *Stichting Natuur en Milieu*, this reasoning was used analogously concerning legislation on atmospheric pollution.⁶⁵ It is not far-fetched to believe that the rationale of these latter mentioned cases also covers legislation on chemicals, waste, water and other areas.

Evidently, the underlying reason for the jurisprudence of the CJEU is that the Member States shall not have the advantage of being able to escape from the obligations according to EU law on the environment by simply avoiding implementing them. Clearly, this argument relates to *the rule of law*. Another reason is that the public plays a crucial role as guardian of the correct application of EU law, something already stressed by the Court in *Van Gend en Loos*.⁶⁶ This is even truer when it comes to EU environmental law and has been emphasised in a number of cases concerning the Aarhus Convention and its implementation into the EIA Directive.⁶⁷ That the ENGOs play a key role in that respect as bearers of EU law on the environment was finally confirmed in *Trianel*, where CJEU stated (my italics):

It follows more generally that the last sentence of the third paragraph of Article 10a of Directive 85/337 must be read as meaning that the *'rights capable of being impaired'* which the environmental protection organisations are supposed to enjoy must necessarily include the rules of national law implementing EU environmental law and the rules of EU environment law having direct effect.⁶⁸

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 judgement in combination with the CJEU's reasoning in *Slovak Brown Bear*⁶⁹ 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.

Against this backdrop, I have to say that the idea that the existence of individual subjective rights as a prerequisite for direct effect has played out its role in the area of EU environmental law. Of course, one may water down the notion of individual rights by giving it an extremely wide definition; from substantive property rights in a traditional sense to the procedural possibility for ENGOs to appeal a decision/omission where an authority applies provisions of EU environmental law. However, in doing so, "rights" loses all meaning as a legal concept. This can be illustrated by the "second Slovak brown bear case", where CJEU made clear that Article 47 of the Charter was applicable to a situation where an ENGO had appealed a decision to construct an enclosure for deer within a Natura 2000 site.⁷⁰ My view is therefore that we should instead openly acknowledge

⁶⁵ *Stichting Natuur en Milieu* (n 61) paras 94-100.

⁶⁶ C-26/62 *Van Gend en Loos v Netherlands* [1963] ECR 1, the second last paragraphs (not numbered) above "The second question", see Brakeland 2014, p. 6.

⁶⁷ C-260/11 *David Edwards v Environment Agency* [2013]WLR 2914 para. 40, C-530/11 *Commission v. UK* [2014] 3 WLR 853 para. 47.

⁶⁸ C-115/09 *Trianel* (2011) para 48.

⁶⁹ C-240/09 *Slovak Brown Bear* [2011] ECR I-1255, para 51.

⁷⁰ C-243/15 *LZ II* (n 13).

that the rights of individuals and direct effect form two separate and distinct concepts in the area of EU environmental law. Though rights for individuals in a wide sense may have importance concerning the individual's standing in environmental cases, the concept mainly becomes of interest when claims for damages are made against a Member State for failing to implement EU law correctly according to the *Francovich* doctrine.⁷¹ Therefore, in describing direct effect of this area of EU law, we ought to focus on the *obligations* of the national authorities according to provisions of sufficient clarity. In my view, this would make the doctrine clearer and also more compatible with the principle of legal protection.

In conclusion, I contend that direct effect of EU environmental law relates to *clear obligations* and means that the public concerned shall have *standing* in order to challenge decisions by national authorities on subjects that are covered by provisions that are sufficiently precise and unconditional. In addition to this, the requirement *taking it into consideration* expressed in the case-law of the CJEU means that the Member State court must make an evaluation of its own of the case to see whether the administration has decided in accordance with those provisions. Thus the direct effect has *two legal consequences*: first standing in the case and, second, that of being invocable in court.

D. Who Belongs to the Public Concerned?

According to Article 9(2) and its implementation in EU law, the definition of the class of persons who have standing in environmental cases are those who either have a “*sufficient interest*” in the matter or maintain an “*impairment of a right*”.⁷² ENGOs meeting certain criteria shall be deemed to have sufficient interest and rights capable of being impaired for the purpose of having standing.

The different ways that the Member States provide for the safeguarding of those rights and interests under EU law are open to their own choice under the notion of national procedural autonomy, though the principles of equivalence and effectiveness must be respected. Certain criteria for ENGO standing are thus acceptable, but only if they are set at a level that does not conflict with the aim of providing the public concerned a wide access to justice. As for individuals' standing, the situation is more complex. Clearly, the “double approach” to individuals' standing is not an invitation to limit their possibilities

⁷¹ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357. I will not further discuss how to apply the *Francovich* doctrine in environmental law here, but it may have at least some room for application where individuals have had damage inflicted on them due to breaches in the proper implementation of EU legislation at Member State level. Such examples may include damages to property (C-201/02 *R (Delena Wells) v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723) or prohibitively high costs in environmental proceedings (*Edwards* (n 61)). However, as was illustrated in C-420/11 *Leth v Austria* [2013] 3 CMLR 2, there is little room for state liability towards individuals who suffer damage from an activity that has been approved without a preceding EIA in breach of the EIA Directive. For more on *Francovich* in environmental cases, see Wennerås (n 57), p. 150.

⁷² The ELD (Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD), OJ L 143) actually elaborates with three categories of the “public concerned” on equal footing, including also natural and legal persons “affected or likely to be affected by environmental damage” (Article 12.1 ELD), which was confirmed in C-529/15 *Gert Folk* (n 13), paras 52-58. Also other environmental directives include this “third category” – for example the EIA Directive (Article 1.2.c), but only as a general definition of the “public concerned”. Future case-law of the CJEU will show if the *Gert Folk* judgement will have wider implications for legislation outside the scope of ELD.

to challenge administrative decisions concerning the environment. If, essentially, the national rules on standing do not go beyond what is already protected through a traditional rights-based approach, this does not meet the requirements of the Aarhus Convention.⁷³ In its case-law, the CJEU has stated that Member States have a significant discretion to determine the conditions for the standing of individuals, including the confinement to *individual public-law rights*. The crucial question here is to understand what that expression – deriving from German “subjektiv-öffentliches Recht” – actually means. To me at least, it is not very clear. What is clear, though, is that according to *Janecek*, health issues on a very general level also trigger standing for those who are concerned. In this case, the CJEU found that an affected person should have the possibility available to challenge with legal means any administrative decision or omission that concerned his rights according to Directive 96/62 on ambient air, including the requirement for the authority in charge to draw up an action plan. A similar approach may well be applied in cases concerning environmental quality in other aspects, such as the status of water. A reasonable conclusion is therefore that the jurisprudence of the CJEU will develop towards a wider standing for individuals in environmental cases. I also believe that individuals will be afforded greater possibilities to invoke public interests in cases where they have been granted standing. There are two reasons 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 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.

E. Substantive and Procedural Legality

According to Article 9(2), the scope of the review on appeal shall include both the formal and the substantive legality of all kinds of decisions concerning activities that are covered by that provision. This has been elaborated upon by the Compliance Committee in a series of decisions.⁷⁴ The case-law of the CJEU has not been so developed in this respect, at least not directly dealing with the Aarhus Convention. Even so, in relation to the EIA Directive, one can safely say that the statements made by the CJEU in those cases clearly show that the review may concern all aspects of the legality of the administrative decisions under that legislation. Also in other environmental directives, there are express provisions requiring the national courts to review the substantive legality of the application of law by the competent authorities.⁷⁵ Moreover, if one looks in wider circles and takes into account a multiplicity of cases, the picture becomes clearer. As shown above, a combination of *Stichting Natuur en Milieu*, *Janecek*, *ClientEarth* and the *Slovak Brown Bear* shows that the case-law of the CJEU develops towards the purpose of ensuring that the aim of the law is attained. In another case that concerned access to information, *C-71/14 East Sussex*, the CJEU made clear that a national judicial review procedure must allow for “*the court or tribunal hearing an application for annulment of such a decision to ap-*

⁷³ ACCC/C/2010/50 *Czech Republic*, para 76; see also Elizabeth Steiner’s article in this issue, “*Environmental Rights and the Strasbourg Court*”.

⁷⁴ ACCC/C/2010/48 (*Austria*) para 66, ACCC/C/2008/33 (*United Kingdom*) para124, ACCC/C/2011/63 (*Austria*) paras 52-53 and 66, also *Implementation Guide*, p. 207.

⁷⁵ For example, Article 25 IED (2010/75), Article 23 Seveso II (2012/18) and Article 13 ELD (2004/35).

ply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision”.⁷⁶ Also, in *Commission v. Germany*, the CJEU emphasised that the review in national courts should concern “both the substantive and procedural legality of the contested decision in its entirety”.⁷⁷ In addition, in nature conservation law, it is a common feature that the administration may authorise certain activities only if no reasonable scientific doubts remain as to whether the activity will damage the protected interest.⁷⁸ According to the case-law of the CJEU, when a court reviews those decisions, it must determine whether the technical and nature scientific evidence relied upon by the administration leaves any such doubts. Thus the court is obliged to assess this evidence of its own accord and cannot leave this to the administration’s discretion.⁷⁹ In conclusion, the case-law of the CJEU on the matter has covered the adoption and the content of EIAs and similar instruments in nature conservation law, the adoption and the content of plans and programmes aimed at reducing pollution of different kinds in different elements of the environment. However, there is no reason to believe that the rationale for these cases is less valid in other environmental cases.

F. Administrative Appeal and Judicial Review

A remaining issue to deal with concerns *what kind of appeal body* that the public concerned has access to when challenging administrative decision-making in environmental matters. As was illustrated by the *Appeals ban* case in the Swedish HFD, one may argue that there are inconsistencies between Aarhus and EU law on this matter. Although the Swedish case was somewhat peculiar, the situation as such is not unusual in the Member States. Most national systems show examples of environmental decisions – or omissions for that matter – that are non-appealable to court. Any court in a Member State which is faced with such a situation must decide whether to dismiss the legal challenges to the administration’s standpoints, or, alternatively, to grant standing *contra legem*.⁸⁰

Normally, access to justice provisions relate to the possibility for the public concerned to bring legal action in a “court or another independent and impartial body established by law”. Due to their close connection to scientific and technical issues, the general complexity of cases with many actors and interests and the need for a non-bureaucratic procedural order, environmental cases on appeal are often dealt with by specialised bodies or tribunals outside the ordinary courts system. Sometimes these are staffed with experts of their own. For those tribunals, to be able to satisfy the requirements of being an “independent court or tribunal”, certain criteria must be met. As the expression used in Article 9(2) of the Aarhus Convention closely relates to the ones used in Article 6 European Convention of Human Rights (ECHR) and Article 267 TFEU, guidance can be found in the jurisprudence of both the ECtHR and CJEU regarding the expression “tribunal” to be

⁷⁶ C-71/14 *East Sussex County Council v Information Commissioner* [2016] CMLR 5 para 58.

⁷⁷ C-137/14 *Commission v Germany* [2015] ECR I-nyr (ECJ 15 October 2015 para 80).

⁷⁸ This is, for example, the case with activities that may have a significant impact on Natura 2000 sites; see *Waddenzee* (n 28), para 59.

⁷⁹ See *Kraaijeveld* (n 11), para 56-57.

⁸⁰ If I am not mistaken, this was actually also what the Slovak Supreme Court did when the CJEU had delivered the answers to their questions; see *The VLK Case Slovakia – Application of Art. 9 Para. 3 of the Aarhus Convention According to the Decision of the Court of Justice of the European Union*. Justice and the Environment 2011, <<http://www.justiceandenvironment.org/files/file/2011%20ECJ%20SK.pdf>> accessed 20 June 2017.

an autonomous concept, meeting certain criteria.⁸¹ According to the case-law of Strasbourg court, the tribunal, to begin with, must be established by law and undertake its functions of determining matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner.⁸² Also, its members must be independent and impartial. The independence of a body is to be determined in the light of the manner of appointment of its members, the duration of its terms of office, and guarantees against outside pressures. It is also important whether or not the body is seen to be independent by impartial spectators.⁸³ Lay assessors are generally acceptable, but in specific cases their objectivity may be challenged.⁸⁴ Furthermore, it is acceptable that the first decision in a case is taken by an authority, so long as the possibility exists of having that decision appealed to a court, without restriction on the scope of examination. Finally, the decision of the “court” must be binding, prohibiting the government or other authorities from setting it aside.⁸⁵ As for the CJEU, it has its own, closely related jurisprudence on these issues according to the so-called Vaasen criteria under Article 267 TFEU.⁸⁶

Interestingly, Article 9(3) of the Aarhus Convention only demands access to “administrative or judicial procedures”. This requirement seems to satisfy itself with administrative appeals; that is, an appeal to a higher level within the administrative system or to a specific appeal body or tribunal, even if that body does not meet the criteria of being “independent and impartial”. However, the procedure still has to be fair and effective according to Article 9(4). This is a strange legal construct, which really does not lie in accord with the ordinary perception of access to justice. Furthermore, as there is little case-law from the Compliance Committee on the relationship between Articles 9(3) and 9(4), the understanding of this concept is less developed. This can partly be explained by the fact that such an order clearly breaches EU law, which is built on the cooperation between national – independent and impartial – courts and tribunals and the CJEU. The obvious reason for this is that the EU law system as a whole requires that decisions can be challenged in a national court or tribunal according to Article 267, thus enabling the

⁸¹ Thus the following tribunals were accepted by the European Court of Human Rights: a board for deciding compensation for criminal damage in Sweden, *Gustafsson v. Sweden* [1996] 22 EHRR 409; an authority for real estate transactions in Austria, *Sramek v. Austria* [1984] 7 EHRR 351; a prison board for visitors in the UK, *Campbell and Fell v. UK* [198] 4 ECHR 7819; and an appeals council of the Medical Association of Belgium, *Le Compte a.o v. Belgium* [1983] 5 EHRR 533.

⁸² *Sramek v. Austria*, para. 36, *ibid.*; see also *Coême and others v. Belgium* [2000] ECHR 249.

⁸³ *Campbell and Fell*, para. 78, (n 84)

⁸⁴ In the case of *Langborger v. Sweden* [1989] 12 EHRR 416, the Housing and Tenancy Court was not accepted in a case concerning the right of the applicant to stay outside the organisations that had nominated the lay assessors. However, in this case, the European Court also commented that such members “appear in principle to be extremely well qualified to participate in the adjudication of disputes between landlords and tenants and the specific questions which may arise in such disputes”. (para 34).

⁸⁵ *Zander v. Sweden* [1993] ECHR 59.

⁸⁶ CJEU joined cases C-9/97 and C-118/97 *Jokela and Pitkäranta* [1998] ECR I-6267, about the Finnish Maaseutuelinkeinojen Valituslautakunta (Rural Business Appeals Board) and case C-205/08 *Umweltanwalt von Kärnten v Kärntner Landesregierung* [2009] ECR I-11525 about the Austrian Umweltsenat, also case 61/65 *Vaasen – Goebbels v Beambtenfonds voor het Mijnbedrijf* [1966] ECR 261. For further reading, see Lenaerts, K; Van Nuffel, P: *European Union Law*, section 3.08 (pp. 54ff), also 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, part 1.3. European Commission 2013-10-11/Scandinavian Studies of Law Volume 59: Environmental Law, p. 351.

http://ec.europa.eu/environment/aarhus/access_studies.htm

CJEU to have a final say on the matter.⁸⁷ As is well known, the CJEU is a strong believer in the first Commandment.⁸⁸

There is still one more strong argument for why the public concerned should have access not only to administrative appeal but to a court or tribunal, and that relates to “equality of arms”.⁸⁹ In many environmental cases, the applicant for a permit or a derogation will always be allowed to appeal to court, as the decision concerns his or her “civil rights and obligations” according to the ECHR. If one were to deny the opposing interests a similar opportunity, this would surely create an imbalance in the procedure, which is hardly acceptable from a democratic point of view. Furthermore, such discrepancies would raise a systematic argument. One can hardly handle a procedure where there is one kind of standing for decisions covered by Union law, and another for purely domestic ones. In the environmental law area, Union law and national law are tightly interwoven and any effort to make a distinction at the appeal stage in a case would lead to endless and futile discussions.

VII. Closing Remarks

In this article, I have discussed the encounter between the Aarhus Convention and EU law on environmental matters, focusing on access to justice. My conclusions are much the same as the ones that Chris Hilton draws in another chapter of this issue, namely that when we discuss “rights” in EU environmental law, commonly we mean the procedural rights for the public concerned. The existence of individual subjective rights seldom plays a decisive role in the case-law of the CJEU concerning the direct effect of environmental provisions. In my view, it brings more clarity to the analyses if we instead focus on the unconditional and clear obligations in the legislation and that representatives of the interests expressed therein – commonly ENGOs – should have *standing* in a national court to challenge administrative decision-making, and the *possibility to invoke* the obligations for that court to take them into account and disapply any national legislation incompatible with the EU norms.

Thus I contend that if we look beyond the labels of the legal construct, this is the European way of creating procedural “environmental rights”, namely that the ENGOs are able to defend the interests expressed in EU law. Admittedly, the CJEU would not phrase it that way and the system has its shortcomings. To begin with, many directives and other regulations of EU environmental law are framed broadly and in general terms, thus excluding the possibility of finding any clear obligations expressed therein. However, I do not think this aspect should be over emphasised, as the CJEU has shown considerable imagination in finding obligations in EU environmental law and the jurisprudence on the matter is developing dynamically. A clearer drawback relates to the fact that the environmental rights according to the EU principle of judicial protection are *procedural* and that EU law on the environment is sometimes weak in substance or even lacking in important areas. At least from a Nordic perspective, the EU regulations on chemicals cannot

⁸⁷ See CJEU's Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties*.

⁸⁸ See also Commission Notice (2017, above n 9) paras 23, 94, 210 and 212.

⁸⁹ A classic case illustrating this concept is *McLibel 2* from the European Court of Human Rights (Steele & Morris v UK; (2005) 41 EHRR 403).

be described as anything but weak. On urbanisation and the need for green infrastructures in the cities, EU law is fragmented and has very little to say. Forestry and mining are activities that are mainly regulated at Member State level. On noise, there is silence. As for the natural resources of the sea, the stage of EU legislation is still dominated by the strong economic actors representing extraction interests. Whether sufficient effort will be placed on combating climate change is very questionable, even though we are surely not the ‘baddest guys’ in that play. Even on core areas of Aarhus, the attitude on transparency and access to justice within the EU institutions is embarrassing, something that the Compliance Committee has criticised.⁹⁰ If by “environmental rights” we mean the law in substance – that is, the right to live in a healthy environment – the concept remains most doubtful. But if we argue that “environmental rights” is the label for the possibility open to the public concerned to enjoy transparency, public participation and access to justice in decision-making under environmental law, such as it has been expressed by the legislature, we are on the way.

⁹⁰ See the draft decision of the Compliance Committee in case ACCC/C/2008/32 Part II European Union, see also Darpö, J: *The Commission: a sheep in wolf's clothing?* (n 28).